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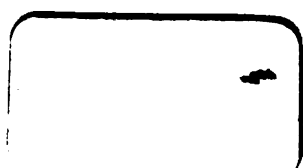
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TO BE CITED L.R.A.1916D

THE
LAWYERS REPORTS
ANNOTATED

1916D

BURDETT A. RICH, HENRY P. FARNHAM, AND
GEORGE H. PARMELE, EDITORS,
ASSISTED BY
THE PUBLISHERS' EDITORIAL STAFF.

THE LAWYERS CO-OPERATIVE PUBLISHING COMPANY
ROCHESTER, N. Y.

1916

121975

JUL 29 1942

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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA EX REL. ANNIE
C. COBURN

v.

GEORGE J. RIES, County Auditor, et al.,
Appts.

(123 Minn. 397, 143 N. W. 981.)

Judgment — fraud — collateral attack.

1. A domestic judgment of a court of general jurisdiction, in an action in which there is jurisdiction of the parties and of the subject-matter, is, until reversed or set aside, binding upon all parties to the action and their privies, and cannot be attacked for error or fraud except in a direct proceeding.

For other cases, see Judgment, II. c, in Dig. 1-52 N. S.

Records — Torrens law — void tax certificates.

2. In proceedings to register title, to which the holder of tax certificates on the land and the county where the land was situated were parties, the tax sales on which the certificates were issued were adjudged void for reasons that entitled the holder to refundment. It is held that such judgment cannot be attacked collaterally for error or fraud, and is, as against the county, conclusive of the right to refundment.

For other cases, see Judgment, II. c, in Dig. 1-52 N. S.

(November 14, 1913.)

APPEAL by defendants from a judgment of the District Court for Ramsey County in plaintiff's favor in a proceeding to compel the county auditor to issue to relator a warrant on the county treasurer for a certain amount in refundment of the

Headnotes by BUNN, J.

Note. — As to Torrens law, see annotation following RILEY v. PEARSON, post, 14. L.R.A.1916D.

amount paid by her for certificates of tax sales, with interest. Affirmed.

The facts are stated in the opinion.

Messrs. Richard D. O'Brien and Patrick J. Ryan for appellants.

Mr. Lanus O'Malley for respondent.

Bunn, J., delivered the opinion of the court:

This is a proceeding in mandamus to compel the county auditor of Ramsey county to issue to relator a warrant on the county treasurer for \$226.27 in refundment of the amount paid by relator for certificates of tax sales, with interest. When the answer came in, relator moved for judgment on the pleadings. This motion was granted, and defendants appealed from the judgment directing a peremptory writ to issue.

The following facts are disclosed by the pleadings, upon which the order for judgment was based:

In May, 1908, lot 23, Hewitt's Outlots, First Division, and "west one half of the vacated portion of La Salle street adjoining the same," were sold to relator at a tax sale for \$114.81. Lot 24 and the "east one half of the vacated portion of La Salle street adjoining the same" were at such sale sold to relator for \$111.46. Certificates of sale were issued to relator, and she has ever since been the owner thereof. Prior to 1889, lots 23 and 24 abutted on La Salle street, which was vacated in that year by the common council of St. Paul.

In 1910 William G. White commenced a proceeding to register his title to the vacated portion of La Salle street between the two lots. R. C. Jefferson, the record owner of these lots, was made a party defendant, as was Annie C. Coburn, the relator here, as owner of tax certificates on the lots. The county of Ramsey was also made a party defendant in said proceeding.

Jefferson answered, claiming to be the owner in fee of the premises. Annie C. Coburn answered, claiming a lien on the premises by virtue of her tax certificates. The action or proceeding was tried, a decision rendered, and judgment entered on the decision. By this judgment the tax certificates of Annie C. Coburn were adjudged null and void, for the reason that no assessment or levy of taxes was ever made as a basis for the tax judgment pursuant to which the sales were made, and for the further reason that the taxes for which said sales were made had been paid before the sales. The county of Ramsey did not appeal from this judgment, and the time to appeal therefrom has expired. The defendant auditor has refused to issue to relator warrants in refundment of the amounts paid by her for the certificates.

The foregoing facts are alleged in the petition and admitted by the answer.

The following facts are alleged in the answer, and must be taken as true on the motion for judgment on the pleadings:

In the registration proceeding, defendant Jefferson and defendant Coburn appeared by the same attorney. Jefferson undertook to establish title in fee in himself, and Coburn to establish her lien by virtue of the tax certificates. It is alleged that the claims and interests of Jefferson and of Coburn were conflicting claims and interests. The certificates were attacked on the trial upon the grounds upon which they were held void as before stated. In truth and in fact, the taxes were lawfully levied, and the taxes had not been paid before sale. These facts were matters of public record, and open to the discovery of the relator; but she wrongfully failed, neglected, and omitted to present them to the court. By reason of this failure, neglect, and omission of the relator to show the facts, the court, upon the evidence before it, was compelled to find that no assessment or levy was ever made, and that the taxes had been paid before sale. In truth and in fact, the certificates of the relator are valid, and the judgment declaring them void was procured, as defendant alleges, "by relator, through relator's negligence, collusion, want of good faith, or fraud."

Is relator, on these allegations of the pleadings, entitled to refundment as a matter of law? Clearly the judgment in the White-Jefferson registration proceedings adjudged the tax sales void for reasons that under the statute (Rev. Laws 1905, §§ 963, 965) entitle the purchaser to a refundment, unless that judgment does not bind the county of Ramsey. The question, then, is whether, if the facts alleged in the answer are true, they are sufficient to make the

judgment not binding on the county in this proceeding for refundment.

The county of Ramsey was a party to the registration proceedings and was served with the summons. It has not appealed from the judgment. The fraud, conceding, without deciding, that the allegations of the answer show fraud, was not in acquiring jurisdiction of the parties. It was at most a fraudulent failure to produce testimony that would have proved the tax sale valid. The rule is elementary that a domestic judgment of a court of general jurisdiction, in an action in which there is jurisdiction of the parties and of the subject-matter, is, until reversed or set aside, binding upon all parties to the action and their privies, and cannot be attacked for error or fraud except in a direct proceeding. *Kipp v. Fullerton*, 4 Minn. 473, Gill, 366; *Cone v. Hooper*, 18 Minn. 531, Gil. 476; *Re Ellis*, 55 Minn. 401, 23 L.R.A. 287, 43 Am. St. Rep. 514, 56 N. W. 1056; *Oswald v. Minneapolis Times Co.* 65 Minn. 249, 68 N. W. 15; *Hall v. Sauntry*, 72 Minn. 420, 71 Am. St. Rep. 497, 75 N. W. 720; *Hinckley v. Kettle River R. Co.* 80 Minn. 32, 82 N. W. 1088; *Henry v. White*, 123 Minn. 182, 143 N. W. 324.

The court, in the registration proceedings, had jurisdiction of the parties, of the subject-matter, and jurisdiction to grant the particular relief of adjudging void the Coburn tax sales. When the county was served, it knew or ought to have known who the parties to the proceeding were, what were their claims of interest in the land, and that the question of the validity of the Coburn tax sales was involved. It also must have known that if these sales were adjudged invalid the county might be called upon to refund the amount paid by the purchaser, with interest. It had the right and the opportunity of taking part in the proceedings and caring for its interests. Under the general principles of the law of collateral attack on judgments, it would seem clear that this judgment is binding upon the defendants here, and conclusively settles relator's right to refundment.

In none of the cases heretofore decided, involving the binding effect upon the city or county of a judgment declaring an assessment or tax sale void, was the city or county a party to the case in which the judgment was rendered. Even under those circumstances, it has been universally held that, in the absence of fraud, collusion, or mistake, the judgment conclusively settles the right to refundment. *Easton v. Scofield*, 66 Minn. 425, 69 N. W. 326; *Willius v. St. Paul*, 82 Minn. 373, 84 N. W. 1009; *Otis v. St. Paul*, 94 Minn. 57, 101 N. W. 1066, 1134. Under *Easton v. Scofield*, fraud in

procuring the judgment declaring the sale invalid will defeat a refundment, where the city or county is not a party to the suit. This is recognized by the Willius and Otis Cases. But it is evident that this was so decided because the city or county was not a party to the action, and had no right or opportunity to take part in the proceedings therein.

The pleadings do not allege that the state of Minnesota was made a party to the registration proceedings. It could not be unless, in the opinion of the examiner, it had an interest in or lien upon the land. *Rev. Laws 1905, § 3382 (Gen. Stat. 1913, § 6880); National Bond & Secur. Co. v. Hopkins, 96 Minn. 119, 104 N. W. 678, 680, 816.* It does not appear that the state had any such interest or lien. But the county

of Ramsey was made a party. It in no way raised the question of its not being a proper party. We can conceive of no interest that it had, save and except in the upholding of the Coburn tax certificates to prevent a judgment declaring the sales invalid that would give a right of refundment. Unlike the state, the county could be sued without its permission. It was sued, and had its opportunity to protect its interests by appearing and taking part in the proceedings. It is the county that seeks in this case to attack the judgment collaterally. We hold that the judgment in the registration proceedings is binding upon all the parties thereto, including the county of Ramsey, and is conclusive on the question of relator's right of refundment.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EBEN S. S. KEITH et al.,
v.
JOHN KENNARD.

(222 Mass. 398, 110 N. E. 1030.)

Records — Torrens law — prescriptive title.

1. A title gained by prescription may be registered under the Torrens law.

For other cases, see Records and Recording Laws, III. a, in Dig. 1-52 N. S.

Adverse possession — maintenance of recreation camps.

2. Prescriptive title to real estate is acquired by cutting the timber from it, fencing it, and erecting upon it buildings for a recreation camp, which are kept locked and have been occupied at the owner's convenience two or three times each year for more than twenty years, the possession so maintained being at all times peaceable.

For other cases, see Adverse Possession, I. k, in Dig. 1-52 N. S.

(January 7, 1916.)

EXCEPTIONS by respondent to rulings of the Land Court for Plymouth County, made upon a petition for the registration of title to certain land, which resulted in a decree for petitioners. Overruled.

The facts are stated in the opinion.

Messrs. Edwin C. Jenney and Henry P. Herr for respondent.

Messrs. J. E. Norton Shaw and Albert B. Collins, for petitioners:

The southerly boundary of the Ralph

Jones deed, under which the respondent claims title, followed the shore of the White Island pond, did not cross Oliver's Neck, and therefore was excluded from the deed under which respondent claims, and included in the deed under which the petitioners claim title.

De Ponta v. Driscoll, 200 Mass. 225, 86 N. E. 308; Van Ness v. Boinay, 214 Mass. 340, 101 N. E. 979; Doon v. Felton, 203 Mass. 267, 89 N. E. 539; Com. v. Roxbury, 9 Gray, 451; Hall v. Mayo, 97 Mass. 416; Nelson v. Butterfield, 21 Me. 220; Mitchell v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; Paine v. Woods, 108 Mass. 160.

No exception lies to the ruling that "occupation under a claim of full record title since 1852, with nothing inconsistent thereto until the respondent asserted his theory or claim, about five years ago, makes a title proper for registration."

Waterman v. Johnson, 13 Pick. 268; Cariño v. Philippine Islands, 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334; Glos v. Wheeler, 229 Ill. 272, 82 N. E. 234; Hamlin v. People, 155 App. Div. 680, 140 N. Y. Supp. 644; Browne, Civ. & Adm. Law, p. 398; Luce v. Parsons, 192 Mass. 8, 77 N. E. 1032; Jeffery v. Winter, 190 Mass. 90, 76 N. E. 282; First Nat. Bank v. Woburn, 192 Mass. 220, 78 N. E. 307; Crowell v. Druley, 19 Ill. App. 509; O'Connor v. Huggins, 113 N. Y. 511, 21 N. E. 184; Sharon v. Tucker, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; Joyce v. Dyer, 189 Mass. 64, 109 Am. St. Rep. 603, 75 N. E. 81; Poor v. Robinson, 10 Mass. 131; Smith ex dem. Teller v. Lorillard, 10 Johns. 356; Sherwood v. Sutton, 5 Mason, 143, Fed. Cas. No. 12,782; Chapin v. Freeland, 142 Mass. 383, 56 Am. Rep. 701, 8 N. E. 128.

Note. — As to Torrens law, see annotation following *RILEY v. PEARSON*, post, 14. L.R.A.1916D.

Braley, J., delivered the opinion of the court:

The petitioners, to establish their right to registration, relied on title by prescription as well as by grant. The proof of title by grant required an examination of ancient records, surveys, and plans covering more than two centuries; and in the first request the respondent asked the judge to rule that "the petitioners have failed to establish that they are the owners in fee of the property described in the petition. . . ." It was refused, and, in so far as title by grant is involved, the questions raised by the refusal would compel a lengthy review of the evidence; portions of which were admitted subject to the respondent's exceptions. But as thus applied it is unnecessary to determine the correctness of this ruling, for reasons presently to be stated. A title gained by prescription would pass by deed, and for purposes of registration it cannot be distinguished from title by grant. *Rev. Laws chap. 128, § 1; Butler v. Atty. Gen.* 195 Mass. 79, 8 L.R.A. (N.S.) 1047, 80 N. E. 688; *First Nat. Bank v. Woburn*, 192 Mass. 220, 78 N. E. 307. The record states that it appeared in evidence and the judge found as a fact that on June 8, 1852, by a duly recorded deed, the land in question was conveyed by one Gibbs to Josiah Folger, under whom, through mesne conveyances the petitioners claimed ownership. While it is further found that Gibbs did not have "full record title at the date of the conveyance," the evidence plainly shows that one Burgess, a predecessor of the petitioners, who obtained title in 1867, went upon the land in that year and also in 1868; cut the timber from both sides and all the timber from the narrow portion of "Oliver's Neck," the designation by which the tract in dispute has been known from Colonial times. The

cutting took place in the presence of one Miller and one Tisdale, under each of whom the respondent alleges title. It was further shown that Burgess built a sledge road through the neck, kept the underbrush cut; and when, in 1873, he parted with the title, his grantees entered into possession and erected camp buildings, consisting of a stable, cabin, cookhouse and boathouse, which were kept locked, the owners only holding keys. The land, although not cultivated, was thereafter kept cleared around the buildings, and nearly thirty years ago the ancient wooden fence across the "Neck" was replaced by a wire fence with a gate, which has been maintained and the gate kept locked by the parties in possession.

The buildings ever since have been occupied two or three times each year for about a week for the purpose of hunting, fishing, rest, and recreation. It thus appears that for more than twenty years before the date of filing the petition, the petitioners and their predecessors, under the claim of a full record title, have occupied and improved the land without interruption by the respondent or those under whom he claims. The occupation having been open, peaceable, and adverse, the respondent's second and third requests that "the petitioners upon all the evidence have failed to establish that they had acquired the title to the property set forth in the petition by prescription," and that "upon all the evidence in this case the petition should be dismissed with costs," were rightly denied. It follows that the finding that a title proper for registration had been made out was warranted. *Wales v. Coffin*, 100 Mass. 177; *Bigelow Carpet Co. v. Wiggin*, 209 Mass. 542, 548, 549, 95 N. E. 938, and cases cited.

Exceptions overruled.

MINNESOTA SUPREME COURT.

JOSEPH A. HENRY, Appt.,
v.

WILLIAM G. WHITE et al., Respts.

(123 Minn. 182, 143 N. W. 324.)

Records — Torrens law — fraudulent judgment.

1. Where, in proceedings under the Torrens act (*Laws 1901, chap. 237*) to register title, a judgment is procured by fraud on the part of the applicant in failing to name as parties or serve claimants known to him, it is not binding upon such omitted claimants.

For other cases, see Judgment, II. c, 2, in Dig. 1-52 N. S.

Headnotes by BUNN, J.
L.R.A.1916D.

Judgment — absence of parties — collateral attack.

2. If the want of jurisdiction, due to the failure to serve known claimants, appears from the judgment roll itself, the judgment is void as against such claimants, and may be attacked collaterally. Where such want of jurisdiction does not appear from the judgment roll itself, the judgment is not subject to collateral attack, though the applicant fraudulently concealed the existence of a known claimant.

For other cases, see Judgment, II. c, 2, a, in Dig. 1-52 N. S.

Records — Torrens law — reliance on judgment.

3. Where the existence of such claimant does not appear from the judgment roll

Note. — As to Torrens law, see annotation following *RILEY v. PEARSON*, post, 14.

itself, or the proceedings, and where such proceedings are absolutely regular on their face, one who purchases from the registered owner for a valuable consideration, in reliance upon the judgment, and without notice or anything to put him on inquiry, takes the title free from all encumbrances and adverse claims except those noted on the certificate.

For other cases, see Records and Recording Laws, III. c, in Dig. 1-52 N. S.

(October 17, 1913.)

APPEAL by plaintiff from an order of the District Court for Ramsey County denying a new trial of an action brought to foreclose a mortgage made by defendant Gould to plaintiff. Affirmed.

The facts are stated in the opinion.

Mr. Lloyd Peabody, for appellant.

Defendant Gould did not, by the registration proceedings and his certificate, acquire any title whatsoever to the land in question which he could assert against the plaintiff.

Baart v. Martin, 99 Minn. 197, 116 Am. St. Rep. 394, 108 N. W. 945; Riley v. Pearson, 120 Minn. 210, post, 7, 139 N. W. 361.

In actions affecting title, if the court never acquires jurisdiction of the true owner or other party in interest, his rights are not affected by the decree; those purchasing or otherwise dealing with the property, on the strength of the decree, do so at their peril; and if subsequently there must be a loss to one or the other claimant, the party who has bought the title tainted with fraud must be the loser.

Falconer v. Cochran, 68 Minn. 405, 71 N. W. 386.

The legislature has no power, either by the passage of an act for the registration of title or otherwise, to make a man's enjoyment of his property to depend on his taking notice of void proceedings.

Baker v. Kelley, 11 Minn. 480, Gil. 358.

Mr. William G. White, in propria persona:

The basic principle of the Torrens system is the registration of the title to land. It is the creation of a new title, binding upon all the world, and must, of necessity, rest upon judicial proceedings. If the registration system has any value, the title thus created must be indefeasible.

Niblack, Analysis of the Torrens Systems, § 5; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; Baart v. Martin and Riley v. Pearson, supra.

A registration proceeding is substantial-ly a proceeding in rem.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. L.R.A.1916D.

565; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Title & Document Restoration Co. v. Kerrigan, 150 Cal. 289, 8 L.R.A. (N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356; Robinson v. Kerrigan, 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 Ann. Cas. 829; Hoffman v. Superior Ct. 151 Cal. 386, 90 Pac. 939; State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; Tyler v. Judges of Ct. of Registration, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812.

The subject-matter of a registration proceeding is the state of the title to the land affected thereby.

State ex rel. Douglas v. Westfall, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200.

Jurisdiction over the land and over all claimants thereto is obtained in the manner clearly pointed out by the statute.

If one who examines the record in a registration proceeding finds the same to be complete and perfect in every particular, and that, so far as is disclosed by the record itself, the summons itself has been served upon all known claimants, and that notice to all other persons has been given by publishing and mailing the summons, as required by law, he may safely conclude that the court has acquired jurisdiction to conclusively establish the title to the land affected thereby, and may rely thereon.

Dewey v. Kimball, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; Riley v. Pearson, 120 Minn. 210, post, 7, 139 N. W. 361.

A registration decree valid upon its face cannot be collaterally attached.

Turrell v. Warren, 25 Minn. 9; State ex rel. Brown v. Macdonald, 24 Minn. 48; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; Riley v. Pearson, supra; Hoffman v. Superior Ct. 151 Cal. 386, 90 Pac. 939; Baart v. Martin, 99 Minn. 197, 116 Am. St. Rep. 394, 108 N. W. 945; 23 Cyc. 1077; Brown v. Atwater, 25 Minn. 520; Sodini v. Sodini, 94 Minn. 302, 110 Am. St. Rep. 371, 102 N. W. 861; Gulickson v. Bodkin, 78 Minn. 35, 79 Am. St. Rep. 352, 80 N. W. 783; Nye v. Swan, 42 Minn. 243, 44 N. W. 9.

Bunn, J., delivered the opinion of the court:

This action was to foreclose a mortgage made to plaintiff by defendant Gould. The trial resulted in a decision that defendant White was the owner of the real estate, free from any claim of plaintiff on account

of his mortgage. Plaintiff appealed from an order denying a new trial.

The assignments of error attack the conclusions of law, but not the findings of fact, which may be summarized as follows: Gould owned a lot in St. Paul, and on December 1, 1908, executed and delivered to plaintiff a promissory note for \$300, and a mortgage on the lot to secure the note. At the time the note and mortgage were delivered to plaintiff, Gould represented that he desired to register the title to the land, and requested plaintiff to refrain from recording the mortgage, promising that he would have the decree in the registration proceedings provide that the mortgage was a first lien on the premises. Plaintiff relied on these representations and did not record his mortgage. Gould made application to register his title, but did not, in the application or otherwise, disclose the fact that plaintiff owned a mortgage on the premises. Plaintiff was not made a party to the proceedings. The decree was thereafter duly entered, adjudging Gould to be the owner of the premises free from all encumbrances, and the premises were thereafter registered in the name of Gould, free and clear of the mortgage of plaintiff. Thereafter, and in furtherance of his purpose to defraud plaintiff, Gould conveyed the premises to defendant White, who paid a valuable consideration therefor. White had no knowledge or notice of the existence of the mortgage, and, in purchasing the premises, relied upon the decree and the certificate in the registration proceedings. As a part of the transaction, the owner's duplicate certificate, held by Gould, was surrendered to and canceled by the registrar of titles, who then registered the title in the name of defendant White, free from all encumbrances, caused the original certificate of registration to be entered and recorded, and delivered an owner's duplicate certificate to defendant.

We have, then, this case: The owner of land makes application to register his title, and fraudulently omits to disclose the existence of an unrecorded mortgage, or to make the mortgagee a party. The proceedings are in all respects regular, and a decree is entered that makes no mention of any mortgage. The owner then conveys the land for a valuable consideration to a purchaser who relies on the registration proceedings and has no notice or knowledge that there is a mortgage on the property. The question is: Does the purchaser take the title free from the lien of the mortgage?

This question must be and is answered in the affirmative. To hold otherwise would not only wholly destroy the indefeasible character of a Torrens title, but also give

an unrecorded conveyance priority as against a subsequent purchaser in good faith for a valuable consideration whose conveyance is first duly recorded, in direct opposition to the provisions of the recording act. Rev. Laws 1905, § 3357. If Gould had not registered his title, and White had, in good faith, and for a valuable consideration, purchased the land and recorded his deed, there can be no doubt that he would take the title free from the lien of an unrecorded mortgage of which he had no notice. It surely cannot be held that a decree in registration proceedings, regular in all respects, removes this protection of the innocent purchaser. It is admitted that nothing in these proceedings would cause one who examined them to suspect the existence of any lien, or fraud on the part of the applicant. It is difficult to see what would remain of the indefeasible character of a Torrens title if the decree is open to collateral attack as against one who purchases in good faith for a valuable consideration, and with nothing to put him on inquiry as to fraud on the part of the applicant. It would seem unnecessary to say again that the purpose of the statute (Rev. Laws 1905, § 3393) was to create an indefeasible title in the person adjudged to be the owner. The basic principle of the system is the registration of the title to land instead of registering only the evidence of such title. A title is created by the decree and certificate of registration. *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; *Baart v. Martin*, 99 Minn. 197, 116 Am. St. Rep. 394, 108 N. W. 945; *Riley v. Pearson*, 120 Minn. 210, post, 7, 139 N. W. 361.

Where the decree is procured by fraud, actual or constructive, as where claimants known to the applicant are not named as parties or served in the proceedings, it does not bind the claimants so omitted. If the want of jurisdiction due to the failure to serve known claimants appears affirmatively from the judgment roll itself, the judgment is void as against such claimants, and may be attacked collaterally. *Riley v. Pearson*, *supra*. But where neither in the proceedings themselves nor by the records the existence of an unnamed claimant is shown, though the applicant knows that there is such a claimant, the want of jurisdiction does not appear from the judgment roll itself, and the decree is not subject to collateral attack.

In *Riley v. Pearson*, the fact that known claimants were omitted appeared from the judgment roll itself, as well as from the records in the office of the register of deeds. No question of innocent purchaser was in-

volved in that case. It may be correct, though we do not so decide, that a decree that is void and subject to collateral attack would not be validated by a transfer of the title to a purchaser, though he paid a valuable consideration, and had no actual notice of the facts which made the decree void. But where, as in the instant case, the fraud or want of jurisdiction does not appear from the judgment or the proceedings, and where such proceedings are ab-

solutely regular on their face, one who purchases from the registered owner for a valuable consideration, in reliance upon the judgment, and without notice or anything to put him on inquiry, takes the title free from all "encumbrances and adverse claims, excepting only such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar." Rev. Laws 1905, § 3393.

Order affirmed.

MINNESOTA SUPREME COURT.

WILLIAM C. RILEY, Resp't.,

v.

MARY H. PEARSON, Impleaded, etc., Appt.

(120 Minn. 210, 139 N. W. 361.)

Deed — construction — easement.

1. A deed of real estate construed, and held to convey to the grantee an easement of a passageway over the land of the grantor, and that such easement was permanent, and not limited to the life of the building on the premises.

For other cases, see *Easements*, II. a; III. in Dig. 1-52 N. S.

Real property — registry of title — absence of parties.

2. Where, in proceedings under the Torrens act to register title, the applicant fails to disclose to the court the names of persons known to him to have an interest in or lien upon the property, and such persons are not named as parties to the proceeding or served with summons, and do not have actual notice of the proceeding, a judgment rendered therein is not binding upon such persons.

For other cases, see *Judgment*, II. c, 2, in Dig. 1-52 N. S.

Same — knowledge of applicant.

3. Applicant in the proceedings in question herein held to have known before the summons was applied for that her title was subject to permanent easements owned by persons known to her.

For other cases, see *Notice*, in Dig. 1-52 N. S.

Judgment — collateral attack.

4. Such judgment, rendered without jurisdiction of the persons owning such easements, was void as to them, and may be attacked collaterally.

For other cases, see *Judgment*, II. c, 2, a, in Dig. 1-52 N. S.

(January 3, 1913.)

APPEAL by defendant Mary H. Pearson from a judgment of the District Court for Ramsey County in favor of plaintiff, and

Headnotes by BUNN, J.

Note. — As to Torrens law, see annotation following this case, post, 14. L.R.A.1916D.

from an order denying a motion for new trial in a proceeding to register title to certain land. Affirmed.

The facts are stated in the opinion.

Mr. William G. White, for appellant:

A title duly and regularly registered under the Torrens system is indefeasible after the expiration of the period fixed by statute, unless the registration was obtained by fraud.

Baart v. Martin, 99 Minn. 197, 116 Am. St. Rep. 394, 108 N. W. 945.

And fraud within the meaning of the Torrens law is actual fraud, mala fides, or dishonesty of some sort.

Niblack, Analysis of Torrens Systems, § 144; Coleman v. Riria Puwhanga, 4 New Zealand L. R. 230; Matai v. Assets Co. 6 New Zealand L. R. 356.

One who seeks relief from a decree which was obtained by fraud must seek that relief in a direct action, and not in a collateral one.

Hoffman v. Superior Ct. 151 Cal. 386, 90 Pac. 939; Baart v. Martin, supra.

In the absence of fraud a registration decree creates a new and indefeasible title in the registered owner. The decree is binding upon all the world, and binds and concludes even residents of the state who were omitted from the summons.

Doyle v. Wagner, 108 Minn. 443, 122 N. W. 316; Baart v. Martin, 99 Minn. 197, 116 Am. St. Rep. 394, 108 N. W. 945; Reed v. Siddall, 94 Minn. 216, 102 N. W. 453; American Land Co. v. Zeiss, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200.

Neither the applicant nor the defendant Daniel Aberle & Sons are in possession of Mary H. Pearson's premises simply because they have the right to use a portion of the same for ingress and egress from the yard room in the rear of their respective stores.

Baker v. Kelley, 11 Minn. 480, Gil. 358; State ex rel. Douglas v. Westfall, 85 Minn. 443, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175.

Even if defendant Daniel Aberle & Sons and the applicant, Riley, were in possession of the Pearson property when her registration decree was rendered, it would avail

them nothing in this present proceeding. They can attack that decree, if at all, only in a direct proceeding instituted for that purpose.

Turrell v. Warren, 25 Minn. 9; 23 Cyc. 1077; *Brown v. Atwater*, 25 Minn. 520; *Sodini v. Sodini*, 94 Minn. 302, 110 Am. St. Rep. 371, 102 N. W. 861; *Gulickson v. Bodkin*, 78 Minn. 35, 79 Am. St. Rep. 352, 80 N. W. 783; *State ex rel. Brown v. McDonald*, 24 Minn. 48; *Nye v. Swan*, 42 Minn. 243, 44 N. W. 9; *Van Fleet, Collateral Attack*, §§ 3-12.

Messrs. **Charles Bechhoefer and A. E. Horn**, for respondent:

Persons who appear of record, or who are known to the applicant to have any title or interest, must be named as defendants, and if this requirement is not complied with, the judgment as to the person not named is void.

Ware v. Easton, 46 Minn. 180, 48 N. W. 775; *Minnesota Debenture Co. v. Johnson*, 94 Minn. 150, 110 Am. St. Rep. 354, 102 N. W. 381; *Dewey v. Kimball*, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; *Baart v. Martin*, 99 Minn. 204, 116 Am. St. Rep. 394, 108 N. W. 945.

As this judgment was void by facts affirmatively appearing in the proceeding, no direct attack was necessary.

Kanne v. Minneapolis & St. L. R. Co. 33 Minn. 419, 23 N. W. 854; *Jewett v. Iowa Land Co.* 64 Minn. 531, 58 Am. St. Rep. 555, 67 N. W. 639.

Respondent was in the "possession and occupancy" of the easement.

39 Cyc. 1751; *Jones, Easements*, § 122; *Hey v. Collman*, 78 App. Div. 584, 79 N. Y. Supp. 780, affirmed in 180 N. Y. 560, 73 N. E. 1125; *Sutphen v. Therkelson*, 38 N. J. Eq. 318; *Croke v. American Nat. Bank*, 18 Colo. App. 3, 70 Pac. 229; *Arterburn v. Beard*, 86 Neb. 733, 126 N. W. 379; *Hatton v. Cale*, 152 Iowa, 485, 132 N. W. 1101; *Ray v. Nally*, 28 Ky. L. Rep. 421, 89 S. W. 486; *McCann v. Day*, 57 Ill. 101; *Robinson v. Thrailkill*, 110 Ind. 117, 10 N. E. 647; *Rollo v. Nelson*, 34 Utah, 116, 26 L.R.A.(N.S.) 315, 96 Pac. 263.

Bunn, J., delivered the opinion of the court:

This is a proceeding under the so-called *Torrens* act to register the title to land in the city of St. Paul. A trial of the issues resulted in a decision that the applicant was entitled to have his title to the land, and to the easements referred to in the decision, registered in him. Defendant *Mary H. Pearson* moved for a new trial, and from an order denying such motion appealed to this court.

The questions presented here relate: (1) L.R.A.1916D.

To the character and extent of the easements owned by plaintiff and defendant *Daniel Aberle & Sons* prior to the decree hereinafter mentioned; (2) to the effect of such decree on such easements. The material facts are as follows:

Alexander Paul, in his lifetime, was the owner of lots 8 and 9, block 26, St. Paul proper. He constructed upon this property a three-story stone building, divided into four separate stores. By his will *Alexander Paul* devised this property to his children, *Charles Paul* and *Mary Paul*, in equal shares. The will was probated in 1867, and the final decree, entered in 1881, assigned the property to the devisees named. Lots 8 and 9 have a frontage on East Third street of 116 feet, and a depth on Robert street of 150 feet. The store building covered the entire frontage of both lots on East Third street, but the division into stores was without any reference to lot lines. Store No. 1, located at the northeast corner of East Third and Robert streets, was constructed on the west 41.06 feet of lot 8. Stores numbered 2, 3, and 4 were located on the remainder of lot 8 and all of lot 9.

In 1881 commissioners appointed by the probate court to partition the estate of *Alexander Paul* filed their report, in which store No. 1 was assigned in severalty to *Charles Paul*, and stores Nos. 2, 3, and 4 were assigned in severalty to *Mary Paul*. In this report, which was confirmed by the court in April, 1881, and duly recorded, store No. 1, together with the land upon which it was located, was set off to *Charles Paul*, subject to the following easement: "Subject to the right of use of the arched alleyway through the rear end thereof by the owners and occupants and their heirs and assigns of said stores 2, 3, and 4 in said block, for ingress and egress from the same into and from the yard room in the rear of said block, so long as said building shall stand." The arched alleyway mentioned in the report leads from Robert street to the "yard room" in the rear of stores 2, 3, and 4. Store No. 1 extends the full length of the lot, and this alleyway is a driveway under the second story, with its sides and arched ceiling of stone. It is 10 feet wide on the ground and 16 feet high at the highest point of the arch, and extends the full width of store No. 1 to an open space in the rear of the other stores, which do not extend to the rear of the parcels on which they stand.

Mary Paul died, and her undivided half interest in the property was assigned by the final decree entered January 26, 1888, to the devisees named in her will, *Emma* and *William Paul*. On the next day there was

recorded a deed from Charles Paul and wife to Emma Paul and William Paul. This deed, dated in November, 1887, purported to convey to the grantees the three stores which had been set off to Mary Paul in the partition proceedings in 1881. In this deed the easement granted was described as follows: "Together with the right of use of the arched alleyway in the rear of said most westerly store, for ingress and egress to and from the yard room in the rear of the stores standing on said lots 8 and 9."

The applicant, William C. Riley, and the defendant Daniel Aberle & Sons, have succeeded to the title and interest of Emma and William Paul in two of the stores and parcels of lots 8 and 9 which went to Mary Paul by the partition, Riley owning parcel No. 4 and Daniel Aberle & Sons parcel No. 3, and they are the present owners of the easements. Defendant Mary H. Pearson succeeded to the title of Charles Paul to parcel No. 1, on which store No. 1 and the arched alleyway stands.

The foregoing are the facts that bear on the question whether the easement of the applicant is permanent or endures only so long as the building stands. The facts that bear on the second question are as follows:

On April 24, 1906, Mary H. Pearson filed in the district court of Ramsey county her application to register the title to the west 41.06 feet of lots 8 and 9, block 26. After the usual reference to the examiner of titles, the latter, on May 8, 1908, filed his report, in which he reported that the applicant was the owner of record of the land sought to be registered, subject to the easement granted by the deed of November, 1887, from Charles Paul, which easement the examiner stated "does not appear to have ever been extinguished." He recommended that the owners and persons in possession of the remainder of lots 8 and 9, covered by the store building, be made defendants in the proceeding. The applicant did not, however, apply for the issuance of a summons in which these owners and persons in possession were named as defendants. Nothing appears to have been done in the proceedings until October 24, 1906, on which day the examiner filed a supplemental report, in which he stated that the title should be registered subject to the right of use of the arched alleyway by the owners and occupants, their heirs and assigns, of the store building, "so long as said building shall stand," and stated that, if this were done, it would not be necessary to make the owners and persons in possession of the remainder of lots 8 and 9 defendants in the proceeding.

On the day following the filing of this supplemental report, the applicant applied L.R.A.1916D.

for the issuance of a summons, and did not include among those to be named as defendants the owners of the remainder of lots 8 and 9 and the easement, who were, as before stated, William C. Riley and Daniel Aberle & Sons. Riley was at the time a resident of St. Paul, and Daniel Aberle & Sons was a corporation having its place of business and the residence of its officers in St. Paul. The summons was issued as applied for, and did not name as defendants either Riley or Daniel Aberle & Sons, and neither was ever served or notified of the proceedings. The summons was directed to certain named defendants, and to "all other persons or parties unknown claiming any right, title, estate, lien, or interest, in the real estate described in the application herein." This summons was published as required by law, and the proceedings came on before the court, which made its decision finding that the applicant was the owner of the real estate described in the application, subject to the easement "so long as said store building shall stand," and directing the entry of judgment accordingly. Judgment was entered, which described the easement in the language of the findings, and ordered the register of titles to register applicant's title, subject to such easement and certain other encumbrances named. The title was so registered, and a certificate issued.

On these facts, the learned trial court decided that the applicant in this proceeding and defendant Daniel Aberle & Sons were the owners of a perpetual easement for a passageway through the arched alleyway, and that, not being parties to the Pearson registration proceeding, they were not bound or affected by the judgment in that proceeding, which declared their easement to be only "so long as said store building shall stand."

1. The first claim of appellant is that the easement is not perpetual, but continuous only "so long as the store building shall stand." If the character of this easement is to be determined by the terms of the partition decree in the estate of Alexander Paul, this is correct; but if the character and duration of the easement are to be determined by the terms of the deed of November, 1887, from Charles Paul to Emma and William Paul, we think it clear that the easement was perpetual. The language will not admit of any other construction. The easement was to each grantee, and to his "heirs and assigns forever," and was without limitation as to time. There is nothing to warrant the conclusion that if the building should be destroyed by fire or cyclone, or torn down to make way for a new structure, it was intended that the easement should terminate. And we hold that we must de-

termine the nature and duration of the easement from the terms of the deed of November, 1887.

It is urged that this deed was merely confirmatory of the partition decree entered six years before; but there is no suggestion why this decree needed confirmation, and no explanation of why, if it did, Emma and William Paul did not give a deed to Charles confirming his title under the decree to parcel No. 1. Apparently the partition proceedings were entirely effective to convey to Mary Paul a complete title to parcels 2, 3, and 4, and to Charles Paul an equally good, but no better, title to parcel 1. The deed of 1887 recited a consideration of \$30,000, which is perhaps a fact not of great weight, but rather suggestive of something more than a mere desire to confirm the partition decree and strengthen the final decree, which on the day the deed was filed for record was entered in Mary Paul's estate, and assigned to the grantees in the deed the identical property it conveyed, if applicant's position is correct. It seems much more reasonable to conclude that it was intended by the deed to convey something that the grantee did not already own. A permanent easement in the owners of parcels 2, 3, and 4 would evidently be of much greater value than the one they already possessed, limited by the life of a building which might at any time be destroyed or torn down to be supplanted by a more modern structure.

We hold that the deed conveyed an easement, and that this easement was permanent, not limited, as was the one granted by the partition decree. It follows that the trial court correctly held that, at the date of the commencement of the Pearson registration proceedings, William C. Riley and Daniel Aberle & Sons each owned a perpetual easement for the use of the arched alleyway over the rear of parcel No. 1. It may be noted here that parcel No. 2 is owned by a defendant who did not appear in this proceeding, and that the owner of parcel No. 3 has also an easement of passage over the rear of parcel No. 2, and the owner of parcel No. 4 an easement of passage over the rear of parcels Nos. 2 and 3, as well as the right to use the arched alleyway. Each of these easements is, by the terms of the deed creating it, a permanent one.

2. The serious and important question in the case is whether or not applicant and Daniel Aberle & Sons are bound by the Pearson registration decree, which adjudged their easements to be limited by the life of the building. That this judgment was erroneous we have already held; but, of course, that is, in this connection, unimportant. If it is binding on applicant, he cannot now claim a permanent easement. The L.R.A.1916D.

question is important, not only as it affects the validity of decrees under the Torrens law as against collateral attack, but as it affects owners of property which may be taken from them by legal proceedings of which they have no notice. We are anxious that a Torrens title be made one which will pass readily, without examination of the records to ascertain if the owner of the certificate had a title that was proper for registration, and without regard to that fact; but we are also anxious to announce no doctrine that will make it easy to deprive another of his property without an opportunity on his part to be heard. We conceive that considerations of public welfare do not demand that we "stretch the law" in order to sustain a Torrens title founded on a judgment rendered without due process of law.

The controlling facts, to which we must apply the law, are that, at the time the Pearson summons was applied for, William C. Riley and Daniel Aberle & Sons were the record owners of a perpetual easement over the land sought to be registered, and were openly in the enjoyment of such easement. The applicant had both constructive and actual knowledge of this fact; the deed creating the easement being on record, the owners being in possession, and the examiner of titles having, in his original report, found that an easement was created by the deed, and still existed, and having recommended that the owners of such easement be made parties defendant in the proceedings. Had there been no supplemental report of the examiner, suggesting that it was not necessary to make the owners of the easement parties, it could not be claimed that the decree would bind parties not joined or served, contrary to the recommendation in the original report. *Dewey v. Kimball*, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704; *Baart v. Martin*, 99 Minn. 204, 116 Am. St. Rep. 394, 108 N. W. 945. All that appellant has on which to base the argument that the judgment is binding is the statement in the supplemental report of the examiner that it would be unnecessary to join the owners of the easement if the decree registered the title subject to an easement limited to the life of the building.

Did this relieve the applicant from making parties to the proceeding the owners of an interest disclosed by the records and actually known by the applicant to exist? If this were not a Torrens law proceeding, if it were an action to quiet title, or to determine adverse claims, it would not for a moment be contended that the owner of a known lien or interest that appeared of record would be bound by a judgment unless he was made a party and served with

the summons. But it is claimed that this is so under the Torrens law, or at least that such judgment binds everybody after the sixty days within which a person having an interest in the land, and who has not been actually served with process, may appear and file an answer. And we agree with this contention, except as we are asked to apply the rule to cases where the applicant has knowledge of the title, interest, or lien existing in another, and fails in his application or petition for summons, or otherwise, to disclose such knowledge. In the absence of fraud, actual or constructive, it is the law, as declared by the act itself and the decisions, that a decree of registration binds all the world. Those not specifically named as defendants are parties to the proceeding under the designation "all other persons or parties unknown claiming any right, title, estate, lien, or interest, in the real estate described in the application herein," and served by publication. This is the effect of *Baart v. Martin*, 99 Minn. 197, 116 Am. St. Rep. 394, 108 N. W. 945, of *Doyle v. Wagner*, 108 Minn. 443, 122 N. W. 316, and of *American Land Co. v. Zeiss*, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200. These cases, and especially the first named, appellant insists, control the case at bar, and compel the conclusion that the judgment in the Pearson proceedings is binding upon Riley and Daniel Aberle & Sons.

In *Baart v. Martin* the action was to foreclose a mortgage given by Martin to one Ernst and assigned to Baart. Ernst forged Baart's name to a power of attorney to foreclose the mortgage, and it was in form foreclosed, though there was no default in the mortgage. At the sale the property was bid in in the name of Baart, and thereafter Ernst forged Baart's name to a deed conveying the property to one Carl. Carl, though having knowledge of these facts, on December 15, 1903, made application to register title to the land under the Torrens law, which application was filed January 23, 1904, and referred to the examiner January 29, 1904, who reported an unencumbered fee title in Carl. Baart had no knowledge of the forged power of attorney, the attempted foreclosure, or forged deed, until in November, 1903. On January 2, 1904, he commenced the action to foreclose his mortgage. The summons was served on Carl February 7, 1904, and a notice of lis pendens filed on March 3, 1904. March 5, 1904, Carl elected to proceed with his registration proceedings, and the summons was issued, served, and published. Though Carl then knew that Martin was the owner of the fee, and that Baart owned an unsatisfied first lien on the property, neither Martin nor Baart was named as a defendant L.R.A.1916D.

in the proceedings, which resulted in a decree registering the title in Carl as fee owner, and not mentioning Baart's mortgage. On these facts it was held that, as Carl knew that Baart claimed a mortgage lien on the land, it was necessary that the latter's name appear in the summons, and that, as he was not an "unknown party," the concealment of his claim is a fraud on the court, and "the decree therein entered is as to him of no force and effect." The conclusion that the decree was not binding on plaintiff because of the "fraud on the court" involved an exhaustive review of the authorities on the effect of a Torrens decree under the laws of different states and countries, and a decision that under our statute a decree and certificate procured by fraud, when the owner of the land is not notified as required by the statute, may be vacated and set aside, as long as the title remains registered in the name of the person guilty of the fraud, in an action brought by the defrauded party within a reasonable time after the discovery of the fraud. In other words, a decree and certificate so obtained by fraud do not give an indefeasible title. It is true that it was stated in the opinion that the purpose of the Torrens law was to create an indefeasible title in the person adjudged to be the owner, and that in the absence of fraud a Torrens decree is final, and we have no intention or desire to in any respect depart from this doctrine. But we by no means regard the case as conclusive in favor of appellant here. Indeed, it supports the position of respondent.

Doyle v. Wagner was an action to foreclose a mechanic's lien, in which the defense was a decree registering the title under the Torrens system. The lien statement was filed before the registration proceedings were begun; but, owing to a mistake in the description of the property, it was not noted on the abstract or mentioned in the examiner's report, and the trial court found as a fact that the applicant at no time had any notice or knowledge of the existence of the lien. It was held that, the registration proceedings being regular, and there being no fraud, plaintiff was bound by the decree, though not named as a party, and though the decree did not recognize or establish the lien. It is clear that this case does not control the case at bar.

In *American Land Co. v. Zeiss*, 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200, the Federal Supreme Court had under consideration the validity of a statute of California, entitled "An Act to Provide for the Establishment and Quieting of Title to Real Property in Case of the Loss or Destruction of Public Records." Cal. Stat. Ex. Sess. 1906, p. 78. This statute was passed at an

extraordinary session of the legislature of California, called after the earthquake and fire in April, 1906, and its object was to restore the record title to land in San Francisco where the records had been destroyed by the great calamity. The act permitted an action by one in possession of property to establish his title. It required the plaintiff to make affidavit before the summons was issued that he does not know, and has never been informed, of any adverse claimants not named in the summons. It was held that this law did not deprive unknown claimants of their property without due process of law. The statute had been construed by the supreme court of California in *Title & Document Restoration Co. v. Kerrigan*, 150 Cal. 289, 8 L.R.A. (N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356, and in *Hoffman v. Superior Ct.* 151 Cal. 386, 90 Pac. 939, as requiring the complainant "to designate and to serve as known claimants all whom by reasonable diligence he could ascertain to be claimants," a construction which was said by Chief Justice White "in effect declared that the statute prohibited the omission of a known claim or claimant upon the conception that the rights of such claim or claimant would be foreclosed by the general designation and notice prescribed for unknown claimants." This construction enabled the court to hold the act constitutional, as, when so construed, it manifested "the careful purpose of the legislature to provide every reasonable safeguard for the protection of . . . unknown claimants, and to give such notice as under the circumstances would be reasonably likely to bring the fact of the pendency and the purpose of the proceeding to the attention of those interested."

It is apparent that the Zeiss Case is no authority for upholding a decree where a known claimant is omitted from the summons, and not served. Indeed, the reasoning of the opinion seems to indicate quite clearly that such a decree would not be binding upon the claimant omitted. The chief justice quotes from *Hoffman v. Superior Ct.* the statement that "failure of the plaintiff to make inquiry, or to avail himself of knowledge which would be imputed to him because of facts sufficient to put him on inquiry, as to the existence of adverse claims, would be available 'in any subsequent attack upon the decree, upon the ground that there was extraneous fraud of the plaintiff in making a false affidavit to obtain jurisdiction.'" That this language met the approval of the court in the Zeiss Case is evident. And in discussing the "adequacy of the proceedings pursued" in the Zeiss Case, it was stated that there was no claim that fraud, actual or constructive,

was employed by Zeiss in obtaining the judgment complained of; in other words, Zeiss had no knowledge of the existence of adverse claims or claimants.

The cases we have above discussed do not hold that a registration decree is infeasible when a known claimant is omitted from the summons, is not served, and has no notice of the proceedings; and we are aware of no case so holding. On the contrary, *Baart v. Martin* expressly holds that "when the name of a claimant is known to an applicant either from the report of the examiner, . . . or from other sources, the summons cannot be served on such claimant by publication, unless his name appears in the summons," and that "the concealment of his claim is a fraud on the court, and the decree therein entered is as to him of no force and effect." The other cases referred to, by necessary implication, announce the same doctrine. Indeed, no other conclusion seems possible under the language of the act requiring the applicant to set forth in his application the names of all parties who "appear of record or are known to the applicant to have or to claim any right, title, estate, lien, or interest in the land," and requiring the order for summons to contain the name and address, so far as known, of every person named in the application or found by the examiner as having any such right, title, interest, estate, or lien. *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; *Ware v. Easton*, 46 Minn. 180, 48 N. W. 775; *Dewey v. Kimball*, 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704.

We do not understand counsel for appellant to question this. He admits that, if the applicant fails to disclose to the court the existence of a claim or claimant known to him, this is a fraud upon the court, and that the decree may be set aside in a direct action for that purpose. But he claims that it is not shown that the applicant knew of the easements claimed by Riley and Daniel Aberle & Sons, and that in any event there must be a direct action to set aside or modify the decree.

3. It may be that Mary Pearson had no actual personal knowledge of the duration of the easements claimed. But her attorney had. He may have considered that legally the easements were not permanent, but he knew all the facts, or at least is charged with such knowledge,—the examiner's first report, the deed of record, the fact of possession, if it may be so called. Clearly the applicant is charged with the knowledge acquired by her attorney. It is not clear why the recommendations in the original report were not followed, why

the supplemental report was made, or what influenced the examiner to change his opinion. But certainly the astute and able counsel knew every fact relating to the claims of the owners of parcels 2, 3, and 4, and it is immaterial if he still considered that the easements continued only so long as the store building should stand. We do not believe for a moment that there was any intent to commit a fraud on the court. The high character of the counsel is sufficient evidence to rebut any inference that might otherwise be drawn from the facts. But such actual intent or purpose to defraud the claimant is not necessary. We think that constructive fraud is sufficient, and that the omission to disclose the adverse claims was such a fraud upon the court. The use of the term "fraud" in this connection is perhaps unfortunate, naturally implying, as it does, moral turpitude and bad faith. It is the fact itself that a known claimant was not made a party or served that makes the judgment not binding upon him, rather than any bad faith in concealing the existence of the claim or claimant.

It is insisted that the applicant disclosed to the court all the facts upon which the character of the easement depended, including the deed by which it was created. It is certainly true that the first report of the examiner disclosed this deed, and that it was referred to in the abstract. But it may be noted that this information did not come from the applicant, and we are not prepared to hold that the fact that it was possessed by the court, or, more accurately, that the facts were disclosed in the files of the case, relieved applicant of the duty of doing anything further to disclose the names of claimants. The fact still remains that neither in the application, nor in the petition for the summons, was any mention made of the easements claimed by Riley and Daniel Aberle & Sons. It is, of course, the duty of the court to determine what parties shall be named as defendants in a registration proceeding; but it is not to be expected that the court can or should do this without the aid of the applicant and the examiner. Had the applicant disclosed the fact that the deed granted a perpetual easement, and that Riley and Daniel Aberle & Sons were the record owners of such easement, in the actual enjoyment thereof, all facts within the applicant's knowledge, it would not be necessary now to claim that the court, not the applicant, was responsible for the failure to name the owners in the summons.

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4. It is strenuously insisted that the decree is binding in any event until set aside or modified in a direct proceeding brought for such purpose. This would clearly be true in case of fraud that did not go to the question of the jurisdiction of the court over the parties. But this is a case where, as we have held, the court never acquired jurisdiction over the persons who are now insisting that the decree is not binding upon them. And this want of jurisdiction appears affirmatively from the judgment roll itself. The rule applicable to such a case is well settled; that is, such a judgment is a nullity as to those not parties to it, and may be attacked collaterally. *Kanne v. Minneapolis & St. L. R. Co.* 33 Minn. 419, 23 N. W. 854; *Jewett v. Iowa Land Co.* 64 Minn. 531, 58 Am. St. Rep. 555, 67 N. W. 639; 2 *Dunnell's Minn. Digest*, § 5141. We see no reason why this rule should not apply to a judgment in a Torrens proceeding, as well as in any other action. We fully agree that a Torrens certificate based upon a decree in a proceeding in which the law as to naming and serving known claimants is complied with gives, in the absence of fraud, an indefeasible title, and is not merely evidence of the title which the applicant had before the decree. All claimants unknown to the applicant, and not named in the examiner's report, are parties to the proceeding as "unknown parties;" but where it affirmatively appears that claimants known to the applicant or named by the examiner are not made parties, the decree is not binding on such claimants, and may be attacked collaterally. Any other conclusion would go far to remove the safeguards which make the law constitutional. It would make a strong argument for holding that the act was invalid, because the proceedings provided do not constitute due process of law. In its last analysis the case reduces itself to the plain proposition that no man can be deprived of his property without notice and an opportunity to be heard. We may call the attempt to do this fraud, or we may say it was a mistake; but the result is the same,—a judgment claimed to be binding against known owners of an interest in the land, who were not made parties or served with summons, and who had no actual notice of the suit.

We have considered very carefully the able arguments and briefs of counsel, and our conclusions are in harmony with those reached by the trial court.

Order affirmed.

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I. Introductory.

This note deals with the American cases on the Torrens law (including the Hawaiian and Philippine cases); it is also attempted to include such foreign cases as are of general importance, as distinguished from those of local or temporary interest. "American," as used in this note, includes Hawaiian and Philippine matters.

The Torrens system takes its name from Robert (afterwards Sir Robert) Torrens, who drew the first "Torrens" law, which was enacted in South Australia in 1858. The system spread to the other Australian colonies and other British possessions, and to England itself, and modifications of it have been L.R.A.1916D.

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adopted in several American jurisdictions.

The purpose of the Torrens law is that there shall be in the registrar's office a page of a book containing the facts of the title of each piece of property, which page shall be the title to the property, and shall be conclusive; so that an intending purchaser or mortgagee may go to the registrar's office, examine the page, and at once with safety take a deed or mortgage from the owner of the property, file it, and have himself accordingly registered upon the page as owner or mortgagee. This page is known as the certificate of title.¹

¹ "One of the primary and fundamental purposes of the registration of land under

The theory, of course, is an ideal; the practical question is how far it can be accomplished. The title is to be set down on the page of the registrar's book or certificate of title, and is to be registered in the name of a person. It is to be stated to be subject to such liens, etc., as are specified. But, on reflection, it will be seen that such a certificate is not entirely conclusive; there are other things to be excepted, and these, or some of them, the acts in general endeavor to provide for. For example, the especial difficulty is fraud; the certificate is not conclusive in the face of fraud, and statutes attempting to say that taking a title with notice of an outstanding interest is not a fraud break down utterly when they come for construction before the courts, as may be seen by the cases in the English colonies. Again, what is to be done where the property described in the certificate is already registered in the name of another person on another page of the register? What is to be done about easements? And are they to be on the certificate of the servient or dominant tenement? And what is the effect of a certificate on one in adverse possession when it was granted? Other difficulties appear as the matter develops.

For the accomplishment of the purpose of the system, it is the general theory of most, if not all, of the non-American acts, that all registered lands should be presently alienable, so that trust lands shall be registered in the trustees as absolute owners.

In a few jurisdictions the system adopted contemplates the registration of more than one kind of title; as in the Hawaiian, English, and one or two other acts, of an absolute, a possessory, or a qualified title; or, in the British Columbia act, of absolute fees or indefeasible fees.

The system involves, of course, in the first place, the initial registration of title, or, as it is called, "bringing the land under the act," and, second, subsequent matters. The fundamental distinction between the foreign and American acts is that in the foreign acts the land is brought under the act by what is, in general, an administrative matter by the registrar,—though it has been held that in some cases he acts judicial-

ly,—and there are provisions for judicial relief; while, under the American acts, the initial registration is a formal proceeding or suit in a court of justice; the only American act which did not so provide was overthrown as unconstitutional in that it conferred judicial powers upon the registrar.² In the American acts we are, of course, confronted in limine with constitutional questions. As a result of what has been said above, and the comparative newness of the matter here, most of the American cases have arisen in proceedings for original registration, and scarcely any of them pass directly upon matters subsequent to registration of title. The foreign acts are of considerable variety.

The system in America.

Constitutional provisions with reference to the system have been adopted in Ohio, Pennsylvania, and Virginia, and will be found in a note to subdiv. II., infra. Torrens acts have been passed in the following American jurisdictions, viz.: California, 1897; Colorado, 1903; Illinois (1895, declared invalid and new act passed in) 1897; Massachusetts, 1898; Minnesota, 1901; Mississippi, 1913; New York, 1908; North Carolina, 1913; Ohio (1896, declared invalid and new act passed in) 1913; Oregon, 1901; Washington, 1907; Hawaii, 1903; the Philippines, 1902. There have been numerous amendments to these acts. The American acts vary considerably in detail, and in Massachusetts, Hawaii, and the Philippines the registration is committed to a court of land registration. While there are a good many American cases on the subject, they have hardly, as yet, done more than touch the surface of it.

II. Constitutional questions.

a. In general.

The cases upon constitutional questions are not numerous, and have, in general, been raised, even if formally, in a technical or academic manner. One cannot but feel that there remains something to be said upon a constitutional question when it has yet to be urged by a litigant who is complaining that his property has been lost by reason of a violation of his constitutional right. The most import-

the Torrens system is to secure to the owner an absolute, indefeasible title, free from all encumbrances and claims whatsoever, except those mentioned in the certificate of title; and, so far as it is possible, to make the certificate issued to the owner by the court, absolute proof of such title." L.R.A.1916D.

Maloles v. Director of Lands (1913) 25 Philippine, 548.

² The Illinois act of 1895, declared unconstitutional in *People ex rel. Kern v. Chase* (1896) 165 Ill. 527, 36 L.R.A. 105, 46 N. E. 454.

ant of these questions, of course, is that of jurisdiction of the court to render a judgment binding an owner who was not personally served. As heretofore stated, constitutional provisions in regard to registration of titles have been adopted in Ohio,³ in Pennsylvania,⁴ and in Virginia.⁵ These provisions have not yet been construed by the courts. Copies of them are given in the notes.

b. Absence of personal service.

As heretofore stated, the most important constitutional question under these acts is whether the judgment in a registration proceeding is subject to the objection that it deprives persons not personally served with notice of their property without due process of law. This question presents various phases as affecting unknown persons, wherever they may be, known nonresidents, known persons within the state, and the occupant, if there be any occupant other than the applicant. A study of the cases sustaining the acts seems to leave it at least doubtful how far the courts in Illinois, Massachusetts, and Minnesota have intended to sustain the various acts as regards the foregoing question.

It will be seen that the validity of the acts is grounded more or less by the courts upon the view that the registration proceeding is, as the acts in general provide, a proceeding in rem, and that in the views hereafter given of the Ohio court and of Loring, J. (dissenting), in the Tyler Case in Massachusetts, the pro-

ceeding cannot be one in rem. In this connection the reader is referred to the note to *Pinney v. Providence Loan & Invest. Co.* 50 L.R.A. 597, for a discussion as to whether seizure of the property alone in a proceeding in rem will give jurisdiction without some form of notice.

The following may be taken as a suggestion towards the solution of the problem: First, the state has jurisdiction of all property within its boundaries. Second, the power of the state over property does not enable it to deprive anyone of his property without due process of law. Third, the presence within the state of property gives the court no jurisdiction over it. Fourth, due process of law requires that the state may authorize the court to proceed against property in rem only on giving reasonable notice of its purpose to deal with such property, including actual or constructive seizure of the property itself; and the court obtains no jurisdiction to deal with the property except by proceeding according to the enabling statute.

But, in any event, it is not easy to reconcile ourselves, for example, to the case of a remainderman, who, confident in his future enjoyment of his property, pays no attention to it during the intervening life estate, but pursues his calling in distant parts of the country, only to find, on the death of the life tenant, that, during such intervening estate, his own property has been irretrievably taken from him

³ Constitution of Ohio, article 2, § 40, adopted September 3, 1912: "Laws may be passed providing for a system of registering, transferring, insuring and guarantying land titles by the state or by the counties thereof, and for settling and determining adverse or other claims to and interests in, lands the titles to which are so registered, insured or guaranteed, and for the creation and collection of guaranty funds by fees to be assessed against lands, the titles to which are registered; and judicial powers with right of appeal may by law be conferred upon county recorders or other officers in matters arising under the operation of such system."

⁴ Amendment to the Constitution of Pennsylvania, adopted by the people, November, 1915: "Laws may be passed providing for a system of registering, transferring, insuring of and guarantying land titles by the state, or by the counties thereof, and for settling and determining adverse or other claims to and interests in lands the titles to which are so registered, transferred, insured, and guaranteed; and for the creation and collection of indemnity funds; and for carrying the system L.R.A.1916D.

and powers hereby provided for into effect by such existing courts as may be designated by the legislature, and by the establishment of such new courts as may be deemed necessary. In matters arising in and under the operation of such system, judicial powers, with right of appeal, may be conferred by the legislature upon county recorders and upon other officers by it designated. Such laws may provide for continuing the registering, transferring, insuring and guarantying such titles after the first or original registration has been perfected by the court, and provision may be made for raising the necessary funds for expenses and salaries of officers, which shall be paid out of the treasury of the several counties."

⁵ It is provided in the Virginia Constitution (§ 100) that "the general assembly shall have power to establish such court or courts of land registration as it may deem proper for the administration of any law it may adopt for the purpose of the settlement, registration, transfer, or assurance of titles to land in the state, or any part thereof."

without actual notice, and that his "day in court" has ceased to exist. Nor can the excellences of the system inspire a haste to adopt it in those who have lived long enough to recognize that the present day and generation has but little patience with the individual rights for which the original draftsmen of our constitutions were so solicitous.

The Ohio acts of 1896 and the Illinois acts of 1897 are the only American Torrens acts to be declared invalid. The first decision of the question was in *State ex rel. Monnett v. Guilbert*,⁶ holding that the statute of Ohio of 1896 was unconstitutional as violating the constitutional provision that "every person, for an injury done him in his land, goods, person or reputation shall have remedy by due course of law." The act provided for notice by publication and mailing, and for personal service on residents of the county, and declared that "the decree of the court ordering registration shall be in the nature of a decree in rem." The court pointed out that the notice to be served under the act (and which was to be addressed "To whom it may concern") was not a summons, and that it did not contain the names of the persons to be served, and that while the application was required to contain the name and address of adjoining owners and the name of the occupant, if the land was occupied, and the name of the holder of all easements and inferior estates of any kind, in law or in equity, it did not require that one known to claim the title of the land in fee simple adversely to the applicant should be named or notified, although his residence might be within the county and known. The court said, *inter alia*: "To say that the legislature may prescribe such notice as is appropriate to proceedings in rem, and thus invest the proceedings with that character, is to affirm its power to annul the constitutional requirement. In this aspect of the case, and considering the effect of registration upon interests adverse to those of the applicant, the pro-

ceeding to register does not, in any substantial respect, differ from a suit quia timet to settle title. It bears the least possible analogy to a proceeding in rem. The res is not taken into the possession of an officer of the court. No charge or lien is asserted against it. It is not to be sold with a view to the distribution of its proceeds, and it partakes, therefore, less of the nature of a proceeding in rem than does the foreclosure of a mortgage. . . . Except when the land is occupied by one who claims adversely to the applicant, the questions determined in registration are such as, both before and since the adoption of the Constitution, have been determined by courts of equity; and their decrees, much more distinctly than the judgments of courts of law, operate upon persons."⁷

After the decision in *People ex rel. Kern v. Chase* (Ill.) *supra*,⁸ a new Torrens act was passed in Illinois in 1897, making the proceeding for registration a judicial proceeding or suit, the application to be to a court of chancery, and requiring that there be made parties thereto the occupant, if other than the applicant; the holder of any lien or encumbrance; other persons having any estate or claiming any interest in the land, in law or in equity, in possession, remainder, reversion, or expectancy. All other persons were to be made parties defendant by the name and designation of "all whom it may concern." A summons was to issue against all persons mentioned as defendant, and was to be served as in other cases in chancery. Notice was also to be published and mailed to other defendants substantially as in other chancery cases, and the court might direct further notice to be given. This act was sustained in *People ex rel. Deneen v. Simon*,⁹ although the court considered that it might not be entirely free from objection. Thus, it was there held that an act providing for the registration of land titles after they are established in a court of equity might be upheld as against all upon whom service

⁶ (1897) 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551. The question was not discussed in *People ex rel. Kern v. Chase* (1896) 165 Ill. 527, 36 L.R.A. 105, 46 N. E. 454, declaring invalid the Illinois Torrens act of 1895 on the ground that it conferred judicial powers upon the registrar.

⁷ *State ex rel. Monnett v. Guilbert* (Ohio) *supra*.

⁸ Holding the Illinois act of 1897 unconstitutional as conferring judicial powers upon the registrar.

⁹ (1898) 176 Ill. 165, 44 L.R.A. 801, 68 L.R.A.1916D.

Am. St. Rep. 175, 52 N. E. 910, which was an action upon an information in the nature of a quo warranto against the defendant, requiring him to show by what authority of law he was exercising the powers and duties of the office of registrar of titles in and for the county of Cook. In answer the defendant set up the act of 1897; the relator filed a general demurrer to this answer on the ground that the act under which the defendant sought to justify was unconstitutional and void, which was overruled and the information dismissed; and this decision was affirmed upon appeal.

of process has been properly made, although it contains a void provision permitting judgment against a resident of the state, notified only by publication; and also that the provision making a judicial determination of title to land forever binding and conclusive upon all persons after the lapse of two years might be given effect against parties to the proceeding and persons who must bring legal proceedings to establish their rights, although it would be void in favor of persons in possession of all they claim who were not parties to the proceeding.¹⁰

The Massachusetts statute passed in 1898 provided for a proceeding in a court of registration; the application was to state the name and address of the occupant, if there was one, and to give the names and addresses, so far as known, of the occupants of all lands adjoining. After an examination by an examiner, who was to report to the court, the recorder, if the proceeding was continued by the applicant, was to publish a notice by order of the court, to be addressed by name to all persons known to have an adverse interest and to the adjoining owners and occupants so far as known, and to all whom it might concern; a copy was to be mailed to every person named in the notice whose address was known, and a copy posted on the land; further notice might be ordered by the court. It was also provided (by the amendment of 1899) that the proceeding should be one in rem. It will be noticed that there is no requirement for personal service. In *Tyler v. Judges of Ct. of Registration*¹¹ the court denied a petition for a writ of prohibition against the judges of the court of registration established by the act, to prohibit them from proceeding further in registering the title to a certain parcel of land and determining the boundaries between it and an adjoining parcel belonging to the petitioner, who claimed that the original registration provided for by the act would deprive all persons, except the registered owner of any interest in the land, of property without due process of law; that the statute gave judicial powers to the recorder and assistant recorders after the original registration, although they were not judicial officers under the Massachu-

setts Constitution; and that there being no provision for notice before registration of transfers or dealings subsequently to the original registration, the effect was to deprive persons of their property without due process of law. It is to be regretted that the writer of the opinion of the majority of the court confused the actual decision by expressing at length what are confessedly his own individual views on the general subject, which, so far as we can judge, are not in accord with those of the majority of the court. This opinion, therefore, is in general not to be taken as authoritative except where he says: "For the purposes of decision, a majority of the court prefer to assume that in cases in which, under the constitutional requirements of due process of law, it heretofore has been necessary to give to parties interested actual notice of the pending proceeding by personal service or its equivalent, in order to render a valid judgment against them, it is not in the power of the legislature, by changing the form of the proceeding from an action in personam to a suit in rem, to avoid the necessity of giving such a notice, and to assume that, under this statute, personal rights in property are so involved, and may be so affected, that effectual notice, and an opportunity to be heard, should be given to all claimants who are known, or who, by reasonable effort, can be ascertained."¹² Loring, J. (with whom Lathrop, J., concurred), dissented on the ground that the notice provided for was not sufficient; that one not personally notified was not given the right to have the judgment vacated on a writ of review; that "no person is barred by a judgment or decree in a proceeding the effect of which is to strip him of vested rights of property, unless he is named as a defendant;" that the act could not be valid as one starting the statute of limitations against an owner in possession; that the proceeding could not be supported unless it was one in rem; and that it was not one in rem. He said, *inter alia*, that the test of a proceeding in rem "is not, Are all the world barred? but it is: Is it a proceeding to enforce a liability for which the res is liable, irrespective of who owns it,—such a liability that the res can be

¹⁰ (Ill.) *Ibid*.

¹¹ (1900) 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812.

¹² It may be here noted that the writer of the foregoing opinion observed in a later case: "The proceeding for registration is likened to bills in equity to quiet title, but it is different in principle. It is a proceeding in rem under a statute of the type L.R.A.1916D.

of the Torrens act, such as was discussed in *Tyler v. Judges of Ct. of Registration* (Mass.) *supra*. It is nearer to law than to equity, and is an assertion of legal title; but we think it unnecessary to put it into either pigeonhole." *Carifio v. Philippine Islands* (1909) 212 U. S. 449, 55 L. ed. 594, 29 Sup. Ct. Rep. 334, reversing (1906) 7 Philippine, 132.

properly impleaded as the respondent who is liable? If it is, then a proceeding in rem lies, and all the world are barred; but if it is not such a proceeding, and is a proceeding to enforce an ordinary right of lien or of property only, the proceeding is not in its nature a proceeding in rem, and the legislature cannot make it so by providing that all the world shall be barred."¹³ The case was taken to the Supreme Court of the United States upon writ of error, by the applicant for the writ of prohibition, and that court held that the plaintiff in error could not raise the question as to the unconstitutionality of the act as lacking in notice where he himself had actual notice of the proceedings, although not a party to them; that is to say, he could not raise the question to the extent that his writ of error would be within the jurisdiction of the Supreme Court of the United States.¹⁴ Four of the judges dissented on the ground that the objection of the applicant was not as to the jurisdiction of the court over him personally, but as to its jurisdiction over the subject-matter.¹⁵

The Minnesota Torrens act of 1901 was held not unconstitutional as depriving persons of their property without due process of law in *State ex rel. Douglas v. Westfall*.¹⁶ That act provided that notice as to all known residents having claims or known to have any interest or claims to the land must be given by the service of a summons; nonresidents and unknown persons to be cited by publication, and in the case of known nonresidents, also by mailing; the decree to be conclusive upon all the world, except that persons having an interest and not served or notified may appear and answer within sixty days after entry of such de-

creed, if no innocent purchaser for value had acquired an interest; and such decree was not to be opened by reason of absence, infancy, or other disability, or any proceedings at law for reversing the judgment, except as is provided in the act; the sixty-day appeal was not to apply where there was an innocent purchaser for value who had acquired an interest, and in such case the party aggrieved must look to the assurance fund mentioned in the act, and to any person who had procured the decree by fraud.¹⁷ The court, however, pointed out that "it is reasonably clear, and we so hold, that the particular provision of the act which, in effect, forbids the commencement or the defense, in opposition to the decree, of any action or proceeding to recover the land, brought more than sixty days after the entry of the decree, does not apply to an adverse claimant in the actual possession of the land, upon whom the summons is not served; for, being in possession, he cannot bring such an action, and his right to defend his possession and title in such a case cannot be made to depend upon his nonaction;" and said: "So construed, the provision of the act, both as to the opening of the decree and as to the commencement of any action or proceeding to recover the land in opposition to the decree, is valid as a statute of limitations."¹⁸

In *Robinson v. Kerrigan*¹⁹ it was held that the California (Torrens) act of 1897, disposing of the claims to property of persons whose claims and existence were not known, with no notice save by publication, did not deprive such persons of their property without due process of law, nor did it fail to afford to such persons the equal protection of the laws.²⁰

¹³ *Ibid.* *Tyler v. Judges of Ct. of Registration (Mass.) supra.*

¹⁴ (1900) 179 U. S. 405, 43 L. ed. 252, 21 Sup. Ct. Rep. 206.

¹⁵ (U. S.) *Ibid.*

¹⁶ (1902) 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175, which was an information in the nature of quo warranto to determine the respondent's right to the office of examiner of land titles, to which he interposed a general demurrer, and the court stated that the sole issue of law raised by the demurrer was whether the act was constitutional.

¹⁷ See (Minn.) *Ibid.*

¹⁸ (Minn.) *Ibid.*

¹⁹ (1907) 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 Ann. Cas. 829, which was an application for a writ of mandate to the superior court of the city and county of San Francisco and to the judge thereof, to compel the defendant, as judge of such court, to make an order appointing a time

for the hearing of a petition filed in such court to obtain registration of certain lands, as provided in the act of 1897. The defendant had refused to make the order, basing his refusal upon the ground that the act was unconstitutional and void, and the supreme court observed that "the validity of the act is the sole question presented for our consideration," and directed that the writ of mandate issue.

²⁰ The court considered the decision in *Title & D. Restoration Co. v. Kerrigan* (1906) 150 Cal. 289, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 Pac. 356, as a full authority on the question.

In *Title & D. Restoration Co. v. Kerrigan*, the court had under consideration the statute of California passed after the earthquake of 1906, known as the "McInerney act," providing for the bringing by the person in actual possession of an action in rem to determine the title of real property in cases where the official records had been

Occupant not notified.

There has been one case in which the question has directly arisen whether an occupant not notified is bound by the decree, and whether such a decree binding him would be due process of law. This case arose in the Philippines, and it was held that the occupant of the land was not entitled to open a decree for registration, although he had not been named in the proceedings, and the statute required that the application should name the occupant, those applying for registration having omitted him because they honestly believed that he occupied the lands simply as their tenant, and that therefore it was unnecessary to name him.²¹ It was held that the occupant was not deprived of his property without due process of law, in violation of the act of Congress of July 1st, 1902, known as the Philippine bill, which provides "that no law shall be enacted in the said Islands which shall deprive any person of life, liberty, or property without due process of law," as the proceeding for registration was one in rem, and the occupant was made a party by publication, the statute particularly providing that the decree should be conclusive upon and against all persons, whether mentioned by name or included in the general description, "to all whom it may concern."²²

lost, and providing for service by publication and by mailing and by posting of notices on the property, and for personal service on those found within the state, claiming adverse interests, and that the judgment should conclude those claiming estates in the property at the time of the commencement of the action, or those claiming under them. The court held that the proceeding was not one strictly in rem, but was one quasi in rem, and that the effect of such a judgment, both as to those parties known and included and as to unknown parties, was not such as to deprive them of their property without due process of law.

The same "McInerney act" was also sustained in *American Land Co. v. Zeiss* (1910) 219 U. S. 47, 55 L. ed. 82, 31 Sup. Ct. Rep. 200, where there is an interesting opinion, but one which is to be used with caution, at least, in so far as the Torrens acts are concerned, on account of the differences between those acts and the "McInerney act."

²¹ *Grey Alba v. De la Cruz* (1910) 17 Philippine, 49.

²² (Philippine) *Ibid.* But compare *State ex rel. Douglas v. Westfall* (1902) 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175.

²³ *People ex rel. Smith v. Crissman* (1907) 41 Colo. 450, 92 Pac. 949, so holding as to the Colorado act of 1903. L.R.A.1916D.

c. Objection to title of act.

A Torrens act entitled, "An Act Concerning Land Titles," does not fail in the constitutional requirement that its subject shall be clearly expressed in its title.²³

Nor does an act of this character violate the provision of a state Constitution that "every act shall embrace but one subject, which subject shall be expressed in its title," when the title of the act is, "An Act for the Certification of Land Titles and the Simplification of the Transfer of Real Estate," although the act contains provisions relating to the felonies, county officers, county government, principal and surety, attorneys at law, judgments, liens, procedure, and adverse claims, as all of the subjects thus treated are germane to the general subject expressed in the title.²⁴

d. Objection that act is special or local.

A Torrens act is not unconstitutional as special because it contains special provisions regarding the statute of limitations and the rights of purchasers in good faith, and other matters peculiar to the lands which are brought within its provisions.²⁵

Nor is such an act invalid as local because it applies only to counties where adopted,²⁶ nor void as special because it was only to apply to counties having more than a certain population.²⁷

²⁴ *Robinson v. Kerrigan* (1907) 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 Ann. Cas. 829, so holding as to the California act of 1897.

²⁵ *Robinson v. Kerrigan* (1907) 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 Ann. Cas. 829, so holding as to the California act of 1897.

²⁶ *People ex rel. Deneen v. Simon* (1898) 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910.

In *Tower v. Glos* (1912) 256 Ill. 121, 99 N. E. 876, where it was contended that the (Torrens) act was local because it applied only to counties where adopted, and that only the county of Cook had adopted it, the court replied: "Whether a law is local or general in its application is determined by whether or not it applies alike to all persons or classes under like circumstances and conditions. This act applies only to those counties adopting it by vote of the people. All counties may adopt it, and when it is adopted it applies to all counties alike. Its application depends upon the vote of the people, but not its constitutionality. Numerous acts having similar provisions have been before this court and have been upheld."

²⁷ *State ex rel. Douglas v. Westfall* (1902) 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175, holding that chapter 237 of the Minnesota Laws of 1901,

The provision of a state Constitution that all laws relating to courts should be general and of uniform application is not violated by a provision that "the examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts; but the same shall not be held as more than prima facie evidence of title, and any part or parts thereof may be controverted by other competent proofs;" and the court cannot say that the legislature acted unreasonably in providing for a rule of evidence applicable to the proceeding without extending it to all other forms of action in which the title to real estate is involved.²⁸

e. Objection that act devolves executive duties upon court.

A Torrens act is not unconstitutional as committing to the judicial department of the state functions not judicial in character, but purely administrative and executive, contrary to a provision of state constitutions prohibiting one department of state from exercising functions belonging to another.²⁹ Nor is the proceeding nonjudicial because it may be undefended.³⁰ Such an act does not devolve executive duties upon the court on account of the section which provides: "All acts performed by registrars . . . under this law shall be performed under rules and instructions established and given by the district court having jurisdiction of the county in which they act."³¹ Nor does the act make the court a registration office by conferring upon it certain judicial duties incident to the registering of land titles.³²

providing for the Torrens system of registration, was not void for that reason as special legislation against the Minnesota Constitution.

Followed in *National Bond & Secur. Co. v. Hopkins* (1905) 96 Minn. 119, 104 N. W. 678, 680, 816, where the court, in overruling a similar objection to the constitutionality of § 13 of the act as to the preliminary reference to an examiner, etc., held that its constitutionality was not to be determined independently, but rested upon the validity of the law as a whole.

²⁸ *Waugh v. Glos* (1910) 246 Ill. 604, 138 Am. St. Rep. 259, 92 N. E. 97; *Mihalik v. Glos* (1910) 247 Ill. 597, 93 N. E. 372; *Tower v. Glos* (Ill.) supra, the provision quoted being the amendment of 1907 to § 18 of the Illinois act.

²⁹ *Robinson v. Kerrigan* (1907) 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 Ann. Cas. 829 (citing *Title & D. Restoration Co. v. Kerrigan* (1907) 150 Cal. 289, 8 L.R.A.(N.S.) 682, 119 Am. St. Rep. 199, 88 L.R.A.1916D.

Neither is the power conferred upon the court to appoint examiners of titles an executive power; as judicial power includes the authority to appoint all necessary subordinate officers and assistants essential to the conducting of judicial business.³³

f. Objection that act gives judicial power to the registrar.

An act confers judicial powers upon the registrar which provides that he shall examine into the facts, and, if satisfied that the facts stated in the application are true, and that the applicant is the owner of the land, or interested therein, as set forth in the application, he shall issue a certificate of title, otherwise he shall dismiss the application; and the registrar acts judicially under such a statute, although the only effect of the statute might be to start running the statute of limitations which is provided for,—namely five years.³⁴

The modern acts have been particularly attacked on the ground that the registrar (or recorder) was given judicial power, to be exercised subsequent to the original registration. The only successful attack of this kind was in Ohio, where the court, in overthrowing the act on other grounds, also considered it invalid as conferring judicial powers on the recorder, the principal of which it summarized as follows: "The principal powers conferred are to take proof after notice to the holder that a mortgage has been discharged, and, after a hearing, to enter a discharge upon the register; to make an entry that a lien has become inoperative in law by reason of limitation of

Pac. 356); *People ex rel. Smith v. Crissman* (1907) 41 Colo. 450, 92 Pac. 949; *State ex rel. Douglas v. Westfall* (1902) 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175.

³⁰ *Robinson v. Kerrigan* (1907) 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 Ann. Cas. 829.

³¹ *People ex rel. Smith v. Crissman* (1907) 41 Colo. 450, 92 Pac. 929. See also to the same effect, *State ex rel. Douglas v. Westfall* (1902) 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175.

³² *State ex rel. Douglas v. Westfall* (Minn.) supra.

³³ (Minn.) Ibid.

³⁴ *People ex rel. Kern v. Chase* (1897) 165 Ill. 537, 36 L.R.A. 105, 46 N. E. 454, holding that the Illinois act of 1895, entitled, "An Act Concerning Land Titles," was a violation of the Illinois Constitution in that it conferred judicial powers upon the registrar.

time when application has been made therefor, the person interested notified, and he is satisfied that such is the fact; to correct memorials made or issued by mistake, if the rights of a bona fide purchaser or lien holder for value have not intervened."³⁵

Similar objections have not availed elsewhere. Thus it has been held that there was no force to such an objection where the statute required the registrar to note upon the duplicate certificate of title in his office the existence and general character of instruments creating liens, encumbrances, trusts, powers, or leases affecting the land described in the certificate.³⁶ Nor is the Constitution infringed by a statute requiring the registrar to make certain entries when it appears to him that the person intending to create a charge on property "has the title and right to create such charge," and that the person in whose favor it is to be made "is entitled by the terms of the act to have the same registered,"—especially where a party aggrieved is given by the act the right to apply to a court of equity for relief;³⁷ nor by another provision of the same statute that "upon its being made to appear to the registrar that the transferee [evidently intending 'transferor'] has the title or estate proposed to be transferred and is entitled to make the conveyance, and that the transferee has the right to have such estate or interest transferred to him, he

shall make out and register as hereinbefore provided, a new certificate," etc.;³⁸ nor by the duties imposed upon the registrar in case of a tax sale or judgment or levy under an attachment or execution, or in case of a mechanics' lien, where, upon the filing of the proper certificate, he is to enter a memorial thereof upon his record, and in case the lien ripens into a title, the former certificate of title is canceled and a new one issued to the proper party;³⁹ nor is judicial power conferred upon the registrar by a statute permitting him to record a transfer of land held in trust upon the written opinion of two examiners that the transfer is in accordance with the true intent and meaning of the trust, which registration shall be conclusive in favor of the grantee, as such a statute merely abrogates the rule which requires the purchaser of trust property to see to the application of the purchase money, and does not confer judicial power upon the registrar.⁴⁰

The act does not make registrars judicial officers where it provides that their acts shall be performed under the rules and instructions established and given by the court.⁴¹

g. Objection that act infringes right of trial by jury.

It has been held that a constitutional provision that "the right of trial by jury shall remain inviolate, and shall extend

³⁵ *State ex rel. Monnett v. Guilbert* (1897) 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551, where the court said of the recorder: "He is not merely to enter the evidence furnished by the agreement of the parties that a lien has been discharged, or that it has become void by the lapse of time, or that a mistake has intervened touching their rights, but he is to apply the rules of evidence to the ascertainment of disputed facts, to apply the rules of law concerning payment, to interpret and apply the statute of limitations as it may affect the enforcement of liens, including such questions of disability as may arise, to decide the questions of fact and law that may arise in determining whether mistakes have intervened, and who are bona fide purchasers; and then to make an entry which is to have the same effect in concluding the rights of the adversary parties as would a decree in equity. That these are judicial powers is entirely clear. They seem to have been so regarded by the general assembly, for there is a provision for appeal from decisions of the recorder."

³⁶ *Robinson v. Kerrigan* (1907) 151 Cal. 40, 121 Am. St. Rep. 90, 90 Pac. 129, 12 Ann. Cas. 829. L.R.A.1916D.

³⁷ *People ex rel. Deneen v. Simon* (1898) 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910.

³⁸ *People ex rel. Deneen v. Simon* (Ill.) supra, where the court said: "That the duties mentioned are judicial in their nature may be admitted, but it does not necessarily follow that their exercise is prohibited by the constitutional provision to all but officers belonging to the judicial department."

³⁹ (Ill.) Ibid.

⁴⁰ (Ill.) Ibid.

⁴¹ *State ex rel. Douglas v. Westfall* (1902) 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; *Tyler v. Judges of Ct. of Registration (Mass.)* infra.

In *Tyler v. Judges of Ct. of Registration* (1900) 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812, it was held that the power of the assistant recorder to register titles, given by the Massachusetts act of 1898 (and 1899), under which he makes the registration "in accordance with the rules and instructions of the court," is not a judicial power conferred upon a nonjudicial officer, but is merely ministerial, and the registration is the act of the court.

to all cases at law without regard to the amount in controversy," does not apply to a proceeding to register a land title.⁴²

But a constitutional provision that there shall be a right to a trial by jury "in all controversies concerning property" requires that there be a right to a jury trial in registration proceedings.⁴³

It has, however, been held in the same state that the Torrens act does not infringe the right of trial by jury where it provides that a party who is aggrieved by a finding of fact in the land court can have a jury trial on appeal to the superior court, although it provides that no matters shall be tried in the superior court except those specified in the appeal, as this is a reasonable regulation and its natural effect will or may be to facilitate, instead of to impede, the exercise of the right.⁴⁴

It seems to be suggested in a case in New York that the court perhaps had no constitutional right to try without a jury an issue of fact in a registration case, the result of which might be to divest the state of its title, but the court does not refer to the provision in the act that "an issue of fact may be tried by a jury, in the manner prescribed by the Constitution and Code of Civil Procedure," nor does it refer to the closing paragraph of the constitutional provision, the entire provision being: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil

cases in the manner to be prescribed by law."⁴⁵

h. Objection that defendant is unable to obtain affirmative relief.

A Torrens act is not subject to the objection that it is not in accord with due process of law because a defendant cannot obtain affirmative relief, whatever showing he may make, as the legislature may limit affirmative relief to the person who brings the proceeding.⁴⁶

So, the provision in the statute that the applicant, at any time before the entry of a final decree, might dismiss the application on such terms as shall be fixed by the court, does not, as precluding an adjudication of the defendant's rights, violate the constitutional provision that "every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformably to the laws."⁴⁷

i. Objections on account of assurance fund.

The question of the validity of the act in respect to the assurance fund was considered in *State ex rel. Monnett v. Guilbert*,⁴⁸ where the court stated that the act showed "that the fund is to be raised to indemnify those whose lands had been wrongfully wrested from them, under the earlier provisions of the act, and without due process of law;" and

⁴² *Peters v. Duluth* (1912) 119 Minn. 96, 41 L.R.A.(N.S.) 1044, 137 N. W. 390, where the court said: "In Massachusetts it has been held that the right to a jury trial cannot be denied in registration proceedings, where the title to real property is involved. (*Weeks v. Brooks* (1910) 205 Mass. 458, 92 N. E. 45); but the constitutional provision in that state is that there shall be a right to a jury trial 'in all controversies concerning property' (Mass. Const. 1780, pt. 1, art. 15), which is very different from the provision of our Constitution." It was also held in the same case that a general statute providing for trials by jury in actions for the recovery of specific real or personal property does not relate to proceedings under the Torrens law.

⁴³ *Weeks v. Brooks* (Mass.) supra, where the court referred to the statute of 1904, providing that a party who is aggrieved by a finding of fact can have a jury trial on appeal to the superior court, and said: "A jury trial, however, where the title to real property is put in issue, is not a privilege to be granted in the sound discretion of the court, as in probate appeals, or L.R.A.1916D.

issues in suits in equity, but, is a right guaranteed by the Constitution. In the lawful exercise of this right the respondents were not required to offer any evidence in the court below, but could reserve their testimony for presentation at the trial of the appeal, or even there might take the verdict of the jury upon the case as made out by the petitioner."

⁴⁴ *Mead v. Cutler* (1907) 194 Mass. 277, 80 N. E. 496.

⁴⁵ *Hamlin v. People* (1913) 155 App. Div. 680, 140 N. Y. Supp. 643.

⁴⁶ *People ex rel. Smith v. Crissman* (1907) 41 Colo. 450, 92 Pac. 949, an information in the nature of quo warranto to determine the right of the defendant to the office of registrar of land titles, the relator predicating his right to the relief asked upon the ground that the act of 1903 was unconstitutional.

⁴⁷ *Peters v. Duluth* (1912) 119 Minn. 96, 41 L.R.A.(N.S.) 1044, 137 N. W. 390, where, however, no application to dismiss had been made on the part of the applicant.

⁴⁸ (1897) 56 Ohio St. 575, 38 L.R.A. 519, 60 Am. St. Rep. 756, 47 N. E. 551.

stated that this scheme was both inadequate and forbidden under the Ohio Constitution.⁴⁹ The court also stated that the scheme was invalid as not providing for the compensation in advance, and as not providing for an assured compensation at any time. It also considered invalid the provision for compulsory registration by assignees, or trustees for the benefit of creditors, and commissioners of insolvent debtors, as lands thus belonging to creditors would be subject to a forced contribution to the assurance fund.⁵⁰

j. Objection that act creates offices illegally.

An act making the county clerk registrar of titles under it does not transgress the provisions of the Constitution in creating a new county office which was neither filled by election nor appointment, for while the county clerk's office was created by the Constitution, its duties were to be prescribed and enjoined by the legislature.¹

An act is not unconstitutional on the ground that the office of examiner created by it is a county office, which, under the Constitution, must be filled by popular election, as such examiners are not county officers within the meaning of the constitutional provision.²

⁴⁹ The court said: "Section 19 of the Bill of Rights ordains: 'Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads which shall be open to the public without charge, a compensation shall be made to the owner in money; and in all other cases, where private property shall be taken for a public use, a compensation therefor shall first be made in money, or first secured by a deposit of money.'" (Ohio) Ibid.

⁵⁰ (Ohio) Ibid.

¹ People ex rel. Smith v. Crissman (1897) 41 Colo. 450, 92 Pac. 949.

² State ex rel. Douglas v. Westfall (1902) 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175.

³ People ex rel. Deneen v. Simon (1898) 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. 175, 52 N. E. 910. See also in this connection the Massachusetts and Minnesota cases discussed supra, subd. II. b.

⁴ People ex rel. Deneen v. Simon (Ill.) supra. See also, in this connection, State ex rel. Douglas v. Westfall (1902) 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175, discussed supra, subd. II. b.

⁵ In Escudeta v. Director of Lands (1910) 16 Philippine, 482, after the decree of registration, the applicant applied to the court L.R.A.1916D.

k. Partial invalidity.

A statute providing for the registration of land titles after they are established in a court of equity may be upheld as against all upon whom service of process has been properly made, even if it contains a void provision permitting judgment against a resident of the state, notified only by publication.³

A statute making a judicial determination of title to land forever binding and conclusive upon all persons after the lapse of two years may be given effect against parties to the proceeding and persons who must bring legal proceedings to establish their rights, although it would be void in favor of persons in possession of all they claim who were not parties to the proceeding.⁴

l. Miscellaneous.

Amendment increasing land after publication.

It would seem to be fundamental that there can be no amendment increasing, after publication and notice, the amount of land sought to be registered.⁵ But in Illinois such an increase has been considered as no error, or no material error, when all parties interested were "before the court" by service or appearance.⁶ The decision, so far as reported, is not commendable.

to have the same corrected, he having evidence that his boundaries as theretofore stated were not correct, and that the amount of land was larger than he had originally stated, and it was held that the new application could only be granted on a new publication and new notifications.

⁶ Tower v. Glos (1912) 256 Ill. 121, 99 N. E. 876, where, after publication of a notice which followed the description in the petition, describing the premises as lots of certain numbers "except that part of said lots conveyed to" a certain railway company, and, subsequently to the filing of the answer, leave was granted the applicant to amend the application by striking out the words "except that part of said lots conveyed to" such railway company. It was held there was no error in registering the title of the applicant to the lots, all the parties who had or claimed to have any interest in the lots being personally served or having appeared, and the decree sustained the finding that no one other than the parties named in the application had any interest in the land. The court admitted that it was essential that the applicant establish title in himself, good as against the world, and that any defendant may insist that the proofs of title are insufficient to permit registration, but did not think there was any defect in his title by reason of the fact that there was no republication after the amendment was

Providing rules of evidence.

The legislature does not exceed the power to provide impartial and uniform rules of evidence by the provision that "the examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts; but the same shall not be held as more than prima facie evidence of title, and any part or parts thereof may be controverted by other competent proofs."⁷

Delegation of legislative power to people of counties.

A provision that a Torrens act should take effect only in counties where it is so voted is not illegal as an attempt to delegate legislative power.⁸

English language.

Abbreviations in an abstract of title do not render it inadmissible because of a constitutional provision that judicial proceedings shall be conducted, preserved, etc., in no other than the English language, as this provision relates only to the record history of a case, and the abbreviations are open to explanation.⁹

Other questions.

It cannot be objected that a Torrens

act fails in the constitutional requirement of due process of law, on the theory that the plaintiff's case is partially tried and disposed of by the court before persons adversely interested are brought into court, on account of the requirement that there be a preliminary report of an examiner before the summons is issued, where the act expressly declares that the court shall not be bound by the report of the examiners of title, but is only to proceed upon satisfactory proof.¹⁰

A landlord is not deprived of his property without due process of law by a statute which provides that after the title has been judicially determined and registered, the tenure of the owner, the right of transfer and encumbrance, and all rights subsequently accruing, shall be determined in accordance with the rules prescribed by that statute, as this is within the power of the legislature.¹¹

So, the failure to provide for any notice of transfers or other dealings subsequent to a registration of title does not make the act invalid as depriving persons of their property without due process of law, as the legislature has power to fix conditions on which land that has

made, and said: "The amendment after publishing notice as to 'all whom it may concern' could not have affected the rights of the parties interested in or claiming title to the lots, all of whom were before the court by service of summons or entry of appearance, and, under the facts of this case, allowing the amendment could have no possible effect upon the validity of appellee's title or the rights of any of the parties having or claiming any interest therein. If error at all it was, therefore, harmless error."

⁷ Brooke v. Glos (1910) 243 Ill. 392, 134 Am. St. Rep. 374, 90 N. E. 751; Waugh v. Glos (1910) 246 Ill. 604, 138 Am. St. Rep. 259, 92 N. E. 974; Culver v. Walters (1910) 248 Ill. 163, 93 N. E. 747; Bjork v. Glos (1912) 256 Ill. 447, 100 N. E. 233.

In Brooke v. Glos (1910) 243 Ill. 392, 134 Am. St. Rep. 374, 90 N. E. 751, the court said: "We see no constitutional objection to the provision of the statute in so far as it permits a party who seeks to register his title to establish in himself a prima facie title by an abstract of title which was made by a regular abstract maker, and upon which abstract, perhaps, he relied at the time he purchased the property, reserving, however, to persons opposing the registration of his title, the right to establish by proof, if they can, that the abstract is not correct, or, as a matter of fact, the applicant is not the holder of the title to the premises which he seeks to register."

⁸ People ex rel. Deneen v. Simon (1898) 176 Ill. 165, 44 L.R.A. 801, 68 Am. St. Rep. L.R.A.1916D.

175, 52 N. E. 910, so holding as to the Illinois act of 1897.

⁹ Loehde v. Glos (1914) 265 Ill. 401, 106 N. E. 940, holding that an abstract containing in part letters, abbreviations, and symbols is not inadmissible as evidence of title by reason of the provision [§ 18] of the Illinois Constitution that "all laws of the state of Illinois, and all official writings, and the executive, legislative and judicial proceedings, shall be conducted, preserved and published in no other than the English language," as it is the record history of a cause which alone is preserved, and the constitutional provision that it shall be preserved in no other than the English language refers only to such record. The court stated that the letters, abbreviations, or symbols might have been explained so that their meaning would be clear to the examiner and the court, and the objection being that the abstract contained matter in the shape of isolated letters, figures, and words standing alone which made the document unintelligible "except in certain parts thereof," those portions which are not intelligible ought to have been pointed out, so that the objection might have been obviated by testimony, and that there was no error in disregarding the objection as made. The same was held in Teninga v. Glos (1914) 266 Ill. 121, 107 N. E. 126.

¹⁰ People ex rel. Smith v. Crissman (1907) 41 Colo. 450, 92 Pac. 949.

¹¹ People ex rel. Deneen v. Simon (Ill.) supra.

been brought into the register system shall be held.¹²

It is not a violation of the provisions as to due process of law in the Constitutions of the United States and of the state of Illinois that where an examiner had died before the filing of the evidence taken before him, such evidence, reduced by him to writing and certified to by him, was, by order of the court, filed in the court, and the cause was heard on that evidence and any other evidence which any party desired to offer.¹³

The property of persons owning land is not confiscated without due process of law by the Philippine statute providing

for a six months' statute of limitations, within which claims must be presented to the court of land registration, where property is taken by the government for naval purposes.¹⁴

One beginning the proceeding cannot claim that the act is unconstitutional.¹⁵

The constitutionality of the provision adopted in Illinois in 1907, making registration by executors, etc., compulsory, seems not to have been passed upon.¹⁶

It may be noted that the Washington court in a recent case declined to pass on the constitutionality of the Torrens act of that state as not involved in the decision of the case.¹⁷

¹² *Tyler v. Judges of Ct. of Registration* (1900) 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812.

¹³ *Amundson v. Glos* (1915) 271 Ill. 209, 110 N. E. 914, where the court pointed out that the act provided that the court may in any case require other or further proof than that which was before the master, and that the hearing in every case is finally before the court both upon the evidence taken before the examiner and also upon any further evidence that may be required; and the reference in this case having come to an end by the death of the examiner without any report of his conclusions, the cause was properly heard by the court on the evidence taken before him, with liberty to the parties to offer other evidence if they saw fit.

¹⁴ *José y Narvaes v. Commander of Philippine Squadron* (1910) 16 Philippine 62, holding that the property of persons owning lands is not confiscated without due process of law by an act providing that when the President has reserved land for naval purposes, and the civil governor has been so informed by the commander in chief of the United States Asiatic fleet, the civil governor should notify the judge of the court of land registration that all private lands, etc., within the limits described, ought forthwith to be brought within the operation of the land registration act, and that immediately upon the receipt of such notice it shall be the duty of the judge of the court of land registration to issue a notice that claims must be presented within six months, and that the clerk should provide for publication of the notice in the manner stated, posting the notice on the land, serving it on persons living on the land or in physical possession of any part of it, etc., and providing that within six months from the date of such notice all claims should be barred unless the court of land registration, in certain cases specified (accident, etc.), should, after six months, extend the time three months longer.

¹⁵ *Lewis v. Chamberlain* (1914) 69 Or. 476, 139 Pac. 571.

¹⁶ In 1903 the Illinois legislature passed two amendments to the act, subject to their L.R.A.1916D.

adoption by the people of the county, one being as to compulsory registration by executors, etc., the other as to admitting in evidence abstracts made under certain conditions. It was held that these amendments were not properly submitted to the people at the election of 1904. *Harvey v. Cook County* (1906) 221 Ill. 76, 77 N. E. 424. (The amendment as to abstracts was enacted into law in 1907.) The other amendment was adopted in Cook county in 1910 and provided: "It shall be the duty of all executors and administrators, appointed after the adoption of this act and trustees holding title or power of sale under wills admitted to probate after that date to apply within six months after their appointment, to have registered the titles to all nonregistered estates and interests in land, situated in any county in which this act at the time is in force, which the several decedents they represent might have registered in their lifetime in their own right. Such application shall set forth the names and addresses of the persons entitled to the estate or interest sought to be registered, and any such person not joining in the application shall be made a defendant. The court, in its final decree, in addition to what is provided in the subsequent sections of this act, shall determine the several titles and interests of the persons claiming under the decedent, and declare the same, and decree in whom registration shall be made. Land so registered shall be subject to be sold for the debts of the estate of the decedent, as now provided by law. Provided that the court of probate jurisdiction of the county in which the land is situated, in cases where registration may appear to be a hardship, may, by an order entered of record, excuse such application for registration as to the whole or any part of the land." It has been stated (*Niblack, Torrens System*, § 180) that the probate court of Cook county grants all applications to be excused from registration, on the ground that the constitutionality of the act should be established before anyone should be compelled to register his title.

¹⁷ *Brace v. Superior Land Co.* (1911) 65 Wash. 681, 118 Pac. 910, *infra*, III. m.

III. Construction and effect of American statutes.

a. In general.

The reader will understand that this note does not assume to state the provisions and effect of the acts except as developed in the cases.

It has been held that a Torrens act was not in derogation of common rights, but was a remedial statute, to be liberally construed according to its intent.¹⁸

It has been said in New York that "it is well settled that the purpose of the act is to register good titles, not to cure bad ones."¹⁹

b. Who may register; what may be registered.

1. Generally.

Executors and administrators.

It has been held in the Philippines that an executor may not register the title to the lands of his testator in a case where the will of the decedent does not confer upon the executor, as such, any interest in the land of which he died seised;²⁰ nor may an administrator register the land of his intestate.²¹

¹⁸ Cape Lookout Co. v. Gold (1914) 167 N. C. 63, 83 S. E. 3, where it was claimed that the act was "in derogation of common rights" and should be strictly construed, to which the court said that it was not in derogation of common rights, but was a remedial statute, to be liberally construed according to its intent (here the court quoted), "so as to advance the remedy and repress the evil."

¹⁹ Meighan v. Rohe (1915) 166 App. Div. 175, 151 N. Y. Supp. 785, modified on another ground in (1915) 216 N. Y. 677, 110 N. E. 165.

²⁰ Gil v. Lopez (1911) 20 Philippine, 458.

²¹ An administrator may not register the land of his intestate, but if he is found to be the sole heir at law, and entitled to the land, the court may allow an amendment and proceed to register it as if he were the applicant. Soriano v. Talens (1911) 20 Philippine, 257.

The Illinois act, however, contains a compulsory feature as to registration by executors, etc., as to which see *supra*, subd. II. 1.

²² The receiver of a corporation has such title in fee simple as entitles him to apply for registration where he was appointed receiver under a bill for the dissolution of the corporation and closing up its business, and by the terms of the decree he was not a mere custodian, but was expressly authorized to cause to be removed clouds upon the title to the property of the corporation, which had title in fee to the lot, and the corporation was ordered to convey to him all its property, and a special commissioner L.R.A.1916D.

Receivers.

A receiver may have such title as admits of registration.²³

Life estates.

It has been held under the Massachusetts statute that a life estate is not a proper title for registration.²⁴ And under the Illinois statute that it cannot be registered unless the fee has first been registered, the statute providing that no estate less than a fee simple can be registered unless the fee simple to the same land is first registered.²⁴

Fee subject to estates, charges, etc.

The estates, charges, etc., to which the owner's title is subject, are in general to be referred to on the certificate. Thus, it has been held that ancestral land subject to a possible statutory remainder to certain relatives if they survive the holder should be registered, recording also the statutory remainder.²⁵ So, a fee may be registered subject to a possible claim for a certain period under a general provision permitting registration subject to less estates, etc.²⁶

Buildings.

The provision in the statute for the registration of land or buildings or an

appointed by the court to make a conveyance conveyed the title to the lot in fee simple to him by deed, as he was thereby invested with the legal title in fee simple. Teninga v. Glos (1914) 266 Ill. 94, 107 N. E. 125. The same was held in Teninga v. Glos (1914) 266 Ill. 121, 107 N. E. 126.

²³ Baxter v. Bickford (1909) 201 Mass. 495, 88 N. E. 7.

²⁴ Cowman v. Glos (1912) 255 Ill. 377, 99 N. E. 586.

²⁵ Where a mother inherited property from her son, who had inherited it from her husband, his father, and she applied to register the property, it was held that it should be registered, recording in the registration the right (required by art. 811 of the Civil Code) to be reserved to the husband's brothers should they or either of them survive her, as they were within the third degree, art. 811 providing: "The ascendant who inherits from his descendant property which the latter acquired without a valuable consideration from another ascendant, or from a brother or sister, is under obligation to reserve what he has acquired by operation of law for the relatives who are within the third degree and belong to the line whence the property proceeded." Edroso v. Sablan (1913) 25 Philippine, 295.

²⁶ Finn v. Glos (1915) 268 Ill. 350, 109 N. E. 351, holding that the court properly ordered the registration of a fee-simple title subject to the following charge or lien: "Possible claims against the estate" of F. until a certain date, and it was ordered "that the title in fee simple thereto of the

interest therein "does not authorize the separate registration of the buildings upon the land."²⁷

Boundary of highway.

The land court of Massachusetts has jurisdiction to determine whether the applicant has a good title up to the line of the street as originally laid out, or whether the public has acquired a way by prescription over part of his land.²⁸

Owners not of record.

The owner of land is entitled to apply

said Mildred M. Finn be confirmed, subject as aforesaid," where F. had died a resident of the state of Michigan, and was the owner of an undivided interest in the land prior to the time that the person applying for registration had acquired title, and had been dead less than the seven years allowed under the Illinois statute for her creditors residing in Illinois to have administration on her estate, and to subject the real estate of which she died seised to the payment of their claims, the court summarizing §§ 9 and 25 of the statute concerning land titles as providing: "That it shall be no objection to bringing land under that act that the estate or interest of the applicant is subject to any outstanding lesser estate, mortgage, lien or charge; that every such lesser estate, mortgage, lien or charge shall be noted upon the certificate of title, and the title or interest certified shall be subject only to such lesser estates, mortgages, liens and charges as are so noted, and that the court may, in any proceeding under the act, order the registrar of titles to register such title or interest, and in case the same is subject to any liens, encumbrance, trust or interest, with directions as to the manner and order in which the same shall appear upon the certificate of title to be issued by the registrar."

²⁷ *Re Manila Bldg. & L. Asso.* (1909) 13 *Philippine*, 575.

In *Merchant v. Manila* (1908) 11 *Philippine*, 116, it was held that although land which was encumbered might be registered, that where there was a difference in ownership between the land and the building, such property could not be registered. And it was also held, however, that the court of land registration could determine and end the controversy between the owner of the land and the owner of the building under § 2 of the Philippine act (No. 496), which provided that such court shall have "power to hear and determine all questions arising from such applications, and also have jurisdiction over such other questions as may come before it under this act." But the determination of this question should be raised by proper petitions, and if the petitioner applying for registration did not, within a reasonable time, make such petition in the same proceeding, that his petition for the registration of the land should be dismissed. L.R.A.1916D.

to have it registered whether he be the owner of record or not. It is not confined to owners of record.²⁹ Thus, a title based on adverse possession may be registered.³⁰ But some of the acts have conditions precedent to be fulfilled in case of tax titles.³¹

Possession; occupancy.

Where the statute requires that the plaintiff be in possession of the land as a condition precedent to registering the title, and it appears from the com-

²⁸ *First Nat. Bank v. Woburn* (1906) 192 *Mass.* 220, 78 N. E. 307, holding that where such street was in a city, the mayor is the proper person to be notified, and he has a right to appeal from the decision under the statute which provides that if the applicant requests to have the line of a public way determined, notice must be given to the mayor of the city or to one of the selectmen of the town or towns in which the land lies, or, if the way is a highway, to one of the county commissioners of the county or counties in which the land lies.

²⁹ *National Bond & Secur. Co. v. Alderson* (1906) 99 *Minn.* 137, 108 N. W. 861, so holding in the case of one having an unrecorded deed.

³⁰ *O'Laughlin v. Covell* (1906) 222 *Ill.* 162, 78 N. E. 59; *Keith v. Kennard*, ante, 3.

A title may be registered which has been acquired under § 6 of the limitation law providing that "every person in the actual possession of lands or tenements under claim and color of title, made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title." *Tobias v. Kasprzyk* (1910) 247 *Ill.* 80, 93 N. E. 52; *Peters v. Dicus* (1912) 254 *Ill.* 379, 98 N. E. 560; *Glos v. Mickow* (1904) 211 *Ill.* 117, 71 N. E. 830.

A record title not entirely good, which was reinforced by adverse possession, will support registration. *Keith v. Kennard*, supra.

³¹ The provision in the statute that no land the title to which is derived through a sale for taxes or local assessments shall be registered until such title has been adjudicated valid by a court of competent jurisdiction is satisfied where the holder of the tax title brought an action to determine adverse claims against the holder of the legal title and others, and the judgment was in effect an adjudication that the tax title was in all respects valid. This was a sufficient compliance with the Torrens provision, as the statute did not contemplate an adjudication of validity against all possible claimants to the property, as, if so, registration proceedings following the judgment would be useless.

plaint and the examiner's certificate that there is occupation under an adverse title, the complaint is demurrable.³²

The requirements of the statute that the application shall set forth whether the land is occupied or unoccupied, and that the examiner to whom the case is referred shall examine particularly whether the land is occupied, and make report, are mandatory. Consequently the application must fail where there is no proof of the allegation that the land is unoccupied,³³ or insufficient proof.³⁴

So, the allegation in the application that the premises are occupied by the person applying is a material allegation that must be proved as alleged; and it is error to enter a decree registering the title as applied for when the applicant fails to make this proof.³⁵

It is no answer to a proceeding for registration of title that the applicant has a complete remedy at law in ejectment where the defendant is in possession as his tenant at will.³⁶

**Matters peculiar to the Philippines—
pacto de retro.**

The Philippine act (No. 496, § 19)

Hendricks v. Hess (1910) 112 Minn. 252, 127 N. W. 995.

³² The New York statute requires that the plaintiff other than the holder of a contract to purchase be in possession of the land as a condition precedent to registering the title; therefore, where it appears from the complaint and the certificate of title that the defendants had built several structures on portions of the land which were actually occupied by several persons who recognized the defendants or other person as their landlord, which persons in no wise recognized the plaintiff, and claimed no interest under him, it was held that it was unnecessary to make the complaint more definite and certain, inasmuch as it clearly showed that the plaintiff did not occupy the land, either directly or indirectly, and that his assertion of possession was denied by the physical fact that there was occupation under an adverse title, and the demurrer of the defendants was sustained, with leave, however, for the plaintiff to plead over under conditions. *Eldert v. Cross Country R. Co.* (1914) 165 App. Div. 917, 150 N. Y. Supp. 220. See also, decided upon the authority of this case without further report, *Eldert v. Cross Country R. Co.* (1914) 165 App. Div. 931, 150 N. Y. Supp. 221.

³³ *Jackson v. Glos* (1909) 243 Ill. 280, 90 N. E. 717; *Brooke v. Glos* (1909) 243 Ill. 392, 134 Am. St. Rep. 374, 90 N. E. 751, the statute providing that the application to register title shall set forth, among other things, whether the land is occupied or unoccupied, and that the examiner to whom the case shall be referred shall "proceed to examine into the title and

gave the right to the owner in fee simple to register the land, and also gave a mortgagor the right to register his interest, but did not give the right of registry to the interest which is set out in a deed providing that the vendor may repurchase the property within a certain time, which is known as the contract of "pacto de retro,"³⁷ but the right to register this interest was later expressly given by statute.³⁸

And now the vendor of real property under pacto de retro may apply for registration thereof, provided, of course, that he record the purchaser's right thereto.³⁹

—municipality.

A municipality is not entitled to have a public square registered in its name, nor was it given this authority by an act of the commission, providing that "the following public lands and buildings in the said municipality of Cavite are hereby granted to the said municipality. . . Soledad square."⁴⁰ Nor can it be presumed that a municipality, by mere occupation for ten years of land of the state, can acquire a title capable of reg-

into the truth of the matter set forth in the application, and particularly whether the land is occupied, the nature of the occupation, if occupied, and by what right, and make report in writing to the court, the substance of the proof, and his conclusions therefrom."

³⁴ *Strebel v. Glos* (1915) 271 Ill. 65, 110 N. E. 778. For cases holding the evidence of vacancy sufficient to sustain the judgment on appeal, see: *Miller v. Glos* (1915) — Ill. —, 111 N. E. 113; *Harts v. Glos* (1915) — Ill. —, 111 N. E. 125; *Walther v. Glos* (1915) 270 Ill. 390, 110 N. E. 509; *Bonner v. Glos* (1915) 270 Ill. 567, 110 N. E. 916.

³⁵ *Mihalik v. Glos* (1910) 247 Ill. 597, 93 N. E. 372.

³⁶ *Peters v. Duluth* (1912) 119 Minn. 96, 41 L.R.A.(N.S.) 1044, 137 N. W. 390.

³⁷ *Villarruel y Basilio v. Encarnacion* (1905) 5 Philippine, 360.

³⁸ Section 6, subdiv. (e) of act 1108 (passed April 15, 1904): "(e) Instruments known as pacto de retro, made under sections fifteen hundred and seven and fifteen hundred and twenty of the Spanish Civil Code in force in these Islands, may be registered under this act, and application for registration thereof may be made by the owner who executed the pacto de retro sale under the same conditions and in the same manner as mortgagors are authorized to make application for registration."

³⁹ *Montiero v. Salgado* (1913) 27 Philippine, 630.

⁴⁰ *Nicolas v. José* (1906) 6 Philippine, 539.

istration by reason of the public land act, hereafter referred to.⁴¹

—public land act.

Where there is a defect in evidence in regard to the identity of land described in the petition with that described in the evidence, the court, in reversing a judgment of registration of the land in favor of the petitioner, may remand the case for a new trial in order that he may have an opportunity to bring himself within the provisions of subd. 6 of § 54 of act 926, known as the public land act.⁴²

Paragraph 6 of § 54 of act 926, quoted in the foregoing note, does not require that the land be cultivated.⁴³

⁴¹ *Tacloban v. Director of Lands* (1911) 18 *Philippine*, 201, holding that the mere occupation by a municipality for ten years before the passage of act No. 926, known as the public land act, could not serve as a title whereby to acquire the ownership thereof pursuant to the provisions (hereafter quoted) of ¶ 6, § 54, of the act, and therefore on such occupation the land should not be inscribed in the registry as belonging to the municipality. The court stated that to acquire the ownership "it is necessary that the municipality shall have an implied or express grant from the government, without the fulfilment of which requisite it cannot be presumed that a municipality owns and holds in good faith really admittedly belonging to the state, enabling it to convert the same into terreno propio so as to form a part of its estate or municipal assets."

⁴² *Order of Dominicans v. Insular Government* (1906) 7 *Philippine*, 98; *Paras v. Insular Government* (1908) 11 *Philippine*, 378; *Carrillo y Velasquez v. Insular Government* (1908) 11 *Philippine*, 379; *Pamin-tuan v. Insular Government* (1907) 8 *Philippine*, 485.

The act provides: "Section 54. The following-described persons or their legal successors in right, occupying public lands in the Philippine Islands, or claiming to own any such lands or interest therein, but whose titles to such lands have not been perfected, may apply to the court of land registration of the Philippine Islands for confirmation of their claims and the issuance of a certificate of title therefor,

... b. All persons who by themselves or their predecessors in interest have been in the open, continuous, exclusive, and notorious possession and occupation of agricultural public lands, as defined by said act of Congress of July first, nineteen hundred and two, under a bona fide claim of ownership except as against the government, for a period of ten years next preceding the taking effect of this act, except when prevented by war or force majeure, shall be conclusively presumed to have performed all the conditions essential to a L.R.A.1916D.

It is no defect in cases of the foregoing character to fail to summon the director of lands when the attorney general is already in court, representing the government.⁴⁴

A person entitled to proceed under ¶ 6 of § 54 of the public land act need not make the payment to the government required by § 65 of that act, although he might have been able to proceed under § 65.⁴⁵

The exemption of the province of Benguet from the public land act does not prevent registration of land in that province under the Torrens act of 1902.⁴⁶

—property in military zones.

A person having a good title to land at

government grant and to have received the same, and shall be entitled to a certificate of title to such land under the provisions of this chapter. . . ."

⁴³ *Sandoval y Manlave v. Insular Government* (1909) 12 *Philippine*, 648.

⁴⁴ *Order of Dominicans v. Insular Government* (1906) 7 *Philippine*, 98; *Pamin-tuan v. Insular Government* (1907) 8 *Philippine*, 485.

⁴⁵ It is provided in § 65 of the public land act that wherever, in any proceedings under the same chapter (6), to secure registration of an incomplete or imperfect claim of title initiated prior to the transfer of the Islands to the United States, it shall appear that had such claims been prosecuted to completion under the laws prevailing when instituted, and, under the conditions of the grant then contemplated, the conveyance of such land to the applicant would not have been gratuitous, but would have involved the payment therefor to the government, that the court should determine the amount the applicant should pay for registration of the land. It was held in *Towle v. Director of Lands* (1913) 25 *Philippine*, 637, that although an applicant for land might have been in a position to proceed under § 65 of the act, if, as a matter of fact, he did proceed under, and his evidence shows that he was entitled to registration under § 54, subd. 6, he had a right to proceed under this second statute, and in such case he would not be required to make the payment to the government required under § 65.

⁴⁶ *Carino v. Philippine Islands* (1909) 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334, reversing (1906) 7 *Philippine*, 132 and holding that one claiming to own the land in fee simple is entitled to have it registered under the Philippine Commission's act of 1902, although it is in the province of Benguet, which was exempted from said Commission's act No. 926, of 1903, as that act deals with the acquisition of new titles by homestead entries, purchase, etc., and the perfecting of titles begun under the Spanish law.

the time of the treaty of peace with Spain is entitled to have it registered, although it lies within the limits of what has been declared by the President a military reservation of the United States.⁴⁷

Thus, private property at the time of the treaty with Spain, which was afterwards leased by the owners to the military authorities, does not become public property because it is within a zone reserved by the President of the United States for military purposes, although it may be subject to the public easements and require permission to be obtained as to buildings, etc., but it is entitled to be registered.⁴⁸

—religious lands.

Where land had by decree been registered in favor of the Roman Catholic Bishop of Nueva Segovia "in trust for the use, purpose, behoof and sole benefit of the Roman Catholic Church in these Islands," it was held that the words quoted must be stricken out of the certificate, as, under the law, the registration in the name of the Bishop would, by § 157 of the corporation law, put the title in the Roman Catholic Apostolic Church, and that registration, therefore, in the name of the Bishop or in the name of the Church, was the proper way, and not in the name of the Bishop in trust for the Church.⁴⁹

A parish priest of the Roman Catholic Apostolic Church, administrator of the capellania of a convent, is a sufficient petitioner for the registration of the land of the capellania, notwithstanding that the capellania has no board of directors.⁵⁰

⁴⁷ *Buenaventure v. Commanding General* (1906) 6 Philippine, 600.

⁴⁸ *Inchausti v. Commanding General* (1906) 6 Philippine, 556.

⁴⁹ *Bishop of Nueva Segovia v. Insular Government* (1913) 26 Philippine, 300.

⁵⁰ *Capellania de Tombobong v. Cruz* (1907) 9 Philippine, 145, where the statute provided that "corporations may make application by any officer duly authorized by vote of the directors," the court considering that the application was sufficient under § 21, providing that "the application shall be in writing, signed and sworn to by the applicant, or by some person duly authorized in his behalf," and said: "Under this provision it was competent for the authorized agent of this capellania to sign and swear to the application, without the formal vote of a board of directors which had, in fact, no existence." The court said further: "We should be loath to narrow the general and beneficent effect of the land registration act by an interpretation so narrow as to shut out from its bene-

2. More than one piece.

Several pieces of land may be included in one application if they have the same chain of title and belong to the same person, although they are not contiguous, where the act provides that "any number of contiguous pieces of land in the same county, and owned by the same person, and in the same right, or any number of pieces of property in the same county having the same chain of title and belonging to the same person, may be included in one application."¹

"Contiguous," under such an act providing for the inclusion in one application of "contiguous" properties, means "touching."²

The provision permitting lots to be included in one application that have the same chain of title means an identical chain; it does not mean the same chain part of the time.³

The expression in such an act, "substantially the same chain of title," means "in the main" the same chain of title.³

Where, after a decree was entered registering all the premises but one lot, the applicant filed an amended application as to such lot, making two persons parties not parties to the original proceeding, these persons cannot object that this lot is not contiguous to the other lots, nor that it has not substantially the same chain of title.⁴

3. Easements.

Certificate of servient tenement.

Some of the statutes particularly provide that the certificate shall set forth easements to which the land is subject.⁵

Under such a statute, land of the peti-

fits most, if not all, of the corporations existing in these Islands at the time of the transfer of sovereignty, as well as other interests, governmental and otherwise, corporate in form, but not possessing boards of directors which would enable them to comply with the demands of this section."

¹ *Held v. Houser* (1912) 53 Colo. 363, 127 Pac. 139.

² *Culver v. Waters* (1910) 248 Ill. 163, 93 N. E. 747, where the provision was the same as that of Colorado, quoted above.

³ (Ill.) *Ibid.*

⁴ *Gibson v. Glos* (1915) — Ill. —, 111 N. E. 123, the Illinois act (§ 12) having been amended, in 1913, by inserting the word "substantially" before the words "the same chain of title;" but the court was unable to decide whether the chains of title in the case satisfied the amended statute, owing to the condition of the record.

⁵ *Schiessle v. Glos* (1915) — Ill. —, 111 N. E. 127.

⁶ See *Perez y Samanillo v. Gonzalez*

tioner subject to an easement in favor of a respondent should be so registered.⁶

Certificates of dominant tenement.

But an easement in favor of the applicant's land is not to be entered (but only the easements against it) under a statute providing that the decree "shall set forth the estate of the owner, and also, in such manner as to show their relative priority, all particular estates, mortgages, easements, liens, attachments, and other encumbrances, including rights of husband or wife, if any, to which the land or owner's estate is subject," etc.⁷

But the petitioner is entitled to register his land and a right of way appurtenant thereto where the statute provides that "application for registration of title may be made by . . . the person or persons who claim . . . to own the

legal estate or easements or rights in land held and possessed in fee simple."⁸

Owners of easements as defendants to proceeding.

Where an abutter as such is not a necessary party, although the examiner is required to name him, nevertheless all persons having an interest in the property by way of easement or otherwise are necessary parties.⁹

It has been held in the New York second department that an abutter who is the owner of an admitted easement will not be allowed to appear and answer for the purpose of raising issues in which he is not interested, but if he is excluded the certificate should contain a recital that it is without prejudice to his rights, if any;¹⁰ but a later case in the first

(1910) 17 Philippine, 343, *infra*, next heading; see also *Sinclair v. Matter* (1914) 125 Minn. 484, 147 N. W. 655, reversed on other grounds; see also Massachusetts cases cited in next note.

⁶ *Battelle v. New York, N. H. & H. R. Co.* (1911) 211 Mass. 442, 97 N. E. 1004, holding that land subject to an easement of way in favor of a respondent must be so registered.

In *Bigelow Carpet Co. v. Wiggin* (1911) 209 Mass. 542, 95 N. E. 938, the jury found that the respondents had rights of way over the land sought to be registered by the petitioner, and this finding the court declined to disturb; but the exceptions were sustained on account of an error in practice.

In *Battelle v. New York, N. H. & H. R. Co.* (1912) 211 Mass. 442, 97 N. E. 1004, it was held that it was proper to register a fee "under the railroad location and under its station location," subject to such easements, where the statute provided that "application for registration of title may be made by . . . the person or persons who claim . . . to own the legal estate or easements or rights in land held and possessed in fee simple."

⁷ *Perez y Samanillo v. Gonzalez* (Philippine) *supra*, referring to § 40 of the Philippine act, No. 496.

Such was substantially the effect of the obiter statement in *Minot v. Cotting* (1901) 179 Mass. 325, 60 N. E. 610; but the Massachusetts statute was later amended, in 1905, to include easements.

⁸ See *Hart v. Deering* (1916) 222 Mass. 407, 111 N. E. 37.

⁹ *Hawes v. United States Trust Co.* (1911) 142 App. Div. 789, 127 N. Y. Supp. 632; *Hawes v. United States Trust Co.* (1911) 142 App. Div. 795, 127 N. Y. Supp. 636; *City & Suburban Homes Co. v. People* (1912) 148 App. Div. 920, 132 N. Y. Supp. 1124; *Partenfelder v. People* (1912) 148 App. Div. 921, 132 N. Y. Supp. 1140.

In *Hawes v. United States Trust Co.* L.R.A.1916D.

(1911) 142 App. Div. 789, 127 N. Y. Supp. 632, where the boundary line between the plaintiff's property and that of an adjoining owner ran through a retaining wall, and such adjoining owner, to the extent that said retaining wall stood on the plaintiff's premises, claimed an interest or easement therein, it was held that such adjoining owner was a necessary party and he had a right to appear, and his motion for leave to appear should not be denied on the ground that the time for him to answer or demur had expired, when he was not made a party by the plaintiff. The court distinguished *Smith v. Martin* (1910) 142 App. Div. 60, 126 N. Y. Supp. 877, *infra*, as there the application was made for the purpose of raising issues in which the abutter was not interested.

Where, pending an appeal from an order refusing to permit an abutter claiming an easement to appear, the plaintiff, without notice to such appellant, enters judgment that his title be registered, and obtains a certificate of title, it is proper, upon the reversal of such order, that there be entered upon the certificate of title a memorandum referring to the reversing order, and the provisions of the statute relating to the entry upon certificates of memorials and as to leases, liens, mortgages, deeds, or other instruments of transfer, or other voluntary instrument presented for registration, had no relation to an annotation upon a certificate of an order reversing an order denying leave to appear to a person who claimed an easement. *Hawes v. Clarke* (1913) 159 App. Div. 65, 144 N. Y. Supp. 11, where the court observed that the proposed defendant might have proceeded by moving to vacate the judgment, but that it was not necessary for him to do so.

¹⁰ *Smith v. Martin* (1910) 142 App. Div. 60, 126 N. Y. Supp. 877, holding that where the boundary runs through a party wall, and is correctly described in the complaint, the owner of the adjoining premises, who has an easement in the party wall, and who

department seems to hold that an abutter has an absolute right to appear.¹¹

c. Notice, and inquiry on which to base it.

The statutory provisions of the law as to the publication of the summons is all that is required in that respect; it is not necessary to follow also the provisions of the general law as to the ordinary service by publication.¹² Where the notice is to be published "at the time of issuing" the summons, once a week for four issues, it is sufficient if its first publication is made in a paper dated one week from the issue of the summons where the paper dated the day of such issue was printed the day before.¹³

A summons will be set aside and the proceedings dismissed where the only means or method of calling attention or

giving notice to the heirs or next of kin of a deceased or missing holder of title is the omnibus clause in the summons and complaint, "All other persons, if any, having any right or interest in or lien upon the property affected by this action, or any part thereof," as such rights ought not thus to be taken away and the title registered against them merely by considering these unknown heirs as brought in and made parties by the general words.¹⁴

The court will not sign the order for the service of the summons at the commencement of the action unless it is satisfied that sufficient facts are shown to call for or justify that order,¹⁵ and where owners are shown to be unknown, there must appear to have been a diligent search.¹⁶

offers an answer which does not contain a defense based upon such ownership nor ask for any affirmative relief, ought not to be allowed to be made a party, nor to appear for the purpose of serving such answer, although he might be allowed to appear simply to protect his interest and to see that the judgment agreed with the complaint, but not to serve his answer, which could only make a delay; and the order excluding him was affirmed, upon the condition, however, that the certificate of registration which might be issued should contain a recital that it was without prejudice to the rights, if any, of the person so excluded. The court said that the judgment could not estop him, as he was excluded from the record upon the plaintiff's motion.

¹¹ *Sundermann v. People* (1911) 148 App. Div. 124, 132 N. Y. Supp. 68; see *infra*, subd. III. g, 1.

¹² *Dewey v. Kimball* (1903) 89 Minn. 454, 95 N. W. 317, 895, 98 N. W. 704.

¹³ *Cape Lookout Co. v. Gold* (1914) 167 N. C. 63, 83 S. E. 3, where the summons was dated on the 9th of July and was issued on the 10th, and it was first published in a weekly paper dated the 17th, whereas, as a matter of fact, the issue of the paper dated the 17th and the previous issue dated the 10th were both issued the day before the day of their date, and it was held that the notice published in four consecutive weekly issues of the paper, beginning on the issue of the 17th, was sufficient, the statute providing that the clerk shall at the time of issuing such summons publish a notice once a week for four issues.

¹⁴ *Belmont Powell Holding Co. v. Serial Bldg., Loan & Sav. Inst.* (1915) 167 App. Div. 124, 152 N. Y. Supp. 868, where the objection was made by the attorney general on the ground that the title had escheated to the state. The court said: "The power to register a title which may be conclusive against absent heirs or others having interests in the property should not be L.R.A.1916D.

permitted to do away with the usual precautions to give notice to such heirs. Here the name of White was not in the summons. Had it so appeared, it might reach the attention of some of the family. With that essential wholly left out, and no other notice than the general designation of 'all other persons,' we cannot say that the title of such absentees has been transferred over to the plaintiff by this proceeding by publication. *Barkenthien v. People* (1914) 212 N. Y. 36, 105 N. E. 808, motion for reargument in (1915) 213 N. Y. 554, 107 N. E. 1034." The decision was on the further ground that there was also a lack of evidence to sustain the finding of adverse possession, "should," said the court, "that be decreed a finding of fact."

This case was followed under somewhat similar facts in *Sherman v. Carman* (1915) 160 App. Div. 17, 154 N. Y. Supp. 484, where judgment of registration was reversed and the complaint dismissed on the ground that the name of a missing owner did not appear in the summons, that his heirs were not named in the summons, and that the evidence of adverse possession was insufficient.

¹⁵ *Lachman v. People* (1910) 127 N. Y. Supp. 910, affirmed in (1911) 144 App. Div. 942, 129 N. Y. Supp. 1131; *Partenfelder v. People* (1914) 211 N. Y. 355, 105 N. E. 675.

¹⁶ *Meighan v. Rohe* (1915) 166 App. Div. 175, 151 N. Y. Supp. 785, modified on another ground in (1915) 216 N. Y. 677, 110 N. E. 165 (see succeeding notes); *Lachman v. People* (N. Y.) *supra*, where the petitioner apparently relied on adverse possession and the court was not satisfied with the search made.

In *Partenfelder v. People* (1914) 211 N. Y. 355, 105 N. E. 675, *infra*, subd. d, 1, it was stated that the attempts to find missing remaindermen had been only trivial and wholly inadequate on which to found an order commencing an action against unknown owners, or on which to base a judgment of registration.

It has been held that the court has no jurisdiction to make a decree barring a person where its order directing that the action be commenced, and that service upon him be made by advertisement and mailing, is made when it had not before it any legally satisfactory evidence that diligent or any effort had been made to find such person or his heirs.¹⁷

For the subject of amendment increasing the amount of land after publication, see *supra*, subd. II. 1.

It is interesting in this connection to refer to *Hoffman v. Superior Ct.* (1907) 151 Cal. 386, 90 Pac. 939, which arose under the California "McInerney act" of 1906 in regard to cases where the public records had been lost (see the *Kerrigan and Zeiss Cases*, *supra*, subd. II. b), where it was held that it was not necessary to make diligent inquiry in order to uphold the constructive service provided for by the act as to unknown interests. It was also held that it was insufficient if the person applying to have his title registered under such act stated in his affidavit that he did not know and had never been informed of any adverse claimants, and that it was not necessary for him to go on and say whether he had made any inquiry or not as to adverse claimants, although the act required that if the applicant was "unable to state," he should show his reasons for such inability, as "the only inquiry necessary to enable him to make the statement required in the statute on this point is a scrutiny of his own mind and memory."

¹⁷ *Meighan v. Rohe* (1915) 166 App. Div. 175, 151 N. Y. Supp. 785, modified on another ground in (1915) 216 N. Y. 677, 110 N. E. 166, where the statute required that the official examiner's certificate of title "shall state fully what search and efforts have been made to find" actual or possible owners or claimants not known or found, and the certificate simply stated as to a person that he was never heard of after his departure upon his travels, "although diligent efforts have been made to find him," and the only support for this insufficient statement was the applicant's affidavit that she and her father and mother and other members of her family had made every effort to trace such person, but had been unable to locate him or find any trace of him since a date some fifty years before.

In *Eldert v. Cross Country R. Co.* (1915) 88 Misc. 684, 151 N. Y. Supp. 441, the court sustained a motion to vacate the original order and to set aside the summons, notice of object of action, and all subsequent proceedings, because an inspection of the examiner's certificate disclosed omissions which, in the light of the law as laid down by the court in *Partenfelder v. People* (N. Y.) *supra*, showed a lack of jurisdiction to issue the summons therein, where it appeared that a certain person had formerly owned the premises, and there was an entire absence in the certifi-

d. Must have good title.

1. In general.

Evidence establishing title good as against the world is essential to warrant a decree awarding registration of a title;¹⁸ and the petitioner must identify the property.¹⁹

The petitioner for registration in fee has the burden of proving title in himself, which does not shift, although the weight or preponderance of the evidence

cate of any effort to show what search, if any, was made for his heirs, and no deed out of him was shown, and neither he nor his heirs, whether known or unknown, were made parties to the proceeding, and no efforts were shown to locate those heirs. And there were other matters in the examiner's certificate suggesting irregularities and possible outstanding interests which were not covered, and also an adoption of the title as established upon an action in partition without facts from which the regularity of the proceedings in that suit could have been determined. The court said: "As in the *Partenfelder Case*, the examiner's certificate of title contains the following statement: 'The facts as to the inquiries and efforts made to find any other person having rights or interests in said premises, and the diligence used to ascertain whether or not those known can be served personally with summons, are set forth in the following detailed statement.' But the certificate is silent as to any search whatever. The examiner further says: 'There are no other persons interested or claiming to have any right or interest in said property.' This, of course, is a conclusion wholly unsupported by the facts."

¹⁸ *Glos v. Holberg* (1906) 220 Ill. 167, 77 N. E. 80; *Glos v. Kingman* (1903) 207 Ill. 26, 69 N. E. 632; *Glos v. Cessna* (1903) 207 Ill. 69, 69 N. E. 634. See also as holding that the evidence fulfilled the condition as establishing a title good as against all the world, *Teninga v. Glos* (1914) 266 Ill. 94, 107 N. E. 125; *McDonnell v. Glos* (1915) 266 Ill. 504, 107 N. E. 897.

Where the applicant for registration does not show that he has a good title to the land, his petition should be denied. *Lienau v. Insular Government* (1906) 6 Philippine, 230; *Inocencio v. Gat-Pandan* (1909) 14 Philippine, 491; *Oligan v. Mejia* (1910) 17 Philippine, 494.

¹⁹ *Glos v. Bragdon* (1907) 229 Ill. 223, 82 N. E. 224, holding that where the record contains no evidence by which the premises can be located, a decree of registration will be reversed.

"It is a well-settled doctrine of the courts, that a person who seeks to register his title of ownership to certain land in the court of land registration must, like another who brings an action for the recovery of possession, satisfactorily prove, not only his right of ownership, but also

may change from one side to the other during the proceedings.²⁰

It is not the design of the act that a mere prima facie title shall be registered as a good title.²¹

Thus, a party is not entitled to registration who has not shown the possession of "a good and marketable title, such as one as a court of equity would compel an unwilling vendee to accept,"²² and the court will not register a questionable title whether it is objected to or not;²³

the identity of the land." *Villa Abrille v. Bañuelos* (1911) 20 Philippine, 1.

In *Oligan v. Mejia* (1910) 17 Philippine, 494, where the property was shown to be in the defendant, the court, in reversing a judgment of registration and in ordering that the proceeding be dismissed, said: "The applicant for the registration of real property is in the same condition as is a person who prosecutes before the courts an action for the recovery of possession, wherein it is necessary, to secure a favorable judgment, that the claimant prove in an unquestionable manner his ownership and the identity of the property claimed."

In *Temple v. Benson* (1912) 213 Mass. 128, 100 N. E. 63, the court said: "The petitioner has the burden of proving himself entitled to a registration of the premises as described in the application."

²⁰ *Hughes v. Williams* (1914) 218 Mass. 448, 105 N. E. 1056.

²¹ *Glos v. Cessna* (1903) 207 Ill. 69, 69 N. E. 634; *Glos v. Wheeler* (1907) 229 Ill. 272, 82 N. E. 234.

²² *Meighan v. Rohe* (1915) 166 App. Div. 175, 151 N. Y. Supp. 785, modified on another ground in (1915) 216 N. Y. 677, 110 N. E. 165.

While it is not intended to include in this note foreign cases on this point, it is interesting in this connection to refer to *Smith v. Auckland Dist. Land Registrar*, 24 New Zealand L. R. 862, where it was held that under the statute the registrar properly refuses to proceed with an application to bring lands under the act where he is not satisfied that the land is vested in the applicant, and that the reviewing powers of the court provided for by the statute ought not to be exercised to order him to proceed with an application involving the right of third parties in their absence, unless it is "clearly satisfied that such a title has been shown as would be forced on an unwilling purchaser."

As to requisites of a marketable title, see note to *Justice v. Button*, 38 L.R.A. (N.S.) 1.

²³ *Crabbe v. Hardy* (1912) 77 Misc. 1, 135 N. Y. Supp. 119.

It is immaterial that there may not be anyone claiming the land sought to be registered against the applicant. The applicant must show that he has good title to the land or it will not be registered, as the adjudication against him is not conclusive proof that he is not the owner,—it L.R.A.1916D.

and where, from the complaint and papers filed therewith, it appears that the plaintiff has not a good title to the premises, the summons should not be issued and the proceedings should be dismissed.²⁴

2. Title good to part of premises.

The court may hold the title good as to a part of the premises described in the application for registration and direct the registration of such part;²⁵ and

simply shows the failure of proof. *Maloles v. Director of Lands* (1913) 25 Philippine, 548.

²⁴ *Partenfelder v. People* (1914) 211 N. Y. 355, 105 N. E. 675, where it appeared that the party applying for registration had a deed from the owner of a life estate, and it did not appear whether the owner of the life estate was living or dead, and the court said under these circumstances there was nothing to show that any statute of adverse possession had run against the remainderman, and further stated that only trivial attempts had been made to discover the whereabouts of the remainderman, which were wholly inadequate on which to found an order commencing an action against unknown owners, or on which to base a judgment of registration.

Where in the premises sought to be registered there were small gores, the title to which appeared according to the official examiner's certificate to be in certain parties not specifically named as defendants to the proceeding, and no facts were stated justifying the omission, it was held that the court had failed to obtain jurisdiction to direct that an action to register such title should be commenced, or to authorize the issue of the summons which was issued (within the rule stated in *Partenfelder v. People* (1913) 157 App. Div. 462, 142 N. Y. Supp. 915). *City & Suburban Homes Co. v. People* (1913) 157 App. Div. 459, 142 N. Y. Supp. 924. (Note that the *Partenfelder* Case was affirmed in the court of appeals, 211 N. Y. 355, 105 N. E. 675.)

In this connection reference may be made to *Ventura v. Felix* (1913) 26 Philippine, 500, where the owner of lands, having donated them to her grandchildren subject to a life estate in herself, notwithstanding such donation, assumed to sell the lands with the right of repurchase, and later the lands were registered in the names of the grandchildren; thereafter the grandmother executed the agreement of repurchase, paying the money and taking a transfer to herself, and it was held that such transfer would not be registered, as the proper owners of the land were already registered as owners, the assumed sale having passed no title.

²⁵ *Glos v. Holberg* (1906) 220 Ill. 167, 77 N. E. 80, where, however, the case was reversed on other grounds.

It was upon this principle that *Meighan v. Rohe* (1915) 166 App. Div. 175, 151

the act itself sometimes provides for striking out part of the land.²⁶

e. Dismissal or other relief.

Decreeing registration in another than the applicant.

While it has been held in Oregon that the land may be registered in the name

of a defendant to the proceeding,²⁷ and the act sometimes contains a provision giving power to the court to decree in whom the title is vested, whether in the applicant or another person,²⁸ it is the general rule that the property cannot in whole or in part, be registered as the property of the defendant.²⁹

N. Y. Supp. 785, was modified by the court of appeals in (1915) 218 N. Y. 677, 110 N. E. 165. That court, while concurring in the decision of the appellate division that deficiencies in the proceeding existed, as pointed out in the opinion there delivered, which lead to the conclusion that the summons in the action should not have been issued and the judgment registering the plaintiff's title should not have been granted so far as a part of the property was concerned, stated that it was asserted, however, by the plaintiff appellant, that as to another portion of the premises the record disclosed that the plaintiff had a good title, and that the appellate division was in error in dismissing the complaint in the action as to that portion of the property, and the court of appeals sent the case back so as to remit to the special term for rehearing the question of title of the other property.

Where the proof does not agree with the land set out in the petition to its full extent, the judgment of registration will be reversed and the case remanded without prejudice to the right of the petitioner to present an amended petition. *Pamintuan v. Insular Government* (1907) 8 Philippine, 512.

In *Re Lewers & Cooke* (1909) 19 Haw. 334, where the court below had denied an application to register land, and the title to part of the land was not controverted, the appellate court held that the decree should be modified by denying the petition without prejudice to the right to obtain a registered title as to the part of the land the title to which was not in controversy. This case was affirmed on appeal to the Supreme Court of the United States under the title of *Lewers & Cooke v. Atcherly* (1911) 222 U. S. 285, 56 L. ed. 202, 32 Sup. Ct. Rep. 94, but this point was not noticed.

²⁶ *Villa Abrille v. Bafuelos* (1911) 20 Philippine, 1, holding that the court may strike out part of the land as to which a good title is not shown, the statute (§ 24 of act No. 496, as amended by act No. 1875, in effect July 1, 1908) providing that "the application may include all the parcels of land or properties belonging to the applicant, provided they are situated within the same province or city. The court may at any time order an application to be amended by striking out one or more parcels or by severance of the application."

This course was followed in *Perez y Samanillo v. Gonzalez* (1910) 17 Philippine, 343.

See also for opening decree (apparently for fraud) and excluding therefrom land L.R.A.1916D.

shown to belong to the defendants, *Cruz v. De Leon* (1911) 21 Philippine, 199, *infra*, subd. III.

²⁷ *Lewis v. Chamberlain* (1912) 61 Or. 150, 121 Pac. 430, see also further proceedings in the same case (1914) 69 Or. 476, 139 Pac. 571, where the court observed that "equity, having once obtained jurisdiction, will administer complete relief."

²⁸ *Re Cooper* (1913) 21 Haw. 431, where the act provided that the court of land registration has power "to decree in whom the title or any interest, legal or equitable, in land, is vested, whether in the applicant or in any other person," and it was held that an unassigned right of dower in a widow which had been sold by her to other parties would be recognized in the decree.

²⁹ *Foss v. Atkins* (1910) 204 Mass. 337, 90 N. E. 578; *Foss v. Atkins* (1909) 201 Mass. 158, 87 N. E. 189 (obiter); *Seeger v. Young* (1914) 127 Minn. 416, 149 N. W. 735, *infra*, h (obiter); *Tecson v. Dominicos* (1911) 19 Philippine, 79; *Manila v. Lack* (1911) 19 Philippine, 324; *Lim Cumpao v. Rodriguez* (1913) 24 Philippine, 149. However, this seems to have been done as to a part of the land in *Flores v. Director of Lands* (1910) 17 Philippine, 512 (see *infra*), but perhaps the case is to be explained as a transfer pendente lite.

As to the question of the constitutionality of the act as denying affirmative relief to defendants, see *supra*, subd. II. h.

It is error to amend a petition by permitting the respondent's name to be inserted as the person in whose name a portion of the land described in the petition is to be registered, as the land court might not allow such an amendment, by which the respondent became the petitioner, and the petitioner the respondent. If the respondent wished to become a petitioner, he ought to bring his own petition or cross petition. *Foss v. Atkins* (1909) 201 Mass. 158, 87 N. E. 189 (obiter).

It may be here noted that it was held in *Santiago v. Cruz* (1911) 19 Philippine, 145, that where it is found that the applicant owns an undivided one half, and the defendants the other undivided one half, the title cannot be registered under the provisions of § 19 of the land registration act, which requires "that one or more tenants claiming undivided shares less than a fee simple in the whole land described in the application shall not make application except jointly with the other tenant owning undivided shares, so that the whole fee shall be represented in the action."

Thus, an opponent cannot by agreement with the petitioner in an action for the registration of land under the Torrens system be substituted for the latter and have the title to the land registered in his name. He must commence an original action for that purpose, and must comply with all the requirements of the law as to publication of notices, etc.³⁰

Compare, however, *infra*, "Transfer pendente lite."

It has been held in the Philippines that a statement in a decree that part of the land belongs to the defendant is not *res judicata*, and is of no force or effect in an action of ejectment brought by such defendant.³¹

Accordingly, it has been held that it is no objection to a proceeding to register land that there is another proceeding over the same land between the same parties already pending, the defendant in one being the applicant in the other.³²

But in Minnesota the court seems to take the view that a finding of title in the defendant would operate as an estoppel.³³ The matter there arose in an action to determine adverse claims to real property, which was dismissed on the ground that there was still pending a proceeding theretofore brought by the defendant to register his title, in which the plaintiff in the current action had answered alleging that he was the owner in fee of the land, and praying judgment to that effect. The court, in affirming the judgment of dismissal, pointed out that though in the registration proceedings the defendant might set up his own title, and the court might find that he had a good title, it must then dismiss the proceedings, as he could get no affirmative relief in that action except the form of the judgment, but that nevertheless it was proper to abate his action to determine the adverse claim to real property, while the registration action

was still undetermined, as the plaintiff's action was not necessary, and to permit him to carry it out would emasculate the registration act. The court stated that the issues in the two actions were identical; that a judgment registering the applicant's title, if such should be rendered, would unquestionably be conclusive upon the parties in respect to the matters involved in the second action, for the court in the registration proceeding not only has authority to adjudicate the issues, but is required to do so, and said: "The only doubt, therefore, which can be suggested as to the applicability of the rule of abatement as between the proceeding and the action, must inhere in the nature of the judgment or decree which the court must render where applicant fails to establish title, the court having no power in such case to decree title in defendant or to order such title registered, but only to dismiss the application. Gen. Stat. 1913, § 6888."³⁴ The court said also: "Undoubtedly, under this section, the court may in a proper case dismiss or allow dismissal without prejudice, as in any other action, and must furthermore dismiss where applicant fails to establish title, whether because a defendant has established title in himself, or otherwise; but what court would, after trial on the merits of a defendant's claim of title, fail to make findings according to the facts proved? Indeed, failure to make such findings to a defendant's prejudice would be reversible error. . . . And these, if in defendant's favor, would estop applicant in any subsequent proceeding between the parties involving the same subject-matter."³⁵

—transfer pendente lite.

But it has been held that a purchaser from the applicant of the whole property pendente lite may be registered as owner in the proceeding,³⁶ and also that if

³⁰ *Lim Cumpao v. Rodriguez* (1913) 24 Philippine, 149. Compare as to part of the land, *Flores v. Director of Lands* (Philippine) *supra*, where, however, this may perhaps be explained as a transfer pendente lite.

³¹ *Manila v. Lack* (1911) 19 Philippine, 324, where, after a decree had been entered in favor of the applicants, the city of Manila had the decree opened and amended as regarded a certain strip of land, which decree so amended described the strip as the property of the city of Manila, and the city thereafter brought an action of ejectment for the strip, showing no title except the opinion of the judge granting the aforesaid amendment and the proceedings following as a consequence of L.R.A.1916D.

that opinion, and it was held that the action should be dismissed.

³² *Tecson v. Dominicos* (1911) 19 Philippine, 79.

³³ *Seeger v. Young* (1914) 127 Minn. 416, 149 N. W. 735.

³⁴ § 6888. "If the court shall find after hearing that the applicant has not a title proper for registration, an order shall be entered dismissing the application, which may be made without prejudice. The applicant may upon motion dismiss the application at any time before the final decree is entered upon such terms as shall be fixed by the court."

³⁵ *Seeger v. Young* (Minn.) *supra*.

³⁶ *Ortiz v. Ortiz* (1913) 26 Philippine, 280, where the owner of land applied for

pendente lite the applicant parts with a part of the property, the court may in the same proceeding register both the applicant and the purchaser as owners respectively of their respective parcels.³⁷

Foreclosure.

Provisions in the act authorizing the court to pass on the validity of liens will not permit the foreclosure of a mechanics' lien in the registration proceedings.³⁸

Withdrawal.

The constitutionality of a provision for withdrawal is referred to *supra*, subd. II. h.

It has been held in Massachusetts that the petitioner's right of withdrawal un-

der the act continued after questions of fact had been decided against him on an appeal from the land court.³⁹

It has been held in Washington that it is error for the court, on the petitioner's motion to dismiss, to dismiss the proceeding with prejudice, or with an adverse finding of fact as to part of the real property, when the statute provides that "if, in any case, after hearing, the court finds that the applicant has not title proper for registration, a decree shall be entered dismissing the application, and such decree may be ordered to be without prejudice. The applicant may dismiss his application at any time, before the final decree, upon such terms as may be fixed by the court, and upon motion to dismiss duly made by the court."⁴⁰

its registration subject to a mortgage then upon it, and while his application was pending made an arrangement with the mortgagee whereby he sold the premises to the mortgagee with an option of repurchase within a certain period, and after that period had expired the said original mortgagee under the law consolidated its interest and became the absolute owner of the land; it was held that said mortgagee, so having become the absolute owner, had a right to be substituted in the registration proceedings for the applicant, and to have the land registered in its name.

³⁷ *Peters v. Dicus* (1912) 254 Ill. 379, 98 N. E. 560, where, after a decree for registration of all the land in the applicant, another person obtained leave to answer, and meantime the original applicant had sold some of the land and filed a supplemental petition for his registration to the unsold land, and his grantee filed a petition for the registration of his title to the land which he had bought, and it was held that these petitions were both properly granted in the same proceeding.

Perhaps the court considered that it was following a similar course in *Flores v. Director of Lands* (1910) 17 Philippine, 512, where it is stated that "by a transaction" between the applicant and A. part of the land was adjudicated to A, and this part had later been conveyed to B, in whose favor a decree was ordered, all it seems in the same proceeding; but it also appears that the adjudication to A was in view of the acquiescence of the applicant.

³⁸ *Reed v. Siddall* (1905) 94 Minn. 216, 102 N. W. 453.

³⁹ *McQuesten v. Com.* (1908) 198 Mass. 172, 83 N. E. 1037, holding that the provision in the Massachusetts statute, § 36, that "the applicant may withdraw his application at any time before final decree, upon terms to be determined by the court," enables an applicant who has obtained a decree in the land court, after which appeals on questions of fact have been decided against him in the superior court, still to withdraw, and that his withdrawal

is a matter of absolute right, but that the terms are to be fixed by the court, and the court may impose as further terms actionable costs, and may direct the petitioner to pay all the expenses of the defendant. The court said: "It is manifest that the Massachusetts legislature did not intend to follow that in New Zealand, which made the right of withdrawal dependent on the discretion of the judge, nor those in New South Wales, Queensland, South Australia, and Tasmania, where the right of withdrawal at any time before the certificate was issued was absolute, and not subject to terms, but did follow that in Victoria and Western Australia, where it is absolute, but subject to terms to be imposed by the court."

It may be noted that the change in this section by chap. 245, of 1910, referred to in *Foss v. Atkins* (1911) 208 Mass. 510, 94 N. E. 752, provides that a decree dismissing the application "may be ordered to be without prejudice, in whole or in part, but unless it is so ordered it shall bind the parties, their privies, and the land in respect of any issue of fact which has been tried and determined," and that the court in its discretion may require an applicant who moves to withdraw or substitute another to stipulate that he shall be bound by the result of any issue of fact which has been tried and determined, "and such stipulation shall bind the parties, their privies, and the land itself," etc.

⁴⁰ *Krutz v. Dodge* (1911) 66 Wash. 178, 119 Pac. 188, Ann. Cas. 1913C, 869, where the court refers to *McQuesten v. Com.* (Mass.) *supra*, and other Massachusetts cases, and says: "But it is said that under the Massachusetts law the title is not determined by a court of general jurisdiction, but by a land board exercising no juridical functions. This may be admitted, but it does not destroy the reasoning upon which the decisions are made to rest; that is, that the procedure is a voluntary one, and its limitations as well as the power of the tribunal administering it, are to be found in the act itself, and not by reference to

f. Matters of evidence peculiar to the acts.

1. In general.

It is not intended in general to include matters of evidence which are not peculiar to proceedings under these acts.

Examiner's preliminary reports.

The opinions of the examiner in his preliminary report prior to bringing the action are not evidence for or against a party on the trial of the issues.⁴¹

Where the examiner in his certificate expresses a matter to be his opinion, this is not within the statute providing that the allegations and statements of the examiner's certificate of title and of his abstract and searches, etc., shall be prima facie and presumptive evidence of the facts so alleged and stated, where the act further provided that the allegations and statements in the certificate should be taken and construed as statements of fact, "unless they are expressly declared therein to be conclusions or opinions." Consequently, such allegations have no probative force whatever, although they are not controverted by answer expressly,

and no demand is made that the plaintiff adduce common-law proofs of the facts upon which he relied.⁴²

The same section of the act declares that where a party has controverted in his pleadings specifically an allegation or statement contained in the certificate of title, etc., any party may require at the trial that the ordinary rules of evidence and proof shall apply unaffected by the statute; when this is done the burden of proof is on the plaintiff affirmatively to establish his title notwithstanding the provisions of said section.⁴³

Examiner's report made after action is begun.

In Illinois the relation to the court and the parties, of the examiner of titles to whom it is referred to examine and report to the court as to the title, after the action has been commenced, is analogous to that of the master in chancery in other chancery proceedings,⁴⁴ and he should so far report the evidence as to show its introduction before him, notwithstanding the statute provides that he shall not be required to report to the court more than the substance of the

the general rules of law. Nor can we agree with the contention that the provision of the law providing for a dismissal without prejudice implies that it may be with prejudice when a motion for voluntary dismissal is made, nor that the right to impose terms implies a right to fix a condition."

⁴¹ *Re Pa Pelekane* (1912) 21 Haw. 175.

A legal conclusion by the examiner cannot be accepted by the court unless he gives the facts upon which it is based. *Lachman v. People* (1909) 127 N. Y. Supp. 912 (where the court, in passing upon an application for an order directing that the action be commenced by the issuance of the service of summons, pointed out many defects in the papers, this being the first application under the statute. The court in the same case questions the propriety of the attorney for the applicant being the examiner, or, that is to say, of the person who was the examiner acting also as the attorney for the applicant).

So, in *Voorhies v. Voorhies* (1910) 66 Misc. 78, 120 N. Y. Supp. 677, it was held obiter (prior to the amendment in 1910 of § 385 of the act) that while the statements made by the examiner were sufficient to enable the court to issue the summons, they had no effect as evidence of title upon the trial.

⁴² *Hamlin v. People* (1913) 155 App. Div. 680, 140 N. Y. Supp. 643, the statute, § 385, by the amendment of 1910, providing that "in all proceedings subsequent to the determination by the court that the plaintiff appears to have a title that should be registered, the allegations and statements of the examiner's certificate of title and L.R.A.1916D.

of his abstract and searches, and in the survey, shall be prima facie and presumptive evidence of the facts so alleged and stated, and if any defendant controverts any allegation or statement contained in said certificate of title, abstract, or searches, or survey, the facts controverting such allegation or statement must be specifically pleaded and set forth, and, except as in this section otherwise provided, must be established affirmatively by the defendant pleading or setting forth the same. The court may require, at any time, any amendment or modification of said official examiner's certificate, or any further or amended survey or certificate, or any additional evidence or proof that may be necessary or proper. All the allegations and statements in said certificate, abstract, searches, and survey shall be taken and construed as statements of fact, unless they are expressly declared therein to be conclusions or opinions. Where a party has controverted in his pleading specifically an allegation or statement contained in said certificate of title, abstract, searches, or survey, any party who has appeared in person or by attorney or counsel at the trial may require that the ordinary rules of evidence and proof, unaffected by this section, shall apply to the matters so controverted."

⁴³ *Barkenthien v. People* (1914) 212 N. Y. 36, 105 N. E. 808; see also motion for reargument in (1915) 213 N. Y. 554, 107 N. E. 1034.

⁴⁴ *Gage v. Consumers' Electric Light Co.* (1901) 194 Ill. 30, 64 N. E. 653; *Glos v. Holberg* (1906) 220 Ill. 167, 77 N. E. 80.

proof submitted to him, except upon the request of some party to the proceeding or by the direction of the court;⁴⁵ and it is error for the examiner of titles to make his decision upon papers not in evidence, such as abstracts of title; and where he stated in his report that he had been furnished with certain abstracts of title, and these abstracts were not returned by him as part of the evidence, nor were they offered in evidence, nor did they appear in the record, it was held that the report would be set aside.⁴⁶

But the Illinois examiner is not required to return the evidence unless it is asked for.⁴⁷

Miscellaneous.

A statute changing a rule of evidence, but not the substantial rights of the

parties, will apply to future trials of a case pending when it took effect.⁴⁸

Other miscellaneous cases are referred to in the notes.⁴⁹

2. Abstracts.

A number of cases have arisen in Illinois as to the admission of abstracts in land registration proceedings, first under the burnt records act and later under the amendment of 1907.

It was held that it was error for the examiner to whom the matter had been referred after the action for registration of title had been begun, to receive in evidence abstracts of the record of conveyances without requiring preliminary proof that the original conveyances were lost or destroyed by fire, etc., with the other preliminary proof required by the burnt records act.⁵⁰

⁴⁵ *Glos v. Holberg* (Ill.) supra.

⁴⁶ *Glos v. Grant Bldg. Loan & H. Asso.* (1907) 229 Ill. 387, 82 N. E. 304, where the court refers to the views expressed in *Glos v. Holberg* (Ill.) supra, to the effect that "it was not within the province of the examiner to make ex parte examinations of title not introduced in evidence before him, and that the applicant for initial registration of title should introduce his evidence before the examiner of titles upon notice to the defendants in such form that the latter may preserve their rights for review by objection to the evidence."

⁴⁷ Where the defendant, instead of asking for an order upon the examiner to return the evidence, moved that the solicitor for the applicant should return the examiner's report and the exhibits in his possession, and the court ordered that the solicitor should return the report, but might retain the exhibits, and permitted him by further order to withdraw the exhibits filed with the examiner, but to hold the same subject to the order of the court, it was held that the defendant could not complain as he had not proceeded to take an order on the examiner. *Mundt v. Glos* (1910) 246 Ill. 636, 93 N. E. 49.

⁴⁸ *Woodvine v. Dean* (1907) 194 Mass. 40, 79 N. E. 882, so holding as to the Massachusetts amendment of 1905, providing that "when an appeal is taken to the superior court for a jury trial on the facts, the judge of the land court who rendered the decision . . . appealed from shall . . . file in said superior court a full report of his decision and of the facts found by him so far as they relate to or bear upon any questions involved in the appeal, and upon the trial of the cause in the superior court such report shall be prima facie evidence as to the matters therein contained."

For an illustration of this statute, holding the decision of the judge of the land court in a finding of fact conclusive in the L.R.A.1916D.

absence of the evidence, see *Van Ness v. Boinay* (1913) 214 Mass. 340, 101 N. E. 979.

⁴⁹ In *Glos v. Hoban* (1904) 212 Ill. 222, 72 N. E. 1, it was held that where the applicant shows a good title, it is not necessary for him to show the invalidity of an opposing tax deed; that in such case the onus lies upon the holder of the alleged tax title to show its validity. Approved in *Glos v. Talcott* (1904) 213 Ill. 81, 72 N. E. 707, which, however, was reversed on other grounds. The same was held in *McMahon v. Rowley* (1908) 238 Ill. 31, 87 N. E. 66, the court stating that the same rule was upheld under the burnt records act in *Gage v. Caraher* (1888) 125 Ill. 447, 17 N. E. 777.

The question under the general statutes of Massachusetts as to whether a man who has omitted to provide for his children in his will did so intentionally, and not through accident or mistake is a question of fact, and the land court has jurisdiction to try it on an application to register title. *Woodvine v. Dean* (1907) 194 Mass. 40, 79 N. E. 882.

It is error for a judge to order the opposition to submit certain evidence, and in default of their compliance to dismiss their opposition, when their other evidence is sufficient. *Cruz y Trias v. Lopez* (1911) 19 Philippine, 555 (obiter).

⁵⁰ *Glos v. Hallowell* (1901) 190 Ill. 65, 60 N. E. 62; *Glos v. Talcott* (1904) 213 Ill. 81, 72 N. E. 707; *Glos v. Holberg* (1906) 220 Ill. 167, 77 N. E. 80; *Glos v. Wheeler* (1907) 229 Ill. 272, 82 N. E. 234.

The same was held in *Messenger v. Messenger* (1906) 223 Ill. 282, 79 N. E. 27, the court also holding that the proposed amendment to § 18 of the act, permitting abstracts made under certain conditions to be admitted in evidence, had not been properly submitted to the people of the county, as was required by the terms of the amendment as passed in 1903, follow-

In 1907 there was passed an amendment to § 18 of the act,¹ which provided that "the examiner may receive in evidence any abstract of title or certified copy thereof, made in the ordinary course of business by makers of abstracts; but the same shall not be held as more than prima facie evidence of title, and any part or parts thereof may be controverted by other competent proofs."

For cases upon the constitutionality of this amendment, see *supra*, subds. II. d, and II. l. This amendment did not require submission to the people of the county and became operative without, although the original (Torrens) act required submission to the people of the county.²

To authorize the admission of an abstract in evidence under this statute, there must be competent evidence that it was made in the ordinary course of business by a maker of abstracts.³

ing in this respect the decision in *Harvey v. Cook County* (1906) 221 Ill. 76, 77 N. E. 424, *supra*, subd. II. l.

¹ This was the same amendment in terms that was passed to this section in 1903, except that the proposed amendment of 1903 required submission to the people of the county, but this was not required by the amendment of 1907.

² *Waugh v. Glos* (1910) 246 Ill. 604, 138 Am. St. Rep. 259, 92 N. E. 974, followed in *Mihalik v. Glos* (1910) 247 Ill. 597, 93 N. E. 372.

³ It is not sufficient to enable an abstract to be introduced in evidence under this statute, that the applicant testified that such abstracts were ordered in the regular course of business from a certain corporation engaged in the business making of abstracts for hire in Cook county, giving the name of the corporation (*Culver v. Waters* (1910) 248 Ill. 163, 93 N. E. 747); nor that the testimony was that the abstract was made in the usual course of business where the witness testified merely from an examination of the abstract itself (*Waugh v. Glos* (1910) 246 Ill. 604, 138 Am. St. Rep. 259, 92 N. E. 974).

It is error to admit an abstract printed except the signature, where there is no evidence as to when or where or under what circumstances the abstract was made, and it shows on its face that it was the result of examinations by various examiners at various times, such examiners not being shown to be makers of abstracts, nor their examination shown to have been made in the ordinary course of business. (Ill.) *Ibid*.

But it is proper to admit an abstract of a title company signed by the company by its secretary, who testifies that it was made in the usual course of business under his supervision and direction, and duly signed by such company by himself as sec-
L.R.A.1916D.

Abstracts signed by the official recorder of the county are properly admitted where a witness testifies that he was an employee in the recorder's office of the county, and that the abstract was made in such office under his supervision and direction in the ordinary course of business, and was signed by the recorder.⁴

A copy of a copy of an abstract, the "last" copy not being certified, is not admissible.⁵

Decisions since the Illinois amendment of 1913.

The Illinois statute was amended in 1913 by adding a provision that certain proof as to abstracts should be sufficient.⁶

A county recorder is not necessarily a maker of abstracts,⁷ but on proper evidence abstracts made in his office may be admitted.⁸

retary. Hammond v. Glos (1911) 250 Ill. 32, 95 N. E. 39.

It is sufficient to admit an abstract, that a witness testifies that he is in the office of the abstracter and knows of his own knowledge that the abstract was made in the usual course of business, and that he was in such office at the time that the abstract was made. *Caswell v. Glos* (1911) 251 Ill. 505, 96 N. E. 251, so holding both as to a corporation abstracter and as to the office of the recorder.

For decisions under the amendment of 1913, see *infra*.

For practice as to objections, see *infra*, subd. III. g.

⁴ *Hammond v. Glos* (1911) 250 Ill. 32, 95 N. E. 39, see also *Caswell v. Glos* (Ill.) *supra*. For decisions since the amendment of 1913, see *infra*.

⁵ *Hammond v. Glos* (Ill.) *supra*.

⁶ See *Harts v. Glos* (1915) — Ill. —, 111 N. E. 125. The amendment provided: "It shall be sufficient proof that any original abstract of title was made or issued in the ordinary course of business by makers of abstracts, to show that the signature attached to the abstract is the genuine signature of the person, firm, or corporation purporting to make or issue the same, appended either in person or by the hand of any person or official accustomed to attach such signature in the ordinary course of business, and that such maker was known or generally reputed to have been in the business of making abstracts of title for hire, at the date shown upon the abstract, or the actual date of the issuance thereof. Certified copies may also be proven in the manner aforesaid."

⁷ *Harts v. Glos* (Ill.) *supra*; see also *Walther v. Glos*, in next note.

⁸ An abstract made by a recorder is competent evidence where an abstract maker in the abstract department of the recorder's

Other cases since this amendment are referred to in the notes.⁹

Abbreviations, etc.

As to the constitutional question raised by the offer of abstracts containing abbreviations, see *supra*, subd. II. 1.

As to the failure to object to the suf-

ficiency of the explanation of an abbreviation in an abstract, see *infra*, subd. III. g, 2.

g. Objections.

1. Who may raise.

The people of the state may object to the plaintiff's application,¹⁰ and may ob-

office testifies that the recorder was, in the business of making abstracts for the general public. *Amundson v. Glos* (1915) 271 Ill. 209, 110 N. E. 914.

It was held that an abstract made by the recorder of the county was properly admitted in evidence where a witness testified that he was an abstract maker and had been employed by the recorder of that county as an abstract maker for eleven years, and was in such employ at the date of the certificate of the abstract, which stated the name of the recorder; that the signature was in the handwriting of the deputy recorder; that the abstract was made on an order given, "the order being 60,485, and was made in the regular course of business by the abstractor of Cook county, acting recorder," the court concluding from this testimony that it was reasonably to be inferred that the recorder of Cook county was engaged in making abstracts for hire. *Bonner v. Glos* (1915) 270 Ill. 567, 110 N. E. 916.

Where objection was made to the admission in evidence of an abstract made by the recorder of deeds of Cook county, on the ground that there was no evidence to show that such recorder was the maker of abstracts of title, or engaged in the business of making abstracts of title, the court pointed out that under the provisions of chapter 115 of Hurd's Statutes of 1913, the county recorder, in counties where a recorder is elected, is to keep abstract books when required by the county board, and in such event is required to furnish abstracts of title. The court stated that, strictly speaking, the better practice would be to prove that the county board required the recorder to keep abstract books and make abstracts, as such proof would show that the recorder was the maker of abstracts, but held that the abstract was admissible anyway where the proof was that it was certified by the person who was the recorder of deeds, and was made by a maker of abstracts engaged in that business, and it further appeared from the evidence that the making of the abstract and other abstracts was part of the duties of the office of the recorder, and that one of the departments of his office was engaged in that business, and the abstract was made and issued in the ordinary course of business, and that he was engaged in making abstracts for hire. *Walther v. Glos* (1915) 270 Ill. 390, 110 N. E. 509.

⁹ In *Harts v. Glos* (1915) — Ill. —, 111 N. E. 125, it was held that abstracts were improperly admitted where there was no proof that the signature of the person purporting to make or issue the abstracts was

his genuine signature, nor anything to show that such maker was known or generally reputed to have been in the business of making abstracts of title for hire at the date shown upon the abstract or at the actual date of the issuance thereof, nor sufficient evidence that the signature was appended in person or by the hand of any person or official accustomed to attach such signature in the ordinary course of business.

But an undated certificate that a copy of an abstract is a true copy signed in the firm name of the firm that made the abstract, in the handwriting of a partner, is *prima facie* evidence for the admission in evidence of the copy, as it is not presumed that a partner would sign at the time when he was not a partner. *Loelhe v. Glos* (1914) 265 Ill. 401, 106 N. E. 940; *Teninga v. Glos* (1914) 266 Ill. 94, 107 N. E. 125.

A copy of an abstract certified by a member of the firm, who made it in the firm's signature, will be admitted in evidence when it is shown that the abstract was made in the ordinary course of business by that firm, which at that time was engaged in the business of making abstracts for hire, although the same witness testified on cross-examination that the abstract might have been certified to when the makers had before them only a copy which they had previously certified to, instead of the original, as such evidence is not sufficient to impeach the certificate of the makers that the copy was made from an original abstract. *Walther v. Glos* (Ill.) *supra*.

The copy of an abstract is evidence where it contains a certificate that it is a true copy of the original signed by a person who had an interest in the firm, and who was accustomed to attach the firm signature, in the ordinary course of business, together with the testimony of a witness that he was acquainted with the firm and had worked for them; that they were in the business of making abstracts for hire, and were in that business when the abstract was made, and made the abstract as a part of the transactions ordered in their office at the time it bore date; that he knew the firm signature, and that the signature was the genuine signature of said abstracters, and was written by the aforesaid person, who had an interest in the firm. *Wilson v. Glos* (1914) 266 Ill. 392, 107 N. E. 630.

¹⁰ *Barkenthien v. People* (1914) 212 N. Y. 36, 105 N. E. 808; *Meighan v. Rohe* (1915) 166 App. Div. 175, 151 N. Y. Supp. 785, modified on another ground in (1915) 216 N. Y. 677, 110 N. E. 165.

ject to the correctness of his proceeding.¹¹

It has been held in the New York second department that an abutting owner who has no interest in the subject-matter of the action cannot raise the constitutionality of the registration statute,¹² nor the question that the complaint fails to state facts sufficient to constitute a cause of action generally;¹³ but if made a party, he may demur on the ground that the complaint does not state facts sufficient to constitute a cause of action against him.¹⁴

It has, however, been held in the New York first department, that an abutting owner has an absolute right to appear where the statute provides that an abutting owner may file a caution requiring written notice to be given to him of any application for the registration of any or all of the land abutting on his land, and that all persons who have filed any caution shall be named as defendants, for

the statute thus recognizes abutters as persons "whose interests may be affected by the judgment in the action," who are given an absolute right to appear and answer.¹⁵

A defendant cannot complain of a decree allowing the petitioner to register title to property in which such defendant claims no interest,¹⁶ but a defendant claiming a right to or lien upon part of the property, who appears by an order of court declaring such defendant a proper party, has a right to defend on the ground that the complaint and the papers connected therewith did not show that the plaintiff was entitled to be registered.¹⁷

Where no question is raised as to the validity of the plaintiff's title, a person who is served or who has notice cannot object that the proceedings are defective or insufficient as to nonresidents or unknown owners.¹⁸

See as to default by Philippine director of lands, *Cabanas v. Director of Lands*, *infra*, subd. III. g. 2.

Where, after the filing of a complaint, the act was amended requiring the complainant to state "what claim, if any, the state of New York makes to the property in question, or what interest, if any, it has therein other than the general governmental interest, or such as exists as to all land in private ownership," the attorney general filed an answer after such amendment of the statute denying that the people have any knowledge or information sufficient to form a belief as to the truth of any of the allegations in said complaint contained; the court refused to grant a motion for judgment upon such answer, and said, among other things, that the judgment would not be rendered against the people on a question of pleading, and that while it was held that a denial of information, etc., did not raise an issue as to matters that are of public record, it could not properly be said in these proceedings that the attorney general was charged with a knowledge of all records of private titles throughout the state. *Smith v. Martin* (1910) 69 Misc. 108, 124 N. Y. Supp. 1064.

¹¹ *Belmont Powell Holding Co. v. Serial Bldg. Loan & Sav. Inst.* (1915) 167 App. Div. 124, 152 N. Y. Supp. 868, *supra*, subd. III. c.

¹² *Duffy v. Shirden* (1910) 139 App. Div. 755, 124 N. Y. Supp. 529; *Marvin Realty Co. v. Barre* (1910) 142 App. Div. 4, 126 N. Y. Supp. 483.

¹³ (N. Y.) *Ibid.*

See *infra* as to the objection of defect of parties by such an owner.

¹⁴ (N. Y.) *Ibid.*

¹⁵ *Sundermann v. People* (1911) 148 App. Div. 124, 132 N. Y. Supp. 68. L.R.A.1916D.

¹⁶ *Mundt v. Glos* (1907) 231 Ill. 158, 83 N. E. 135.

A person without interest in the premises cannot complain that third parties did not consent to the result or were not served. *Lewis v. Chamberlain* (1914) 69 Or. 476, 139 Pac. 571.

"In order that an application for registration of the title of ownership in the court of land registration may be objected to, pursuant to the provisions of act No. 496, the opposition must be based on the right of dominion or some other real right opposed to the adjudication or recognition of the ownership of the petitioner, whether it be limited or absolute; and if none such rights of the respondent have been injured by the judgment, he cannot have, on his part, the right to appeal from the said judgment, whatever it may be, as neither the said act nor any other law on this matter grants anyone the right to appeal on behalf of another party, and not in his own name and by reason of his own interest." *Roxas v. Cuevas* (1907) 8 Philippine, 469. This case was cited and followed in *Couto Soriano v. Cortes* (1907) 8 Philippine, 459.

See also as to appeals, *infra*, subd. III. j.

¹⁷ *Partenfelder v. People* (1914) 211 N. Y. 355, 105 N. E. 675.

¹⁸ *O'Laughlin v. Covell* (1906) 222 Ill. 162, 78 N. E. 59; *McDonnell v. Glos* (1915) 266 Ill. 504, 107 N. E. 807; *Finn v. Glos* (1915) 268 Ill. 350, 109 N. E. 351; *Gibson v. Glos* (1915) — Ill. —, 111 N. E. 123.

In *McDonnell v. Glos* (1915) 266 Ill. 504, 107 N. E. 897, the court said: "The appellant insists that because the decree is not binding upon the defendants not served, the applicant has failed to show a title which is good against all the world. . . . This conclusion does not follow. Unless the applicant has shown a title of the

It has been held that an abutting owner cannot sustain a demurrer for defect of parties, unless it appears that he has an interest in having the parties joined, or that he is prejudiced by their nonjoinder.¹⁹

The appearance of parties waives any defect as to them in publication of the notice.²⁰

nature proper to be registered,—that is, good against all the world,—the application should be dismissed, without regard to the question whether the claim of title of a defendant is a good title or a mere cloud. If, on the other hand, the applicant has shown such a title as may be registered, he may then have the incidental relief of the removal of clouds from such title, and if a decree of registration is entered, which also removes the cloud of a defendant's claim of title, such defendant cannot insist upon the want of service upon another defendant with whom he is in no way connected, as error."

In *Tyler v. Judges of Ct. of Registration* (see *supra*, subd. II. b), brought into the Supreme Court of the United States (1900) 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206, by writ of error, the plaintiff in error having been the applicant for a writ of prohibition as to the Massachusetts act from which the proceedings arose, the court pointed out that the plaintiff in error could not raise the question as to the unconstitutionality of the act as lacking in notice, where he himself had actual notice of the proceedings, although not a party to them, that is to say, he could not raise the question to the extent that his writ of error would be within the jurisdiction of the Supreme Court of the United States; four of the judges dissented on the ground that the objection of the applicant was not as to the jurisdiction of the court over him personally, but as to its jurisdiction over the subject-matter.

¹⁹ *Duffy v. Shirden* (1910) 139 App. Div. 755, 124 N. Y. Supp. 529.

²⁰ *Cape Lookout Co. v. Gold* (1914) 167 N. C. 63, 83 S. E. 3.

²¹ *Gage v. Consumers' Electric Light Co.* (1901) 194 Ill. 30, 64 N. E. 653.

²² *Glos v. Hoban* (1904) 212 Ill. 222, 72 N. E. 1.

Where the objection to the introduction of abstracts was that they were not certified, or not made in the ordinary course of business, it was held that the objections came too late when, at the time they were offered, no objection was made, but counsel obtained leave to file his objections later, and he did not file his objections until after the testimony had closed, the court holding that the objections were of such a character that, if made at the time, they might have been obviated; and also that the objections were too general. *Bjork v. Glos* (1912) 256 Ill. 447, 100 N. E. 233.

L.R.A.1916D.

2. Necessity and effect.

In Illinois, where no exceptions or objections are raised to the examiner's report, the proceeding being one in chancery, the parties cannot complain if the report is approved by the court.²¹

Objections to the report of the examiner of titles as to evidence must be made in the court below.²² Thus, a constitu-

Followed in *Carlson v. Glos* (1912) 257 Ill. 149, 100 N. E. 512.

So, where the director of lands was duly served and defaulted, and made no objection to the registration until after the decision, when a motion was made for a new trial, it was held that he could not then object and he could not appeal. *Cabanas v. Director of Lands* (1908) 10 Philippine, 393.

Where the defendant asked the examiner that the evidence be returned into court, and the examiner, instead of returning documents, returned copies of them, it was held that the defendant, not having applied for relief to the court below, could not raise the question on appeal. *Cregar v. Spitzer* (1910) 244 Ill. 208, 91 N. E. 418.

Where some evidence was introduced in the form of uncertified records which seem to have been afterwards abandoned as not necessary for the applicant's case, it was claimed by the defendant that the examiner had based his report in part on this evidence and that he had not returned it; it was held that there was no error in sustaining the report of the examiner, as defendant should have objected and raised the question, if he did not think that the evidence had been returned, and asked the trial judge to require the examiner to report the evidence; and that this was required by the statute. *McMahon v. Rowley* (1908) 238 Ill. 31, 87 N. E. 66.

Where, it being objected that the abstract contained unintelligible hieroglyphics and abbreviations, a witness was tendered to the defendant to explain any abbreviations or hieroglyphics, and the defendant asked him what the abbreviations "b. e. d. h." meant, and he said that they meant "bearing even date herewith," and no further explanation was required by the defendant, the objection was gone. *Amundson v. Glos* (1915) 271 Ill. 209, 110 N. E. 914, where the witness was an abstract maker in the abstract department of the recorder's office of the county, and the abstract was one from that office.

Where a finding of fact by an examiner was not excepted to, the court on appeal will take it as conclusively establishing the fact. *Keeney v. Glos* (1913) 258 Ill. 555, 101 N. E. 943, where the question was as to the lack of good faith in one acquiring a tax deed, because he gave no notice as to redemption to the owner, and the examiner found that the property was assessed to a certain person, and it was claimed that it was not assessed to anyone.

tional question not in the record, and not raised below, cannot be raised on appeal.²³

An objection to a finding of title by the examiner does not raise the question that he admitted an abstract of title without the necessary preliminary proof.²⁴

h. Practice in general.

Generally the ordinary rules of pleading apply unless it is otherwise provided.²⁵

It is not necessary to plead the statute under which the complaint is brought.²⁶

The state is not to be made a party because it has a lien for taxes on the land, where the statute provides that the state shall be joined as a party when,

in the opinion of the examiner, it has any "interest in or claim upon the land,"²⁷ but it is otherwise when the state is to be joined as a party whenever, in the opinion of the examiner, it has an "interest in or lien upon" the land.²⁸

A provision for a consent with an acknowledgment by the husband or wife of an applicant does not make it necessary that the consent of other parties should be acknowledged.²⁹

The court in a registration case should make findings of fact and conclusions of law;³⁰ and the court will reverse a judgment entered upon the report of a referee when the findings of fact made by the referee are not sufficient to sustain the conclusions of law and the direction for judgment.³¹

In New York, judgment may be en-

²³ *McMahon v. Rowley* (1908) 238 Ill. 31, 87 N. E. 66, where the plaintiffs in error, who held tax titles, desired to test the constitutionality of § 10 of the act, which denied the holder of a tax title the right to register title unless he had had actual possession for ten years and showed payment of taxes for seven years.

²⁴ *Glos v. Hoban* (1904) 212 Ill. 222, 72 N. E. 1.

²⁵ Where it appears on the face of the petition that no title could have been gained in the manner described in the petition or application, and the point was not raised by pleading, if it appears that the petitioner is entitled to any relief, evidence may be admitted to that end and the matter of amendment left in abeyance, as the proceeding is in the nature of a suit in equity, and the rules of equitable procedure generally apply. *Re Title of Pa Pelekane* (1912) 21 Haw. 175.

Under the New York act there cannot be a judgment on the pleadings for the applicant when the defendant denies each of the allegations of the complaint, including the plaintiff's ownership, and sets forth the facts upon which his denial of the statements of the certificate, abstract, searches, and survey is based, and further states what his interest is, and sets forth a number of defenses. (If the defenses are inconsistent, the court has the power, on motion, to compel an election.) *Sunderman v. People* (1912) 3 N. Y. Civ. Proc. Rep. N. S. 6, 138 N. Y. Supp. 500.

See, as to form of answers by the People, *Smith v. Martin* (1910) 69 Misc. 108, 124 N. Y. Supp. 1064, supra, subd. III. g. 1.

Under the New York statute the certificate of an examiner as to title, with an abstract of the title, must be annexed to the complaint. *Barkenthien v. People* (1914) 212 N. Y. 36, 105 N. E. 808.

²⁶ *Duffy v. Shirden* (1910) 139 App. Div. 755, 124 N. Y. Supp. 529.

²⁷ *National Bond & Secur. Co. v. Daskam* (1903) 91 Minn. 81, 97 N. W. 458.

²⁸ *National Bond & Secur. Co. v. Hop-L.R.A.1916D.*

kins (1905) 96 Minn. 119, 104 N. W. 678; *National Bond & Secur. Co. v. King* (1905) 96 Minn. 119, note, 104 N. W. 680; the statute having been so amended in 1905.

²⁹ *McDonnell v. Glos* (1915) 266 Ill. 504, 107 N. E. 897; *Teninga v. Glos* (1914) 266 Ill. 94, 107 N. E. 125; *Teninga v. Glos* (1914) 266 Ill. 121, 107 N. E. 126; *Mooney v. Valentynovicz* (1914) 262 Ill. 355, 104 N. E. 645.

³⁰ *Kuby v. Ryder* (1911) 114 Minn. 217, 130 N. W. 1100.

In *Owsley v. Johnson* (1905) 95 Minn. 168, 103 N. W. 903, the court, in holding that findings of fact should have been made, but that their omission in the case was not reversible error, said: "We are of opinion that, in proceedings of this kind, though the Torrens act contains no express directions on the subject, where issues are made by the appearance of parties who, by their pleadings, assert rights in the property sought to be registered adverse to the petitioners, findings of fact should be made as in ordinary civil actions. In fact, all rules and principles of law applicable to equitable actions and proceedings, and rules of practice with respect to the trial, introduction of evidence, findings, and order of judgment, should, so far as not clearly inappropriate or otherwise provided for by the act, be followed and applied."

³¹ *Jamieson & B. Co. v. Reynolds* (1915) 169 App. Div. 107, 154 N. Y. Supp. 836, where there was a finding of fact "that the plaintiff and its predecessors in ownership have had record title to the premises sought to be registered herein, since in or about the year 1877, as appears by the documentary evidence herein," to which the court said: "This is not at all a finding of fact, but a conclusion of law expressly inferred from 'the documentary evidence herein,' but as to the facts established by this 'documentary evidence,' there is no finding whatever." The court also said: "Doubtless this court may, under the recent amendments to the Code of Civil Pro-

tered on the decision of a referee appointed to hear and determine.³²

It is error to refuse the successful applicant a writ of possession against per-

sons who have been duly served, but have made default in hearing or answering.³³

Reference will be found in the notes to cases touching on matters of discretion³⁴

cedure and the precedents applying to them, go outside the findings of the referee and search the record for basis for additional findings to support the judgment. We shall not do so in this case, for we feel that it is most desirable that actions conducted under this statute should be regular and workmanlike in their procedure. This statute appears to come into larger use, year by year. It will furnish a large volume of judicial work. This work should be done adequately in the forum of its origin, and the appellate courts should be freed from the necessity of retrying issues on appeal."

³² The provision of the act that "no judgment of registration shall be made unless the court is satisfied that the title to be registered accordingly is free from reasonable doubt" does not mean necessarily that the court itself must determine the issues raised by the pleadings, for § 371 of the statute provides that the issues shall be tried by the court or referee. Furthermore, actions of this kind are, by express provision of the statute, subjected and assimilated to actions regulated by the Code of Civil Procedure. Jamieson & B. Co. v. Reynolds (N. Y.) supra, where the case was reversed on other grounds.

³³ *Pasay Estate Co. v. Del Rosario* (1908) 11 Philippine, 391, where the court below had refused the writ on the ground that such persons were not defeated persons. The appellate court, in sustaining a demurrer to the answer of the judge against whom a mandamus was sought for the writ, quoted § 17 of the land registration act, as amended by § 5 of act 1108, to wit: "Section 17. The court of land registration, in all matters over which it has jurisdiction, may enforce its orders, judgments, or decrees in the same manner as orders, judgments and decrees are enforced in the courts of first instance, including a writ of possession directing the governor or sheriff of any province or of the city of Manila to place the applicant in possession of the property covered by a decree of the court in his favor. . . ."

³⁴ A judge is not bound to dismiss a petition where, over two years after the respondent has answered on the merits, she moves to dismiss because the petitioner did not file any plans or the original muniments under his control, as required by § 25 of the act. *Welch v. Briggs* (1910) 204 Mass. 540, 90 N. E. 1146.

In *Brown v. Hagadorn* (1912) 119 Minn. 491, 138 N. W. 941, it was held that the provision requiring that those who acquire interest pending proceedings to register must answer at once does not entitle the party to answer as a matter of right after six months. And while the general pro-

visions in the statute as to answers give the court power to allow further time to answer than that named in the summons, and thus it is within the jurisdiction for the court on the facts to allow or disallow an application to answer after six months by persons who acquired interest pending the proceedings, there is no abuse of discretion in declining to permit such parties to answer six months afterwards, where their claim was inherently weak.

The court of land registration may, before the entry of a decree, open a case for the admission of further evidence and further presentation of an amended petition. *Capellania del Convento de Tambobong v. Antonio* (1907) 8 Philippine, 683.

In *Crabbe v. Hardy* (1912) 138 N. Y. Supp. 870, the plaintiff offered proof after having made an application to reopen the case, which was allowed, and it was held that supplemental proof proved a good title, together with that which had been already offered, and his title was registered.

There is nothing in the North Carolina act of 1913, known as the Torrens act, to prevent the clerk from enlarging the time in which answers shall be received, nor from receiving answers after the time has expired, nor to prevent the court from permitting this course, the statute requiring the court to review the whole proceeding, and declaring that it has power to require any reformation in the process, pleadings, decrees, or entries. The statute provided: "Every decree rendered as hereinbefore provided shall bind the land and bar all persons claiming title thereto or interest therein, quiet the title thereto, and shall be forever binding and conclusive upon and against all persons, including the state of North Carolina, whether mentioned by name in the order of publication or included under the general description, 'To whom it may concern.' It shall not be an exception to such conclusiveness that the person is an infant, lunatic, or is under any disability, but such person may have recourse upon the indemnity fund provided for, for any loss he may suffer by reason of being so conclusive. Such decree shall, in addition to being signed by the clerk of the superior court, be approved by the judge of the superior court, who shall review the whole proceeding, and have power to require any reformation of the process, pleadings, decrees, or entries." It was further held that no appeal would lie from the court's action in allowing the answers to be put in, as this was a matter of discretion; and further, that an appeal would not lie, as it was premature, as such order was not a final judgment. *Empire Mfg. Co. v. Spruill* (1915) 169 N. C. 618, 86 S. E. 522.

as to surveys,³⁵ and certain miscellaneous matters.³⁶

Illinois practice as to outstanding tax deeds, etc.

In Illinois, an applicant for registration under the Torrens act, although he does not in terms ask to have the tax deed held by others set aside, brings himself within the equity rule that he who seeks equity must do equity, within the requirement of a statute that he who seeks to set aside a tax deed must pay

the holder all taxes and legal costs and penalties paid by the holder, etc., which is construed as the taxes and legal interest, as the effect of the proceeding is to remove all liens and clouds from the title.³⁷

So it is error to register the title without prior reimbursement to the owners of void tax deeds, and therefore a decree permitting registration on condition that such reimbursement be made in a certain time is error.³⁸

³⁵ In *Lichauco v. Lim* (1908) 6 Philippine, 271, it was held that while the act authorizes the court to require that a new survey be made for the purpose of determining boundaries of land sought to be brought under the provisions of the land registration act, nevertheless the issuance of such order rests in the sound discretion of the court, and it is not mandatory.

But, under the acts of 1908, §§ 4 and 5 of act No. 1875 of the Philippine legislature, the plan to accompany the application must be by a duly authorized surveyor; that is, duly authorized to make surveys for the court of land registration. *Aguillon v. Director of Lands* (1910) 17 Philippine, 506.

Where, after the decree, a rehearing was granted on petition of another applicant, and part of the land was found to belong to him, the original applicant acquiescing, it was held that a new survey by an authorized surveyor must be had. *Flores v. Director of Lands* (1910) 17 Philippine, 512.

The New York act requires that a survey be filed. *Barkenthien v. People* (1914) 212 N. Y. 36, 105 N. E. 808.

³⁶ In *Cregar v. Spitzer* (1910) 244 Ill. 208, 91 N. E. 418, it seems to be held that where the application is lost, and not in the transcript, the court will not presume that it did not contain the residence of the applicant, particularly when the examiner reported that the application followed the form prescribed by the statute.

In order to foreclose a mortgage by advertisement it is not necessary that assignments of the mortgage made before the land was registered be entered upon the certificate of title, as such assignments are not within the statute providing that "where the mortgage is upon registered land, it shall be sufficient to authorize the foreclosure thereof by advertisement, if such mortgage and all assignments have been registered, and a memorial thereof duly entered upon the certificate of title." *Sander v. Stenger* (1912) 117 Minn. 424, 136 N. W. 4.

As to the death of an examiner and reference to a substitute examiner, and also as to re-referring the case to take evidence where the examiner has erroneously sustained an objection to a question put to a witness, see *McMahon v. Rowley* (1908) 238 Ill. 31, 87 N. E. 66. L.R.A.1916D.

³⁷ *Gage v. Consumers' Electric Light Co.* (1901) 194 Ill. 30, 64 N. E. 653.

Where it appeared that the holder of a tax deed set aside had made a quitclaim deed to a party of an undivided one-hundredth interest in the premises, and that, after the execution of the deed, such party had made payment of taxes at different dates, amounting in the aggregate to \$2.46, her title could not be set aside as a cloud upon the applicant's title without repayment of the taxes which she had paid. *Stallings v. Glos* (1915) 271 Ill. 201, 110 N. E. 915.

In *Jackson v. Glos* (1909) 248 Ill. 280, 90 N. E. 717, it was held that a tax deed for a vigintillionth of a lot could not be set aside without reimbursing the owner. The court stated that the applicant might have stood on her legal right and disregarded such tax deed as not a cloud upon the title, but, having appealed to the court to remove it as a cloud upon a title, she was subject to the ordinary statute that reimbursement must be made.

The holder of a tax deed set aside should be reimbursed not only for the amounts paid by her up to the time that she received the tax deed, but for taxes subsequently paid. *Strebel v. Glos* (1915) 271 Ill. 65, 110 N. E. 778.

And where it is conceded that the amount allowed by the examiner to the owner of a tax deed in setting aside his deed was insufficient, the judgment will be reversed, and the case will be sent back to the circuit court to make the proper corrections. *Finn v. Glos* (1915) 268 Ill. 350, 109 N. E. 351.

But a general objection of the insufficiency of the amount allowed for taxes and expenses of a holder of tax titles set aside as clouds on the title will be disregarded, as the objector ought to point out the specific errors that he claims, so that the examiner might have an opportunity to correct any mistakes. *Walther v. Glos* (1915) 270 Ill. 390, 110 N. E. 509.

Where, under the proof of the plaintiff, the holder of a tax deed was barred, it was held that the error, if any, was harmless in setting aside this deed upon payment of the expenditures of the holder in securing it, although there was no proof that the deed was invalid. *Glos v. Mickow* (1904) 211 Ill. 117, 71 N. E. 830.

³⁸ *Cregar v. Spitzer* (1910) 244 Ill. 208, 91

But it is proper to decree registration of title without requiring the applicant to reimburse the holder of the certificate of tax sale, where the time for the execution of the deed upon the certificate has expired without any deed being taken.³⁹ And there is no error in a decree of registration without provision for the reimbursement of the holder of a tax deed who entirely fails to prove the amount he expended for it.⁴⁰

An applicant for official registration cannot have a tax deed removed as a cloud unless he shows he has a good title entitled to registration; so that one claiming to own a tax title is entitled to have the proceedings dismissed if he can show that the applicant has not a good title, or a title of a nature proper to be registered, and need not, if he can do this, go into the question as to whether his tax title is merely a cloud or not.⁴¹

4. Costs, etc.

In Illinois the court is invested with a discretion in allowing the examiner's and

other fees and determining which party shall pay them, and it seems that the matter is treated as an ordinary chancery suit in this respect,⁴² but it is improper to render a judgment in favor of the registrar for the fees which the court directs to be paid to him.⁴³

Costs incurred in defeating a claim upon an alleged judgment lien are rightfully charged to the claimant;⁴⁴ but no part of the cost of a proceeding for registration should be charged upon the defendant, the holder of a tax title, who puts in no evidence, but simply insists that the applicant should show a good title.⁴⁵

Costs against the people.

In a recent case in New York, the court, in reversing a judgment in favor of the applicant on other grounds, the people being the appellants, expressed the opinion that the case did not call for the imposition of costs or extra allowance against the people, made by the court below.⁴⁶

N. E. 418; *Hammond v. Glos* (1911) 250 Ill. 32, 95 N. E. 39; *Wilson v. Glos* (1914) 266 Ill. 392, 107 N. E. 630, see also *Mihalik v. Glos* (1910) 247 Ill. 597, 93 N. E. 372, where tax deeds were set aside, but the report does not say they were void.

³⁹ *Snow v. Glos* (1913) 258 Ill. 275, 101 N. E. 606.

⁴⁰ *Tobias v. Kaspyk* (1910) 247 Ill. 80, 93 N. E. 52, where the error complained of was the refusal of the examiner to permit the holder of the tax deed to reopen the case again and bring in evidence, he having made no proof of the amount he expended for it, and having stated he did not know how he was going to make proof, this statement being made after the case had been closed the second time without the proof, and when he again asked permission to bring in evidence.

⁴¹ *Glos v. Kingman* (1903) 207 Ill. 26, 69 N. E. 632; *Glos v. Cessna* (1903) 207 Ill. 69, 69 N. E. 634.

⁴² *Wells v. Messenger* (1911) 249 Ill. 72, 94 N. E. 87.

Where the decree required the applicant to pay all the costs of the proceedings, including such costs as may be taxed in favor of the said defendants, A, B, and C, it was held that he must also pay the costs of defendant D. *Stallings v. Glos* (1915) 271 Ill. 201, 110 N. E. 915, where the court said: "Since the decree requires the applicant to pay all the costs, the omission of the name of the appellant from the defendants specifically named does not excuse the applicant from the payment of her costs." (It will be noted that the court does not seem to give a particularly good reason for its decision.)

⁴³ *Peters v. Dicus* (1912) 254 Ill. 379, 98 N. E. 560; *Tomczak v. Bergman* (1915) L.R.A.1916D.

269 Ill. 330, 109 N. E. 1003. Nor to decree that an execution be awarded in favor of the registrar. *Peters v. Dicus* (Ill.) supra.

⁴⁴ *Tomczak v. Bergman* (Ill.) supra.

⁴⁵ *Waugh v. Glos* (1910) 246 Ill. 604, 138 Am. St. Rep. 259, 92 N. E. 974.

⁴⁶ *Jamieson & B. Co. v. Reynolds* (1915) 169 App. Div. 107, 154 N. Y. Supp. 836, where the court said: "In view of the award of costs and a general allowance against the defendant, the people of the state of New York, we take occasion to say that, in our opinion, this case did not call for the imposition of costs and extra allowances upon the appellants. The statute under which the action was brought expressly requires that the people should be made parties defendant. This requirement is in the public interest, and is provided that the attorney general may have a standing in the action to compel the plaintiff to establish a title free from reasonable doubt. . . . We are not persuaded by the contention of the learned counsel for the respondent that costs and allowances were awarded against the appellant properly under § 3241 of the Code of Civil Procedure. That section on its face relates to 'an action or a special proceeding brought by a public officer, pursuant to any provision of law.' The plaintiff in this action is a private corporation, and not a 'public officer.' But, argues the learned counsel, the examiner of titles under the statute is a public officer, and he is the real plaintiff. This contention is naive, but not convincing." Section 3241 of the Code referred to by the court provides that "where costs are awarded against the people of the state, in an action or a special proceeding brought, by a public officer, pursuant to any provision

j. Appeals.

A writ of error is the proper proceeding to bring from the Philippines to the Supreme Court of the United States as a case on the registration of a land title.⁴⁷

The Supreme Court of the United States, as heretofore stated, has held that one who, having actual notice of registration proceedings (though not a party to them), was defeated in the state court on a writ of prohibition brought by him, could not raise the question as to the unconstitutionality of the act as lacking in provisions for notice, by writ of error, so as to give the court jurisdiction to pass upon the question;⁴⁸ but

four of the judges dissented on the ground that the objection of the plaintiff in error was not as to the jurisdiction of the court over him personally, but as to its jurisdiction of the subject-matter.⁴⁹

One may not appeal who has consented to the application,⁵⁰ or has not opposed it;¹ nor may one appeal who has no interest in the land.²

An appeal cannot be taken from a discretionary order extending the time to permit answers to be filed,³ nor from a decision, as it must be from the decree.⁴

An appeal cannot be taken after the time limited by the act.⁵

of law, and the proceedings have not been stayed, by appeal or otherwise, the comptroller must draw his warrant," etc.

⁴⁷ *Jover y Costas v. Philippine Islands* (1910) 221 U. S. 623, 55 L. ed. 884, 31 Sup. Ct. Rep. 664; *Tiglaio v. Philippine Islands* (1909) 215 U. S. 410, 54 L. ed. 257, 30 Sup. Ct. Rep. 129; *Cariño v. Philippine Islands* (1908) 212 U. S. 449, 53 L. ed. 594, 29 Sup. Ct. Rep. 334, where the court said: "The proceeding for registration is likened to bills in equity to quiet title, but it is different in principle. It is a proceeding in rem under a statute of the type of the Torrens act, such as was discussed in *Tyler v. Judges of Ct. of Registration* (1900) 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812. It is nearer to law than to equity, and is an assertion of legal title; but we think it unnecessary to put it into either pigeon-hole. A writ of error is the general method of bringing cases to this court, an appeal the exception, confined to equity in the main. There is no reason for not applying the general rule to this case."

⁴⁸ *Tyler v. Judges of Ct. of Registration* (1900) 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.

⁴⁹ (*U. S.*) *Ibid.*

⁵⁰ *Mooney v. Valentynovicz* (1914) 262 Ill. 355, 104 N. E. 645, where the defendant filed his consent to the application for registration, and no summons was issued against him, but a decree was entered, finding that he had filed his consent in writing to the entry of the decree.

¹ The Director of Lands cannot appeal where he did not answer nor oppose the registration. *Cabanas v. Director of Lands* (1908) 10 Philippine, 393.

² *Waban Rose Conservatories v. Hall* (1914) 218 Mass. 533, 106 N. E. 137; *Roxas v. Cuevas* (1907) 8 Philippine, 469; *Couto Soriano v. Cortes* (1907) 8 Philippine, 459.

In *Waban Rose Conservatories v. Hall* (Mass.) supra, it appears that the person asking for leave to appeal was a legatee of a prior holder of the property, who had died, and who had conveyed away the premises on an oral agreement to reconvey on payment of a debt; and it was held that the person desiring to appeal had no more than a right to have the estate wound up L.R.A.1916D.

and his legacy paid, and had no title, legal or equitable, to any portion of the estate, real or personal, of the testator.

³ *Empire Mfg. Co. v. Spruill* (1915) 169 N. C. 618, 86 S. E. 522.

⁴ *Re Castle* (1909) 19 Haw. 436, holding that an appeal from a decision of a judge of the land court denying a petition of a party for a registered title as to a certain portion of land set forth in his petition, the title to which was found in another, would not lie, as the appeal should be not from the decision, but from the decree, the statute providing that "appeals solely upon points of law shall be allowed from any final order, decision, judgment or decree of the court to the supreme court."

⁵ *Lewis v. Chamberlain* (1912) 61 Or. 150, 121 Pac. 430, where the plaintiff made an application to register title, and, no one appearing, obtained a decree which was subsequently set aside on the motion of a defendant, and a decree was made, registering the title in the name of such defendant on condition that he pay into court a certain sum for improvements made by the plaintiff upon the land, and later he made that payment and the decree was made absolute; more than two years after such payment the plaintiff took an appeal to the supreme court from the decree, and it was held that the appeal must be dismissed although the plaintiff's attorney had filed an affidavit in the supreme court to the effect that he had no notice of the entry of the decree, and that he had been misled by a letter from the trial judge, asking for further authorities, into thinking that the judge had not reached the final conclusion, and would not do so until the authorities had been presented, the statute providing that "the order or decree so made and entered shall, except as herein otherwise provided, be forever binding and conclusive upon all persons. . . . An appeal may be allowed to the supreme court, if prayed at the time of entering the order or decree, and upon like terms as in other suits in equity. A writ of error may be sued out of the supreme court within two years after the entry of the order or decree, and not afterward." The court observed that the act was intended

But the time occupied by the court below in taking under consideration a motion for a new trial is not part of the time within which an appeal must be taken after receipt of a copy of the decree of the land registration court.⁶

Where there is a question as to whether the premises belonged to the public, there is no impropriety in the attorney general entering an appeal through the authorized attorneys of the town; it is not necessary that he act personally.⁷

It has been held in New York that in counties where there is a registrar a notice of appeal from a judgment of registration should be entered on the certificates in the registrar's office.⁸

In Massachusetts, where registration proceedings are brought in the land court, certain appeals are allowed to the superior court, and in some cases to the supreme judicial court. A number of cases have arisen as to the construction of this branch of the act and of amendments thereto. As the matter is one peculiar to the jurisdiction (though there is some similarity in the Hawaiian act), the cases are not discussed here. A list of them may be found in the note.⁹

to be complete in itself, and while, if the decree was entered without notice to counsel, it might perhaps be set aside in the court where it was issued, on motion as irregular, the application should first be made there.

⁶ *Paetz v. Berenguer* (1906) 6 Philippine, 521.

⁷ *McQuesten v. Att. Gen.* (1905) 187 Mass. 185, 72 N. E. 965.

⁸ *Lachmann v. Brookfield* (1911) 135 N. Y. Supp. 261, followed in *People ex rel. Realty Associates v. O'Loughlin* (1912) 136 N. Y. Supp. 339.

⁹ *Mass.*—*Lancy v. Snow* (1902) 180 Mass. 411, 62 N. E. 735; *Jeffery v. Winter* (1906) 190 Mass. 90, 76 N. E. 282; *Luce v. Parsons* (1906) 192 Mass. 8, 77 N. E. 1032; *First Nat. Bank v. Woburn* (1906) 192 Mass. 220, 78 N. E. 307; *Foss v. Atkins* (1907) 193 Mass. 486, 79 N. E. 763; *Woodvine v. Dean* (1907) 194 Mass. 40, 79 N. E. 882; *McQuesten v. Com.* (1908) 198 Mass. 172, 83 N. E. 1037; *Dunbar v. Kronmuller* (1908) 198 Mass. 521, 85 N. E. 106; *Cohasset v. Moors* (1910) 204 Mass. 173, 90 N. E. 978; *Weeks v. Brooks* (1910) 205 Mass. 458, 92 N. E. 45; *Old Colony Street R. Co. v. Thomas* (1910) 205 Mass. 529, 91 N. E. 1006, 18 Ann. Cas. 247; *Bishop v. Burke* (1910) 207 Mass. 133, 93 N. E. 254; *Foss v. Atkins* (1911) 208 Mass. 510, 94 N. E. 752; *Bigelow Carpet Co. v. Wiggins* (1911) 209 Mass. 542, 95 N. E. 938; *Hart v. Deering* (1916) 222 Mass. 407, 111 N. E. 37.

¹⁰ *RILEY v. PEARSON*, ante, 7; *Henry v. White* (1913) 123 Minn. 183, 143 N. W. 324. L.R.A.1916D.

k. Effect of decree in general.

For effect of decree attacked for fraud, see *infra*, subd. III. 1.

It is the general theory that a title is created by the decree and certificate of registration.¹⁰ The few cases that have arisen as to opening a decree for reasons other than fraud leave the matter in a good deal of confusion. A decree is not effective as to unrelinquished rights of the United States.¹¹

In the Philippines it has been held that the court of land registration has no power whatever to open a decree and alter a certificate of registration on the ground that, on different evidence from that originally presented, a different result might have been reached.¹²

In Hawaii it has been held that a decree registering the title in an applicant and adjudging that the defendants had no interest therein is conclusive upon such defendants if they do not appeal, although they desired to make a defense which the registration court erroneously decided it had no jurisdiction to pass upon.¹³

But it has also been held there that a decree might be modified on motion of

¹¹ *Shevlin-Mathieu Lumber Co. v. Fogarty* (1915) 130 Minn. 456, 153 N. W. 871.

This is probably the ground of the decision in *Cusar v. Insular Government* (1909) 13 Philippine, 319, where the court recognized that, in the absence of fraud, the only way to correct a decree was by appeal, and that if the appeal was not entered within the proper time, the decree must stand; but nevertheless held that, inasmuch as, owing to a mistake in the proceedings, there had been a decree for the registration of much more land than was owned by the petitioner, to the prejudice of the government, the error ought to be corrected "in order to avoid prejudice to the interest of the government, and in view of the provisions of § 66 of act No. 926." Section 66, however, does not seem to be applicable to the situation.

¹² In *Cuyugan v. Sy Quia* (1913) 24 Philippine, 567, where, several years after the grant of certificate of registration, the city of Manila appeared and claimed that there had been a mistake in boundaries material to it, as it was about to condemn some of the land, and the court thereupon had a hearing and opened the decree and made a new adjudication as to boundaries, it was held that this was without any jurisdiction on the part of the court.

¹³ *Paahao v. Swinton* (1910) 20 Haw. 355, where, after the decree, said defendants brought an action in equity against the registered owners of the land to reform a deed which they alleged had, by mistake and by fraud, conveyed the entire tract of land when it was only intended to con-

the applicant eleven days after it was entered, on the ground that if the rights had not been lost by negligence or by unreasonable delay the decree might be amended on motion as to mere clerical errors, or by the insertion or striking out of any matter which would have been inserted or omitted as a matter of course if it had been asked for at the hearing as necessary or proper to carry into effect the decision of the court.¹⁴

It has been held in Illinois that the court at a subsequent term has no power to vacate and set aside a decree registering the title, although it was argued that, as it appeared from the cross-petition filed on the motion that the applicant was not the owner of the prem-

ises sought to be registered, therefore the court did not have jurisdiction to make the first decree, and therefore the decree was void, and might be attacked by cross-petition or otherwise at a subsequent term.¹⁵

It has been held in Colorado that a decree would be conclusive against a railroad company as an unknown owner where the applicant had no reason to suppose it claimed any interest in the land;¹⁶ but, on appeal, the matter was sent back for the lower court to determine simply whether the company still had the title.¹⁷

In Oregon it has been said that the court has power to set the decree aside on reasonable grounds.¹⁸

vey one half thereof, the fraud being that of one of the grantees; and in such action they alleged the registration proceedings, and that they opposed the registration, and insisted that the deed was fraudulent and should be avoided and annulled, or, if established at all, it should first be so reformed as to convey only one half of the property, but that the court of land registration ruled that it did not possess equity powers such as to authorize it to reform the deed in question. The court said: "The court having jurisdiction of the subject-matter, and power to hear evidence and to determine the title to the land in question, the ruling that it did not possess equity powers to reform the deed, and for that reason would not hear the evidence as to the alleged fraud, is wholly immaterial so far as the question before us is concerned. The parties had the right to present their evidence and to have it considered by the court, but, failing to appeal from the decree, they are now bound by it." "While it is true the court does not possess the general powers of either courts of law or of equity, and its jurisdiction is limited to the determination of the status of the title to land, nevertheless, for that single purpose, its powers are peculiarly adapted and are ample and complete. It does not possess power to reform a deed, but it may determine the validity of a deed, and accordingly, it may hear and consider any competent evidence to the end that a decree may be entered declaring in whom the title or any interest, legal or equitable, in land, is vested, whether in the applicant or in any other person, notwithstanding the express terms of any deed or instrument."

¹⁴ *Re Title to Palmyra Island* (1913) 21 Haw. 431.

¹⁵ *Mooney v. Valentynovicz* (1912) 255 Ill. 118, 99 N. E. 344, where the applicant applied to have her title registered, and named the defendant as her tenant, and he filed his consent in writing that the title should be so registered in the applicant in fee, and in him as her tenant, and it was done and the decree entered thereon, and at a later term he filed a cross petition and L.R.A.1916D.

asked to have the decree set aside. Whether the court meant to suggest or not that an original bill in the nature of a bill of review might have been filed is not clear where it says: "In considering the power of a court to set aside a final decree entered at a subsequent term, this court, in *Ernst Tosetti Brewing Co. v. Koehler* (1902) 200 Ill. 373, 65 N. E. 636, said: 'A decree regularly entered cannot be altered or amended after the term has elapsed, except for the correction of matters of form or clerical errors. . . . The proper method of impeaching and setting aside a decree after the term is to file an original bill in the nature of a bill of review, when such decree may be set aside, reversed, or modified, according to the equities of the parties. *Adamski v. Wiczorek* (1897) 170 Ill. 373, 48 N. E. 951.'"

¹⁶ *Mills v. Denver & R. G. R. Co.* (1912) 198 Fed. 137, so holding as to an abandoned part of the company's old right of way which it had given up (and taken a new right of way), and the old right of way for many years, and during all the time of the ownership of the registering owner, had been a common part of the cultivated fields of the land which he purchased, and there was nothing of record in the county to show that the railroad company claimed any interest in the land, and the registered owner was granted (a temporary) injunction against the railroad company from trespassing on the old right of way.

¹⁷ *Denver & R. G. R. Co. v. Mills* (1912) 117 C. C. A. 663, 199 Fed. 988, suspending the injunction pendente lite, and ordering that the court below determine whether the company still had the right of way; and the lower court found against the company, and this decision was affirmed in (1915) 138 C. C. A. 77, 222 Fed. 481.

¹⁸ *Lewis v. Chamberlain* (1914) 69 Or. 476, 139 Pac. 571 (later proceedings in the matter referred to supra, subd. III. j, under the same name in (1912) 61 Or. 150, 121 Pac. 430), where the court said: "The decree of the court, entered in the absence of counsel, was not void, but irregular; and it was in the discretion of the court, upon

In Minnesota it has been held that a decree is void as against those who are not included as parties, against the advice of the examiner, and their privies.¹⁹

Assignee in bankruptcy.

It has been held in the Federal court in Massachusetts that an assignee in bankruptcy who has been notified of the registration proceedings and makes no objection to the registration of title is not estopped thereafter, on discovering that he has rights in the land, to bring a bill as soon as possible after he makes discovery of these rights, seeking a conveyance of the land as against a party who was not a holder for value and in good faith.²⁰

County and county officer.

A county which was made a party to a proceeding to register land, wherein it was found that tax certificates held by a party were void for reasons entitling her to refundment, cannot defend against an application by such party for refundment on the ground that the finding that the certificates were not void was due to the fraud of the holder, as the county is bound by the decree, the fraud, if any there was, being simply in failing to adduce testimony to prove the validity of the certificates.²¹ But where the holder of a tax title conveys the property to one who registers the title under the act,

seasonable motion and good cause shown, to set it aside." On the merits the case was for the defendant, except that, as he had withdrawn money deposited by him in the court below, according to an order of that court, to repay the plaintiff for taxes and improvements, and as he announced that he was at all times ready to abide the decision of the lower court, it was ordered that a decree be entered giving the plaintiff a lien upon the premises for the amount of such deposit, and unless the defendant paid the money within ninety days there might be a foreclosure to satisfy such lien and the costs of the sale.

¹⁹ *Dewey v. Kimball* (1903) 89 Minn. 454, 95 N. W. 317, 895, 96 N. W. 704, where the examiner in his report stated as to a certain corporation that it had been excluded as to claims or liens by judgment, but that nevertheless an assignee, if any, of it, prior to the commencement of the action resulting in such judgment, would not be excluded, and that such corporation should be made a party to the proceedings.

²⁰ *Morris v. Small* (1908) 160 Fed. 142.

²¹ *State ex rel. Coburn v. Ries* (1913) 123 Minn. 397, 143 N. W. 981.

²² *State ex rel. Southeray v. Krahmer* (1904) 92 Minn. 397, 100 N. W. 105, where the court said that the county auditor "acts in a purely ministerial capacity, and as it appears from his records that the taxes

a purchaser from such grantee is not entitled to demand of the county auditor, who was not a party to the registration proceedings, that he indorsed the deed "Taxes paid," while it appears on the records of the auditor's office that taxes prior to those for which the land was sold and the tax title made are unpaid.²²

Minnesota sixty-day clause.

A statute permitting one having an interest or lien, and not actually notified, to come in and answer within sixty days after decree, on affidavit (as to lack of notice) made by the person answering, or by someone in his behalf, having knowledge of the facts, is satisfied by the affidavit of one member of a partnership, stating that his firm had not been notified, without negating possible knowledge of the proceeding on the part of his partner.²³ Such statute is also satisfied by the affidavit of the president of a corporation as to the absence of notice or information received by the corporation, without negating notice on the part of the president or other members of the corporation.²⁴

An affidavit is not insufficient in order to let in a lienor to defend under the sixty-day clause because it states that the lien claim was filed with the register of deeds, whereas the act states that liens are to be filed with the registrar of

for the years 1891 to 1896, inclusive, have not been paid, we are of the opinion he was justified in refusing to certify as requested. We are unable to concur in the view that the registration of titles under the so-called Torrens system enlarges the powers of the county auditor. The auditor was not a party to such proceedings, and, independent of the question whether the same added to the rights of appellant, such registration did not operate to change the records of his office."

²³ *Reed v. Siddall* (1903) 89 Minn. 417, 95 N. W. 303, the statute providing that "any person having an interest in or lien upon the land who has not been actually served with process or notified of the filing of the application or the pendency thereof may at any time within sixty days after the entry of such decree, and not afterwards, appear and file his sworn answer to such application, . . . provided, however, that such person had no notice or information of the filing of such application or the pendency of the proceeding during the pendency thereof, or until within three months of the time of the filing of such answer, which facts shall be made to appear before answering by the affidavit of the person answering or the affidavit of someone in his behalf having knowledge of the facts."

²⁴ (*Minn.*) *Ibid.*

titles, as, under the Torrens system, the register of deeds is the registrar of titles.²⁵

It has been held that where a title had been registered in the applicant, the decree stating that the premises were in possession of another under a contract of purchase, and lienors were allowed, under the sixty-day statute, to come in and claim mechanics' liens, that the person in possession could not appeal from an order of the court denying him leave to contest the liens, as such an order was discretionary, although in the registration proceeding the applicant had stipulated that such possessor should have such leave.²⁶

"Bound by the decree."

Persons desiring to file a mechanics' lien on property which is afterwards registered, but who, by mistake, file on other property, and who are not named in the registration proceedings, are bound by the decree of registration in favor of an applicant, who knew nothing of the alleged lien, and consequently they cannot take advantage of a statute excluding persons "bound by the decree."²⁷

1. Fraud.

While the statutes in general make certain express exceptions in case of fraud, it has been held that such express exceptions are not necessary to sustain an attack based on fraud. Thus it has been held in Minnesota that a decree of registration under the Torrens law could be

attacked on the ground that it was obtained by fraud although the statute contained no express exception in favor of the owner of the land which had been fraudulently registered in the name of such other person, as the legislature could not be deemed to have left the true owner in such case with only his right of action against the person who had defrauded him and the claim upon the assurance fund provided by the statute.²⁸

The court considered that the act made the general statutes relating to the vacating and opening of ordinary judgments inapplicable, and that the person who sought equitable relief must proceed promptly after notice of the fraud, but that the matter was governed by general equitable considerations, and that the person so seeking was, of course, subject to all the restrictions and exceptions applicable in proceedings in equity; that the sixty-day limitation contained in the act had no application; and that if the defrauded party was not guilty of laches he might attack the decree on the ground that it was obtained by fraud, so long as the land stood registered in the name of the party who was guilty of the fraud.²⁹ Thus, where the name of a claimant is known to an applicant, either from the report of the examiner or from other sources, the summons cannot be served on such claimant by publication unless his name appears in the summons, as he is not an "unknown party," the concealment of his claim is a fraud on the court, and

²⁵ (Minn.) Ibid.

²⁶ *Reed v. Siddall* (Minn.) supra, where, after a title had been registered in favor of an applicant, the decree stating that one S., who was a party, was in possession under a contract of purchase, certain lienors, under the sixty-day clause, were permitted to come in and make claims for mechanics', etc., liens upon the property, and it was held that the application of S. to come in and contest the liens was within the discretion of the court, and that the court having denied it, he had no claim to appeal, and that it was immaterial that S. had an understanding with the original applicant that S. should have a house built on the premises by a third person (with whom the lien claimants contracted), and that, on paying for the property, he should receive a deed for the same, and that a stipulation was filed in the proceedings by the applicant, to the effect that if the decree was opened for the lienors, S. should be permitted to come in and defend against them. It is stated in the opinion that S. claimed that he had no notice of any lien claims upon the property until a certain date; but whether this date was before or after the decree does not appear.

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²⁷ *Doyle v. Wagner* (1909) 108 Minn. 443, 122 N. W. 316, holding that such persons could not take advantage of the provision in the statute which declared that "no action or proceeding for the enforcement or foreclosure of any lien or charge upon or against registered land, in existence at the date of any original decree of registration hereafter entered, and which is not recognized and established by such decree, shall be maintained, unless such action or proceeding is commenced within six months from the date of such original decree. No such action or proceedings shall be commenced by any person who is bound by the decree."

²⁸ *Baart v. Martin* (1906) 90 Minn. 197, 116 Am. St. Rep. 394, 108 N. W. 945, where the registered owner, who was subsequent to the first registered owner, was a party to the fraud of such first registered owner. The court states that the only Torrens statutes which make no express exceptions in cases of fraud are those of Minnesota and the Fiji Islands and the Colorado statute, which is based upon the Minnesota statute, and it reviews the statutes generally as to fraud.

²⁹ (Minn.) Ibid.

the decree therein entered is, as to him, of no force and effect.³⁰

But a purchaser in good faith for a valuable consideration, without notice, who relies on the registration proceedings, will be protected where the fraud or want of jurisdiction does not appear from the judgment or the proceedings.³¹ Such a decision seems to leave the innocent holder where he was before the Torrens law, for it seems he must examine the proceedings for registration. Thus, the court in the case last cited says: "Where the decree is procured by fraud, actual or constructive, as where claimants known to the applicant are not named as parties or served in the proceedings, it does not bind the claimants so omitted.

If the want of jurisdiction due to the failure to serve known claimants appears affirmatively from the judgment roll itself, the judgment is void as against such claimants and may be attacked collaterally. *RILEY v. PEARSON*, supra. But where neither in the proceedings themselves nor by the records the existence of an unnamed claimant is shown, though the applicant knows that there is such a claimant, the want of jurisdiction does not appear from the judgment roll itself, and the decree is not subject to collateral attack."

A number of cases have arisen under the exception of fraud in § 38 of the Philippine act.³²

In order to apply under § 38 for a

³⁰ (Minn.) *Ibid.*; *RILEY v. PEARSON*, ante, 7.

A person who is misdescribed in the summons knowingly, as bearing her former husband's name when she has been remarried, who for many years has resided out of the state, no personal service being made upon her, and she in no way appearing in the proceedings, is not estopped by the decree from obtaining relief against a person to whom that decree has adjudged title. *Arnold v. Smith* (1913) 121 Minn. 116, 140 N. W. 748; the court referring to *Riley v. Pearson*, and saying: "Mr. Justice Bunn has recently delivered an opinion upon a kindred question in *RILEY v. PEARSON*, and the reasoning of that case is applicable here, as is also that of *Baart v. Martin* (Minn.) supra. The essence of these decisions is that failure to name a known party defendant in published service is a fraud upon the court, which vitiates the judgment as to such party on collateral attack. This court adheres to the rule that, in cases where there is no personal service, care must be taken to name the defendant correctly, and we have held that the use of a wrong initial will prevent the acquisition of jurisdiction over the real party defendant."

³¹ *Henry v. White* (1913) 123 Minn. 183, 143 N. W. 324, where an applicant, after having made an unrecorded mortgage, applies to register his title, and fraudulently omits to mention the mortgage, or to make the mortgagee a party, and the decree is entered without mention of the mortgage, and thereafter the applicant conveys the property for a valuable consideration to a purchaser, who relies on the registration proceedings, and has no notice or knowledge of the mortgage, such purchaser obtains a good title as against the mortgagee. The court referred to the fact that in *RILEY v. PEARSON*, ante, 7, the fact that known claimants were omitted appeared from the judgment roll itself as well as from the records in the office of the register of deeds, and there was no question of innocent purchaser in that case; and the court continued and said: "In *RILEY v. L.R.A.1916D.*

PEARSON, the fact that known claimants were omitted appeared from the judgment roll itself, as well as from the records in the office of the register of deeds. No question of innocent purchaser was involved in that case. It may be correct, though we do not so decide, that a decree that is void and subject to collateral attack would not be validated by a transfer of the title to a purchaser, though he paid a valuable consideration and had no actual notice of the facts which made the decree void. But where, as in the instant case, the fraud or want of jurisdiction does not appear from the judgment or the proceedings, and where such proceedings are absolutely regular on their face, one who purchases from the registered owner for a valuable consideration, in reliance upon the judgment, and without notice or anything to put him on inquiry, takes the title free from all 'encumbrances and adverse claims, excepting only such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the office of the registrar.' Rev. Laws 1905, § 3393."

³² Section 38 of the act (No. 496) provides that a decree of registration shall be subject, however, "to the right of any person deprived of land or of any estate or interest therein by decree of registration obtained by fraud to file in the court of land registration a petition for review within one year after entry of the decree, provided no innocent purchaser for value has acquired an interest."

Thus, the real owner may, within one year, review the decree provided no innocent purchaser for value has acquired an interest, when the decree of registration has been obtained by fraud. *Salva v. Salvador* (1910) 18 Philippine, 193, where the court found that, on the evidence, the original applicant had acted with fraud.

Where, within a year after decree of registration, the opponent asked to have the judgment reconsidered on the ground that the applicant had maliciously made no mention of the petitioners as occupants of the property, and on the hearing it appeared that the opponents were in posses-

review within one year on the ground of fraud, two things are necessary: First, the applicant must have an estate or interest in the land; and, second, must show fraud. Mere claim of ownership is not sufficient, and fraud alone is not sufficient.³³

It has been held that the occupant of the land is not entitled to open a decree where he has not been named in the proceedings, where, notwithstanding that the statute requires that the application should name the occupant, those applying had omitted the occupant because they honestly believed that he occupied the land simply as their tenant, and that it was unnecessary to name him.³⁴ It will be observed that the court in this case takes a different view of "fraud" from the Minnesota court, and that the result would seem to be perilous for the real owner.

sion of some part of the premises, and there was some question, it seems, as to when their possession began, the court ordered a survey and directed that the original applicant should have a judgment registering title excluding "the portions of land owned by the opponents." *Cruz v. De Leon* (1912) 21 Philippine, 199. It seems that the land "owned" was the land of which the opponents were in possession, and had been, and their predecessors before them, for more than ten years. The court did not discuss the question of fraud, but it seems, must have allowed the reconsideration on that ground.

But upon an application to set aside a decree of registration on the ground that the person registered committed a fraud upon the movers when alleging in his petition that no other person, with the exception of the applicant, claimed any interest in the land sought to be registered, where the movers had not been in possession, their interest in the lands being based entirely upon the fact of their having cultivated them, in holding that there was no proof of fraud, the court pointed out that the applicant was without the means of knowledge which he would have possessed had the moving parties been living upon the property; but the court considered that the claim was without any legal foundation at all. *Lermay Martinez v. Antonio* (1906) 6 Philippine, 236.

In *De Guzman v. Ortiz* (1909) 12 Philippine, 701, the court refused to interfere with a decree denying a review of the case where the person asking such review had not proved nor attempted to prove any ownership or real right, and held that her claim of fraud in that she was not cited to appear fell to the ground where it was shown that her son, who occupied the same house with her, was made a party, and that the applicant had mentioned her as one of the persons who was living on the land, L.R.A.1916D.

The year under § 38 within which the decree obtained by fraud may be reviewed provided no innocent purchaser for value has acquired an interest begins to run from the time of the entry of the final decree on an appeal.³⁵

The Massachusetts certificate of title is no defense to a bill in equity by an assignee in bankruptcy, alleging fraud as against creditors, and seeking a conveyance from one who is not a holder in good faith for value.³⁶

m. Registry as transfer.

"The act of registration is the operative act to convey title."³⁷ After the title has been registered, a deed or mortgage by the owner does not pass the title, which is only passed by the act of registration itself; consequently the giving of a deed or mortgage by the registered owner will be of no effect if subsequent-

that the land was so small that she must have seen the notice posted thereon by the sheriff, together with another reason, possibly conclusive, which is not clearly stated.

³³ *Broce y Apurado v. Apurado* (1914) 26 Philippine, 581.

³⁴ *Grey Alba v. De la Cruz* (1910) 17 Philippine, 49.

³⁵ *Broce y Apurado v. Apurado* (Philippine) supra, the court pointing out that the statute further provided that no certificates of title shall be issued until after the expiration of the period for perfecting a bill of exceptions for filing, showing that the certificate of registration which concludes the whole matter and is the "execution" of the judgment of registration shall not be issued until the time for appeal has elapsed, there being a further provision that "at the end of the proceedings on appeal, the clerk of the appellate court in which final decision was made shall certify to the court of land registration the final decision on the appeal, and the court of land registration shall enter the final decree in the case, in accordance with the certificate of the clerk of the appellate court in which final decision was made."

³⁶ *Morris v. Small* (1908) 160 Fed. 142, where the court pointed out that the Massachusetts statute declared that the proceedings were proceedings in rem, while the action in question was a bill in equity, that is, a suit in personam, and referred to a number of the sections of the Massachusetts statute, including § 54, providing that "in all cases of registration which are procured by fraud, the owner may pursue all his legal and equitable remedies against the parties to such fraud, without prejudice, however, to the rights of any innocent holder for value of a certificate of title."

³⁷ *Tyler v. Judges of Ct. of Registration* (1900) 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812.

ly he gives another mortgage to a third party, which is duly registered before the mortgage or deed first given.³⁸

It has been held in the Philippines that an attachment duly entered upon the register against the grantor of a deed after the deed was given, but before it was registered, was prior to the deed, as it was the act of registration which passed the title.³⁹

n. Assurance fund.

Most of the acts provide for an assurance fund,⁴⁰ and require from an applicant for new registration a payment usually of $\frac{1}{10}$ of 1 per cent for such fund.⁴¹ This fund is, in general, for the indemnity of those who lose their property through fraud or error, and who are without other means of redress.

A purchaser in good faith, for a valuable consideration, from the owner of the registered title, who has registered his transfer and taken out a certificate of title in himself without notice or knowledge of any defect, has a cause of action against the county treasurer for the

value of the land, where his grantor's title rested upon a tax title based on taxes assessed against the land when it belonged to the United States, under the statute providing that "any person who, without negligence on his part, sustains any loss or damage by reason of any omission, mistake or misfeasance of the registrar or his deputy, or of any examiner or of any clerk of court, or of his deputy, in the performance of their respective duties under this law, . . . may institute an action in the district court to recover compensation out of the assurance fund for such loss or damage;" that in such actions "the county treasurer, in his official capacity, shall be the sole defendant;" and that the examiner, among other things, "shall search all public records, and fully investigate all facts pertaining to the title which may be brought to his notice, and shall file in a case a full report thereof, together with his opinion upon the title."⁴²

The case arose upon a demurrer, and the court stated that it was sufficient upon the question of negligence to say

³⁸ *Brace v. Superior Land Co.* (1911) 65 Wash. 681, 118 Pac. 910, where the statute provided: "No voluntary instrument of conveyance, except a will and a lease, for a term not exceeding three years, purporting to convey or affect registered land, shall take effect as a conveyance, or bind the land; but shall operate only as a contract between the parties, and as evidence of the authority to the registrar of titles to make registration. The act of registration shall be the operative act to convey or affect the land." In that case the holder of a mortgage was named in the proceedings for registration, but by mistake this mortgage was omitted from the decree and from the registered certificate. Subsequently the registered owner made a deed to a third party which was in law a mortgage, and delivered his duplicate certificates of registration to such third party, who, however, was unable to get his mortgage or his deed registered because the taxes had not been paid. Thereafter the registered owner procured the temporary delivery of the certificate to a third party from whom he wished a loan, and while in the possession of such third party the omission of the old mortgage was discovered, and a new mortgage was given by the registered owner to the old mortgagee, who thereupon paid the back taxes and registered the new mortgage. And it was held that the new mortgagee, by virtue of this new mortgage, given because her old mortgage had been omitted by mistake from the registration certificate and decree, had a prior lien to the person who had the unregistered deed. The decision of the court seems mainly grounded on the fact that the person who had the unregistered deed was not a purchaser in good L.R.A.1916D.

faith, for the reason that he could not be a purchaser at all under the statute until his deed was registered. It does not seem necessarily to rest the decision upon the fact that the old mortgagee had given and paid additional money, namely, the taxes, but points this out as an equitable consideration. And also points out that the original old mortgage was given for the purchase price of the property (the court declined to pass on the constitutionality of the act, as not involved in the decision).

³⁹ *Buzon v. Licauco* (1909) 13 Philippine, 354, where the statute provided that "no deed, mortgage, lease, or other voluntary instrument, except a will, purporting to convey or affect registered land, shall take effect as a conveyance or bind the land, but shall operate only as a contract between the parties, and as evidence of authority to the clerk or register of deeds to make registration,"—the act of registration being "the operative act to convey and affect the land."

⁴⁰ There is none provided for in the California act of 1897.

⁴¹ See the various statutes.

It has been held in the Philippines that a person receiving a patent from the government to a mineral claim, which requires registration to make it effective, can only have the same registered by the payment of the $\frac{1}{10}$ of 1 per cent for the assurance fund, as in ordinary cases. *Loewenstein v. Page* (1910) 16 Philippine, 84.

⁴² *Shevlin-Mathieu Lumber Co. v. Fogarty* (1915) 130 Minn. 458, 153 N. W. 871, where it is pointed out that the United States is the source of all titles in Minnesota, and that the tax was assessed before title had been divested from the United States.

that the complaint did not disclose affirmatively that the plaintiff was guilty of negligence, as purchasing the land in reliance upon the certificate of title, and without making an independent investigation of the title, is not sufficient to establish negligence, as the plaintiff had the right to rely upon the certificate as evidence that the holder thereof possessed a title entitled to registration. It was objected that the statute did not undertake to insure the title against rights arising or existing under the laws or Constitution of the United States, where it provided that every person receiving a certificate, etc., should hold the same free from all encumbrances and adverse claims except, among other things, "liens, claims or rights arising or existing under the laws or the Constitution of the United States, which this state cannot require to appear of record." The court said: "It is not within the power of the state to bar the rights of the United States, and the registration proceedings do not purport to bar such rights. But the purpose of the registration act is to insure to the one to whom a certificate of title is issued, and to his vendees, an absolutely perfect and indefeasible title free from all claims of every kind and nature except those expressly noted upon the certificate, and to put such title beyond attack. A subsequent purchaser has the right to rely upon such certificate as an assurance that the court which decreed its issuance had jurisdiction of the subject-matter of the title, and that the holder thereof possesses a title which the law authorized to be registered. If this be not true, if the

court in fact had no jurisdiction to render the decree for the reason that the land still belonged to the United States, and if the fact that the United States had not parted with its title was not ascertained and reported by the examiner, the purchaser sustains a loss by reason of the neglect of the examiner which entitles him to reimbursement out of the assurance fund under § 6943, Gen. Stat. 1913."⁴³

o. Miscellaneous.

The notice of six months provided for within which claims for private lands must be presented to the land court for registration when the President has taken land for naval or military purposes does not begin to run as to persons living upon or in visible possession of the land, until the notice is served upon them personally; and as to that class, it is of no consequence when the notice is published or when it was posted.⁴⁴ Certain miscellaneous cases are referred to in the notes.⁴⁵

IV. Foreign decisions of general interest.

a. In general.

These cases are from British possessions and from England. The statutes vary much even in Australia, the home of the Torrens law, and have been greatly amended and changed in the various jurisdictions from time to time. For example, a recent book on the system in Canada only assumes to deal at length with the acts of a few of the Canadian provinces (Thom, 1912), though not confined to them. The cases that have

⁴³ (Minn.) Ibid.

⁴⁴ *Lagariza v. Commanding General* (1912) 22 *Philippine*, 297.

⁴⁵ It was held in *Re Lewers & Cooke* (1908) 18 *Haw.* 625, that the petitioner, in seeking to register a title depending upon an unexecuted equitable decree in another matter, was, "as against the holder of the outstanding legal title, in the same position as a party asking the aid of the court of chancery in executing a former decree; and it is well established that he must take the risk of opening up such decree for re-examination." Quoted and followed on an appeal to the Supreme Court of the United States in (1911) 222 U. S. 285, 56 L. ed. 202, 32 Sup. Ct. Rep. 94.

Where a club or association not having any existence as a legal entity agreed to have the title to the property placed in the name of one of its members, which was done, and he collected rents, and failed to account therefor, and further claimed, upon proceedings to make him account, that he had title to the property, and that he had L.R.A.1916D.

bought it with his own funds, the court decreed a conveyance by him of the property, and that he must account. *Uy Aloc v. Cho Jan Ling* (1911) 19 *Philippine*, 202.

In view of the first headnote in *Broce v. Broce* (1905) 4 *Philippine*, 611, it may be noted that the certificate of land registration there referred to was under the Spanish law, and prior to the Philippine act of 1902. So, the case of *Veguillas v. Jaucian* (1913) 25 *Philippine*, 315, seems to have related to the old form of registration, and not to the new.

It may be noted that there was probably a question of jurisdiction in *Lerma y Martinez v. Antonio* (1906) 6 *Philippine*, 236, but the case is not fully reported in regard to it; also that the reported facts are insufficient to the full understanding of *Pollard v. Burchard* (1908) 199 *Mass.* 376, 85 N. E. 444, holding that the same parties on a subsequent application were not estopped by the prior adjudication as to lands not included therein.

arisen under these foreign statutes are very numerous. Over twenty years ago a volume was written on the Victorian act of 1890 (Duffy & Eagleson, 1895) although it cites cases from other colonies.

There are numerous cases in which the registration of title questions are complicated by intricate statutes relating to Crown grants or mining leases, native land acts, and the like, to such an extent as to render them of little value beyond the jurisdiction. There are many other cases dealing with registration matters of importance which also depend to such an extent upon the varying local statutes as to be of little general value; such, for example, as those dealing with caveats, injunctions, etc. There have been also, of course many cases of local importance which are of no present practical use in view of amendments to or changes in the statute.

The selection of subjects as of general importance or interest is, of course, wholly arbitrary, and is not to be taken as meaning that the subjects excluded may not be of interest and value to those desiring to make a study of the general subject.

b. Adverse possessors.

Adverse possession under these acts may be viewed (1) as a mere protection,

⁴⁶ *Staughton v. Brown* (1875) 1 Vict. L. R. 150, *Hunter, Torrens Title Cases*, 213 (but a new trial was ordered, as the court was not satisfied that the defendant's evidence as to possession was sufficient to cover all of the land claimed by him).

Thus, the court ordered the certificate of title of a corporation to be delivered up to be canceled, where the corporation, in its application to have land brought under the act, stated that the possessor was only a trespasser, and obtained a certificate, and afterwards failed in an action against such possessor, who set up a statutory title to the land by length of possession. *Ex parte Rigby* (1883) 9 Vict. L. R. 417, *Hunter, Torrens Title Cases*, 459.

⁴⁷ *Lake v. Jones* (1899) 15 Vict. L. R. 728. It may be noted that in *Solling v. Broughton* [1893] A. C. (Eng.) 556, 63 L. J. P. C. N. S. 21, affirming (1891) 12 N. S. W. L. R. 189, where the caveators claimed under a possessory title, and where the applicant for registration showed a complete documentary title, and proved that he was in possession within the period of twenty years before the commencement of the proceedings, that the burden of proof was shifted, and it lay upon the caveators to show that the applicant's original title had been defeated.

⁴⁸ *Bethune v. Porteous* (1891) 14 Austr. L.R.A.1916D.

and (2) as giving the right to register title.

As mere protection.

The rights of one in adverse possession, not heard at the time of the granting of a certificate of title to another, are not, in general, disturbed by such certificate.

Thus, under the Victoria statute making the land included in a certificate or registered instrument subject "to any rights subsisting under any adverse possession of such land," the person in possession, when sued in ejectment by the holder of a certificate of title, may show that he has been in possession for the statutory period.⁴⁶

So, where a purchaser from a registered proprietor went into possession and later registered his title and received a certificate for another piece of land, owing to a mistake of roads (probably by the title office), others who later got a certificate for the land bought by the first purchaser could not oust him, his possession having been long enough to make a title.⁴⁷

A person who has a good title by adverse possession may restrain an applicant who applies to have the land brought under the act.⁴⁸

Similarly, under the South Australia act,⁴⁹ protection was afforded to a defendant "adversely in actual occupation of and rightfully entitled to such land" at the time of the plaintiff's certificate, being the one issued on first bringing the

L. R. 265, *Hunter, Torrens Title Cases*, 553, overruling *Ex parte Brown* (1879) 5 Vict. L. R. 5, *Hunter, Torrens Title Cases*, 381.

So, the holder of the equitable title, who has been in possession long enough to obtain a title by adverse possession of the premises, may properly bring an action to prevent one desiring to bring land under the act from doing so. *Hodgson v. Hunter* (1872) 3 Vict. Rep. 61, 3 Austr. Jur. 13, *Hunter, Torrens Title Cases*, 203, holding that in such action the owners of the legal title should be brought in.

⁴⁹ Act of 1861, § 134: "Any certificate of title issued upon the first bringing of land under the provisions of this act, and every certificate of title issued in respect of the same land, or any part thereof, to any person claiming or deriving title under or through the applicant proprietor, shall be void, as against the title of any person adversely in actual occupation of and rightfully entitled to, such land, or any part thereof at the time when such land was so brought under the provision of this act, and continuing in such occupation at the time of any subsequent certificate of title being issued in respect of said land; but every such certificate shall be valid and effectual as against the title of any other person whomsoever."

land under the act, and continuing therein, and whose land was, by mistake of a surveyor, wrongfully included therein.⁵⁰

So, a certificate is void as against occupation by one claiming under a person deprived.¹

It has been held in Alberta, on ejectment by the registered owner, that the defendant, who had been in possession of a part of the land at the time that the land was brought under the act by the plaintiffs, was entitled to succeed on the ground of adverse possession under § 44 of the act, providing that the certificate of title should be conclusive with certain exceptions "except so far as regards any portion of land by wrong description of boundaries or parcels included in such certificate of title."²

It has been stated that in Queensland the profession is not agreed on the subject.³

Right to register.

One having a good title by adverse

possession to land not under the act may have his title registered and obtain a certificate.⁴

—right as against registered titles.

Whether one claiming land by adverse possession may have his title registered as against a registered holder is considered differently in different jurisdictions.

It was held in Victoria that the registrar cannot register lands on the application of one claiming by adverse possession, when the lands are already registered to another;⁵ but this is otherwise under the act of 1904.⁶

Under the New Zealand act a title cannot be acquired by adverse possession against the registered proprietor.⁷

But it has been held that there was nothing in the Honduras act inconsistent with the acquisition of a title by adverse possession against the registered holder, which commenced subsequent to the registration.⁸

⁵⁰ Gallash v. Schutz (1882) 16 South Austr. L. R. 129.

¹ Harvey v. Williams (1883) 18 South Austr. L. R. 8 (where there was no fraud).

These cases would seem to clarify any obscurity in Wadham v. Buttle (1879) 13 South Austr. L. R. 1, where one suing in ejectment on his certificate, less than two years old, was opposed by the claim of adverse possession for more than twenty years, and it was held that the only point was whether the plaintiff had obtained his certificate by fraud, by falsely swearing that there was then no adverse possession; otherwise his certificate would be conclusive.

² Harris v. Keith (1911) 3 Alberta L. R. 222, 16 West L. R. 433, the court citing Belize Estate & Produce Co. v. Quilter [1897] A. C. (Eng.) 367, 66 L. J. P. C. N. S. 53, 76 L. T. N. S. 361.

³ It is stated in Maltby v. Pang See [1910] St. R. Qd. 12, that "the profession are not agreed whether adverse possession can be asserted against a registered title," and that the editors of the Queensland real property acts apprehend that the law in Queensland is similar "to that of New South Wales, which is, that adverse possession is not effective against the registered proprietor in an action of ejectment by him if the action is not expressly barred against the person against whom the action is brought."

⁴ Re Eaton (1879) 1 Qd. L. J. pt. II. p. 9; Ex parte Neill (1897) 7 Qd. L. J. 155; Bradshaw v. Patterson (1911) 4 Sask. L. R. 208, 18 West L. R. 402.

In Re Eaton (Qd.) supra, it was held that a purchaser after twenty years' possession was entitled to register the land in his name where he had bought the land from a Crown grantee, paid the money, took the L.R.A.1916D.

Crown grant and entered, the seller having signed no transfer, and the sale note which he gave having been lost, and the seller having disappeared many years before.

In Re Anderton (1908)—Alberta, L. R. —, 8 West. L. R. 310, the court stated that he found that such applications were granted in different states of Australia, not only those whose land title acts contained special clauses dealing with the rights of persons claiming by possession, and permitting them to secure registration, but also in those states whose acts "like our own do not contain any specific reference to the question," and that the applicant came within the statute; but the court declined to register the title on the ground that while the twelve years' possession had been sufficiently shown, it was not shown that there might not have been some person against whom the statute did not begin to run; that is, a remainderman or reversioner, etc.

⁵ Vict.—Re Allen (1896) 22 Vict. L. R. 22.

⁶ See Marriott v. Hosken (1911) Vict. L. R. 54; Thomson v. Byrne, 11 Argus, L. R. (Current Notes) 49; Tregent v. Templeton (1914) Vict. L. R. 613.

⁷ In Ex parte Campbell, 12 N. Z. Gaz. L. R. 484 (where there was no possession), it was held that the statute of limitations could not run against a mortgagee under the provision of the land transfer act that "after land has become subject to this act no title thereto, or any right, privilege, or easement in, upon or over the same shall be acquired by possession or user adversely to or in derogation of the title of the registered proprietor." This case overruled Shirley v. Tapper (1904) 24 N. Z. L. R. 849, where it was held that there is nothing in the act to obviate the effect of the statute of limitation as to mortgages.

⁸ Belize Estate & Produce Co. v. Quilter

Other cases will be found in the notes.⁹

c. Tenant.

It is not in general intended to deal with questions between landlord and tenant, but only with some special features of the acts as to persons in possession.

The Victoria act¹⁰ makes the certificate subject to the interest of any tenant of the land where the possession is not adverse. Thus, the possession of one entering under a purchase of land is that of a tenant not adverse to the person who sold it to him.¹¹ So, one in possession under an instrument which is both a lease and a contract for sale is ahead

of a subsequent mortgage,¹² and the interest of the tenant of a mortgagor whose mortgage was made after the tenancy began is not adverse to the mortgagee.¹³ And though in general a vendor who remains in possession after a conveyance is not a tenant at will, but a wrongdoer,¹⁴ where a partly paid vendor remained in possession, and the vendee obtained a certificate and borrowed upon its deposit with the plaintiff, the vendor's right was held superior to that, of the plaintiff.¹⁵

It appears that in New South Wales the person in possession is not protected,¹⁶ and that the certificate is conclusive against the person in possession,

[1897] A. C. (Eng.) 367, holding that there was nothing inconsistent with this in § 30 of the act, which provided: "The person or persons who, according to the entries made according to this chapter in the register, appear to be entitled, according to this chapter, to land, or to any legal estate, interest, power or right in or affecting land, shall be entitled accordingly, and to the exclusion of all other persons, and of all other estates, interests, powers and rights, not being equitable estates or interests, in or affecting the said land or any part thereof; and the register shall be to all intents and purposes whatsoever, and to the exclusion of all other evidence (evidence of fraud only excepted), the foundation, and the evidence of the foundation of the title to the land registered, and to the estates, interests, powers and rights registered; and the registered land, estates, interests, powers and rights respectively may and shall descend, devolve, and be transmitted, dealt with, disposed of, and enjoyed accordingly."

⁹ When, subsequent to the defendant's certificate of title, the plaintiff entered, it was held that after he had held adversely for the statutory period he might, by action, have judgment against the defendant, declaring him (the plaintiff) the owner in fee simple; but he could not obtain a certificate, nor have that of the defendant canceled. *Wallace v. Potter* (1913) — *Alberta L. R.* —, 10 D. L. R. 594, citing *Belize Estate & Produce Co. v. Quilter* (Eng.) *supra*.

Under the English acts permitting registration both of absolute and possessory titles, in *Marshall v. Robertson* (1905) 50 Sol. Jo. (Eng.) 75, A sold to B, and B got a certificate as having a possessory title by means of a statutory statement by A that he had been in possession for more than the statutory period, and B charged the land to mortgagees, who registered the charge; it was held that the real owner, who was all the time in possession, was entitled to have removed from the title register the entry of B as proprietor and of the mortgagees as proprietors of a charge, and that the onus was on A and B to show that they had title by adverse possession.

It may be noted that in Tasmania, where a woman owner of land under the L.R.A.1916D.

real property act died intestate, and her husband entered and remained for upwards of twelve years, it was held that he acquired title as against his adult children, but not as against an infant grandson. *Re Bartlett* (1908) 4 *Tasmania L. R.* 26.

¹⁰ Section 49 of 1866, and § 74 of 1890.

¹¹ *Robertson v. Keith* (1870) 1 *Vict. Rep.* 11, *Hunter, Torrens Title Cases*, 366.

¹² *Colonial Bank v. Roach* (1870) 1 *Vict. Rep.* 165, *Hunter, Torrens Title Cases*, 374.

So, when the tenant had a contract of sale from the registered owner, who transferred the land to the plaintiff for a loan, and he sued the tenant in ejectment, judgment was for the defendant. *Sandhurst Mut. Permanent Soc. Invest. Bldg. v. Gissing* (1889) 15 *Vict. L. R.* 329, *Hunter, Torrens Title Cases*, 466.

¹³ *Colonial Bank v. Rabbage* (1879) 5 *Vict. L. R.* 462, *Hunter, Torrens Title Cases*, 418.

Where a certificate issued after a decree in favor of the plaintiff and against the defendant, but before the certificate was issued, though after the decree, the defendant, being in occupation, granted a lease to A, who afterwards assigned it to B, the plaintiff in said suit could not, in ejectment against B, apply for a rule nisi to enter a caveat in his own favor. *Slack v. Downton*, 1 *Austr. L. T.* 2.

¹⁴ *Commercial Bank v. Breen* (1889) 15 *Vict. L. R.* 572, *Hunter, Torrens Title Cases*, 407, where, after the registered owner had conveyed the land, the grantee mortgaged it and the transfer and the mortgage were registered, and it was held that, as against the mortgagee, the original vendor was not a tenant, that her possession was adverse, and she could be ejected by the mortgagee.

¹⁵ *Commercial Bank v. McCaskill* (1897) 23 *Vict. L. R.* 10, 18 *Austr. L. T. R.* 243, affirming 18 *Vict. L. R.* 175, the court, however, not referring to the *Breen* Case.

¹⁶ The New South Wales act provided (26 *Vict. No.* 9, § 40; 1900, No. 25, § 42): "40. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this act might be held to be paramount, or to have priority, the registered proprietor of land, or

although the latter but for the act would be entitled to the property.¹⁷

Thus, a transferee of a mortgage which is indorsed on a certificate of title is not affected by a prior verbal lease for less than three years, as the act does not permit the registration of such a lease.¹⁸

And a tenant in possession under an unregistered lease for seven years, which was not in the form required to make it capable of registration, may be ejected by a purchaser from the landlord.¹⁹

In South Australia the early cases seem to leave the matter in some confusion.²⁰

Under the statute of 1886, registered

of any estate or interest in land, under the provisions of this act, shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the Register Book, constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior certificate of title or under a prior grant registered under the provisions of this act, and except as regards the omission or misdescription of any right of way or other easement created in or existing upon any land, and except so far as regards any portion of land that may, by wrong description of parcels or of boundaries, be included in the grant, certificate of title, lease, or other instrument evidencing the title of such registered proprietor, not being a purchaser or mortgagee thereof for value, or deriving from or through a purchaser or mortgagee thereof for value."

¹⁷ *Phillips v. M'Lachlan* (1884) 5 N. S. W. L. R. 168.

¹⁸ *Arnold v. Wallwork*, 20 N. S. W. L. R. 368.

¹⁹ *Josephson v. Mason* (1912) 12 N. S. W. St. Rep. 249.

²⁰ In *Manning v. Crossman* (1871) 5 South Austr. L. R. 130, it was held that one claiming under a lease from a registered owner is protected as against a lease for less than three years made by a former owner. One of the judges seemed to consider that a lease for less than three years was void under the act.

Manning v. Crossman (South Austr.) supra, was followed in *Trantor v. Lord* (1874) 8 South Austr. L. R. 81, where the agreement was a verbal agreement to lease for ten years, which created a tenancy from year to year.

In *Buckett v. Knobbe* (1874) 8 South Austr. L. R. 86, the registered plaintiff gave the defendant a lease signed by both in the form provided for by the act, but it was only for two years; the court nonsuited the plaintiff, who was suing the tenant in ejectment, but the three judges (one of whom dissented) differed in their views of L.R.A.1916D.

dealings were to be subject to prior unregistered leases, etc., for a term not exceeding one year.²¹

Where the acts of New Zealand had no provision for registering leases for less than three years, the court was of opinion that such a lease gave a legal title to the tenant for the tenancy.²²

d. Trusts.

In general.

The general theory of most of the acts in British countries is that no trust shall be entered upon the certificate.²³

It has been held in Victoria that a

the effect of the act on leases under three years.

In *Hunter v. Player* (1875) 9 South Austr. L. R. 100, it was held where one who had agreed to let the plaintiff certain land obtained a clean certificate, that the plaintiff had no claim for right of possession.

But in *Franklin v. Ind* (1883) 17 South Austr. L. R. 133, it was held that under § 134 of the South Australia act, quoted supra, subd. IV. b, a lessee in possession when land was brought under the act was protected against the fraud of the omission of the lease from the certificate, committed by those who got out the certificate, and against subsequent mala fide transferees and mala fide mortgagees. The expression "adverse," in § 134, means adverse to the certificate. The court referred to the difference in the Victoria act, No. 301, of 1866, § 49.

It should be noted that *Franklin v. Ind* (South Austr.) was followed in *Re Wright*, 2 Nicholls & Stops Rep. (Tasmania) 74, where it was held that a bona fide transferee for value was not protected against occupation of one entitled to the land and in possession at the time of the first certificate, and so continuing during the time till the issue of the later certificate to the bona fide purchaser.

²¹ *Rounsevell v. E. Ryan & Sons* [1910] South Austr. L. R. 67, where it was held that one purchasing on the understanding that there is only a verbal arrangement, and no lease, is protected by his certificate against a written unregistered agreement for a lease which does not exceed three years, the statute of 1886 providing that leases exceeding one year should be in the form required by the act, and that registered dealings shall be subject to prior unregistered leases, etc., for a term not exceeding one year.

²² *Finnoran v. Weir*, 5 N. Z. L. R. S. C. 280.

²³ For example, the Victoria act (§ 38 of 301 of 1866, § 57 of 1890) provided: "38. The registrar shall not enter in the Register Book notice of any trust, whether express, implied, or constructive; but trusts may be declared by any document, and a duplicate

trustee without power of sale is included in the expression in the statute, "the person claiming to be the owner of the fee simple, either in law or in equity," and as such may make an application to have the land registered in his name under the act;²⁴ and in New Zealand that one of two trustees who has obtained a transfer to himself, as if he were the sole trustee, and has contracted to sell the land, is entitled to compel specific performance by the purchaser, as he can give a good title.²⁵

So, in general, the registrar should not refuse to register a transfer from a trustee, except in case of a manifest breach of trust.²⁶

Thus, where trustees transferred the land to beneficiaries, taking the chance that there would be no birth of a possible remainderman, the registrar should

not refuse to register the transfer, as there was "no manifest breach of trust."²⁷

But cestui qui trustent have a right to caveat with a view to protect their interests.²⁸

It may be noted that where trustees under a will renounced, it was held that this effected an intestacy as to land under the act, as the act does not recognize equities.²⁹

Transferees of trustees.

In the absence of fraud, the transferee is not "affected by notice, direct or constructive, of any trust or unregistered interest."³⁰

Thus, he who takes trust land from a trustee without knowledge that the trustee is committing or intends to commit any fraud is protected.³¹

or an attested copy thereof may be deposited with the registrar for safe custody and reference; and the commissioner, should it appear to him expedient so to do, may protect in any way he may deem advisable the rights of the persons for the time being beneficially interested thereunder, or thereby required to give any consent; but the rights incident to any proprietorship or any instrument dealing or matter registered under this act shall not be in any manner affected by the deposit of such duplicate or copy, nor shall the same be registered."

²⁴ *Re Benn* (1886) 12 Vict. L. R. 366, *Hunter, Torrens Title Cases*, 282.

²⁵ *George v. Australian Mut. Provident Soc.* (1904) 4 N. Z. L. R. S. C. 165.

²⁶ *Ex parte Campbell* (1888) 9 Austr. L. T. 183, holding that a discharge of a mortgage by the mortgagees, even though some of them signed by attorneys under powers of attorney, must be registered by the registrar, although he claims to have had other notice that they were trustees, and their right as trustees to discharge the mortgage is not shown, the statute forbidding the entry of trusts in the register, and providing that no person dealing with a registered proprietor "shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding."

The registrar should register a transfer to an executrix to whom the first certificate ran "as executrix," as long as he has no express notice of a breach of trust. *Re Fairbrother to Allen*, 15 N. Z. L. R. 196.

Administrators having a court order giving power of sale, on applying to bring property under the act, met with a controversy, and in compromise sold the property to the adverse party,—this compromise not having court authority. It was held that the registrar could not refuse to register the transfer from the trustees to the adverse party. *Ex parte Saunders*, 21 N. S. W. L. R. 291. L.R.A.1916D.

²⁷ *Rex v. Registrar of Titles* [1913] Vict. L. R. 549.

²⁸ *D'Albedyhl v. D'Albedyhl* (1885) 3 N. Z. L. R. S. C. 391.

²⁹ *Adcock v. Poole* (1873) 7 South Austr. L. R. 149.

³⁰ *Smith v. Essery* (1890) N. Z. L. R. 449; see also statutes quoted *infra*, subd. IV. f.

³¹ *Gregory v. Alger* (1893) 19 Vict. L. R. 565, 15 Austr. L. T. 22, where a widow who was administratrix of her husband's estate was registered as the absolute owner of the property of his estate, and it was held that one who sold to her other property, and took in good faith a mortgage on the husband's said property in part payment, was protected, although knowing that the land had been part of her husband's estate and that she was administratrix, as no "fraud" under § 74 of the act of 1890 was shown, as that means moral turpitude, and § 140 of the act of 1890 means that constructive fraud will not invalidate the transferee's title. The court distinguished *Droop v. Colonial Bank* (1881) 7 Vict. L. R. 71, *infra*, subd. IV. m. (For the statutes, see *infra*, subd. IV. f.)

Where an administratrix whose duty was to convey to trustees took a certificate to herself of land under the act, and had other land brought under the act and sold all to her son, who knew the facts, but all acted honestly and with good intent, it was held that the son's registered title was good and that of his mortgagee was good. *Public Trustee v. Arthur* (1892) 25 South Austr. L. R. 59.

The court stated in *McLeod v. Lawson* (1906) 8 Ont. Week. Rep. 213 (while perhaps it was not material to the decision), that the provisions of § 103 of the Ontario act indicated that it was the intention of the statute to permit registered owners to deal with land, and third persons to deal with them in respect of the land, although it may appear on the register that the registered owner is a trustee. The statute provided that no notice of any trust is to

But a person who obtains a title by transmission, and as the representative of the holder of a certificate of title, with full notice that such holder is a bare trustee, takes the title subject to the trust, and will be compelled to transfer to the real owner.³²

Options of purchase.

The cases on options of purchase from those holding in a fiduciary capacity are not entirely clear. It has been held in New Zealand that one taking a lease with an option of purchase, from persons registered as executors (of a deceased registered proprietor), is protected, although he knew the executors were trustees, but did not know the nature of the trust, the court assuming that the option was in excess of the trust powers.³³

But soon after, the same court declined to extend this principle to the case where

trustees made a lease with an option of purchase, covering land which was registered and land which was not registered, and it was held that the instrument was not entitled to registration, and the option, which was in excess of the trustees' authority, should be stricken out of the lease.³⁴

And in Alberta it was held that a beneficiary of a decedent's estate might have declared void an option coupled with a lease given to the defendant by the administratrix of such estate, who was registered as owner, but had no power to give such an option.³⁵

e. Effect of registration of title in general.

The intent of the statute is that the certificate shall be conclusive in the absence of fraud.³⁶

be entered on the register, and that describing one as a trustee is not notice of a trust, nor does it impose duty of inquiry.

A fortiori, in *North-West. Constr. Co. v. Valle* (1906) 16 *Manitoba L. Rep.* 201, 4 *West. L. R. (Can.)* 37, where a person purchased land with money of which he was trustee, and sold and transferred the land to a bona fide purchaser with no actual notice or knowledge of such trusteeship, nor any reason to suppose that the trustee was not the beneficial owner in his own right, it was held that the purchaser was protected.

³² *Kissick v. Black* (1892) 10 *N. Z. L. R.* 519.

³³ *Fels v. Knowles* (1906) 26 *N. Z. L. R.* 604.

³⁴ *Horne v. Horne* (1906) 26 *N. Z. L. R.* 1208.

³⁵ *St. Germain v. Renault* (1909) 2 *Alberta L. R.* 371, holding that one taking from an administratrix who is registered as owner a lease with an option of purchase, she having no power to give such an option, cannot, by registering such lease, obtain any right to have the option carried out, although the act, after providing that a person registered in place of a deceased owner shall hold the land upon the trusts, and for the purposes to which the same is applicable, further provided that, for the purpose of any registered dealings, he shall be deemed to be the absolute and beneficial owner thereof, and also provided that except in case of fraud no person taking or proposing to take a transfer, etc., need inquire into the circumstances or considerations under which any owner or any previous owner took title, etc., "nor shall he be affected by notice, direct, implied, or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding; and the knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud." The court intimated *L.R.A.* 1916D.

that possibly an assignee of a lease with such an option might have enforced the option.

³⁶ See, generally, cases throughout this branch of the note; see also the following cases:

The New Zealand statutes are absolute as to the nonavailability of the title of one registered as owner, except in the cases expressly mentioned as exceptions. *Matai v. Assets Co.* (1887) 6 *N. Z. L. R.* 356.

The registered title, in the absence of fraud, is conclusive. *Assets Co. v. Mere Roihi* [1905] *A. C. (Eng.)* 176, 74 *L. J. P. C. N. S.* 49, 92 *L. T. N. S.* 397, 21 *Times L. R.* 311, on appeal from New Zealand.

But in *Louden v. Morrison* (1895) 14 *N. Z. L. R.* 245, the court was of the opinion that where the registrar had issued a certificate which by mistake omitted a lease shown on the register, the person to whom the certificate was issued could not get any right against the lessee by such omission, the statute providing that the certificate is to be conclusive evidence unless the contrary be proved by the production of the register.

Where an attorney in fact, whose power of attorney was not broad enough for the purpose, executed an instrument granting an easement over registered land, which was itself registered, it was held that the grantee of the easement, in the absence of fraud, became the duly registered proprietor of the easement, under §§ 36 and 49 of the Victorian act, No. 301, of 1866. *Magor v. Donald* (1887) 13 *Vict. L. R.* 255, 8 *Austr. L. T.* 150, *Hunter, Torrens Title Cases*, 266. Section 36 of the act provided: "36. Every grant, and every certificate of title, shall be deemed and taken to be registered under this act when the registrar has marked thereon the volume and folium of the Register Book in which the same is entered; and every instrument purporting to affect land under the operation of this act shall be deemed and taken to be registered

An honest purchaser for value will be protected by his certificate, even against the proper owner.⁸⁷

Effect of nonregistration of instruments.

It is in general provided by the acts that no instrument until registered shall pass any estate or interest in registered land.

It would be hard to say whether this provision means anything more than that a subsequent purchaser or mortgagee in good faith, without notice, who has registered his instrument, will be protected against unregistered instruments.

No difficulty would seem to be found under this provision with the view that the foregoing provision referred to effect upon the land only, and did not make such unregistered instruments invalid as contracts,³⁸ nor with a holding that equity would specifically enforce such a contract,³⁹ nor with a holding that an equi-

table right to have a fraudulent registration set aside will pass by an unregistered deed.⁴⁰

It has, indeed, been held that there was nothing in the English registration act which prevented the passing of a legal estate by a mortgage created by an ordinary deed executed by an owner in fee, whether he was or was not a registered proprietor, subject to the risk of the title being defeated or impaired; but it is not clear that this was necessary for the decision.⁴¹

On the other hand, it has been said by the English privy council that under the Victoria (Australia) act no interest in the property could effectually pass till registration, and consequently that an unregistered sale was a mere agreement which left a prior equity untouched;⁴² but this was possibly not necessary to the decision; nor does it appear whether

when a memorial thereof, as hereinafter described, has been entered in the Register Book upon the folium, constituted by the grant or existing certificate of title; and the person named in any grant, certificate of title, or instrument so registered as the grantee or as the proprietor of or having any estate or interest or power shall be deemed and taken to be the duly registered proprietor thereof." For § 49, see *infra*, subd. IV. f.

⁸⁷ *Main v. Robertson* (1886) 7 Austr. L. T. 127.

So, a bona fide transferee from one whose certificate was not founded on a good title—the native title in part not having been extinguished—was protected. Re *Okirae Block* (1892) 10 N. Z. L. R. 677.

So, the title of a transferee, bona fide, for valuable consideration, without notice, from a registered owner, is protected as against rights existing before the land was registered. *Farah v. Glen Lake Min. Co.* (1907) 17 Ont. L. Rep. 1, where it was held also that a purchaser pendente lite was without any actual or constructive notice of the existence of the action or of a previous counterclaim therein, no caution being registered at the time of the transfer.

So, in *Central Canada Loan & Sav. Co. v. Porter* (1903) 2 Ont. Week. Rep. 137, it was held that judgment in ejectment must be for the plaintiffs, who were purchasers for value of a registered title, and without notice of the paper title of defendant, which was not registered until after the action was brought.

So, the registered owner is protected where he did not know that his grantor got the property by foreclosure of a mortgage of which he was the mortgagee, and such owner had nothing to do with the questions between the mortgagee and the mortgagor. *Richards v. Thompson* (1911) 4 Sask. L. R. 213, 18 West. L. R. (Can.) 179, L.R.A.1916D.

³⁸ In *Morrissey v. Clements*, 6 Austr. L. T. 107, affirmed in (1884) 11 Vict. L. R. 13, the court considered that the statutory provision that documents should have no effect until registration referred to effect upon the land only, but that they would be valid as contracts.

³⁹ In *Cuthbertson v. Swan* (1877) 11 South Austr. L. R. 102, it was held that a contract to sell land under the act would be specifically enforced (or an action for damages maintained on it), overruling *Lange v. Ruwoldt* (1872) 7 South Austr. L. R. 1, where it was held that an executory contract of sale of registered land, executed by a testator, will not be specifically enforced against his devisees or heirs, as the act does not provide for the registration of such an executory instrument.

⁴⁰ *McEllister v. Biggs* (1883) L. R. 8 App. Cas. (Eng.) 314, affirming (1880) 14 South Austr. L. R. 86, where it was held that deeds which have not been registered, while passing no title, pass the equitable right from the owner of the land to have a fraudulent registration of it set aside, although the (South Australia) act (§ 39 of 1861) provided: "No instrument shall be effectual to pass any estate or interest in any land under the provisions of this act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the estate or interest specified in such instrument shall pass."

⁴¹ *Capital & Counties Bank v. Rhodes* [1903] 1 Ch. (Eng.) 631, 72 L. J. Ch. N. S. 336, 51 Week. Rep. 470, 88 L. T. N. S. 255, 19 Times L. R. 280.

⁴² *National Bank v. United Hand-in-Hand & Band of Hope Co.* (1879) L. R. 4 App. Cas. (Eng.) 391, 40 L. T. N. S. 607, 27 Week. Rep. 889, affirming decisions of the Victoria court.

It was held in *Macindoe v. Wehrle* (1913)

the purchaser had later registered the agreement before the suit.

But it has been held in Victoria that a purchaser for value in good faith, from one registered, will be protected against one defrauded by the vendor, although the purchaser, at the time of suit by the person defrauded, had not yet registered his transfer.⁴³

And the same principle seems to have been sustained in an obscurely reported case in New Zealand.⁴⁴

And the high court of Australia in a recent decision holds that where a fraudulent transferee from the registered owner, to whom he had not paid the purchase price, mortgaged the land to one who had no actual or constructive notice of the fraud, the mortgage was superior to the interest of the true owner, although neither the mortgage nor the transfer to the mortgagor had been registered.⁴⁵

The court stated that the repeal, so far as inconsistent with the act, of "all laws . . . rules . . . practice," was not sufficient to embrace "the body of law recognized and administered by courts of equity in respect of equitable claims to land arising out of contract or personal confidence." "But," the court continued, "it is said that the words of § 41, 'No instrument, until registered, . . . shall be effectual to pass any estate or interest in any land under the provisions of this act,' have that effect. It is now more than half a century since the Australian Colonies and New Zealand adopted, in substantially the same form, but with some important variations, the system, sometimes called the 'Torrens' system, which is now in New South Wales, embodied in the real property act 1900. With the exception of one decision in South Australia, soon afterwards overruled, the contention of the appellant has never been accepted in any of them." In the same case, Isaacs, J., concurring, said that counsel "contended that the consequence was that until registration no person can acquire

any interest in land, legal or equitable. He said that whatever personal liability existed might be enforced as 'a chose in action' against the person liable, but not against the land, for the act recognizes no interests, legal or equitable, except in the registered proprietor. Such a contention is absolutely opposed to all hitherto accepted notions in Australia with regard to the land transfer acts. They have long, and in every state, been regarded as in the main conveyancing enactments, and as giving greater certainty to titles of registered proprietors, but not in any way destroying the fundamental doctrines by which courts of equity have enforced, as against registered proprietors, conscientious obligations entered into by them. The notion that an equitable right is a mere chose in action, once accepted by the court (*Finch's Case* (1590) 4 Co. Inst. (Eng.) 85), but definitely and finally parted from by Lord Hardwicke in *Hopkins v. Hopkins* (1738) West, Ch. (Eng.) 606, and Lord St. Leonards, in *Stump v. Gaby* (1852) 2 DeG. M. & G. (Eng.) 623, 22 L. J. Ch. N. S. 352, 17 Jur. 5, 1 Week. Rep. 85, has not, so far as I know, except in one notable instance, been considered by Australasian courts as applicable to the land transfer acts." And he states that the instance referred to, *Lange v. Ruwoldt*, 6 South Austr. L. R. 75 (1872) 7 South Austr. L. R. 1, was "reversed" in *Cuthbertson v. Swan* (1877) 11 South Austr. L. R. 102.⁴⁶ The court does not refer, although it was cited by counsel, to a decision of the Victoria court in 1885, holding that where one lodged with a bank, as security for a loan, a transfer to herself of title and the certificate of her transferrer, the bank cannot hold against the rights of the transferrer, in which case the Victoria court observed that it would be otherwise if the bank had insisted that the transfer to the borrower should have first been registered.⁴⁷ Nor does the court refer to an earlier opinion of a New South Wales

13 N. S. W. St. Rep. 500, that no legal estate in the land would pass by an instrument not in the form to entitle it to be registered.

⁴³ *Barnes v. James*, 27 Vict. L. R. 749, 8 Argus L. R. (Current Notes) 73.

⁴⁴ It seems to be held in the obscurely reported case of *Honeybone v. National Bank*, 9 N. Z. L. R. 102, that if a debtor, instead of giving his creditor a mortgage, gives him an absolute transfer under a promise not to register it, and the creditor breaks the promise, registers the transfer, and mortgages the property to a third party, the mortgagee, who does not at once

register the mortgage, will not be prevented from doing so after the debtor has settled with his creditor in ignorance of the mortgage.

⁴⁵ *Barry v. Heider* (1914) 19 C. L. R. (Austr.) 197, 15 N. S. W. St. Rep. 271, affirming with a modification on another question, *Barry v. Schmidt* (1913) 13 N. S. W. St. Rep. 639. For the question decided in the modification, see *infra*, subd. IV. f. 5.

⁴⁶ For the *Lange* and *Cuthbertson* Cases, see the earlier part of this subdivision.

⁴⁷ *Plumpton v. Plumpton* (1885) 11 Vict. L. R. 733, *Hunters, Torrens Title Cases*, 495.

judge, that protection from equities does not arise in favor of a transferee until he has registered his transfer.⁴⁸

The reader is referred in this connection to the cases under the head of equitable mortgages, *infra*, subd. IV. k.

f. Fraud.

1. In general.

For cases on forgery, see *infra*, subd. IV. g.

⁴⁸ It was considered in the opinion of Owen, J., in the lower court, printed in *Baker's Creek Consol. Gold Min. Co. v. Hack* (1894) 15 N. S. W. L. R. 207, that protection from equities does not arise in favor of a transferee until he has registered his transfer.

⁴⁹ For example, these provisions in the Victorian act of 1866, No. 301, are as follows: Section "49. Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from her Majesty or otherwise, which but for this act might be held to be paramount, or to have priority, the proprietor of land, or of any estate or interest in land, under the operation of this act, shall, except in case of fraud, hold the same subject to such encumbrances as may be notified on the folium of the Register Book, constituted by the grant or certificate of title, but absolutely free from all other encumbrances whatsoever, except the estate or interest of a proprietor claiming the same land under a prior registered grant or certificate of title, and except as regards any portion of land that may, by wrong description of parcels or boundaries, be included in the grant, certificate of title, or instrument evidencing the title of such proprietor, not being a purchaser for valuable consideration, or deriving from or through such a purchaser. Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to the reservations, exceptions, conditions, and powers (if any) contained in the grant thereof, and to any rights subsisting under any adverse possession of such land, and to any public rights of way and to any easements acquired by enjoyment or user or subsisting over or upon or affecting such land, and to any unpaid rates, and to any license granted by the board of land and works under the 'mining statute 1865,' and also where the possession is not adverse to the interest of any tenant of the land, notwithstanding the same respectively may not be specially notified as encumbrances on such certificate or instrument." (Section 74 of the Victorian act of 1890 is the same except there are inserted after the figures "1865" the words "or Part I. of the mines act 1890." "50. Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer from, the proprietor of any registered land, lease, mortgage, or charge, shall be required or in L.R.A.1916D.

The statutes generally include in substance (1) a statement of the effect of a certificate of title "except in case of fraud," and (2) a statement that a purchaser of a registered title shall not be affected by notice, etc., "except in case of fraud."⁴⁹

2. Constructive fraud.

Generally speaking, constructive fraud is immaterial under the acts.⁵⁰

any manner concerned to inquire or ascertain the circumstances under or the consideration for which such proprietor, or any previous proprietor thereof, was registered, or to see to the application of any purchase or consideration money, or shall be affected by notice, actual or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud." (Section 140 of the Victorian act of 1890 is the same.)

⁵⁰ *Conroy v. Knox*, 11 Qd. L. J. 112, *Assets Co. v. Mere Roihi* [1905] A. C. (Eng.) 176, 74 L. J. P. C. N. S. 49, 92 L. T. N. S. 397, 21 Times L. R. 311; *Strang v. Russell* (1906) 24 N. Z. L. R. 916.

Under the Queensland statute, § 44 makes the estate of a registered proprietor of land, or of any estate or interest in land, paramount, and § 109 provides that a transferee, either voluntary or involuntary, under the various provisions of the act, shall not, except in the case of fraud, be affected by actual or constructive notice of any claims, etc., other than those which have been notified or protected by entry in the registry book. It was held in *Conroy v. Knox* (Qd.) *supra*, that these sections do not mean constructive fraud, but actual fraud, but that the provisions of the act giving an indefeasible title "are not to be construed as meaning that, by registration alone under the act, a duly registered proprietor is enabled to get rid of equities residing in himself in relation to such property." The court cited on the last proposition, *Hall v. Loder* (1885) 7 N. S. W. L. R. (Eq.) 44, and *Sempill v. Jarvis*, 6 N. S. W. S. C. R. 68; see *infra*, subd. IV. m.

Section 119 of the New Zealand act of 1870 was the same as § 111 of the New South Wales act of 1862 (26 Vict. No. 9), and was substantially the same as § 189 of the New Zealand act of 1885, and differed but slightly from § 50 of the Victorian act of 1892, above quoted, f. 1, it being as follows: 119. "Except in the case of fraud, no person contracting or dealing with, or taking or proposing to take a transfer from, the registered proprietor of any registered estate or interest, shall be required or in any manner concerned to inquire or ascertain the circumstances in or the consideration for which such registered owner, or any previous registered owner, of the estate or

Mere knowledge of a possible outstanding interest is not a fraud.¹

Applicants.

The statutory provision that the applicant shall declare that he is unaware "of any mortgage, encumbrance or claim affecting the said land, or that any person hath any claim, estate or interest in the said land at law, or in equity, in possession or in expectancy other than is set forth and stated as follows, that is to say," etc., does not mean that the applicant "shall specify every demand,

honest or dishonest, well founded or ill founded, which may by possibility at any time be set up in opposition to his title."²

In one case where the applicant stated in his application that the land was unoccupied when a part of it was occupied, the appellate court stated that "there seems to have been merely a mistake, and a pardonable one," instead of a case within the statute providing that certificates should be canceled for wilful fraud; but the "mistake" was perhaps due to misdescription.³

interest in question, is or was registered, or to see to the application of the purchase-money or of any part thereof, or shall be affected by notice, direct or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding; and the knowledge that any such trust or unregistered interest is in existence shall not of itself be imputed as fraud."

In *Assets Co. v. Mere Roihi* [1905] A. C. (Eng.) 176 (an appeal from New Zealand), where the court held there was no fraud, it was said: "The fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the native land acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

In *Strang v. Russell* (1906) 24 N. Z. L. R. 916, where it was perhaps obiter, the court said that in order to establish a case of fraud under § 189 of the act, by an intending purchaser, there must be enough to raise an inference of dolus, and mere culpa lata, upon which the doctrine of constructive or equitable fraud is based, is not sufficient. There must be not merely negligence, but bad faith, direct notice of some right, or wilful shutting of the eyes to circumstances which, if looked at in good faith, must necessarily lead to the conclusion that fraud on another was being committed.

¹*Nicholson v. Bank of New Zealand*, 12 N. Z. L. R. 427; *Kirkpatrick v. Hutchinson* (1904) 23 N. Z. L. R. 665. L.R.A.1916D.

So under the Manitoba act which provides that "except in the case of fraud on the part of such person, no person contracting," etc., shall be required, etc., "nor shall any person be affected by notice, direct, implied, or constructive," etc. *Shaw v. Bailey* (1907) 17 Manitoba L. R. 97, holding that an intending purchaser who hears that there is an outstanding contract of sale for the property, and also has other evidence reasonably good that there is no such outstanding sale, is not guilty of fraud. The court followed *Stark v. Stephenson* (1891) 7 Manitoba L. R. 381, where it was held that in order to bring abstinence from inquiry within the category of actual notice, there must be wilful abstinence and fraudulent determination not to be informed. The *Stark Case*, however, seems to have been decided under § 43 of the registry act, which, the court said, required actual notice of the prior instrument.

²*Re Tanner* (1886) 5 N. Z. S. C. 102.

A certificate will not be invalidated because of the failure of the applicant to state that he had ordered off a trespasser who had suggested some claim to the title and who tried to build a cottage which the applicant had torn down, removing the lumber from the land, although there might come a possible claim by the trespasser. *Re Beckett* (1894) 15 N. S. W. L. R. 94.

Where the applicant's statement as to no adverse possession was inadvertently wrong as to a small portion of land in adverse but wrongful possession, and the parties have agreed as to their differences, the registrar general has no right to caveat the land on the ground that the certificate was acquired by fraud. *Smith v. Registrar General* [1909] South Austr. L. R. 1.

So, one who took a lease and registered it was protected against the claim of one in possession under a verbal agreement for a lease from the same lessor, where the lessor told the lessee that the one in possession had no lease, and that his tenancy would be determined at any time, and the lessee in good faith believed the statement, as this did not make "fraud" on the part of the lessee. *Kirkpatrick v. Hutchinson* (1904) 23 N. Z. L. R. 665, citing *Merrie v. McKay* (1897) 16 N. Z. L. R. 124.

³*Wiggins v. Hammill* (1878) 4 Vict. L. R. 63, *Hunter, Torrens Title Cases*, 363,

3. Actual knowledge.

For mere knowledge of a trust, see *supra*, subd. IV. d.

Actual knowledge by the transferee of an intent to commit fraud will forfeit his right to protection.⁴

Actual knowledge of outstanding rights.

The cases merge imperceptibly from knowledge of fraud to knowledge of outstanding rights. It is the general rule that actual knowledge of outstand-

ing rights will forfeit a right of protection against them.⁵

"The principle of notice still exists as it did before the act," and one who at the time of taking a transfer has actual notice that the transferor has contracted to convey the property to a third party is not protected by the act, but his rights must give way to those of the third party, notwithstanding the provision in the act (§ 37) that "instruments purporting to affect the same estate or interest shall, notwithstanding

holding that a "pardonable" mistake made by an applicant in his application, to wit, that the land was unoccupied when it was in fact occupied, was not within the statute providing that certificates should be canceled for wilful fraud; consequently, when the plaintiff in ejectment was shown to have made such a mistake in his application, on which his certificate of title had been granted, and the defendant gave evidence that he had been in possession of the land, or a part of it, for fifteen years, and the court decided that the plaintiff had been guilty of fraud in his application and that his certificate was rendered void, and gave judgment for the defendant, the appellate court sent the case back for a new trial, intimating that the defendant's defense of adverse possession might be shown on the new trial.

⁴ Colonial Bank v. Pie (1880) 6 Vict. L. R. 186, 1 Austr. L. T. 156, Hunter, Torrens Title Cases, 122; National Bank v. National Mortg. & Agency Co. 3 N. Z. L. R. S. C. 257.

Thus, actual knowledge of a trust and of the nature of it, with the acceptance of a transfer knowing it to be a breach of the trust, is actual fraud, and the acceptor is not protected. National Bank v. National Mortg. & Agency Co. (N. Z.) *supra*.

An actual fraud, that is to say, conspiracy to defraud the creditor of one who made a transfer to A without consideration, if known to a transferee of A before paying his purchase money, is not protected by § 50 of the Victorian act of 1866, as this protects constructive notices, but not actual notices. Colonial Bank v. Pie (1880) 6 Vict. L. R. (E.) 186, 1 Austr. L. J. 156, Hunter, Torrens Cases, 122.

In Davis v. Wekey (1871) 3 Vict. Rep. 1, Hunter, Torrens Title Cases, 350, an injunction was granted preventing a purchaser of a lease from dealing with it pending the trial of the action, on the ground that the purchaser was a party to or aware of fraud committed by his assignor in selling it.

⁵ Cowell v. Stacey (1887) 13 Vict. L. R. 80, Hunter, Torrens Title Cases, 355; Biggs v. McEllister (1880) 14 South Austr. L. R. 86, affirmed in (1883) L. R. 8 App. Cas. (Eng.) 314, 52 L. J. P. C. N. S. 29, 49 L. T. N. S. 86; Thomson v. Finlay (1886) 5 N. Z. L. R. S. C. 203; Locher v. Howlett (1894) 13 N. Z. L. R. 584; Millard v. Cowdrey (1896) 14 N. Z. L. R. 12; Merrie v. McKay (1897) 16 N. Z. L. R. 124; Crowley v. Bergt-L.R.A.1916D.

heil [1899] A. C. (Eng.) 374, 68 L. J. P. C. N. S. 81, 80 L. T. N. S. 428, dismissing an appeal from Natal; Syndicat Lyonnais Du Klondyke v. McGrade (1905) 36 Can. S. C. 251; Fish v. Bryce (1909) 2 Sask. L. R. 111; Tasker v. Carrigan (1909) — Sask. L. Rep. —, 11 West L. R. 621; Chapman v. Edwards (1911) 16 B. C. 334. Compare, *infra*, New South Wales cases; also King v. Price (1904) 24 N. Z. L. R. 291, *infra*.

Thus, one who procures a certificate knowing another to be the real owner of the land is guilty of fraud, and a new certificate to his executors and trustees is not conclusive against the real owner. Biggs v. McEllister (1880) 14 South Austr. L. R. 86, affirmed in (1883) L. R. 8 App. Cas. (Eng.) 314, 52 L. J. P. C. N. S. 29, 49 L. T. N. S. 86.

So, one who purchases knowing of an outstanding agreement for a lease, under which the tenants are in possession, is not entitled to obtain registration free from the agreement. Millard v. Cowdrey (1896) 14 N. Z. L. R. 12.

Thus, where a registered owner made an agreement for a lease with the plaintiff, who entered, and the property passed in succession to three new registered owners, each having knowledge of the agreement and the plaintiff's possession, the third of such owners could not avoid the agreement for a lease. Merrie v. McKay (1897) 16 N. Z. L. R. 124.

So, where the owner of mortgaged land executed an agreement for a lease not in registerable form, and the tenants entered, and the mortgagee sold the land under the power of sale, expressly subject to the agreement, the purchaser could not defeat an action by the tenants for specific performance of the agreement to execute a lease, by claiming that the agreement was unenforceable and unregistered. Thomson v. Finlay (1886) 5 N. Z. L. R. S. C. 203.

In Crowley v. Berghel [1899] A. C. (Eng.) 374, dismissing an appeal from Natal, where the registered proprietor transferred the property, and after his death, the transfer not having been registered, a third party secured from his estate a transfer and registered it, although having facts sufficient to inform him that the possessor of the land represented an outstanding lawful interest different from that of the decedent's estate, such third party was held guilty of *dolus malus*, and his transfer was

any actual or constructive notice, be entitled to priority as between themselves according to the date of registration, and not according to the date of the instrument."⁶

—New South Wales.

In New South Wales, the courts take a different view of the question, holding that actual notice of an outstanding in-

set aside. The court said that they "cannot find that there is much difference between the Roman-Dutch law, which requires proof of *dolus* to set aside a later completed purchase in favor of an earlier contract, and the English law relating to similar questions in a locality where the system of registration prevails."

In *Syndicat Lyonnais Du Klondyke v. McGrade* (1905) 36 Can. S. C. 251, it was held that persons taking a conveyance from one whose certificate of title was stated to be subject to a *lis pendens* had actual notice of the *lis pendens*, and therefore must face the charge that their land might be subject to a claim of fraud, or that the transfer to their grantor might be, although the act (applicable to the Yukon Territory) did not provide for the filing and noting of a *lis pendens* upon the registered title and the registrar had no right to enter it.

If a person takes a lien upon land and registers it, having notice that the land had been previously sold to another, his lien is subject to the outstanding interest. *Tasker v. Carrigan* (1909) — Sask. L. R. —, 11 West L. R. (Can.) 621.

In *Conroy v. Knox*, 11 Qd. L. J. 112, it was held that an unregistered mortgage is good against a subsequent registered mortgagee who took with notice, though he claimed to have forgotten the notice, as this forgetfulness could not alter the case. It may be noted that the court pointed out that under the act (§ 60) a mortgage was a security, and not a transfer of the land, and considered that §§ 44 and 109 of the act (referred to *supra*, subd. IV. b) did not apply to mortgages.

But it should be noted that it was held in *King v. Price* (1904) 24 N. Z. L. R. 291, where a purchaser from a native's devisee, to which devisee a clear certificate of title had been issued, learned at the time of purchase that the original Crown grant to the testator had a restriction on sale without consent of the governor, that such purchaser's clear certificate was unassailable. (It seems that the question whether the restriction ever had any validity was not decided.)

It may be noted also that where the purchaser of land had notice of an outstanding interest as to part of it, and later gave the owner of such outstanding interest an agreement of sale, it was held that he must execute a proper transfer. The court observed that the act "protects a purchaser of land from all encumbrances and trusts; but it does not absolve him from the obligation of performing an express contract into which he has entered." *Cunningham v. Gundry* (1876) 2 Vict. L. R. 197, *Hunter, Torrens Title Cases*, 161.

⁶*Cowell v. Stacey* (1887) 13 Vict. L. R. 80. *Hunter, Torrens Title Cases*, 355. L.R.A.1916D.

In *Locher v. Howlett* (1894) 13 N. Z. L. R. 584, it was held that a purchaser was not protected under § 189 of the New Zealand statute of 1885, whose contract was made in the knowledge that there was an outstanding equitable interest, viz., a contract for conveyance to another person then in possession, this being apparently before any complete registration of title to the property, although a grant from the Crown to the seller awaited only payment of licenses and fees to the Crown, which were later paid, the grant obtained, and the transfer registered to the purchaser. The action was by the first contractee against the seller, the purchaser, and his mortgagee for specific performance. The court considered that the purchaser knew that he was buying a lawsuit, and said that it may be considered as the settled construction of § 189 of the land transfer act, 1885, "that a purchaser is not affected by knowledge of the mere existence of a trust or unregistered interest, but that he is affected by knowledge that the trust is being broken, or that the owner of the unregistered interest is being improperly deprived of it by the transfer under which the purchaser himself is taking." And after referring to *Smith v. Essery* (1890) 9 N. Z. L. R. 449 (see *supra*, subd. IV. d); where the appellate court was equally divided, the court said: "I hold that the purchaser's action must be judged of by considering what, with the knowledge he possessed, it was reasonable that he should believe respecting the good faith of the transaction;" and that where the circumstances should raise a strong suspicion of fraud, the purchaser should go no further without full inquiry. The seller claimed that the first contractee had broken his contract.

Voluntary trustees taking a conveyance with knowledge that the land has already been sold to another person are not protected by subsequently having the land registered, as the procurement of an unqualified certificate of title by *suppression veri* is a fraud, where the statute provided: "Nothing contained in this act shall take away or affect the jurisdiction of any competent court on the ground of actual fraud, or over contracts for the sale or other disposition of lands, or over equitable interests therein." *Fish v. Bryce* (1909) 2 Sask. L. R. 111.

In this connection reference may be made to *Chapman v. Edwards* (1911) 16 B. C. 334, though the case is probably beyond the scope of this note, as the title of the seller to at least a part of the land was unregistered, and as to the other part the report is not clear. It was there held that one with knowledge of an outstanding unregistered contract of purchase cannot, by taking a new contract of purchase of the land from

terest does not affect a lienor⁷ or purchaser.⁸

4. *Fraud-doers.*

The actual fraud-doer is not protected.⁹

the owner and filing it for registry, dispose of the rights of the holder of the earlier contract, notwithstanding the land registry act (§ 74) provided that no instrument (except those as to certain leasehold interests) "shall pass any estate or interest, either at law or equity, in such land, until the same shall be registered in compliance with the provisions of this act," the court referring with approval to *Cowell v. Stacey* (1887) 13 Vict. L. R. 80, *supra*.

⁷ *Cooke v. Union Bank* (1893) 14 N. S. W. L. R. 280, where, after a marriage settlement agreeing to convey certain lands to trustees, the husband registered the lands and borrowed money of a bank, to which he gave the deeds (whether he delivered the certificate also does not appear) and showed the marriage settlement, and it was held that the bank was not affected by notice of the trust.

⁸ *Oertel v. Hordern* 1902) 2 N. S. W. St. Rep. 37, where it was held that one who purchased with actual knowledge of an unregistered lease, which there was possibly some reason to think invalid, can, after registering the transfer to himself, defend against the lessee, who filed no caveat before such registration. The court did not content itself with resting the decision on the ground that the purchaser had only notice of a possible claim which might be invalid, but cited as contrary to its decision the foregoing cases of *National Bank v. National Mortg. & Agency Co.* 3 N. Z. L. R. S. C. 257; *Locher v. Howlett* (1894) 13 N. Z. L. R. S. C. 584; *Merrie v. McKay* (1897) 16 N. Z. L. R. 124, and upon the other side the foregoing cases of *Cooke v. Union Bank* (N. S. W.) and also the case of *Robertson v. Keith* (1870) 1 Vict. Rep. 11, *Hunter, Torrens Title Cases*, 366. The *Robertson* Case was decided in favor of the person in possession, but the court did express the opinion that the defeated party was not guilty of fraud in buying with notice of the possessor's rights.

It may be noted that in *Josephson v. Mason* (1912) 12 N. S. W. St. Rep. 249, the court observed, after quoting § 43 of the act of 1900, No. 25 (which is the same as § 111 of the act of 1862, 26 Vict. No. 5, and as § 119 of the New Zealand act of 1870, quoted *supra*, subd. IV. 8, 1): "In the cases of *Cooke v. Union Bank* (N. S. W.) *supra*, decided by Manning, J., and *Oertel v. Hordern* (N. S. W.) *supra*, decided by A. H. Simpson, J., the view taken was that 'fraud' as here used meant actual fraud, as distinguished from what is spoken of as 'constructive' fraud, and this agrees with what was said in the judgment of the privy council in *Assets Co. v. Mere Roihi* [1905] A. C. (Eng.) 176, with reference to the New Zealand enactments, where it was said, at p. 210, 'By fraud in these acts is meant actual fraud, i. e. dishonesty of some sort, not what is called constructive or equitable L.R.A.1916D.

fraud,—an unfortunate expression, and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud."

⁹ *Finnoran v. Weir*, 5 N. Z. L. R. S. C. 280; *Saunders v. Cabot* (1885) 4 N. Z. L. R. C. A. 19; *Independent Lumber Co. v. Gardiner* (1910) 3 Sask. L. R. 140; *McDonald v. Leadlay* (1914) — *Alberta L. R.* —, 20 D. L. R. 157; *Sydie v. Saskatchewan & B. River Land & Dev. Co.* (1913) — *Alberta L. R.* —, 25 West. L. Rep. 570, 14 D. L. R. 51; *Loke Yew v. Port Swettenham Rubber Co.* [1913] A. C. (Eng.) 491, 82 L. J. P. C. N. S. 89, 108 L. T. N. S. 467, 50 Scot. L. R. 964 (appeal from Malay Peninsula); *Annable v. Coventry* (1912) 46 Can. S. C. 573; *Ogle v. Aedy* (1887) 13 Vict. L. R. 461, *Hunter, Torrens Title Cases*, 285.

In *Independent Lumber Co. v. Gardiner* (1910) 3 Sask. L. R. 140, where the registered owner made a deed to an undivided half of his lot, and while this was unregistered made a mortgage of the whole lot to another person, stating to him the circumstances of the earlier transfer, and stating that he owned only one undivided one half, and that the mortgage was not intended to cover more than that, and the mortgagee registered his mortgage and then endeavored to foreclose it, it was held that the mortgagee was guilty of fraud notwithstanding the following provision of the statute: "173. No person contracting or dealing with, or taking or proposing to take, a transfer, mortgage, encumbrance, or lease from the owner of any land for which a certificate of title has been granted, shall, except in case of fraud by such person, be bound or concerned to inquire into or ascertain the circumstances in or the consideration for which the owner or any previous owner of the land is or was registered, or to see to the application of the purchase money or of any part thereof, nor shall he be affected by notice, direct, implied, or constructive, of any trust or unregistered interest in the land, any rule of law or equity to the contrary notwithstanding. (2) The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud."

Where an official of a company, taking advantage of a purchaser's clerical mistake, caused the company to convey to such purchaser the wrong lot, and later (it not being clear whether he was still connected with the company or not) procured a conveyance to himself from the company of the lot bargained for by said purchaser, and registered such conveyance, becoming thus the registered owner of the lot, the court compelled him to transfer the lot to the first purchaser, and the company to release a mortgage it had taken thereon from the second purchaser. The court considered that the defendants were not pro-

Thus, one who takes title knowing that his transferrer is defrauding a lessee, and who instigates such fraud, is himself guilty of fraud, under the New Zealand act.¹⁰

So, a mortgagee whose mortgage by an agreement was an absolute transfer, which he registered, and was by the agreement subject to an unregistered contract of sale, should not be allowed to set up his certificate of title to defeat the holder of such contract.¹¹

"So long as the rights of third parties are not implicated a wrongdoer cannot

shelter himself under the registration as against the man who has suffered the wrong."¹²

One applying to have land registered for the first time, who conceals a legal fraud in the title committed by himself, is within the section providing that the registered owner, "except in case of fraud," shall hold the land free from all encumbrances, etc., not specified in the register book, as this refers to fraud as understood in courts of equity, and is not limited as the provision as to fraud in the section as to fraud apart

tected by the section providing that every certificate shall (except in case of fraud wherein the owner had participated or colluded) be conclusive evidence of title, with certain exceptions, nor by the further section (135) which is in general similar to § 50 of the Victoria act of 1866, except that in the Alberta act he is not to be affected by notice "direct, implied, or constructive," while the Victoria act reads "actual or constructive." *Sydlie v. Saskatchewan & B. River Land & Dev. Co.* (1913) — *Alberta L. R.* —, 14 D. L. R. 51, where the court cited *Assets Co. v. Mere Roihi* [1905] A. C. (Eng.) 176, 74 L. J. P. C. N. S. 49, 92 L. T. N. S. 397, 21 Times L. R. 311, arising under the similar New Zealand provision, and also said: "The exact interpretation to be placed on the section of the New Zealand act similar to the section before us was discussed by Richmond, J., in *National Bank v. National Mortg. & Agency Co.* 3 N. Z. L. R. S. C. 257, at pp. 262-264, a case very like the present one. I agree with his remark that it may be an act of downright dishonesty knowingly to accept from the registered owner a transfer of property which he has no right to dispose of. As pointed out in that case, it is enough to say on which side of a possible line of demarcation the case falls, without pretending to draw the actual line."

It may be noted, although it does not appear whether the title was registered until after the mortgage, that it was held that the mortgagee of a registered mortgage will not be protected in advances made thereon after receiving notice from a third party that the land had been obtained from him by fraud, as the making of further advances would be acting in collusion with the mortgagor. *Robinson v. Ford* (1914) 7 Sask. L. R. 443, 19 D. L. R. 572.

¹⁰ *Finnoran v. Weir*, 5 N. Z. L. R. S. C. 280, decided under § 189 of the act of 1885.

¹¹ *McDonald v. Leadlay* (1914) — *Alberta L. R.* —, 20 D. L. R. 157.

¹² *Loke Yew v. Port Swettenham Rubber Co.* [1913] A. C. (Eng.) 491, 82 L. J. P. C. N. S. 89, 108 L. T. N. S. 467, 50 Scot. L. R. 964, on appeal from the court of appeal of the state of Selangor (*Federated Malay States*), holding that a purchaser from a registered proprietor could not ignore its own agreement with him that it must make L.R.A.1916D.

its own arrangements as to certain unregistered interests, the court stating that the case was within the exception in § 7 of the "registration of titles regulation," which provided: "Section 7: The duplicate certificate of title issued by the registrar to any purchaser of land upon a genuine transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the conditions and agreements expressed or implied in the original grant, and the title of such proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party, or on the ground of adverse possession in another for the prescriptive period."

Where the defendant fraudulently got possession of a transfer to himself of a piece of property, which transfer had never been delivered to him, and registered the transfer, the certificate will be canceled and the transfer set aside. *Annable v. Coventry* (1912) 46 Can. S. C. 573, dismissing an appeal from *Saskatchewan*.

The court, it seems, will not dissolve on affidavits an injunction made to restrain the holder of a registered title from dealing with it on the ground that he had been guilty of fraud. *Hooper v. Smith* (1905) 7 Terr. L. R. (Can.) 27, where the court said: "In *Gregory v. Alger* (1893) 19 Vict. L. R. 565, 15 Austr. L. T. 22, *Hunter, Torrens Title Cases*, 532, it was held by the supreme court of Victoria that, in the absence of fraud on the part of the holder of a certificate of title, his title will prevail over an unregistered interest, even though he had notice of such interest before he obtained his certificate, and that his obtaining the certificate with such notice did not constitute fraud. This was a decision under the Victorian transfer of land act, similar to § 126 of our act, the land titles act, 1894, 57-58 Vict. chap. 28. It appears, however, that the courts of New Zealand have taken a different view of the effect of a similar enactment there. See *Duffy v. Howland*, p. 285, and *Locker v. Howland*, *Digest of Australian Land Cases*, p. 114. The question of the effect of such notice is therefore not free from doubt."

from and outside of knowledge of some existing trust, etc., which applies in cases of land already registered.¹³

5. Rights of bona fide purchasers.

Bona fide takers from one fraudulent-ly registered will be protected.¹⁴

The bona fide transferee from one whose certificate is founded on a void instrument takes a good title.¹⁵

But it has been held that he who obtains a first certificate based on a void conveyance is not protected.¹⁶

The court seems to have misapprehended the situation in *Gregory v. Alger* (see supra, subd. IV. d), as in that case it did not appear that the mortgagee knew that the situation actually meant that there was an outstanding unregistered interest. For *Locher v. Howlett* (1894) 13 N. Z. L. R. 584, see supra, subd. IV. f. 3.

¹³ *Saunders v. Cabot* (1885) 4 N. Z. L. R. C. A. 19.

¹⁴ *Cullen v. Thompson* (1879) 5 Vict. L. R. 147, *Hunter, Torrens Title Cases*, 322; *Barnes v. James*, 27 Vict. L. R. 749, 8 *Argus L. R.* (Current Notes) 73; *Honeybone v. National Bank*, 9 N. Z. L. R. 102.

One who innocently and in good faith takes a mortgage to secure a prior indebtedness, without knowledge of any fraud on the part of the mortgagor, takes a good title from the mortgagor, he being the registered owner, although the mortgagor acquired his title by deceiving a prior owner into executing, instead of a mortgage, an absolute transfer of the land, by which he had himself registered as the owner, for, while this was a fraud as against the original owner, who was then the registered proprietor, and whose tenant was in possession during all the time, the mortgagee from the person committing the fraud is protected under § 50 of the act. *Cullen v. Thompson* (1879) 5 Vict. L. R. 147, *Hunter, Torrens Title Cases*, 322, where the court said: "The whole policy of the act would be frustrated if 'except in the case of fraud' was held to mean or include fraud of the conveying party in acquiring title. In a recent case of *Chomley v. Firebrace*, 5 Vict. L. R. 57, *Hunter, Torrens Title Cases*, 98, the full court held as to a conveyance by a person who was agent of both parties to his conveyance, that his fraud prevented the application of the act; that the fraudulent conveyance was ineffectual. But to decide for the plaintiff in this case against *Johnson* would be to say that a person innocently taking from another having fraudulently acquired is to be defeated."

A purchaser for value in good faith from one registered will be protected against one defrauded by the vendor, although the purchaser at the time of suit by the person defrauded had not yet registered his transfer. *Barnes v. James*, 27 Vict. L. R. 749, 8 *Argus L. R.* (Current Notes) 73.

It seems to be held in the obscurely reported case of *Honeybone v. National Bank*, L.R.A.1916D.

Notice.

One lending money to an unregistered transferee, with notice that the transferor has a claim, will be second to such claim, although it would be otherwise without such notice.¹⁷

One not a bona fide purchaser.

It has been held that one not a bona fide purchaser will not be protected.¹⁸

Specific performance.

It seems to be held in a case in *Manitoba*, that where one who contracted to

9 N. Z. L. R. 102, that if a debtor, instead of giving his creditor a mortgage, gives him an absolute transfer under a promise not to register it, and the creditor breaks the promise, registers the transfer, and mortgages the property to a third party, the mortgagee, who does not at once register the mortgage, will not be prevented from doing so after the debtor has settled with his creditor in ignorance of the mortgage.

¹⁵ *Katene Te Whakaruru v. Public Trustee* (1893) 12 N. Z. L. R. 651.

Thus, a bona fide purchaser for valuable consideration, from a vendor who holds under a certificate void in law, obtains an indefeasible title. *Beale v. Tihema Te Hau*, 24 N. Z. L. R. 883.

¹⁶ *Matthews v. Paraone*, 7 N. Z. L. R. 528, affirming 6 N. Z. L. R. 744.

¹⁷ *Barry v. Heider* (1914) 19 C. L. R. (Austr.) 197, 15 N. S. W. St. Rep. 271, modifying *Barry v. Schmidt* (1913) 13 N. S. W. St. Rep. 639 (see supra), where there were two unregistered mortgages to two successive and independent mortgagees, and before the second mortgage money was advanced, a caveat was lodged by a solicitor for the true owner, stating that the purchase money had not been paid, and during the course of the negotiations for the second mortgage, the solicitor withdrew the caveat although the purchase money had not been paid, and the second mortgagee thereupon advanced his money, although he knew that the solicitor acted for the transferee as well as the true owner.

¹⁸ *Crow v. Campbell* (1884) 10 Vict. L. R. 186, 6 Austr. L. R. 34, *Hunter, Torrens Title Cases*, 87; *McInnis v. Getsman* (1908) 1 Sask. L. R. 172.

Section 50 of the Victorian act does not apply in the case of a person who takes with constructive notice of a trust, and who at the time he acquires his interest pays no consideration. *Crow v. Campbell* (Austr.) supra.

A registered holder, A, having been induced by fraud to execute a transfer to B, who transferred to C, who transferred to D, none of the transfers being registered, it was held in an action by A against B, C and D, that, the transfer to B being shown to be fraudulent on B's part, and it not being shown that C and D were bona fide purchasers for value, all the transfers must be canceled. *McInnis v. Getsman* (Sask.) supra.

purchase property from a registered owner who is really a mortgagee, and having made such contract and paid part of the money down, is informed of the rights of the mortgagor and of his creditor, he will only be protected to the extent of the money which he paid before he had notice of those rights; but it may be that the court's decision was affected by the fact that the payment was only of \$55 on a purchase price of \$9,800.¹⁹

But the same court held shortly afterwards that a purchaser in good faith from a registered owner, having paid part of his consideration, is entitled to have his contract carried out without reference to the fact that there may be anterior fraud; however the judgment was afterwards set aside on the ground that there was an interested person who had not been made a party.²⁰

6. Miscellaneous.

Fraud by agent.

Fraud committed by an agent cannot benefit his principal.²¹

Thus, where a trustee took a mortgage in his own name registered under the transfer of land statute, and without the payment of any new consideration trans-

ferred the mortgage to the trustees of a different estate, under whom he had power of attorney to invest money, and died, it was held that his successors in trust might have such mortgage re-assigned to them, as the fraud committed by him as agent could not benefit his principal.²²

Statutes of Elizabeth.

It has been held that the transfer of land act did not do away with the statutes of Elizabeth against fraudulent conveyances, etc.

Thus, a gift by a father to his son, of land registered in the son's name under the transfer of land act, will be of no effect against a subsequent contract made by the father to sell the land to a third person, although the third person is aware of the son's interest, and the father will be compelled to a specific performance of his contract, and so the act has not in this respect altered the statute of 27 Elizabeth, chap. 4, for the protection of purchasers.²³

In this connection it should be noted that it has been held that the statute 13 Elizabeth chap. 5, has not been done away with by the land registry act of British Columbia.²⁴

¹⁹ Wallace v. Smart (1912) 22 Manitoba L. Rep. 68, 19 West L. R. (Can.) 787, 1 D. L. R. 70.

²⁰ Cooper v. Anderson (1912) 22 Manitoba L. Rep. 428, 5 D. L. R. 218.

²¹ Chomley v. Firebrace (1878) 5 Vict. L. R. 57, Hunter, Torrens Title Cases, 98; Wolfson v. Oldfield (1911) 22 Manitoba L. R. 159, 18 West L. R. (Can.) 449; see also Ex parte Batham, 6 N. Z. L. R. 342, *infra*, subd. IV. g, "Miscellaneous."

In Wolfson v. Oldfield (1911) 22 Manitoba L. R. 159, 18 West L. R. (Can.) 449, where an agent acted both for the buyer and the seller, unknown to the seller, and a fraud was committed on the seller, the seller was held entitled to recover the premises from the buyer. It was claimed on the part of the buyer that he was an innocent party, and that therefore he was protected by the land title act, and that the fraud referred to in the act meant only actual fraud, but the court held that there was improper conduct on the part of the agent in bringing about the purchase. The court quoted § 71 of the act giving the right to any person "to show fraud wherein the registered owner, mortgagee, or encumbrancee has participated or colluded, and as against such registered owner, mortgagee, or encumbrancee," also § 76 of the act (in part, viz.): "No action of ejectment . . . shall lie or be sustained against the registered owner . . . except in the following cases, that is to say: The case of a person deprived of any land by fraud, as against the person registered as owner L.R.A.1916D.

through fraud, or as against a person deriving his right or title otherwise than bona fide for value from or through a person so registered, through fraud."

²² Chomley v. Firebrace (1878) 5 Vict. L. R. 57, Hunter, Torrens Title Cases, 98. As may be noticed, this case is distinguished in Cullen v. Thompson (1879) 5 Vict. L. R. 147, Hunter, Torrens Title Cases, 322, *supra*, subd. IV. f, 4.

²³ Colechin v. Wade (1878) 3 Vict. L. R. 266, Hunter, Torrens Title Cases, 278. Note, however, the English statute of 1893, as altering the effect of 27 Elizabeth.

²⁴ In Peck v. Sun Life Assur. Co. (1905) 11 B. C. 215, 1 West L. R. 302, the plaintiff registered his contract of sale and thereafter paid an additional part of the price and took the deed, leaving some part of the price still to be paid, but, on applying to register his deed, discovered that since the registry of his contract a lis pendens had been filed against the property by persons attacking the transfer to the plaintiff's grantor as fraudulent. It was held that the plaintiff was not protected by § 43, subsection 4, of the land registry act (British Columbia), providing that unregistered titles are of no effect as against the purchaser for valuable consideration of such real estate; nor was he protected by § 43, subsection 7, providing that the purchaser for valuable consideration of registered real estate shall not be affected by any notice, expressed, implied, or constructive, of any unregistered title, etc., other than a leasehold interest in possession for a term not exceeding three

Other miscellaneous cases on fraud are referred to in the notes.²⁵

g. Forgery.

It is the general rule under the statutes that the immediate taker of a forged instrument, though innocent, is not protected, but that, after the forged instrument has been registered, a trans-

feree of such registered title will, if a bona fide purchaser, take a good title.

Immediate innocent takers.

As stated above, the immediate taker of a forged instrument, though innocent, is not protected.²⁶

It will be seen that the New Zealand decision to the contrary in *Coleman v.*

years; but that the matter was covered by the provisions of 13 Eliz. chap. 5, it being claimed that the conveyance from the plaintiff's grantor was void ab initio, and that the statutory right to have this so declared was neither an unregistered title nor an unregistered interest nor an unregistered disposition, but that the plaintiff was protected by the saving clause of such statute of Elizabeth, which saved the rights or interests or estate lawfully conveyed or assured to any person upon good consideration and bona fide, and that the plaintiff, having bought in good faith, was protected as to the payments which he had made before actual notice of the adverse claim of the defendants, and that the defendants had a charge on the land for the amount of the purchase money unpaid.

²⁵ Reference may be made in this connection to *Brady v. Brady* (1874) 8 South Austr. L. R. 219, holding that a certificate and a mortgage were nullities where a son, fraudulently suppressing the will of his late father, applied in his father's name to have land brought under the act, stating that the only claim affecting the land was that he had agreed to execute a mortgage to K. for £250, money borrowed on the security of the land. The certificate was issued in the father's name, and the same day the son in such name mortgaged the property for £250 to D, who was, said the court, probably the principal of K. The act provided for issuing a certificate in the name of a decedent only where he died after application.

It may be noted that in *Turner v. Clark* (1909) 2 Sask. L. R. 200, where the registered owner gave a power of attorney to his wife to transfer land, and she transferred the land, giving the transferee the duplicate certificate of title, and the register refused to transfer the title because he did not have the power of attorney, a subsequent transferee from the registered owner filed a caveat, and, suppressing the facts, obtained an order for the registry of his title without the duplicate certificate, but that this was set aside, the court concluding that the subsequent transferee, if not acting fraudulently, had acted in collusion with the husband.

²⁶ *Ex parte District Land Register* (Ex parte Davy) (1888) 6 N. Z. L. R. 760; *Keavy v. Barnett* [1909] St. R. Qd. (W. N.) 39; *Re Adams* (1914) — *Alberta L. R.* —, 20 D. L. R. 293; *Atty. Gen. v. Odell* [1906] 2 Ch. (Eng.) 47, 75 L. J. Ch. N. S. 425, 54 Week. Rep. 566, 94 L. T. N. S. 659, 22 Times L. R. 466. Compare *Coleman v. Riria Puwhanga* (1886) 4 N. Z. S. C. 230, *infra*.

man v. Riria Puwhanga (1886) 4 N. Z. S. C. 230, *infra*.

Thus, one who, in good faith, takes a forged transfer and registers it, obtains nothing. *Re Adams* (1914) — *Alberta L. R.* —, 20 D. L. R. 293.

So, where a person in good faith procures a forged instrument to be registered for which he has given value to the forger, he will be compelled to give up the instrument in order that the registration may be canceled, as title only passes by the registration of a valid instrument (but a bona fide purchaser from one registered under a void instrument would be protected). *Ex parte District Land Registrar* (Ex parte Davy) (1888) 6 N. Z. L. R. 760.

For the circumstances in *Atty. Gen. v. Odell*, see *infra*, subd. IV. l.

In *Kay v. Barnett* [1909] St. R. Qd. (W. N.) 39, the defendant, claiming under a forged mortgage from the registered proprietors, was held not entitled to relief (when the plaintiffs sued for their title deed) on the ground that the forgery was rendered possible by the proprietors' negligence, as the court would not interfere unless the degree of negligence proved was "negligence so gross as to be tantamount to fraud;" and the court considered that there was here not even carelessness or improvidence. It is suggested that the fraud was committed by a conveyancer with whom the plaintiffs left their papers, and a conveyancer (said the court) "is an official of the court."

See, also, in this connection, *Oelkers v. Merry* (1872) 2 Qd. S. C. 193, where an owner having a certificate mortgaged the property, and the mortgagee's executor, on default of principal and interest, brought ejectment against the holder of a subsequent certificate as to part of the land, who brought this part under the act after purchase from a stranger; it was held the plaintiff could recover, but that it would have been otherwise if the stranger had had a certificate, the defendant being a bona fide purchaser for value.

The decision contrary to the text in *O'Connor v. O'Connor* (1887) 9 Austr. L. T. 117, followed the decision of the full court in *Messer v. Gibbs* (1887) 13 Vict. L. R. 854, 9 Austr. L. T. 106, which was later reversed in [1891] A. C. (Eng.) 248, 60 L. J. P. C. N. S. 20, 64 L. T. N. S. 237, see *infra*. It was held in the *O'Connor* Case that a registered proprietor who is a purchaser for value, without notice, obtains an indefeasible title although the instrument by which he obtained his registration

Riria Puwhanga²⁷ is not consistent with the later decision in *Ex parte District Land Registrar (Ex parte Davy)*,²⁸ cited in a foregoing note, nor with the reasons given for the still later decision in *Gibbs v. Messer*,²⁹ hereafter referred to.

Fictitious proprietor.

In accordance with the foregoing principle it has been held that one who forges a transfer to a fictitious person, has the title registered in the name of such fictitious person, and then makes a mortgage in the name of the fictitious person to a bona fide mortgagee, has not done anything whereby the bona fide mortgagee can be protected in his mortgage as against the original registered owner, whose name has been forged.³⁰

was a forgery. (It seems to be assumed that the land had been already registered before the forgery.)

²⁷ (1886) 4 N. Z. S. C. 230. In that case the testator in his lifetime had obtained a certificate of title, and it was claimed that a deed of conveyance of a part of the land was forged, but there was no proof that the testator or his agents were aware of the forgery. It was held that his title was good and that that of his devisees (who obtained a certificate) was good. (Apparently we are to understand that the deed claimed to be forged was to the testator.)

²⁸ (1888) 6 N. Z. L. R. 760.

²⁹ [1891] A. C. (Eng.) 248, 60 L. J. P. C. N. S. 20, 64 L. T. N. S. 237.

³⁰ *Gibbs v. Messer* [1891] A. C. (Eng.) 248, 60 L. J. P. C. N. S. 20, 64 L. T. N. S. 237, reversing (1887) 13 Vict. L. R. 854, 9 Austr. L. T. 106, where the court stated that if the mortgagee had then conveyed the property or passed his right to another bona fide person, that such second bona fide person would have been protected; but that here the mortgagee did not deal with the owner of the registered title, but dealt with a person who was the real forger, and who purported to act as agent for the holder of the registered title, who in fact had no existence.

³¹ *Bailey v. Cribb* (1884) 2 Qd. L. J. 42; *Brown v. Broughton* (1915) 25 Manitoba L. R. 489, 24 D. L. R. 244; *Fialkowski v. Fialkowski* (1911) 4 Alberta L. R. 10, 19 West L. R. (Can.) 644.

In *Bailey v. Cribb* (1884) 2 Qd. L. J. 42, the court quoted the Queensland real property act of 1861, § 123, viz.: "Except in the case hereinafter provided of a mortgagee or encumbrancee against a mortgagor or encumbrancer or in the case of a lessor against a lessee or tenant or in the case of a person deprived of any land by fraud or against a person registered as proprietor through fraud or against a person deriving otherwise than as a purchaser or mortgagee

Subsequent transferees.

When a title registered by means of a forged certificate has passed into the hands of a bona fide purchaser for value, without notice, whose title is registered, the last title is good.³¹

A forged transfer to the forger who registered title in himself, followed by a mortgage by him to a bona fide person, will protect the mortgagee, although the registered true owner was not negligent in letting the forger have possession of his certificate of title.³²

Miscellaneous.

Where one employed his agent to procure the transfer of a mortgage, giving him the money, and the agent forged the transfer as to one of the two mortgagees, and deceived the other as to what he was signing, the transfer must be delivered

bona fide for value from or through a person registered as proprietor through fraud or in the case of a person deprived of any land by reason of a wrong description of any land or of its boundaries and except in the case of a registered proprietor claiming under a prior certificate of title or under a prior grant registered under the provision of this act in any case in which two grants or certificates or a grant and a certificate may be registered under the act in respect of the same land no action of ejectment shall lie or be sustained against a registered proprietor for the recovery of land under the provisions of this act and except in any of the cases aforesaid the grant or certificate of title shall be held in every court of law or equity to be an absolute bar and estoppel to any such action against the person named in such grant or certificate of title as seised of or entitled to such land."

³² *Brown v. Broughton* (1915) 25 Manitoba L. R. 489, 24 D. L. R. 244, where the court considered that the registered true owner's recourse was against the assurance fund.

Where the son of a registered owner stole the certificate of title, forged a transfer from his father to himself, and obtained thereon the issue of a certificate to himself, and upon it obtained a loan from a third party, it was held that the father could not have the new certificate to the son canceled as against the third party. *Fialkowski v. Fialkowski* (1911) 4 Alberta L. R. 10, 19 West L. R. 644 (Can.) The court referred to § 135 of the Alberta act, which is similar but not exactly the same as § 140 of the Victoria act of (1890), quoted supra, subd. IV. f, and said: "The word 'fraud' in § 135 of the land titles act must mean, and mean only, fraud on the part of the person taking or proposing to take a transfer, mortgage, encumbrance, or lease from the holder of the certificate of title."

up to the registrar in order that its registration may be canceled.³³

For a case on recourse upon the assurance fund of those defrauded by forgery, see *infra*, subd. IV. 1.

h. Misdescription.

One of the most difficult matters under the Torrens acts is that of misdescription of land in a certificate, and the cases have not gone far toward solving the difficulties. The acts generally, in providing for the conclusiveness of the certificate, except rights under an earlier certificate of another proprietor, and most of them also except land included by wrong description in the certificate of one not being a purchaser for a valuable consideration, or deriving title through such a purchaser.

The earlier certificate, in general, prevails;³⁴ but this rule is not invariable.³⁵

An error in description or boundaries

cannot be relied upon to displace a good title of a person in possession.³⁶

But it has been held that an original misdescription will be protected in the hands of a bona fide certificate holder for value, without fraud, notwithstanding an outstanding possession of the disputed strip, which was for less than the statutory period at the time of trial.³⁷

Where there is no misdescription, but a certificate includes a plainly described tract to which it is claimed there was no title in the registered proprietor, the statute as to misdescription does not apply, and the certificate is conclusive.³⁸

And it has been held that after registration there cannot be correction of the mistake where one agreeing to sell lands to two different parties substituted one lot in the transfer to A, which was meant for B, and vice versa.³⁹

Errors in survey or misdescription will be corrected when there has been no bona fide sale;⁴⁰ and a transferee is not

³³ *Ex parte Batham* (1888) 6 N. Z. L. R. 342.

³⁴ Where two certificates overlap as to the land covered, the earlier certificate prevails. *Lloyd v. Mayfield* (1885) 7 Austr. L. T. 48.

Where A sold part of his land to B, who got a proper certificate, and later A sold the remainder to D, whose certificate, through error, described both pieces, and D transferred this certificate to E, a bona fide purchaser, who took a new certificate with the same error, all parties acting in good faith, it was held that E must deliver up his certificate for correction. *Registrar of Titles v. Esperance Land Co.* 1 West Austr. L. R. 118.

³⁵ See cases in next note.

³⁶ *Overland v. Lenehan* (1901) 11 Qd. L. J. 59, where the court construed § 44 of the real property act of 1861, declaring the estate of a registered proprietor to be paramount except in certain cases, one of which is "the wrong description of the land or its boundaries," and held that an error in description of boundaries cannot be relied upon to displace the title, otherwise good, of a person in possession of land erroneously included in the title. The court considered that the plaintiffs, who claimed under the earlier certificate, had such land as was marked out on the ground when their predecessor acquired title, but that his certificate erroneously included part of the land correctly described in the defendant's certificate; and held further that (while it was not considered material) any right of action in the plaintiffs accrued more than twenty years before suit.

Where a purchaser from a registered proprietor went into possession, and later registered his title and received a certificate for another piece of land, owing to a mistake of roads (probably by the title office), *L.R.A.*1916D.

others who later got a certificate for the land bought by the first purchaser cannot oust his possession, it having been long enough to make a title. *Lake v. Jones* (1889) 15 Vict. L. R. 728.

It has been held that one claiming under a possessory title may not have relief in equity on the ground of mistaken boundaries in a certificate of an adjoining owner, as he may sufficiently show possession at law. *Rourke v. Schweikert* (1888) 9 N. S. W. L. R. 152.

³⁷ *West Australian Fresh Food & Ice Co. v. Freecom*, 7 West Austr. L. R. 222, referring to the similarity between the Victorian and West Australian acts.

³⁸ *Hamilton v. Iredale* (1903) 3 N. S. W. St. Rep. 535, holding that *Marsden v. McAllister* (1887) 8 N. S. W. L. R. 300, *infra*, is not to be extended.

³⁹ *Jonas v. Jones* (1883) 2 N. Z. S. C. 15, where, by mistake one agreeing to sell various lots to two different parties substituted one lot in the transfer to A which was meant for B, and vice versa, it was held that the mistake could not be corrected after registration, as the case was not within the exceptions to § 129 of the act of 1870, providing that "no action for possession or other action for the recovery of any land shall lie or be sustained against the registered proprietor under the provisions of this act for the estate or interest in respect to which he is so registered except in any of the following cases [that is to say] . . . subsection 4. The case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud or as against a person deriving otherwise than as a transferee bona fide for value from or through a person so registered through fraud."

⁴⁰ *National Trustees etc. Co. v. Hassett* [1907] Vict. L. R. 404.

protected where he took with notice of the mistake, or with means of knowledge that it was a mistake.⁴¹

4. Easements.

(Questions of dedication of highways are not considered.)

Under the Victorian act of 1866,⁴² it

The 33d section of the New South Wales act 26 of Vict. 9 (1862), making the certificate conclusive, is to be read in connection with § 40, providing an exception: "So far as regards any portion of land that may by wrong description of parcels or of boundaries be included in the grant, certificate," etc., "evidencing the title of such registered proprietor, not being a purchaser or mortgagee for value, or deriving from or through a purchaser or mortgagee thereof for value." *Marsden v. McAllister* (1887) 8 N. S. W. L. R. 300.

Where one by a misdescription in the transfer obtains a certificate of title covering a lot in addition to what he bought, his certificate as to such lot will be canceled, the court considering it gross fraud for such transferee to resist the claim of the plaintiff, the real owner of such lot, who was a prior grantee of the same grantor. *Ott v. Lethbridge Brewing & Malting Co.* (1910) 3 Alberta L. R. 210. In that case, at the time of the plaintiff's purchase her vendor had not registered the transfer to him, and later, by misdescription, included her lot in a transfer to the defendant, who obtained a certificate including it. The court pointed out that the conclusiveness of the certificate is not for all purposes, but for the purposes of the act, and said: "The purpose, then, for which the act declares the conclusiveness of the certificate of ownership, is the protection of persons dealing with the certificate owner."

But it may be noted in this connection that where one who owned two adjoining pieces by separate registered titles erected buildings and sold by the old descriptions to different persons, one of the buildings encroaching on the other land, it was held that his grantee was not obliged to remove the encroachment at the suit of a bona fide transferee from the grantee of the other parcel. *Billiet v. Commercial Bank* [1906] South Austr. L. R. 193.

⁴¹ *Hay v. Solling* (1895) 16 N. S. W. L. R. 60, following *Marsden v. McAllister* (N. S. W.) supra, and holding that if the transferee took with notice of the mistake, or with means of knowledge that it was a mistake, he was not a bona fide transferee for value within the meaning of § 115, providing for ejectment in "the case of a person deprived of or claiming any land included in any grant or certificate of title of other land by misdescription of such other land or of its boundaries as against the registered proprietor of such other land not being a transferee thereof, bona fide for value."

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was held that an easement over upon or affecting land which had not been brought under the act could not be registered under such act.⁴³ After this decision the act was amended to the effect that a statement of an easement on the certificate of the dominant tenement should be conclusive evidence.⁴⁴ There-

⁴² It was provided in the Victoria statutes in § 4 of act No. 301 of 1866, and also in § 4 of the act of 1890, that the word "'land' shall include messuages tenements and hereditaments corporeal or incorporeal; and in every certificate of title transfer and lease issued or made under this act such word shall also include all easements and appurtenances appertaining to the land therein described or reputed to be part thereof or appurtenant thereto." It was also provided by § 49 of No. 301 that the land "included in a certificate of title or registered instrument shall be deemed to be subject to . . . any easements acquired by enjoyment or user or subsisting over or upon or affecting such land." And by § 64 of said act No. 301, that "a memorial of any transfer or lease creating any easement over or upon or affecting any land under the operation of this act shall be entered upon the folium of the register book constituted by the grant or existing certificate of title of such land in addition to any other entry concerning such instrument required by this act."

⁴³ *Ex parte Cunningham* (1877) 3 Vict. L. R. 199, *Hunter, Torrens Title Cases*, 138, where the court said: "There is no mode of indicating an easement, and, so far as we can see, only one mode pointed out by the act. Section 64 prescribes that when any easement is created over or upon or affecting any land under the operation of the act, a memorial is to be entered upon the folium constituting the title to such land; or, in other words, a blot is to be made in the register on the title to the servient tenement. There is no provision for showing on the title of the dominant tenement any easement which may be appurtenant to it, though, as we have already seen, the use of the word 'land' will carry with it any easement which its owner can be proved by evidence, external to the register, to be entitled to enjoy in respect of his ownership of such land."

⁴⁴ Act No. 610 of 1878, providing: "Section 2. Whenever any certificate of title or any duplicate thereof, either already registered or issued, or hereafter to be registered or issued, under any of the provisions or otherwise under the operation of the 'transfer of land statute,' shall contain any statement to the effect that the person named in the certificate is entitled to any easement therein specified, such statement shall be received in all courts of law and equity as conclusive evidence that he is so entitled."

after it was held that the owner of the servient tenement could not deny an easement shown on both certificates,⁴⁵ and also that one claiming an easement over registered land might have his own land registered with the easement set out, and that the court could not review the action of the registrar in deciding against the owner of the servient tenement.⁴⁶

Although it was required by a later act that the registrar should specify upon the certificate as an encumbrance any subsisting easement affecting the same which should appear to have been created by deed or writing,⁴⁷ it was held that the failure of the registrar to enter on the certificate of the servient tenement an easement granted by deed before the transfer of land acts did not prevent the owner of the dominant tenement from showing that such easement exists, as the provision of the earlier statute that land included in a certificate shall be deemed to be subject to any

easement subsisting over it had not been interfered with by subsequent legislation.⁴⁸

A grant of way in gross is not an easement, and therefore is not to be registered as such.⁴⁹

It has been held in South Australia that a clean certificate is subject to an existing right of way under the exception, "except so far as regards the omission or misdescription of any right of way or other easement created in or existing upon any land," the court also considering that it was not the purpose of the act to affect easements.⁵⁰

It has also been held that a certificate of title of the dominant tenement, describing also easements of rights of way, is no evidence of the easements.¹

But it has also been held that in an application to bring lands under the act, on a caveat by another, claiming an easement, which is not disputed, the court may direct the easement to be entered upon the certificate.²

⁴⁵ *Jones v. Park* (1879) 5 Vict. L. R. 167, 1 Austr. L. T. 10, *Hunter, Torrens Title Cases*, 421, where, in an action for obstruction by fence, etc., of part of the plaintiff's right of way, the certificate of title of the plaintiff showed that he was entitled to the right of way as claimed, and by the certificate of title of the defendant his fence was an encroachment, and it was held that the defendant could not show that the certificates were not correct, that is to say, could not show possession of the part of land in suit.

⁴⁶ *In Re Byrne* (1884) 10 Vict. L. R. 361, overruling *Ex parte Beissel* (1879) 5 Vict. L. R. 53, *Hunter, Torrens Title Cases*, 333, it was held that upon an application by an owner of a dominant tenement to have his land registered, including his easement over other registered land, such easement could not be registered, the court there construing the amending act, No. 610, as relating only to evidence.

⁴⁷ Act No. 872 of 1885.

⁴⁸ *Stevenson v. James* (1889) 15 Vict. L. R. 616, appeal dismissed in [1893] A. C. (Eng.) 162, where the court said: "The 49th section of the transfer of land statute provides that land included in any certificate of title shall be deemed to be subject to any easement subsisting over it. The subsequent legislation on the subject has not, in their lordships' judgment, interfered with this provision. The amending act, No. 610, by § 2, makes a certificate of title, which certifies that the person named therein is entitled to an easement, conclusive evidence that he is so entitled; but it does not make such certificate the only evidence admissible. The 41st section of the subsequent amending act, No. 872, requires the registrar to specify upon the certificate as an encumbrance affecting the land included in it any L.R.A.1916D.

subsidizing easement affecting the same which shall appear to have been created by deed or writing; but their lordships agree with the judgment of the full court of Victoria, that 'the omission by the registrar to enter the easement as an encumbrance on the certificate of the servient tenement under this provision would not relieve the servient tenement of its liability.' In like manner the omission of the registrar to state on the certificates granted to the plaintiffs the existence of the rights of way they claim is no bar to that claim."

⁴⁹ *Ex parte Johnson* (1867) 5 W. W. & A.B. (Vict.) 55, *Hunter, Torrens Title Cases*, 343, removing a caveat filed by the owner of a right of way in gross, on the motion of the owner of the land over which it passed, who had applied for registration of his title.

⁵⁰ *Lean v. Maurice* (1874) 8 South Austr. L. R. 119.

¹ *Formby v. Adelaide* (1880) 14 South Austr. L. R. 144.

² *In Re Schmid* (1881) 15 South Austr. L. R. 48, distinguishing the above cases of *Lean v. Maurice* and *Formby v. Adelaide* (South Austr.) *supra*, *Ex parte Cunningham* (1877) 3 Vict. L. R. 199. The court said: "Yet, if it were held that 'rights of way or other easements' were not such 'interests in the land' as entitled the owner to enter a caveat in respect of them, they might, if created by express grant since the passing of the real property amendment act of 1878 (No. 128) be altogether extinguished by omissions from the certificate of title which their owner would be powerless to prevent (see § 60). . . . This application, it must be observed, is not one to set the caveat aside, but is on the caveator's own petition in support of the caveat, and we think we have jurisdiction under § 48

It has been held in New South Wales that if a right of way is shown by an owner of unregistered land over land about to be registered, the easement should be entered on the certificate of the servient tenement;³ and the view has been expressed there that one claiming an easement may file a caveat.⁴

It has been held under the New Zealand act of 1885 that after land has become subject to the acts either of 1870 or of 1885, no easements can be acquired by user;⁵ and that, in order to create an easement, the instrument must purport to create one, and a memorial must be entered on the title of the servient tenement before any right passes; and the statute also provides that a

memorial of it is to be entered on the title of the dominant tenement;⁶ and further, that an unregistered easement is of no effect against one who takes title even with notice of it.⁷

j. Covenants.

A covenant which is not an interest in the land need not be registered.⁸

It has been held under the English acts that placing upon the register notice of covenants or conditions does not annex them to the land.⁹

An unregistered restrictive covenant is of no effect against one without notice of it.¹⁰

It has been held in Saskatchewan that the seller could not thereafter have a

of the act of 1878, to direct 'such entries' upon the certificate and the register as justice requires. . . . Though easements are protected when omitted or misdescribed (subject to the provisions of § 60 of the act of 1878), they should be mentioned upon the certificate of title of the land subject to them; at least, when their existence is, as in this case, admitted."

³ *Re Housion*, 18 N. S. W. 300.

In the New South Wales statute of 1862, 26 Vict. 9, it is provided: "43. Whenever any easement or any incorporeal right other than an annuity or rent charge in or over any land under the provisions of this act is created for the purpose of being annexed to or used and enjoyed together with other land under the provisions of this act the registrar general shall enter a memorial of the instrument creating such easement or incorporeal right upon the folium of the Register Book constituted by the existing grant or certificate of title of such other land."

⁴ In *Re Paul*, 19 N. S. W. W. N. 114 (not necessary to decision).

⁵ *Bannister v. Chiene* (1902) 22 N. Z. L. R. 628, where the court said: "Section 10 of 'the land transfer act 1885' provides that land subject to the provisions of 'the land transfer act 1870' becomes subject to the provisions of 'the land transfer act 1885.' And by § 57 it is enacted: 'After land has become subject to this act no title thereto or to any right, privilege, or easement in, upon, or over the same shall be acquired by possession or user adversely to or in derogation of the title of the registered proprietor;'" the court pointing out the distinction in § 49 of the Victoria statute.

⁶ *Mackechnie v. Bell*, 11 N. Z. Gaz. Rep. 402.

Under § 46 of the act of 1870, the holder of a certificate took subject to easements set forth in an earlier certificate of the dominant tenement. *Anderson v. Maori Hill Borough Council*, 3 N. Z. S. C. 364.

⁷ *Strang v. Russell* (1906) 24 N. Z. L. R. 916. The court expressed a similar opinion in *Mackenzie v. Waimumu Queen Gold Dredging Co.* 21 N. Z. L. R. 231. L.R.A.1916D.

⁸ *Staples v. Corby* (1900) 19 N. Z. L. R. 517, holding that upon an application to register land for the first time the ownership of a hotel is none the less a fee simple vested in possession under the statute, although the owner is subject to a certain restriction not to purchase any colonial ale, etc., which might be consumed therein except from a certain company, and the company has no interest in the land, nor is the covenant a trust, and such covenant should not be entered upon the certificate.

In *International Coal & C. Co. v. Trelle* (1907) 1 Alberta L. R. 170, 7 West. L. R. (Can.) 264, however, it appears that a covenant by a purchaser not to sell intoxicating liquors was referred to on his certificate of title.

⁹ *Willé v. St. John* [1910] 1 Ch. (Eng.) 325, 79 L. J. Ch. N. S. 239, 102 L. T. N. S. 383, 26 Times L. R. 405, 54 Sol. Jo. 269, where a purchaser of land under a deed with restrictive covenants afterwards registered himself as the owner, but without the restrictive covenants. He then conveyed a part of the land by deeds containing similar covenants and other covenants, and later had covenants similar to those under which he took the premises noted on the register, and thereafter sold another part of the premises with similar restrictions in the deed. It was held that the first purchaser could not compel the second purchaser to carry out the covenant in his deed, as placing notice of the covenants or conditions upon the register did not annex them to the land.

¹⁰ Where a railroad company sold land, the transfer containing a covenant that the grantee, his heirs or assigns, should not claim any contribution from the company for fencing, and this covenant was not entered upon the certificate, a subsequent grantee from said company's grantee, who took without actual notice or knowledge of the covenant, was not bound by it. The court thought that the covenant was one affecting land, and should have been entered on the certificate. *Brown v. Wellington & M. R. Co.* (1898) 17 N. Z. L. R. 471. But it was held in *Wellington & M.*

restrictive covenant entered upon the buyer's title as an easement, as under the act any easement was ineffective as not registered in the manner prescribed by the statute.¹¹

The registrar may not decline to register the title of an applicant on the ground that he is not shown to have "a good safeholding and marketable title," in that the conveyance did not contain the usual covenants for title.¹²

A transferrer does not guarantee that he will not afterwards buy an outstanding title for his own benefit, where, under the statute, the transfer purports to convey "all his estate and interest in said piece of land," without saying what that interest consists of.¹³

k. Equitable mortgages.

Preferences between equitable mort-

R. Co. v. Registrar-General (1899) 18 N. Z. L. R. 250, that the company could not have recourse to the assurance fund on the ground that the registrar had refused at its request to enter the covenant on the certificate, as such a covenant was not registerable under the act.

¹¹ *Re Jamieson* (1913) 6 Sask. L. R. 206, holding, where it was claimed by the seller that a clean transfer of land was subject to a restrictive covenant as in effect an easement, but it was held that any easement was ineffective as not registered under the (Sask.) statute, providing in effect that when an easement is granted over registered land in favor of other registered land, the registrar shall make a mem. of the instrument creating the easement upon the register and duplicate certificate of such other land.

¹² *Re Dalgleish* (1910) 15 B. C. 217.

¹³ *Bennett v. Gilmour* (1906), 16 Manitoba L. R. 304, where a transfer was made before, but registered after, a caveat, and subsequent to the filing of the caveat the caveator sold out to the transferrer, and the court refused to declare that the transferees should stand in the same position as their transferrer against the caveator.

¹⁴ *London Chartered Bank v. Hayes* (1871) 2 Vict. R. 104, holding that an equitable mortgage by deposit of the certificate of title with the creditor is not inconsistent with the act.

In the insufficiently reported case of *Richard v. Jones* (1865) 1 South Austr. L. R. 167, it was held that an equitable lien was created by the deposit of the certificate of title.

Where one who procured a certificate deposited it as security for an advance, and thereafter the court held that another person should be registered, the court will not cancel the first registration until the equitable mortgagee, who was an innocent person, has been satisfied. *Ex parte Patterson* (1873) 4 Austr. Jur. 110. L.R.A.1916D.

gages and executions, etc., or insolvent assignments, are not included. The difficulty of changing an old system of conveyancing is illustrated by the effect of the English practice of borrowing upon the deposit of title deeds, upon the Torrens law, it being natural for registered owners familiar with the old practice to borrow money on deposit of the certificate of title with the creditor. The courts, as far as possible, will support equitable mortgages of this kind, which are not considered inconsistent with the acts.¹⁴

A mortgage by deposit of certificate is good as against a subsequent unregistered mortgage.¹⁵ (In some jurisdictions equitable mortgages are expressly authorized.)¹⁶

It has been held in Queensland that an equitable mortgagee by deposit of

In *Acme Co. v. Huxley* (1912) 4 Alberta L. R. 63, 1 D. L. R. 860, a wife, being the registered owner of property, delivered a transfer thereof to her husband, she retaining the certificates of title. Her husband delivered this transfer to his creditor as collateral security, and thereafter made a settlement with his creditor, giving him a transfer of the land,—that is to say, a transfer from the husband to the creditor; and upon an application by the creditor to compel the wife to deliver up her certificate of title, the court below held that the plaintiff must recover. An appeal was dismissed on an equal division of the judges, those in favor of the plaintiff holding that the wife had in effect represented by what she had done that the husband was entitled to deal with the property as his own, and the plaintiff having relied upon that, she could not, to his prejudice, be permitted to deny it; while the opposing members of the court seemed to consider that the plaintiff was not in any sense a bona fide purchaser, and that the deposit by the husband with the creditor of a transfer from the wife to the husband was not in any sense a deposit of any title deed, and that the husband had no legal or equitable estate which could be pledged in any such manner.

See also *Fialkowski v. Fialkowski* (1911) 4 Alberta L. R. 10, 19 West. L. R. 644, supra, (Can.) subd. IV. g.

But it seems to be held in *Swan v. Seal* (1884) 10 Vict. L. R. 57, that a creditor lending money to an administrator on a certificate of title of a decedent, already in the creditor's hands at his death, is not protected when he knows the money is borrowed for a business the administrator had no right to go into.

¹⁵ *Friebe v. Cullen* (1879) 13 South Austr. L. R. 35.

¹⁶ See *Connolly v. Noone & C. Timber* (Qd.) infra; see also Ontario act of 1 Geo. V. chap. 28, § 93; Ont. Rev. Stat. 1914, chap. 126, § 92.

"the instrument of title" is ahead of a prior unregistered bill of sale of the right to cut timber.¹⁷

It has been held in a case in Victoria that where one lodged with a bank, as security for a loan, a transfer to herself of title and the certificate of her transferrer, the bank cannot hold against the rights of the transferrer;¹⁸ but the contrary has been recently held by the high court of Australia in a New South Wales case, as heretofore stated in subd. e, supra.¹⁹

It has been held under the British Columbia act that one who claimed as equitable mortgagee by the deposit of title deeds (of one registered as the owner of an absolute, as distinguished from an indefeasible, title) did not have priority over a purchaser for a valuable consideration, who, without actual fraud or express notice of the equitable mortgage, took a conveyance unaccompanied by delivery of title deeds and without a certificate, and registered it as a "charge," the registrar having registered the transfer without the certificate.²⁰

For claims of equitable mortgagees against the assurance fund, see next subdivision.

1. Claims against assurance fund.

Claims against the assurance fund on account of mistakes as to caveats, etc., are not included. The expression used hereunder, "action against the assurance fund," means, of course, action against the proper officer.

The general theory as to the assurance fund is that it is to indemnify those who have been deprived of land or interests therein through fraud or mistake, including mistakes of the registrar, and who have no other remedy.

The deprivation of a person of his land, whether by bringing it under the act or by the registration of transfers, is intended to be compensated for by the assurance fund.²¹

Recoveries against the fund have been sustained by those whose lands were unlawfully mortgaged;²² by trustees of those whose rights under a settlement prior to the act were disregarded in is-

¹⁷ Connolly v. Noone & C. Timber [1912] St. R. Qd. 70, where the registered owner gave a bill of sale of the right to cut timber to A, and later deposited the deed of the land, which the court calls "the instrument of title," as an equitable mortgage, and a caveat was filed by the equitable mortgagee, who had no notice of the bill of sale, and it was held that he was ahead of it. The court said: "Section 30 of the act of 1877 enacts and declares that an equitable mortgage . . . upon land . . . may be created by the deposit of the instrument of title, and such deposit shall, subject to the provisions hereinafter contained, have the same effect on the estate, interest, or security sought to be charged as a deposit of title deeds would have had before the passing of this act."

¹⁸ Plumpton v. Plumpton (1885) 11 Vict. L. R. 733, Hunter, Torrens Title Cases, 495, the court stating that it would be otherwise if the bank had insisted that the transfer to the borrower should have first been registered.

¹⁹ Barry v. Heider (1914) 19 C. L. R. (Austr.) 197, 15 N. S. W. St. Rep. 271.

²⁰ Hudson's Bay Co. v. Kearns (1896) 4 B. C. 536, where the statute provided: "No purchaser for valuable consideration of any registered real estate, or registered interest in real estate, shall be affected by any notice expressed, implied or constructive, of any unregistered title, interest or disposition affecting such real estate, other than a leasehold interest in possession for a term not exceeding three years, any rule of law or equity to the contrary notwithstanding."

²¹ Public Trustee v. Registrar General (1899) 17 N. Z. L. R. 577. L.R.A.1916D.

²² Anderson v. Davy (1882) 1 N. Z. S. C. 302; Queensland v. Registrar of Titles (1893) 5 Qd. L. J. 46; Finucane v. Registrar of Titles [1902] St. R. Qd. 75; Cox v. Bourne (1897) 8 Qd. L. J. 66.

Where one of the sons of an intestate fraudulently represented himself as the owner of land, and obtained a certificate of title, and mortgaged the land, and the mortgage was foreclosed, the widow of the intestate, having taken out letters of administration, was allowed the value of the land from the assurance fund. Anderson v. Davy (1882) 1 N. Z. S. C. 302.

Where a certificate issued to a devisee, and the will was later set aside, and the devisee had mortgaged the land, and had been adjudicated insolvent, the person deprived of the land might recover from the assurance fund the amount of the mortgage, the land being worth more. Queensland Trustees v. Registrar of Titles (1893) 5 Qd. L. J. 46.

One whose land had been unlawfully mortgaged to a bona fide mortgagee for value is "deprived of the land pro tanto" under § 126 of the Queensland act, and, possibly, said the court, the diminished right of enjoyment may be held to be "deprivation of an 'interest' in the land" under § 126, and so the deprived party may have recourse against the assurance fund where the depriving party cannot pay, but a remainderman's action, it seems, is premature, considered merely as an action for damages. Finucane v. Registrar of Titles [1902] St. R. Qd. 75. Section 126, supra, provided: "Any person deprived of any land or any estate or interest in land in consequence of fraud or in consequence of the issue of a certificate of title to any

suing a certificate of title;²³ by cestuis que trustent of a charge where their trustees were barred and they were not;²⁴ and by an equitable mortgagee with whom a certificate was deposited, where the owner, on claiming that he had lost his certificate, obtained another and sold the land to a purchaser in good faith whose transfer was registered.²⁵

But it has been held that a creditor may not have recourse on the assurance fund as "deprived of land" or of an "estate or interest in land," where the registrar failed to indorse on the last material registered document a memorandum that the land had been brought under the statute, and the owner later procured

a loan by deposit of the deeds, the creditor supposing the land not to be registered.²⁶

But it is not necessary that one who made a loan in ignorance of a mortgage which the registrar had omitted to enter on the certificate (and which had been held prior to the loan) should show that he was deprived of land or of any estate or interest therein by the omission, where the statute in substance permits an action by any person sustaining loss through such omission, and by any person deprived of land.²⁷

Recoveries have also been sustained against the fund where the registrar has

other person or in consequence of any entry in the Registrar Book or of any error or omission in any certificate of title or in any entry in the Register Book may bring and prosecute an action at law in the supreme court for the recovery of damages against the person who derived benefit by such fraud or in consequence of the issue of such certificate of title or by such entry or in consequence of such error or omission. Provided always that no such action shall lie or be sustained unless the same shall be commenced within six years from the date of such deprivation except nevertheless that any person being under the disability of coverture. . . . Provided also that nothing in this act contained shall be interpreted to subject to any action of ejectment or for recovery of damages any bona fide purchaser or mortgagee for valuable consideration of any land under the provision of this act, although his vendor or mortgagor may have been registered as proprietor through fraud or error or may have derived from or through a person registered as proprietor through fraud or error whether by wrong description of land or of its boundaries or otherwise."

²³ *Spencer v. Registrar of Titles* [1906] A. C. (Eng.) 503, 75 L. J. C. P. N. S. 100, 95 L. T. N. S. 316 (on appeal from West Australia), where a settlement was made prior to the act, and a certificate of title was afterwards issued in disregard of the rights of remaindermen under the settlement, and it was held that, the precedent estates having expired, the remaindermen's trustee might have recourse on the assurance fund for deprivation of title.

²⁴ *Papworth v. Williams* (1899) 20 N. S. W. L. R. 280, appeal dismissed in [1900] A. C. (Eng.) 563, 69 L. J. P. C. N. S. 129, 83 L. T. N. S. 184, the court holding that "interest in land" includes an equitable interest.

²⁵ *Tolley & Co. v. Byrne* (1902) 28 Vict. L. R. 95, holding that the equitable mortgagee was deprived of an interest in land.

²⁶ *Oakden v. Gibbs* (1882) 8 Vict. L. R. 380.

²⁷ *Morris v. Bentley* (1895) 2 Terr. L. R. L.R.A.1916D.

(Can.) 253, where it was held that the plaintiff was entitled to recourse against the assurance fund where the register had omitted to enter a memorial of a mortgage upon the certificate of title, although it had been filed and entered in the day book, and the plaintiff, not knowing there was this mortgage, made a loan upon the property, which was afterwards held subsequent in part to the omitted mortgage, and that it was not necessary that the plaintiff, in order to recover, should show that he was deprived of land or of any estate or interest therein by the mistake or omission, where the statute provided that "any person sustaining loss or damage through any omission, mistake or misfeasance of the registrar, or any of his officers or clerks, in the execution of their respective duties under the provisions of this act, and any person deprived of any land or of any estate or interest in land by the registration of any other person as owner of such land, or by any error, omission or misdescription in any certificate of title, or in any entry or memorial in the register, and who, by the provisions of this act is barred from bringing an action of ejectment, or other action for the recovery of such land, estate or interest, may, in any case in which the remedy by action for recovery of damages . . . is barred, bring an action against the registrar as nominal defendant, for recovery of damages. . . ." The court considered that the words "and who, by the provisions of this act," etc., referred merely to persons deprived of land or of an estate or interest therein, and did not refer to persons sustaining loss or damage through any omission, etc., and pointed out that the act construed in *Oakden v. Gibbs* (Vict.) supra, was different, and stated that he had to some extent adopted the construction of the dissenting opinion in that case as more reasonable. As to part of his loan, the plaintiff was ahead of the omitted mortgage, being as to such part subrogated to the rights of a prior mortgagee whose mortgage was paid off with the plaintiff's money.

omitted to register a mortgage,²⁸ a lien,²⁹ or an execution.³⁰

So, a recovery was sustained by a transferee of a registered lease, which, by mistake of the lessor and of the registrar, included land not owned by the lessor.³¹

But a recovery will not lie against the assurance fund by a purchaser on account of deficiency of acreage where the title as registered contains a description of the property as well as a statement of the acreage.³²

A recovery will not lie against the

assurance fund upon the ground that the registrar had refused to enter upon the certificate an instrument which was not registerable under the act.³³

Forgery.

The opinion has been expressed that the recourse of a registered owner is against the assurance fund for the amount of a mortgage (and such owner's expenses) to a bona fide registered mortgagee, given by a forger who had first forged a transfer from the true owner to himself, and had it registered.³⁴

²⁸ *Wells v. Registrar-General* (1909) 29 N. Z. 101, where the registrar, through mistake, issued a certificate omitting to place a mortgage thereon, whereby the mortgage was lost as against a purchaser for value, and the mortgagee and the surety of the mortgagor jointly recovered.

See also *Morris v. Bentley* (Can.) supra. Reference may be made in this connection to *Hall v. Registrar of Land Titles* (1911) 4 Sask. L. R. 244, 16 West. L. Rep. (Can.) 568, where a mortgage was sent to the registrar at a time when it was not entitled to registration, by reason of the fact that no patent or certificate of title had been issued, and thereafter the patent and certificate of title were issued, and later a third party obtained a mortgage from the original mortgagor, which was registered, and thereafter, upon request, the registrar registered the original mortgage, it was held (that it had no priority, as it was left or remained in the registrar's hands simply as an individual, he not having had any authority as an official to receive it when it was sent to him, and) that the registrar was not liable in damages to the original mortgagee. It was also held in the same case that the fact that the registrar returned the mortgage when he had registered it with an abstract of title which did not show the other mortgage had caused no damage to the holder except that it appeared that such holder paid the mortgagor a small amount due him for services which he otherwise would have credited upon the mortgage, and that recovery should be limited to that amount.

²⁹ *Canada Life Assur. Co. v. Registrar* (1912) 5 Sask. L. R. 208, 3 D. L. R. 810, 21 West. L. R. (Can.) 469, holding that one who purchases land on the assurance of a certificate of title issued by the registrar that the property is free and clear is entitled to recover from the assurance fund the expense of paying off seed grain liens which the registrar had omitted to register, and it is not necessary to make a special search for seed grain liens, as the statute requires such liens to be entered upon the register and upon the duplicate certificates.

³⁰ *Borbridge v. Borland* (1915) 8 Sask. L. R. 190, 24 D. L. R. 147, holding that recourse will be had against the assurance fund for the failure of the registrar to indorse a filed execution on certificates L.R.A.1916D.

subsequently issued to the execution debtor and his transferee.

³¹ Where a lease was registered which, by mistake of the lessor and of the registrar, included land not owned by the lessor, a transferee of the lease is entitled to damages from the assurance fund although he relied solely on the certificate of registration indorsed on the lease, and did not examine the register. *Russell v. Registrar-General* (1906) 26 N. Z. L. R. 1223, where Stout, Ch. J., said of § 178 of the N. Z. land transfer act of 1885: "Section 178 contemplates two things: (a) A person 'sustaining loss or damages through any omission, mistake, or misfeasance of any registrar, or any of his officers or clerks, in the execution of their respective duties;' and (b) a person dispossessed of any land, or of any estate or interest in land, through (1) bringing land under the act, (2) the registration of any other person as proprietor, (3) any error, omission, or misdescription in any certificate of title, or in any entry or memorial on the register, or (4) the wrongful inclusion of land in any certificate of title, etc."

³² *Burden v. Registrar of Titles* (1913) — Alberta L. R. —, 13 D. L. R. 813, as it was the title to the parcel, and not to the acreage, that the registrar certified to in copying, as he did, the description (stating the acreage) in the patent when the land was first registered, and this was not such an "omission, mistake, or misfeasance" as is referred to in the statute.

³³ *Wellington & M. R. Co. v. Registrar-General* (1899) 18 N. Z. L. R. 250, where the registrar had refused to enter upon the certificate a covenant contained in a transfer by a railroad company that the grantee, his heirs or assigns, should not claim any contribution from the company for fencing, and it had been already held that a grantee of its grantee, who had taken without actual notice or knowledge of the covenant, was not bound by it. In *Brown v. Wellington & M. R. Co.* (1898) 17 N. Z. L. R. 471, supra, subd. IV. i, in which case the court expressed the opinion that the covenant was one affecting land, and should have been entered on the certificate. But in the later case the court held that the covenant was not registerable under the act.

³⁴ *Brown v. Broughton* (1915) 25 Manitoba L. R. 489, 24 D. L. R. 244.

But it has been held under the English act that the taker in good faith, for value, from the forger, of a forged instrument, who registers the same, is not entitled to indemnity, as he is not a person "suffering loss by the rectification" of the register, which was done on the application of the person whose name had been forged,³⁵ a decision with which it is not easy to be reconciled.

One cannot recover of the assurance fund as a person wrongfully deprived of land, on the theory that the transfer from her was obtained by fraud, in that the consideration was worthless, although the transfer from her transferee had been by means of forgery, through

which the land eventually was registered in the hands of a bona fide holder.³⁶

Remedies and diligence.

An action will not, in general, lie against the assurance fund if the person deprived has another remedy,³⁷ or if he has been negligent.³⁸

Limitations.

It seems that the statute begins to run in favor of the fund when the plaintiff is deprived, although he may not know of it.³⁹ In case of a remainderman it has been held that the cause of action accrued at the time of the death of the life tenant,⁴⁰ and that therefore

³⁵ In *Atty. Gen. v. Odell* [1906] 2 Ch. (Eng.) 47, the holder of a mortgage was registered as such, and her attorney forged a transfer by her to a third person, and collected the money from the third person, who delivered the transfer into the registration office and was registered; thereafter, on the application of the rightful mortgagee, the registration was corrected so as to remove the forged instrument, and it was held that the person who had been defrauded was not entitled to indemnity, the court seeming to admit that he could have transferred a title which would have been good, but that he himself could not be indemnified, considering that he was not a person "suffering loss by the rectification of the register under the statute providing that 'where the register is rectified under the principal act by reason of fraud or mistake which has occurred' in a registered disposition for valuable consideration, and which the grantee was not aware of, and could not by the exercise of reasonable care have discovered, the person suffering loss by the rectification shall likewise be entitled to indemnity under this section."

³⁶ *Fawkes v. Atty. General* (1903) 6 Ont. L. Rep. 490, where it was held that the plaintiff could not recover from the assurance fund as a person wrongfully "deprived" of land, where the circumstances were that she transferred her title to a party whose transfer was duly registered, and she claimed that the transfer was a fraud upon her in that the consideration (certain stocks) was of no value; and that this was true although the transfer from her transferee had been by means of forgery, and the land had eventually been registered in the hands of a bona fide holder, as the forgery was a mere accident, and not connected with her particular claim.

³⁷ In *Fotheringham v. Archer* (1868) 5 W. W. & A'B (Vict.) 95, which seems to have been decided under act 140 of 1862, it was held that where one personates the owner and applies for registration, and has the land registered in the name of his grantee, the real owner must go against the fraud-doer, he not having been adjudged insolvent, and not against the registrar of titles. L.R.A.1916D.

One bringing an action against the assurance fund must allege that the present holder is one bona fide, for value; for otherwise it does not appear that the plaintiff has been "deprived of land." *Cox v. Bourne* (1897) 7 Qd. L. J. 66.

³⁸ In *Gilbert v. Bourne*, (1895) 6 Qd. L. J. 270, an action against the assurance fund for fraud of an insolvent failed because the holder, who took from the fraud-doer, ought, under the circumstances, to have inquired and found out the fraud.

Where the registrar by mistake issued two certificates of title, and the sufferer thereby would have discovered the true state of the title from the original certificate of title to a tract of land, of which that in question formed part, and which original certificate was in the registrar's office, it was held that such sufferer was guilty of contributory negligence in not searching the register, and could not get relief from the assurance fund. *Miller v. Davy* (1889) 7 N. Z. L. R. 515.

Where a person about to take a transfer examined (by her agent) the register, but made no inquiry of the officers whether any instrument had been received for registration, but was not yet entered, she could have no recourse against the assurance fund, although, at the time of examination, an instrument had been received for registration and had been entered in a book called "the journal," which she had not examined, but was not then entered in the register. *Re Jackson* (1890) 10 N. Z. L. R. 148.

³⁹ *Bonnin v. Andrews* (1878) 12 South Austr. L. R. 153, where it was held that the cause of action against the assurance fund accrued when the land was first registered and the plaintiffs so deprived, although the six years' limitation had run before the plaintiffs knew it. (It seems there was no fraud here.)

⁴⁰ *Spencer v. Registrar of Titles* [1906] A. C. (Eng.) 503, 75 L. J. P. C. N. S. 100, 95 L. T. N. S. 316 (on appeal from West Australia); *Spencer v. Registrar of Titles* [1908] A. C. (Eng.) 235, 77 L. J. P. C. N. S. 43, 98 L. T. N. S. 288, 24 Times L. R. 282.

the value of the buildings must be taken as they were at that time, and not as they were at the prior time when the certificate of registration was taken out.⁴¹

It seems that a remainderman whose land has been mortgaged is entitled to recourse against the assurance fund although his action, considered merely as an action for damages, would be premature.⁴²

Cestuis que trustent of a charge, who have been under a disability, may, although their trustees are barred by the statute of limitations, sue the registrar-general for damages, where the land subject to the charge has, by mistake in his office, been registered without the charge, as they have been deprived of an interest in land under the act.⁴³

Miscellaneous

Certain miscellaneous cases will be found in the notes.⁴⁴

m. Miscellaneous.

One knowingly taking title from a infant must reconvey to the infant on his demand after majority; the certificate of title is no defense.⁴⁵

The registrar properly does not use a certificate deposited by a rival claimant to defeat the claim of such rival claimant; ⁴⁶ and he has no right to register a transfer by a person who is not the registered proprietor.⁴⁷ Only those who claim under registered instruments can rely upon the statute; ⁴⁸ and one registering his title cannot (while holding it) escape equities by which he holds it.⁴⁹

Certain other miscellaneous cases will be found in the notes.⁵⁰

⁴¹ *Spencer v. Registrar of Titles* [1908] A. C. (Eng.) 235, reversing (1906) 9 West Austr. L. R. 18.

⁴² *Finucane v. Registrar of Titles* [1902] St. R. Qd. 75, set out supra, in the early part of this subdivision.

⁴³ *Papworth v. Williams* (1899) 20 N. S. W. L. R. 280, appeal dismissed in [1900] A. C. (Eng.) 563, 69 L. J. P. C. N. S. 129, 83 L. T. N. S. 184, the court holding that "interest in land" includes equitable interest.

⁴⁴ In *Cox v. Bourne* (1897) 8 Qd. L. J. 66, where the case is confusedly reported, it seems to be held that where the deprived owner has suffered because the land has been mortgaged to a bona fide mortgagee, the owner's right is to recover from the assurance fund his expense of redemption not otherwise recoverable; and while he cannot, in general, get from the assurance fund more than the value of the land, if the amount due the mortgagee, with interest and the mortgagee's costs of the suit to redeem, exceeds the value of the land, the assurance fund ought to pay the amount of the mortgagee's costs and the plaintiff's costs besides the value of the land.

In the absence of fraud in obtaining a certificate, the Crown cannot file a caveat to protect the assurance fund. *Re Tanner* (1886) 5 N. Z. S. C. 102.

⁴⁵ *Hall v. Loder* (1885) 7 N. S. W. L. R. 44.

⁴⁶ In *Re Greenshields* (1905) 6 Terr. L. R. (Can.) 208, a mortgage was produced for registration covering two pieces of property, and was registered as to one piece, but not as to the other, for the reason that the duplicate certificate covering the other piece was not produced; but the registrar wrote the possessor of it to send it, and he sent it, together with a later mortgage on the second piece of property, and stated that the certificate was produced on behalf of such subsequent mortgagee; and it was held that the mortgage secondly mentioned L.R.A.1916D.

was properly registered as to property No. 2 prior to the first mortgage, and that the first mortgage, indeed, was not to be registered as to property No. 2 at all.

While the registrar under the statute may register a transfer without the certificate, he is not bound to do so, nor can it be competent for him to use a certificate to defeat a rival claim when it has been deposited in his office by the rival claimant. *Ex parte Bettle* (1895) 13 N. Z. L. R. 129.

⁴⁷ In *Re Rivers* (1893) 1 Terr. L. R. (Can.) 464, where a railroad was the registered proprietor, a transfer was filed by S to X, and thereafter a transfer was registered from the railroad to S, and it was held that any registration of the transfer from S to X would be of no effect as to judgment creditors of S, copies of whose executions, etc., were filed after all the foregoing papers had been filed, as the certificate of title remained in S at the time when copies of these executions were delivered into the registrar's office.

⁴⁸ "Only those who claim under registered instruments can rely upon the statute" (§ 189) "in cases in which it proves that the title of those with whom they contract can be successfully impeached." *Solicitor-General v. Mere Tini* (1899) 17 N. Z. L. R. 773, where the court declined to protect one claiming under an agreement with one whose certificate the court repealed. (It seems to be assumed that the agreement was unregistered, and it was held that grants from the Crown may be repealed while the property is in the hands of the original registered owners of such grants for any cause which would have been sufficient prior to the statute.)

⁴⁹ *Semphill v. Jarvis* 6 N. S. W. S. C. 68.

⁵⁰ In *Howard v. Miller* [1915] A. C. (Eng.) 318, 84 L. J. P. C. N. S. 49, 112 L. T. N. S. 403, it appeared that a wife in British Columbia, having received a deed of land from her husband, and the same day given him back a deed for part of the land, after his death, handed the registrar the two

deeds and signed a form prepared by him (possibly by his mistake), declaring that she was the owner of the whole land and that the only deed in her possession was the deed to her, and applying to be put upon the register of absolute fees (whose owners are deemed to be *prima facie* owners), which was done, and she thereafter contracted to convey the land. It was held that specific performance would not be granted on its appearing that there was a daughter entitled (subject to her mother's dower) to that part of the land which the wife had conveyed back to the husband, but that the purchaser was entitled to a lien on the dower interest for what he had paid.

An administrator holding a certificate of title as such, and entitled to one third of the land, was allowed the value of his improvements as against his children, the other owners. *Droop v. Colonial Bank* (1881) 7 Vict. L. R. 71, where the administrator had mortgaged, and the mortgagee was held to have the mortgagor's rights.

A mortgage of a lease is entitled to registration, as it is not within the statute providing that "no lessee or licensee shall transfer the possession or occupation of the land leased to or occupied by him, or any part thereof by sale, under lease or other disposition, except the board shall sanction the purposed transfer." *King v. Stuart* (1887) 5 N. Z. S. C. 304.

In *Reeves v. Konschur* (1907) 2 Sask. L. R. 125, 10 West. L. R. (Can.) 680, the holder of a first mortgage assigned it to an execution creditor of the mortgagor, who also took a transfer to herself from the mortgagor, there being a second mortgage outstanding; the register issued her a certificate of title which did not show the first mortgage nor assignment, and the chief justice, upon reference to him, declined to interfere with this decision. [See (1907) 1 Sask. L. R. 24, 7 West. L. R. (Can.) 301.] Upon application of the holders of the second mortgage to foreclose it, it was held that the transferee of the first mortgage was entitled to show the first mortgage, and that it had not merged, the court not criticizing the decision of the chief justice, apparently on the theory that he did

not have the entire facts before him; but held that his decision was not a bar to such a defense.

It may be noted that where there were two innocent purchasers for value, one of whom contracted June 25, it was held that his equitable title was protected by his caveat, lodged July 1, and entered in the register, July 15; the other having contracted June 26, paid the money and got the transfer and the seller's certificate July 14, and filed the papers August 13. *Re Scanlan* (1887) 3 Qd. L. J. 43.

While without the scope of this note, it may be noted that it was held by the court of New South Wales in *Doe ex dem. Irving v. Gannon* (1847) 1 Legge (N. S. W.) 400, that the provision in the act as to registration of deeds (7 Vict. No. 16 (1843) N. S. W. § 11), that all deeds, etc., "which shall be executed or made bona fide or for valuable consideration and which shall be duly registered," etc., shall have priority "not according to their respective dates, but according to the priority of the registration thereof only," was not effective unless the maker of the instrument acted bona fide. And this principle was affirmed in *Doe ex dem. Peacock v. King* (1854) 2 Legge (N. S. W.) 827. (The statutes, however, were later changed to make the bad faith only of the conveyor immaterial. 22 Vict. No. 1 N. S. W. § 18 (1858) and 24 Vict. No. 7 N. S. W. (1861) § 1.) But these cases were not followed in *Davidson v. O'Halloran* [1913] Vict. L. R. 367, the court holding that a grantee acting honestly would be protected where the deed effectuated a real transaction in land, the act (real property act of 1890, § 181) providing that the first registered instruments shall have priority "if made and executed bona fide and for valuable consideration."

It may also be noted that it was held in *Jones v. Collins*, 12 N. S. W. L. R. 247, that the expression in the act for registration of deeds, 7 Vict. No. 16 (1843) § 11, as to deeds having priority according to registration "executed or made bona fide or for valuable consideration" should read, "executed or made bona fide and for valuable consideration." B. B. B.

CONNECTICUT SUPREME COURT OF ERRORS.

ALBERT B. MANN, Appt.,
v.

GLASTONBURY KNITTING COMPANY.

(90 Conn. 116, 96 Atl. 368.)

Master and servant — workmen's compensation — act not in course of employment.

An injury to the foreman of a knitting room in a mill, by his hand coming in contact with a revolving fan in a pipe conveying heated air into the dry room, when L.R.A.1916D.

he attempts to place luncheon to heat in the pipe through an aperture left for the care of the fan, does not arise out of and in the course of his employment within the meaning of the workmen's compensation act, although the employer has impliedly assented to the heating of such materials by

Note. — The English cases construing the terms "arising out of" and "in the course of the employment" in workmen's compensation acts are cited at pages 40 et seq., and the American cases at pages 232 et seq., of the annotation in L.R.A.1916A, 23, on "Workmen's compensation acts." Specifically, for injuries received while procuring

employees by placing them in the mouth of the pipe.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52.

(January 27, 1916.)

APPEAL by claimant from a decree of the Superior Court for Hartford County setting aside an award of the Commissioner in a proceeding under the workmen's compensation act to obtain compensation for personal injuries sustained by claimant while in defendant's employ. Affirmed.

Statement by Beach, J.:

The claimant was foreman of the knitting room of the Glastonbury Knitting Company, where he had been employed for several years, and on the 9th of February, 1915, sustained an injury resulting in the loss of the second, third, and fourth fingers and a portion of the first finger of the left hand. The commissioner finds that the injury was sustained under the following circumstances: "In the plant of the respondent there was a galvanized iron pipe about 1½ or 2 feet in diameter used for conveying heated air into the dry room. In the room adjoining the dry room there was an opening in this pipe consisting presumably of a small door. It was a custom of the employees, not prohibited, and presumably acquiesced in by the employer, for the employees to heat their bottles of tea or coffee through the instrumentality of the air from this pipe. The usual custom was to heat the bottles in the dry room at the place where the heated air was emitted. On this particular occasion the claimant, instead of placing his bottle at the mouth of the pipe in the dry room, went around and attempted to place it inside the pipe through the door hereinbefore described, not knowing that inside the pipe was a revolving fan. It was the contact of the bottle and his hand with the fan which caused the injury. The language of the witness in describing his act was as follows: 'I went into the dry room, and didn't see any place there, and went around in front of the pipe; I did not know there was a fan there. When I put the bottle in it hit the bottle.' The witness was unable to recall just why he departed from his usual custom, but was under the im-

pression that something must have been piled up against the opening in the dry room. The claimant had a right to be in the room in which he was injured, and some of the men whom he supervised worked there."

The commissioner held that the claimant was entitled to compensation, and the employer appealed to the superior court for the county of Hartford, which rendered a judgment allowing the appeal and setting aside the award.

Mr. W. S. Hyde, for appellant:

Plaintiff's injury arose out of and in the course of his employment, within the meaning of the workmen's compensation act.

Blovett v. Sawyer [1904] 1 K. B. 271, 20 Times L. R. 105, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 6 W. C. C. 16; Morris v. Lambeth, 22 Times L. R. 22, 8 W. C. C. 3; Moore v. Manchester Liners, 3 B. W. C. C. 527; M'Lauchlin v. Anderson, 48 Scot. L. R. 349, 4 B. W. C. C. 376; Richardson v. Denton Colliery Co. [1913] W. C. & Ins. Rep. 554, 109 L. T. N. S. 370, [1913] W. N. 238, 6 B. W. C. C. 629; McKee v. Great Northern R. Co. 42 Ir. Law Times, 132; Carinduff v. Gilmore [1914] W. C. & Ins. Rep. 247; Evans v. Holloway [1914] W. C. & Ins. Rep. 75, 7 B. W. C. C. 248; Martin v. J. Lovibond & Sons [1914] 2 K. B. 227, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455, 7 B. W. C. C. 243, [1914] W. C. & Ins. Rep. 76, [1914] W. N. 47; M'Guire v. Gabbutt [1915] W. C. & Ins. Rep. 363, 8 B. W. C. C. 555; Thomas v. Wisconsin C. R. Co. 108 Minn. 485, 23 L.R.A.(N.S.) 954, 122 N. W. 456; Heilig v. Southern R. Co. 152 N. C. 469, 67 S. E. 1009; Muller v. Oakes Mfg. Co. 113 App. Div. 689, 99 N. Y. Supp. 923; Helmke v. Thilmany, 107 Wis. 216, 83 N. W. 360, 8 Am. Neg. Rep. 172; Neice v. Farmers' Co-op. Creamery & Supply Co. 90 Neb. 470, 133 N. W. 878; Jarvis v. Hitch, — Ind. App. —, 65 N. E. 608; Bryant v. Fissell, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; Terlecki v. Strauss, 85 N. J. L. 454, 89 Atl. 1023, 4 N. C. C. A. 584; Northwestern Iron Co. v. Industrial Commission, 160 Wis. 633, 152 N. W. 416; Corbett v. H. S. Pitt & Co. [1915] W. C. & Ins. Rep. 295, 8 B. W. C. C. 466.

Mr. A. Storrs Campbell for appellee.

refreshment, as arising out of and in the course of the employment, see annotation following *Re Sundine*, L.R.A.1916A, 320.

Somewhat analogous points are treated in the annotation following *Hopkins v. Michigan Sugar Co.* L.R.A.1916A, 314, as to compensation for injury to employee received while on the street; annotation following L.R.A.1916D.

De Constantin v. Public Service Commission, L.R.A.1916A, 331, as to compensation for injuries received while going to and from work; and the annotation following *Zabriskie v. Erie R. Co.* L.R.A.1916A, 317, as to injuries received while seeking toilet facilities as "arising out of the employment."

Beach, J., delivered the opinion of the court:

The question is whether the claimant's injury arose "out of and in the course of his employment," and the proper construction of that phrase, which now comes before us for the first time, is of great importance, because it controls the determination of what sorts of injuries may properly be brought within the operation of our workmen's compensation act (Laws 1913, chap. 138). The same phrase used in the same controlling sense is found in the workmen's compensation acts of England and of many of our states, and in the literary sense its construction appears to be well settled, although the application of it to particular cases has given rise to differences of opinion which are not easily harmonized. It seems to be agreed that the words "arising out of and in the course of his employment" do not make the employer an insurer against all the risks of the business, but include only those injuries arising from the risks of the business which are suffered while the employee is acting within the scope of his employment. In *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, Chief Justice Rugg says of this phrase: "It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. . . . But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause, and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

See also *Reed v. Great Western R. Co.* [1909] A. C. 31, 78 L. J. K. B. N. S. 31, 99 L. T. N. S. 781, 25 Times L. R. 36, 53 Sol. Jo. 31; *Spooner v. Detroit Saturday Night*, — Mich. —, L.R.A.1916A, 17, 153 N. W. 657, 9 N. C. C. A. 647; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *Boyd, Workmen's Comp.* L.R.A.1916D.

Act, § 573; 1 *Bradbury, Workmen's Comp. Act*, p. 398.

Was the claimant at the time of the injury doing the duty which he was employed to perform, and was there a causal connection between the conditions surrounding the performance of his work and the resulting injury? In approaching these questions we take into consideration the fact that the act is in a very large sense remedial, and that the legislature intended to fix upon the employer a liability which, though sounding in contract, need not depend at all upon the breach of any duty by the employer. *Bayon v. Beckley*, 89 Conn. 154, 161, 93 Atl. 139, 8 N. C. C. A. 588. It is plain enough from the terms of the act that, when an injury arising from a risk of the business is suffered while the employee is doing the thing which his employment fairly requires him to do, he will be entitled to compensation (except when the injury is caused by the wilful and serious misconduct of the injured employee, or by his intoxication), although he was doing the work in a negligent or unusual way. It is also true that, when an injury arising from a risk of the business is suffered while the employee, though not strictly in the line of his obligatory duty, is still doing something incidental to the performance of his work, in going to or from the work, or in the necessary intervals of an intermittent employment, he will (subject to the same exceptions) be entitled to compensation. Finally, the same right to compensation will follow if an injury arising from a risk of the business is suffered while the employee is doing something which, although quite outside of his obligatory duty, is permitted by his employer for their mutual convenience, such as eating his dinner on the premises, or any similar act to the performance of which the employer has assented. *Blovelt v. Sawyer* (1903) 20 Times L. R. 105, [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 6 W. C. C. 16; *Morris v. Lambeth* (1905) 22 Times L. R. 22, 8 W. C. C. 3; *Moore v. Manchester Liners*, 3 B. W. C. C. 527; *M'Lauchlan v. Anderson*, 48 Scot. L. R. 349, 4 B. W. C. C. 376; *Sundine's Case*, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585; *Northwestern Iron Co. v. Industrial Commission*, 160 Wis. 633, 152 N. W. 416.

On the other hand, if the injury, although it arises out of a risk of the business, is received while the employee has turned aside from his employment for his own purposes, so that he is not acting

within the scope of his employment, no compensation can be given. *Reed v. Great Western R. Co.* [1909] A. C. 31, 78 L. J. K. B. N. S. 31, 99 L. T. N. S. 781, 25 Times L. R. 36, 53 Sol. Jo. 31; *Bryce v. Edward Lloyd Co.* 2 B. W. C. C. 26, [1909] 2 K. B. 804, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744; *Spooner v. Detroit Saturday Night*, — Mich. —, L.R.A.1916A, 17, 153 N. W. 657, 9 N. C. C. A. 647; *Keen v. St. Clement's Press*, 7 B. W. C. C. 542.

In the present case the commissioner has found in substance, if not in words, that the employer knew of the employees' custom of heating bottles in the dry room at the mouth of the hot-air pipe, and, upon principles familiar to courts before compensation acts were invented, the right to so heat bottles became, by the tacit consent of the employer, a term or condition added to the contract of employment; so that, if the injury, which clearly arose from a risk of the business, had occurred while the claimant was engaged in heating his bottle at the customary time and place, he would doubtless have been entitled to compensation. The finding does not inform us whether the injury was received at a time when it was customary for the employees to place their bottles for heating; and, in the absence of any finding as to that fact, we cannot say, as a matter of law, that it was unreasonable for a foreman, whose supervisory duties are not necessarily continuous, to place his bottle for heating at 11:30 A. M., at which time the accident occurred. The precise question, therefore, is whether the claimant, in attempting to heat his bottle in a place which was not the customary place, and was not a place whose use for the purpose of heating bottles had been assented to by the employer, was acting "within the scope of his employment." This question is not in principle a new one, and it may be answered by pointing out that an act which is quite outside of the servant's duties, and is not in itself or in the manner of doing it a consequence of the conditions surrounding the performance of those duties, cannot be brought within the scope of the employment, except by proof of the special assent of the employer, actual or imputed. In ascertaining the scope of the servant's employment it has long been the rule to take into account what the servant was required to do, the conditions surrounding the performance of his work, and also whatever else, with the knowledge and assent of the employer, he actually did do. Further than that we cannot go, because the relation is contractual, and, except by a valid exercise of the police power, its terms cannot be enlarged L.R.A.1916D.

or varied without the consent of both parties.

It is quite true, under the workmen's compensation act, that when the scope of the employment is once ascertained, any injury arising out of and in the course of it is to be compensated for, although the employee acted in a negligent or unusual way. This is the principle on which the claimant's counsel relies, contending that the scope of the employment had been enlarged by the known custom of heating bottles at the mouth of the hot-air pipe, and that therefore the claimant is entitled to compensation, although he attempted to heat his bottle on this occasion in an unusual way. But, when the injury arises from his own act, the claimant must first show that the act which caused it was within the scope of his employment; and if the act is one which has no direct relation to his employment or to the conditions surrounding the work, there is no presumption that the master has assented to it in advance, and therefore it cannot be brought within the scope of his employment at all, except by evidence affirmatively showing that it was done with the knowledge and assent of the employer. And if the knowledge and assent to the employer as shown by the evidence is limited to a particular way of doing such an act, it follows that the act, if done in an unusual way, may or may not be within the scope of the employment, according to the circumstances of the case. As to such acts the scope of the employment is coextensive with the master's knowledge and assent. The scope of the employment is to be determined, like the scope of any other contractual relation, by the mutual intent of the parties, which, in a case like this, ultimately rests on the intent of the master, to be ascertained upon the principle that one intends the natural consequences of that which he has permitted to be done.

The issue then takes the form of an inquiry whether the claimant's act in putting his bottle into the hot-air pipe in an adjoining room was a natural consequence of the master's permission to heat bottles in the dry room at the mouth of the hot-air pipe; so that the master, in assenting to the latter custom of heating bottles, may fairly be said to have assented also to the claimant's deviation from that custom. We think not. The finding is that the usual custom was to heat the bottles in the dry room at the place where the heated air was emitted. In the room adjoining the dry room there was an opening in this pipe consisting presumably of a small door. On this particular occasion the claimant, to quote the language of the commissioner,

"instead of placing his bottle at the mouth of the pipe in the dry room, went around and attempted to place it inside the pipe through the door hereinbefore described, not knowing that inside the pipe was a revolving fan." We think it is quite clear that the master's assent to the custom of heating bottles in the dry room at the mouth of the pipe cannot reasonably be said to involve his assent to the claimant's act of going into another room and attempting to put his bottle inside of the hot-air pipe through a door which led to a revolving fan. The finding of the commissioner does not contain any facts which tend to show that the master ought reasonably to have expected the claimant to do this; and, in the absence of any such findings of fact, we think there was nothing from which the commissioner could reasonably conclude that the employer had, in effect, assented in advance to the performance of the act which caused the claimant's injury. In *Keen v. St. Clement's Press*, 7 B. W. C. C. 542, the claimant was placing a tin of milk on a ledge underneath the moving machinery of a press, when his hand was injured by coming in contact with a revolving plate. It was customary for the workmen to take tea at 5 o'clock and to prepare their tea beforehand; and the claimant had gone to the place where the hot-water urn was kept and had returned with the tea when he was injured. The only point in which he went outside of the custom as known to the employer was in putting the tin of milk under the press to hide it from the night shift; and the court of appeals held that, because the employer had no knowledge of any custom of placing tins of milk under the press, the accident did not arise out of the claimant's employment. That case is very like the present one in all material points. Here, as there, the act which resulted in the injury was outside of the servant's duty, and not one which was a consequence of the conditions surrounding the performance of his work, or of conditions to which the master could fairly be said to have assented, and it subjected the claimant to the added risk from which the injury resulted. In this case it is apparent that the injury did not arise out of the employment, because there was no causal connection between the conditions under which the claimant's work was required to be done and the resulting injury.

There is no error.

Wheeler, J.

I concur in the result, and in the holding that the claimant, when injured, was not doing his employer's work, but doing something in his own way—and a way not L.R.A.1916D.

permitted by his employer—and for his own benefit, and hence his injury did not arise out of his employment.

I agree with the doctrine of *Keen v. St. Clement's Press*, 7 B. W. C. C. 542, and *McNicol's Case*, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522, as cited, in their holding that the terms arising "in the course of the employment" and arising "out of the employment" are independent and conjunctive terms.

I do not concur generally in the opinion, through my fear that it confounds these terms, and treats and holds them to be equivalents. And, further, because I fear that the opinion holds that the claimant was not at the time of his injury in the course of his employment, and I am of the opinion that he was, and that his momentary departure from his work to do something for his own benefit, although permitted by his master so to do yet done in a manner and place not permitted, did not take him at the time of his injury out of the course of his employment. The authorities seem to support this view. *Moore v. Manchester Liners* [1910] A. C. 498, 500, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527; *Fitzgerald v. W. G. Clarke & Son* [1908] 2 K. B. 796, 99 L. T. N. S. 101, 77 L. J. K. B. N. S. 1018, 1 B. W. C. C. 197, 201; *Robertson v. Allan Bros. & Co.* (1908) 98 L. T. N. S. 821, 77 L. J. K. B. N. S. 1072, 1 B. W. C. C. 172; *Sundine's Case*, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616; *Brvant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 460, 3 N. C. C. A. 585.

FLORIDA SUPREME COURT.

J. F. McKINNON, Superintendent of Public Instruction in and for Orange County, Plff. in Err.,

v.

STATE OF FLORIDA EX REL. EDWIN W. DAVIS et al.

(— Fla. —, 70 So. 557.)

School — funds — trust.

1. The school funds under our Constitution are to be regarded as a sacred trust; and the provisions of law safeguarding expenditures from such funds should be

Headnotes by the Court.

Note. — As to use of public funds to pay expense incurred by officer or citizen in litigation, see annotation following this case, post, 92.

strictly construed, and the mandate of the Constitution enforced.

For other cases, see Public Moneys, II. in Dig. 1-52 N. S.

Same — employment of attorney — authority.

2. The employment of attorneys by individual school teachers to conduct litigation in their name to require the county superintendent to countersign warrants issued by the county board of public instruction for such teachers' salaries is not such a county purpose as will warrant payment therefor from county school funds that, by the express command of the Constitution, "shall be disbursed . . . solely for the maintenance and support of public free schools."

For other cases, see Public Moneys, in Dig. 1-52 N. S.

(Shackleford and Cockrell, JJ., dissent.)

(December 16, 1915.)

ERROR to the Circuit Court for Orange County to review a judgment granting a writ of mandamus commanding respondent to countersign a warrant drawn by the board of public instruction as compensation for legal services rendered to relators. Reversed.

The facts are stated in the opinion.

Mr. T. F. West, Attorney General, for plaintiff in error:

Relators, having an adequate remedy by other proceedings at law, if such claim is a legal and proper charge or obligation, are not entitled to enforce the collection of the same by mandamus.

State ex rel. Ellis v. Atlantic Coast Line R. Co. 53 Fla. 650, 13 L.R.A. (N.S.) 320, 44 So. 213, 12 Ann. Cas. 359; State ex rel. Walker v. Stewart, 49 Fla. 259, 38 So. 600; Johns v. Orange County, 28 Fla. 626, 10 So. 96; State ex rel. Edwards v. Sumter County, 22 Fla. 1.

The payment of this claim was not a lawful appropriation of public school funds.

Pennock v. State, 61 Fla. 386, 54 So. 1004; State ex rel. Bours v. L'Engle, 40 Fla. 392, 24 So. 539; Brown v. Lakeland, 61 Fla. 508, 54 So. 716; Board of Public Instruction v. Groom, 57 Fla. 347, 48 So. 641; State ex rel. Baas v. McKinnon, 68 Fla. 548, 67 So. 77.

Messrs. Davis & Giles, for defendants in error:

If the legal remedy is not entirely adequate, mandamus lies. A remedy which will avoid mandamus must be specific and adequate.

Ray v. Wilson, 29 Fla. 342, 14 L.R.A. 773, 10 So. 613; State ex rel. Baas v. McKinnon, 68 Fla. 548, 67 So. 77. L.R.A.1916D.

If there has been no illegality or abuse of authority by the county board, it is the superintendent's mandatory duty to sign the warrant.

State ex rel. Moody v. Barnes, 25 Fla. 298, 23 Am. St. Rep. 516, 5 So. 722.

Per Curiam:

It appears that, pursuant to contracts made by the county board of public instruction for Orange county with certain persons for their services as teachers in the public schools of said county, the board ordered warrants drawn for the agreed salaries of the teachers; that the county superintendent of public instruction for Orange county, who is by law secretary of the board of public instruction for such county, refused to countersign said warrant drawn in favor of such teachers; that the board employed the relators, who are practising attorneys at law, to prosecute legal proceedings to require the county superintendent to countersign the warrants drawn in favor of said teachers for their salaries, and that such attorneys by legal proceedings procured a mandate requiring the superintendent of public instruction to countersign said warrants for teachers' salaries; that for such legal services rendered by the relators, the board of public instruction for Orange county agreed to pay relators \$250, and ordered a warrant drawn for said amount; that the warrant was drawn and signed by the chairman of the county board of public instruction, but the respondent county superintendent of public instruction refused to countersign said warrant, as was his legal duty, whereupon the relators brought mandamus proceedings to require the county superintendent of public instruction to countersign the warrant drawn as compensation for such legal services rendered by the relators at the instance of the board.

The respondent defended on the ground, among others, that the payment thus sought to be made from the county school fund is illegal. The court ordered a peremptory writ, and the respondent took writ of error.

The county superintendent of public instruction may by mandamus be required to countersign a warrant duly ordered and drawn by the county board of public instruction, in a proper amount, and for a proper purpose, where there is no fraud, illegality, or abuse of authority in the action of the board. State ex rel. Baas v. McKinnon, 68 Fla. 548, 67 So. 77. But the county superintendent will not by mandamus be required to countersign a warrant that is drawn for a purpose not authorized by law. See State ex rel. Walker v. Stewart, 49 Fla. 259, 38 So. 600; State ex rel. Baas v. McKinnon, supra.

The Constitution provides that "the county school fund . . . shall be disbursed by the county board of public instruction solely for the maintenance and support of public free schools." Section 9, art. 12. And the school subdistrict taxes are "for the exclusive use of public free schools within the district." Section 10, art. 12.

The school funds under our Constitution are to be regarded as a sacred trust; and the provisions of law safeguarding expenditures from such funds should be strictly construed, and the mandate of the Constitution enforced. See *Pennock v. State*, 61 Fla. 383, 54 So. 1004.

The employment of attorneys to conduct litigation to require the county superintendent to countersign warrants issued by the county board of public instruction for teachers' salaries is not such a county school purpose as will warrant payment therefor from county school funds that, by the express command of the Constitution, "shall be disbursed . . . solely for the main-

tenance and support of public free schools." If a county superintendent unlawfully refuses to countersign a warrant, he may be required to do so by the party entitled to the warrant or by the proper officer of the state, or he may be suspended from office by the governor for misfeasance or neglect of duty in office.

The education of the children of the state, for whose benefit the county school fund is provided, has not such relation to the refusal of a county superintendent to countersign warrants drawn for the teachers' salaries as to make the payment of attorney fees to secure such countersigning a part of the "maintenance and support of public free schools."

The judgment awarding a peremptory writ of mandamus is reversed.

Taylor, Ch. J., and Whitfield and Ellis, JJ., concur.

Shackleford and Cockrell, JJ., dissent.

Annotation—Use of public funds to pay expense incurred by officer or citizen in litigation.

The use of public funds to pay counsel assigned to defend an indigent person is not treated in this annotation. For a discussion of a phase of that subject, see note to *Pardee v. Salt Lake County*, 32 L.R.A.(N.S.) 377.

The reimbursement from public funds, of litigation expenses incurred by public officers in the discharge of their duties, is also excluded; and in connection with that question, see *State ex rel. Crow v. St. Louis*, 61 L.R.A. 593, and cases in note to *Daggett v. Colgan*, 14 L.R.A. 477.

The decision in *McKINNON v. STATE*, ante, 90, is in accordance with a fundamental principle of our government that public funds shall not be used for private purposes.

Expenses incurred by public officers in defending charges.

Counsel fees and other expenses incurred by public officers in successfully defending criminal charges or charges of official misconduct are incurred for a private purpose, and cannot, in the absence of a statutory provision therefor, be paid from public funds. *Shaw v. Macon* (1856) 19 Ga. 468; *Gilbert v. Berlin* (1912) 76 N. H. 470, 84 Atl. 235; *People ex rel. Merritt v. Lawrence* (1843) 6 Hill (N. Y.) 244.

A municipality cannot legally vote to pay expenses in defending criminal charges or charges of official misconduct, L.R.A.1916D.

incurred by officers who are not the servants or agents of the municipality, or did not act as such in the matter of the alleged misconduct, where the municipality has no interest to protect in such matter. *Gove v. Epping* (1860) 41 N. H. 539; *Merrill v. Plainfield* (1863) 45 N. H. 126; *Gilbert v. Berlin* (1912) 76 N. H. 470, 84 Atl. 235.

A city has no power to assume the payment of the expenses incurred by supervisors in defending an action for neglect of official duty, or of the statutory penalties to which they have been subjected. *Halstead v. New York* (1850) 3 N. Y. 430.

Where a bill was brought in the name of the state on the relation of a large number of citizens of a city, against its mayor, council, and other officials, charging them with the grossest malfeasance in office, and praying for an injunction restraining them from dealing in alleged fraudulently executed city warrants, and for the appointment of a receiver to control the finances of the city, which prayers were granted, it was held in an action against the city by an attorney retained by the mayor to defend the bill, whose retainer was ratified by the city council, that the city had no interest in defending the bill, and was therefore not liable for the attorney's fees, and that his retainer did not bind it. *Smith v. Nashville* (1879) 4 Lea (Tenn.) 69.

There is a conflict in the cases as to the constitutionality of statutes authorizing the use of public funds to pay expenses incurred by public officers in the successful defense of criminal charges, or of proceedings to remove them from office, but the weight of authority and the more recent cases uphold the validity of such statutes, so far as they are prospective in operation.

A statute providing for the defrayal by a city or county or the state, of reasonable counsel fees and expenses paid or incurred by a city, county, or state officer who shall have been successful in any trial or proceeding to remove him from office, or to convict him of any crime in the performance of, or in connection with, his official duties, was held unconstitutional, mainly upon the ground that it was, in effect, a method of taking private property, not for public use, but for the benefit of private individuals. *Re Fallon* (1899) 28 Misc. 748, 59 N. Y. Supp. 849.

But that holding was made upon the authority of *Re Jensen* (1899) 28 Misc. 378, 59 N. Y. Supp. 653, (involving the same statute), which was affirmed in (1899) 44 App. Div. 509, 60 N. Y. Supp. 933, upon the ground principally that the prosecution of the officer had wholly terminated before the statute took effect, the appellate court stating: "A different question would arise in considering legislation for the reimbursement of innocent parties in criminal prosecutions, if the legislation were wholly prospective in its operation. . . . The purpose that we have to deal with here, and which seems to me to lack the public character necessary to sustain valid taxation, is a purpose to pay money on account of occurrences wholly past before the legislation took effect, which imposed no legal or moral obligation on the state at the time they happened, and from which the state received no conceivable benefit. It may be that purely prospective legislation announcing the intention of the state to pay such expenses incurred in future cases would be deemed expressive of a public purpose, and that the assurance thus given might be regarded as creating such an obligation as to relieve the subsequent payment from the objection that it was a mere gratuity."

The same statute was held unconstitutional in two other cases, but in both of them the claims of the officers arose long before the passage of the statute. *Re Straus* (1899) 44 App. Div. 425, 61 N. Y. Supp. 37; *Chapman v. New York L.R.A.* 1916D.

(1901) 168 N. Y. 80, 56 L.R.A. 846, 85 Am. St. Rep. 661, 61 N. E. 108.

And upon an application by a constable for the payment of expenses incurred in defending an indictment for murder, where the indictment was purely upon the theory that the accused killed the deceased as an individual, and the defense accepted that view and proved that the killing was accidental after the abandonment of an effort to arrest the deceased, the court avoided passing upon the question of the constitutionality of the same statute by holding that it was not intended to provide compensation for officers indicted as individuals for criminal conduct, even though the events connected with the occasion for the indictment were in some manner affected by the official station of the applicant. *Re Labrake* (1899) 29 Misc. 87, 60 N. Y. Supp. 571.

A similar municipal charter provision was held constitutional in so far as it was not retroactive. *Kane v. McClellan* (1905) 110 App. Div. 44, 96 N. Y. Supp. 806; *Deuel v. Gaynor* (1910) 141 App. Div. 630, 126 N. Y. Supp. 112. In the former case, the court said: "A statutory enactment providing in advance for the reimbursement to a public officer of the reasonable expenses actually incurred by him in defending himself against a criminal prosecution based upon a charge of official misconduct is within the constitutional power of the legislature, and not forbidden by any express or implied prohibition contained in the fundamental law of the state. The conditional promise to reimburse contained in such statute may be regarded as a part of the compensation which the state, city, or town, as the case may be, stipulates that the officer shall receive in return for the services to be by him rendered. In this sense, the purpose to be subserved is a public purpose, just as is the purpose in view in providing a specified salary, that is to say, the procurement of suitable and qualified persons to discharge the duties of the office."

The provision of a statute creating a board of police commissioners of a city, that all the salaries, as well as the necessary expenses, of the commissioners, shall be paid by the city, does not contemplate the payment from the municipal funds of expenses incurred by the commissioners in defending themselves against charges of official misconduct. *Gilbert v. Berlin* (1912) 76 N. H. 470, 84 Atl. 235.

A statute authorizing the directors of

a school district to employ counsel in suits against them does not empower them to pay out of the district funds attorneys' fees and stenographers' fees incurred in defending a charge of fraud upon the district in connection with the construction of a schoolhouse. *Scott v. Independent Dist.* (1894) 91 *Iowa*, 156, 59 N. W. 15.

Expenses incurred by public officers in establishing title to office.

The propriety and legality of the use of public funds to pay counsel fees and other expenses incurred by a public officer in establishing his title to the office depend upon the question whether the legal services rendered are for the public benefit, or whether the governmental agency to which the office pertains has any interest in the controversy.

Where one holding a position in the exempt class in the civil service of a city is transferred to a new position in the competitive class at a time when there is no eligible list for such position, and in a subsequent examination attains fourth place, and the civil service commission refuses to certify his pay rolls upon the ground that his transfer was illegal, and that an appointment to his position could be made only from the three standing highest on the eligible list, counsel fees and disbursements incurred by him in mandamus proceedings, in which such commission is compelled to certify his pay rolls and to classify his new position in the exempt class, can be paid by the city, because the settlement of the questions raised in such proceedings is for the public benefit. *Peters v. Justice* (1912) 75 *Misc.* 504, 133 N. Y. Supp. 847.

A city has power to pay a bill for legal services rendered to a city official in the successful defense of an action by the people, through the attorney general, to oust him from office upon the sole ground that he is an alien, and therefore disqualified from holding the office. *McCredie v. Buffalo* (1885) 2 *How. Pr. N. S.* (N. Y.) 336.

The de jure council of a city by motion elected an attorney special city counselor, to bring suit to reinstate them and the other de jure officers into offices at that time claimed and occupied by others, and in the motion was embodied a resolution to pay the attorney a certain sum if he won the suit, and to assess the persons passing the resolution a specified amount to pay him if he lost. The attorney won and brought an action for his services against the city and the L.R.A.1916D.

de jure councilmen, and judgment was rendered in favor of the city, and against the other defendants. The attorney did not appeal from the judgment in favor of the city, and upon appeal by the other defendants, it was held that they were endeavoring to contract for the city and, though without authority to bind it, were not personally liable. *Martin v. Schuermeyer* (1912) 30 *Okl.* 735, 121 *Pac.* 248.

The legislature has the power to pass an act to reimburse a city official out of the public funds, for expenses incurred by him in procuring the transfer of the books, securities, and funds of his office from his predecessor, and in defending and establishing his title to the office. *Stilwell v. New York* (1863) 19 *Abb. Pr.* (N. Y.) 376.

A county has no interest in an action by a supervisor to establish his right to the office of police commissioner, to which he was appointed by the board of supervisors, and therefore his counsel fees are not a legal charge against the county. *Richmond County v. Ellis* (1875) 59 N. Y. 620.

Counsel fees incurred by a county collector in successfully resisting objections to his bond are not a proper charge against the county, as it had no interest in the suit. *Fry v. Chicot County* (1881) 37 *Ark.* 117.

Expenses incurred by citizens for benefit of municipality.

A citizen who, by mandamus proceedings, compels the city council to collect, and a manufacturing company to pay, taxes upon property which the council has unconstitutionally exempted from taxation, is not a representative of the city, so as to make it liable in an action by the citizen's attorney, for his reasonable counsel fees in such proceedings. *Park v. Laurens* (1903) 68 S. C. 212, 46 S. E. 1012; *Milster v. Spartanburg* (1903) 68 S. C. 243, 47 S. E. 141.

But in the former case the court said: "We do not say that no case could arise where a citizen would be entitled to reimbursement from the city of funds expended as attorneys' fees or otherwise in maintaining a suit for its benefit. . . . The right of . . . [the citizen] to bring his action for counsel fees and other expenses, on the ground that he made these disbursements in securing a public municipal right which the city council refused to enforce, is not here involved. Such an action would in no wise depend upon any claim by . . . [the citizen's] attorney to represent the

city, . . . such as is alleged in this complaint; but, if it could stand at all, would have to rest on the principle thus laid down in Keener on Quasi Contracts, 341: 'Where an obligation is imposed by law upon a person to do an act, because of the interest which the public has in its performance, it would seem that, on the defendant's failure to perform, a person performing the same with the expectation of receiving compensation should be allowed to recover against the defendant.'"

Where a town desirous of settling its boundary line votes to indemnify a townsman owning land on the line, for the costs and expenses of a suit in his name to establish the disputed line, he can recover under the vote of indemnity, although he has a personal interest in the suit, and the defect in the proof of his title is the cause of his defeat, the jury finding that the true line is the one claimed by the town. *Baker v. Windham* (1836) 13 Me. 74. G. V. I.

ILLINOIS SUPREME COURT.

FRANK NAHSER

v.

CITY OF CHICAGO et al., Appts.

(271 Ill. 288, 111 N. E. 119.)

Municipal corporations — power to prohibit show near church.

1. Charter authority to regulate and prohibit amusements empowers a municipal corporation to refuse a license for a moving picture show within 200 feet of a church, although the clause of the charter dealing with places of amusement gives power to regulate only.

For other cases, see License, II. b, in Dig. 1-52 N. S.

Theater — prohibiting near church — police power.

2. Prohibiting the operation of a moving picture show within 200 feet of a church is within the police power.

For other cases, see Constitutional Law, II. c, 4, b, in Dig. 1-52 N. S.

(Cooke, J., dissents.)

(December 22, 1915.)

APPEAL by respondents from a judgment of the Circuit Court for Cook County in favor of petitioner in a mandamus proceeding to compel respondents to issue a license to him to conduct a moving picture show. Reversed.

The facts are stated in the opinion.

Messrs. Richard S. Folsom, Leon Hornstein, and Frederick A. Brown, for appellants:

The legislature has delegated to the city all the police power of the state relating to theatricals, exhibitions, shows, and amusements.

Metropolis Theatre Co. v. Chicago, 246 Ill. 20, 92 N. E. 597; *Chicago v. Shaynin*,

Note. — As to power of state or municipality to determine location of places of amusement, see annotation following this case, post, 99. L.R.A.1916D.

258 Ill. 69, 45 L.R.A.(N.S.) 23, 101 N. E. 224; *Block v. Chicago*, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011; 2 Dill. Mun. Corp. § 661; *Goodrich v. Busse*, 247 Ill. 366, 139 Am. St. Rep. 335, 93 N. E. 292, 20 Ann. Cas. 589; *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454; *Clinton v. Wilson*, 257 Ill. 580, 101 N. E. 192.

The control of the location of a place of amusement is within the police power of the state.

Goodrich v. Busse, 247 Ill. 367, 139 Am. St. Rep. 335, 93 N. E. 292, 20 Ann. Cas. 589; *Ex parte Quong Wo*, 161 Cal. 220, 118 Pac. 714; *Storer v. Downey*, 215 Mass. 273, 102 N. E. 321; *St. Louis v. Fischer*, 167 Mo. 654, 64 L.R.A. 679, 99 Am. St. Rep. 614, 67 S. W. 872; *Green v. Savannah*, 6 Ga. 1; 2 Dill. Mun. Corp. 5th ed. § 661; 38 Cyc. 257; *McQuillin*, Mun. Corp. § 1024; *Freund*, Pol. Power, § 250; *People ex rel. Lange v. Palmittter*, 71 Misc. 158, 128 N. Y. Supp. 426; *Duluth v. Marsh*, 71 Minn. 248, 73 N. W. 962; *Chicago v. Stratton*, 162 Ill. 494, 35 L.R.A. 84, 53 Am. St. Rep. 325, 44 N. E. 853; *People ex rel. Keller v. Oak Park*, 266 Ill. 365, 107 N. E. 636; *Denamore v. Evergreen Camp*, 61 Wash. 230, 31 L.R.A. (N.S.) 608, 112 Pac. 255, Ann. Cas. 1912B, 1206; *Chicago v. Ripley*, 249 Ill. 468, 34 L.R.A.(N.S.) 1186, 94 N. E. 931, Ann. Cas. 1912A, 160; *Chicago v. Shaynin*, 258 Ill. 69, 45 L.R.A.(N.S.) 23, 101 N. E. 224; *Dreyfus v. Montgomery*, 4 Ala. App. 270, 58 So. 730.

The power to suppress and prohibit includes the power to control the location. The greater power includes the lesser.

Schwuchow v. Chicago, 68 Ill. 444; *Launder v. Chicago*, 111 Ill. 291, 53 Am. Rep. 625; *Goodrich v. Busse*, 247 Ill. 366, 139 Am. St. Rep. 335, 93 N. E. 292, 20 Ann. Cas. 589; *Malkan v. Chicago*, 247 Ill. 471, 2 L.R.A.(N.S.) 488, 75 N. E. 548, 3 Ann. Cas. 1104; *Dreyfus v. Montgomery*, 4 Ala. App. 270, 58 So. 730; *Chicago v. Ripley*, 249 Ill. 466, 34 L.R.A.(N.S.) 1186, 94 N. E.

931, Ann. Cas. 1912A, 160; *Harrison v. People*, 222 Ill. 150, 78 N. E. 52; *Chicago v. Brownell*, 146 Ill. 64, 34 N. E. 595; *Swift v. People*, 162 Ill. 537, 33 L.R.A. 470, 44 N. E. 528; *People ex rel. Morrison v. Cregier*, 138 Ill. 401, 28 N. E. 812; *Strauss v. Galesburg*, 203 Ill. 234, 67 N. E. 836; *Gundling v. Chicago*, 176 Ill. 340, 48 L.R.A. 230, 52 N. E. 44; *Standard Oil Co. v. Danville*, 199 Ill. 50, 64 N. E. 1110; *Spiegler v. Chicago*, 216 Ill. 116, 74 N. E. 718; *Wright v. Chicago & N. W. R. Co.* 27 Ill. App. 200; *Pennsylvania Co. v. Chicago*, 181 Ill. 289, 53 L.R.A. 223, 54 N. E. 825.

Even if it is beyond the police power of a state or a municipality to prohibit theatricals, there is ample power to control the location.

Carrollton v. Bazzette, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837.

The ordinance in question is a reasonable exercise of the police power. It is within the police power of a municipality to protect a church, school, or hospital in this way.

People ex rel. Busching v. Ericsson, 263 Ill. 368, L.R.A.1915D, 607, 105 N. E. 315, Ann. Cas. 1915C, 183; *Ex parte Lacey*, 108 Cal. 328, 38 L.R.A. 640, 49 Am. St. Rep. 93, 41 Pac. 411; *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580, 12 N. E. 79; *Peoria v. Calhoun*, 29 Ill. 317; *Block v. Chicago*, 239 Ill. 251, 130 Am. St. Rep. 219, 87 N. E. 1011; *Chicago v. Ripley*, 249 Ill. 466, 34 L.R.A.(N.S.) 1186, 94 N. E. 931, Ann. Cas. 1912A, 160; *Dreyfus v. Montgomery*, 4 Ala. App. 270, 58 So. 730.

Messrs. Sonnenschein, Berkson, & M'ishell, for appellee:

The authority to regulate places of amusement does not include the authority to locate.

People ex rel. Goldberg v. Busse, 240 Ill. 338, 88 N. E. 831; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A.(N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292.

The authority "to license, tax, regulate, suppress, and prohibit . . . amusements" does not confer unlimited power on the city.

Chicago v. Weber, 246 Ill. 304, 34 L.R.A.(N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359; *Chicago v. Netcher*, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707; *Carrollton v. Bazzette*, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837; *Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677; *Braceville v. Doherty*, 30 Ill. App. 645.

The authority to license, tax, regulate, suppress, and prohibit . . . amusements does not enlarge the authority merely to regulate places of amusement.

Chicago v. Weber, 246 Ill. 304, 34 L.R.A. L.R.A.1916D.

(N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359; *People ex rel. United Theatres Co. v. Busse*, 162 Ill. App. 314.

The city has no powers except those which are delegated by express words, or necessarily or fairly implied in or incident to those expressly granted or essential to the declared objects and purposes of the city,—not simply convenient, but indispensable.

People ex rel. Huntley Dairy Co. v. Oak Park, 268 Ill. 256, 109 N. E. 11; *Chicago v. O'Brien*, 268 Ill. 228, 109 N. E. 10; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A.(N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292.

The entire act conferring powers on the city of Chicago should be read, and it should be considered, as a whole, so as to give effect to each part.

Illinois C. R. Co. v. Chicago, B. & N. R. Co. 122 Ill. 473, 13 N. E. 140; *Highway Comrs. v. Highway Comrs.* 100 Ill. 631.

The fact that the city is given authority to "regulate" certain industries, and to "direct the location and regulate" other industries, indicates the intention of the legislature to grant authority to locate only when expressly conferred.

People ex rel. Huntley Dairy Co. v. Oak Park, 268 Ill. 256, 109 N. E. 11; *People ex rel. Goldberg v. Busse*, 240 Ill. 338, 88 N. E. 831.

The enumeration of powers granted to the city of Chicago operates to exclude such as are not enumerated.

Emmons v. Lewistown, 132 Ill. 380, 8 L.R.A. 328, 22 Am. St. Rep. 540, 24 N. E. 58; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A.(N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292; *People ex rel. Goldberg v. Busse* and *People ex rel. Huntley Dairy Co. v. Oak Park*, supra; *Chicago v. O'Brien*, 268 Ill. 228, 109 N. E. 10.

The provisions of the cities and villages act granting powers to municipal corporations are strictly construed, and any doubt as to the existence of the powers must be resolved against the city.

People ex rel. Huntley Dairy Co. v. Oak Park, supra; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A.(N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292; *Chicago v. M. & M. Hotel Co.* 248 Ill. 264, 93 N. E. 753; *People ex rel. Busching v. Ericsson*, 263 Ill. 368, L.R.A.1915D, 607, 105 N. E. 315, Ann. Cas. 1915C, 183; *Chicago v. Weber*, 246 Ill. 304, 34 L.R.A.(N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359.

Theaters are not nuisances per se, and the operation of a theater is a lawful business.

People v. Steele, 231 Ill. 340, 14 L.R.A.(N.S.) 361, 121 Am. St. Rep. 321, 83 N. E.

236; *Chicago v. Weber*, 246 Ill. 304, 34 L.R.A. (N.S.) 306, 92 N. E. 859, 20 Ann. Cas. 359; *Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677.

A theater not being a nuisance according to the law of the state, the city of Chicago has no right to declare a theater to be a nuisance, unless it is one in fact.

People ex rel. Lincoln Ice Co. v. Chicago, 260 Ill. 150, 102 N. E. 1039; *People ex rel. Goldberg v. Busse*, 240 Ill. 338, 88 N. E. 831; *Chicago v. Weber*, 246 Ill. 304, 92 N. E. 859; *Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677.

The amusement ordinances of Chicago forbid one to present a show, concert, lecture, or other amusement within 200 feet of a church, if presented for gain, but permit a show, concert, lecture, or other amusement to be presented within 200 feet of a church, if no admission fee is charged; hence the ordinance is discriminatory and invalid.

Tugman v. Chicago, 78 Ill. 405; *Chicago & A. R. Co. v. Pontiac*, 169 Ill. 155, 48 N. E. 485; *Monmouth v. Popel*, 183 Ill. 634, 56 N. E. 348; *Pierce v. Aurora*, 81 Ill. App. 670.

The ordinance in question is unreasonable in that it forbids one who owns real estate within 200 feet of a church, to conduct any kind of amusement thereon, if any admission fee be charged, no matter how harmless, nor what the purpose of the entertainment might be. Offensive and inoffensive amusements are classed alike.

People ex rel. Lincoln Ice Co. v. Chicago, 260 Ill. 150, 102 N. E. 1039; *Carrollton v. Bazzette*, 159 Ill. 284, 31 L.R.A. 522, 42 N. E. 837; *Endelman v. Bloomington*, 137 Ill. App. 483; *Des Plaines v. Poyer*, 123 Ill. 348, 5 Am. St. Rep. 524, 14 N. E. 677.

The owner of real estate has a constitutional right to the use of his property as he sees fit, so long as he does not endanger or threaten the safety, health, comfort, and general welfare of the city.

People ex rel. Lincoln Ice Co. v. Chicago, 260 Ill. 150, 102 N. E. 1039; *People ex rel. Friend v. Chicago*, 261 Ill. 16, 49 L.R.A. (N.S.) 438, 103 N. E. 609, Ann. Cas. 1915A, 292; *Chicago v. Gunning System*, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 Ann. Cas. 392; *Chicago v. Netcher*, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707.

Farmer, Ch. J., delivered the opinion of the court:

Appellee, Frank Nahser, brought an action of mandamus against the city of Chicago, and the mayor and clerk thereof, to compel them to issue to him a license to

conduct a motion picture show. Appellee is the lessee of a building at Fifty-third street and Harper avenue, in the city of Chicago. The adjoining premises on the west are the property of the First Presbyterian Church of Hyde Park. The church edifice and buildings attached occupy the property of the church up to the building in which it is proposed to conduct a motion picture show, and have so occupied said premises for forty years. The building in which it is proposed to conduct the show has been constructed within the last two years. At and before the time the permit was applied for and issued for the construction of the building, there was an ordinance in force in the city of Chicago, classifying entertainments for which the public was required to pay an admission fee into twenty-one classes, and requiring licenses for their operation. One of the provisions of the ordinance is that none of the entertainments so classified "shall be produced, offered, presented, or carried on within 200 feet of any hospital, church, or building used exclusively for educational purposes."

Notice of this ordinance, and that a license would be refused for the carrying on of an entertainment in the building contrary to the provisions of the ordinance, was stamped upon the building plans at the time permission was given to construct the building. The answer avers that a kindergarten is conducted in a building between the church auditorium and the building where it is proposed to conduct the picture show; that children of tender years are taught in said kindergarten; that there are services in the church daily; that it has a membership of 900; that about 500 children attend the Sunday school and a large number attend the kindergarten, and that a motion picture show in the building leased by appellee would interfere with the services in the church and annoy persons attending the same. The wall between appellee's building and the church, as alleged in the petition, is 36 inches thick and sound-proof. Appellee's contention is that the city was without power to adopt the ordinance, and that, in so far as it purports to authorize the city to prohibit his carrying on the proposed show, it is invalid. To the answer to the petition, which set up and relied upon the ordinance as justifying the refusal to grant the license, a demurrer was interposed by appellee and sustained by the court. Appellants electing to stand by their answer, judgment was rendered for the petitioner and the peremptory writ of mandamus awarded. Appellants prayed an appeal, and the trial court certified the validity of a municipal ordinance was involved, and the public interest required the

appeal to be taken directly to the supreme court.

The sole question to be determined is the validity of the ordinance prohibiting amusements for which the public is required to pay an admission fee, within 200 feet of a church. It is not disputed that the building in which it is sought to conduct a motion picture show is within 200 feet of a church, but it is claimed the city had no power to prohibit the show and that the ordinance is invalid. Appellee insists that clause 41 of § 62 of the cities and villages act (Hurd's Rev. Stat. 1913, p. 272) delegates power to cities to regulate and prohibit amusements, but that the power to regulate places of amusement is found in clause 58 of said paragraph, and does not include the power to prohibit; that clause 41 relates to the amusements themselves, while clause 58 deals with the buildings or places where amusements are conducted, and from this it is argued it was intended the power to prohibit should apply to amusements of an objectionable character, but not to amusements objectionable on account of the place where they are conducted. Clause 41 confers upon the city council the right "to license, tax, regulate, suppress, and prohibit . . . theatricals and other exhibitions, shows, and amusements, and to revoke such license at pleasure." Clause 58 grants the power "to regulate places of amusement." The power to regulate does not include the power to prohibit. *People ex rel. Goldberg v. Busse*, 240 Ill. 338, 88 N. E. 831. Assuming clause 58 relates to places of amusement, and not to amusements themselves, and that under it no power is given to prohibit amusements on account of location, what effect and meaning are to be given to clause 41? Taking appellee's view as correct, the power to prohibit amusements could only be exercised because of the character of the show; that is, because it is a nuisance. But, independently of clause 41, cities possessed the power to prohibit nuisances, and it could not have been enacted for the purpose of granting them that power. If it be said such shows cannot be prohibited where their proximity to a church, school, or hospital interferes with such church, school, or hospital's use and enjoyment, or that the city has no power under any circumstances to prohibit shows because of the places where they are carried on, then the power granted by clause 41 to prohibit would seem meaningless. Clause 41 gave cities all the power the state had to do the things purported to be authorized by said clause, subject to no limitations except those imposed by the Constitution upon the legislature. *Metropolis Theatre Co. v. Chicago*, 246 Ill. 20, L.R.A.1916D.

92 N. E. 597. It follows, if the legislature had the power to pass an act prohibiting amusements of the character under consideration within 200 feet of a church, that power was granted to the city council. The legislature had not the power to pass an act prohibiting all amusements, but only such as came within the legitimate exercise of the police power. Would it have been a legitimate exercise of that power for the legislature to have enacted a law prohibiting a motion picture show within 200 feet of a church? We are of opinion the answer must be in the affirmative.

Under what circumstances or conditions the police power of the state may be exercised was defined in *Chicago v. Netcher*, 183 Ill. 104, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707, as follows: "In order to sustain legislative interference with the business of the citizen by virtue of the police power, it is necessary that the act should have some reasonable relation to the subjects included in such power. If it is claimed that the statute or ordinance is referable to the police power, the court must be able to see that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object, but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void."

It is apparent that a motion picture show within 200 feet of a church having a large membership, a large Sunday school, and daily services, will be an interference with and an annoyance to religious worship. Interference with or the disturbance of the people engaging in religious worship may be prohibited under the exercise of the police power. *Meyers v. Baker*, 120 Ill. 567, 60 Am. Rep. 580, 12 N. E. 79. In that case it was held an act of the legislature prohibiting the establishment of a tent or booth within a certain distance of a camp or field meeting, for the sale of provisions or refreshments, without the permission of the authorities having charge of such meeting, was a valid police regulation; and in *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857, 28 N. E. 454, an ordinance prohibiting keeping open places of business on Sunday was sustained on the same ground. In *People ex rel. Busching v. Ericsson*, 263 Ill. 368, L.R.A.1915D, 607, 105 N. E. 315, Ann. Cas. 1915C, 183, the court considered the validity of an ordi-

nance declaring it unlawful to locate, build, or maintain a garage within 200 feet of any building used for a hospital, church, or school, or in any block in which two thirds of the buildings on both sides of the street are used exclusively for residence purposes, without securing the written consent of a majority of the property owners, according to frontage, on both sides of the street. The ordinance was held valid, and the court said: "The place where it was proposed to erect this structure is also within 200 feet of a church, and it is contended that this provision of the ordinance is an unreasonable restriction. The conduct of the affairs of a church, with its various meetings and assemblies in carrying out the purposes for which it is organized, is of such a character that a city is warranted in making such a restriction. The conduct of the business of a public garage would be as offensive to the members of a church as it would be to the occupants of a private residence, and would affect their comfort and welfare to the same extent."

While the business of keeping a dramshop is not a common-law right, and can be engaged in only in the manner and upon the terms prescribed by statute, the power granted municipalities to license, regulate, and prohibit the selling or giving away of

intoxicating liquors has been held to confer the power to prohibit a dramshop on premises adjoining a public school (*Harrison v. People*, 222 Ill. 150, 78 N. E. 52), and to prohibit them in a district designated, or limit the number in a certain district (*Swift v. People*, 162 Ill. 534, 33 L.R.A. 470, 44 N. E. 528; *People ex rel. Morrison v. Cregier*, 138 Ill. 401, 28 N. E. 812). In the case last cited the court said: "Again, the proximity of premises to a church, seminary, schoolhouse, hospital, cemetery, or other public or private institution may undoubtedly be a good reason for including such premises in a district from which dramshops are excluded."

We are of opinion the state had the power to prohibit, by law, a motion picture show being conducted within 200 feet of a church, and that by clause 41 it granted that power to cities, and the ordinance in question was not an unreasonable exercise of that power.

The judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the answer.

Cooke, J., dissents.

Petition for rehearing denied February 3, 1916.

Annotation—Power of state or municipality to determine location of places of amusement.

Generally, as to regulation affecting moving pictures, see note to *State ex rel. Ebert v. Loden*, 40 L.R.A.(N.S.) 193.

As to power of municipal corporation to declare particular kinds of amusement nuisances per se, see note to *Re Jones*, 31 L.R.A.(N.S.) 548.

But few reported cases have been found that have considered the question under annotation, and those in general are in harmony with *NAHSER v. CHICAGO*, ante, 95.

Thus, an ordinance making it unlawful to operate a moving picture show within a certain district of a city is a valid exercise of an express power conferred upon cities by the legislature to license, tax, regulate, restrain, or prohibit theatrical and other amusements. *Dreyfus v. Montgomery* (1912) 4 Ala. App. 270, 58 So. 730.

And such an ordinance is valid and operative as against one who at the time is operating such a show under a license from a city. (Ala.) *Ibid*. The report of this case does not show the facts bearing upon the reasonableness of the restrictions as to location. There is a L.R.A.1916D.

suggestion in the case that the ordinance was challenged as a discrimination against colored persons, from which class patronage was drawn, but the court said that the ordinance appeared to be general in its nature and operation, and to contravene no common right, and make no class distinction. The court also observed that if the ordinance was not consistently enforced, that was no argument against it, or the power to pass such a regulation; that the correction of that evil lay in an entirely different forum.

Because of the manifest menace by fire and panic likely to result to school children and church congregations, it was held in *Laurelle v. Bush* (1911) 17 Cal. App. 409, 119 Pac. 953, that prohibiting the location of moving pictures within a distance of 200 feet from the front line of any church or school, or within 100 feet of the property line of the side or rear of any church or school, is not invalid as prescribing unreasonable or unnecessary conditions.

So, also, it was held in *People ex rel. Moses v. Gaynor* (1912) 77 Misc. 576,

137 N. Y. Supp. 196, that there was no abuse of discretion under a city ordinance requiring common shows to be licensed, in denying a license to maintain a moving picture show on premises which immediately adjoined a large public school and was opposite the parish and other buildings of a church.

A statute providing that the floor of any audience room in which moving picture exhibitions are given shall be the first or main floor of the building in which said room is located, and also providing that in municipalities having ordinances providing for the regulation and installation and operation of moving picture machines, nothing therein shall be construed to abrogate such local regulations, was held, in *Jewel Theater Co. v. Fire Marshal* (1914) 178 Mich. 399, 144 N. W. 835, Ann. Cas. 1915C, 1212, to be a valid exercise of the police power of the state, and not to be in conflict with nor to abrogate, but to supplement, an ordinance of a city providing that "minor theaters which are not in actual operation at the time of the adoption of this ordinance shall not be located above the ground floor of any building within the city limits, nor shall any minor theater contain a balcony or gallery to be occupied by an audience," and so applies to moving picture theaters already in operation when the act was passed. The court stated that the act "does not conflict with the local regulation, but goes further. It disturbs what the local regulation does not disturb, namely, moving picture shows conducted on floors of buildings above the first floor. The local regulation is not abrogated, but is supplemented. The local regulation conferred upon complainant no right to give such exhibitions on the second floor of a building. It did not disturb it there. The statute is prospective in its operation and uniform in its application. . . . If the public safety or welfare demand that a particular business shall not be conducted in a particular place, the legislative power may be exercised to prevent it. Generally, it is by experience only that the necessary regulations of business are indicated, and the legislative power is not limited because the thing which experience has demonstrated should not continue is continuing when the legislature speaks."

But the power to regulate ten pin alleys, given by the general statutes to a city, does not authorize an ordinance forbidding the location of such alleys within the fire limits of the city, or with-

in 100 yards of any private residence or business house, where the only place within the corporate limits and outside of the prohibited points at which such an alley could be located would be 600 yards from the business center and in a portion of the city remote from any thoroughfare or public place, since the power to regulate does not include the power to suppress or prohibit. *Ex parte Patterson* (1900) 42 Tex. Crim. Rep. 256, 51 L.R.A. 654, 58 S. W. 1011.

And in *Re Walker* (1914) 84 Misc. 118, 146 N. Y. Supp. 519, where a license to operate a moving picture theater was refused upon the ground that there was danger from fire, it was held that the issuance of a license to operate a moving picture show may be compelled by mandamus where the theater was built and located prior to the passage of an ordinance providing that no moving picture show shall be maintained in any residence district of a city without the consent of a common council, approved by the mayor, and all lawful prerequisites of law relating to health, public safety from fire, and the reasonable regulations of the health and fire departments of the city, have been complied with. The court said that, the city having once given its permission that the building should be made into a moving picture theater, and the owner having incurred expense in its construction, its power over such building extends simply to regulating, and not prohibiting, its use for those purposes.

Again, it has been held that the location of a theater will not be prevented because it will interfere with an established business which is not permitted to be located within a certain distance of a building occupied by a theater.

Thus, it was held in *Ormsby v. Bell* (1915) — App. Div. —, 157 N. Y. Supp. 533, to be no ground for refusing a license to a theater that the adjacent premises were used for a business that requires a permit which cannot be issued for any building in which a compartment for volatile inflammable oil is within 50 feet of the nearest wall of any building occupied as a school, hospital, theater, or other place of public amusement or assembly. The court stated that "when the third person secured such permit, the land now occupied by the motion picture theater was vacant, and he incurred the risk of a subsequent legitimate use of such vacant lands by the owner and the consequence thereof. He had no legal assurance that such use would be limited so that his own occupation would not of-

fend the ordinance, and he cannot now invoke the permit to that end, for thereby he would deprive the owner of his full property rights." This rule, if adhered to, would, it would seem, result in the closing of a theater or other place of

amusement were it built adjacent to a vacant lot which might later be occupied by a building within a certain distance from which a theater was prohibited from being located. J. H. B.

IOWA SUPREME COURT.

JOHN W. WATSON

v.

MISSISSIPPI RIVER POWER COMPANY,
Appt.

(— Iowa, —, 156 N. W. 188.)

Explosives — blasting — injury by concussion — liability.

1. A private corporation organized to supply the public with electricity, and clothed with the power of eminent domain, is liable for injuries to neighboring property caused by concussion or vibration due to blasting in a navigable stream under license from the government, even though it is not negligent in the performance of the work.

For other cases, see Blasting, in Dig. 1-52 N. S.

Master and servant — independent contractor — injury by blasting.

2. One cannot avoid liability for injury to neighboring property by the concussion from blasting, by letting the work to an independent contractor, if the contract contemplates blasting and the injury results even though the work is properly done.

For other cases, see Master and Servant, III. b, in Dig. 1-52 N. S.

Damages — injury to property by blasting — cost of restoration.

3. The measure of damages for injury to property by blasting is the cost of restoration when that can be done at reasonable expense, and not the diminution in value of the property.

For other cases, see Damages, III. k, 2, in Dig. 1-52 N. S.

(February 9, 1916.)

A PPEAL by defendant from a judgment of the District Court for Lee County

Note. — As to liability for injury to person or property from concussion caused by blasting, see notes to *Bessemer Coal, Iron & Land Co. v. Doak*, 12 L.R.A.(N.S.) 389; *Hickey v. McCabe*, 27 L.R.A.(N.S.) 425; and *Louden v. Cincinnati*, L.R.A.1915E, 356.

As to liability of employer for negligence of independent contractor in the performance of contract requiring blasting, see notes to *Houghton v. Loma Prieta Lumber Co.* 14 L.R.A.(N.S.) 914, and *Hunter v. Southern R. Co.* 29 L.R.A.(N.S.) 851, and see later case, *Salmon v. Kansas City*, 39 L.R.A.(N.S.) 328. L.R.A.1916D.

in plaintiff's favor in an action brought to recover damages for injury to plaintiff's property by blasting alleged to have been caused by defendant's wrongful and negligent acts. Affirmed.

The facts are sufficiently stated in the opinion.

Messrs. W. E. Blake and J. O. Boyd, for appellant:

Negligence is an essential element to recovery.

Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 106, 12 L.R.A.(N.S.) 389, 44 So. 627; *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L.R.A. 220, 30 Am. St. Rep. 649, 31 N. E. 328; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149, 11 Am. Neg. Rep. 166; *Page v. Dempsey*, 184 N. Y. 245, 77 N. E. 9, 20 Am. Neg. Rep. 135; *Central of Georgia R. Co. v. Bernstein*, 113 Ga. 175, 38 S. E. 394; *Simon v. Henry*, 62 N. J. L. 486, 41 Atl. 692; *Mitchell v. Frantz*, 110 Mich. 78, 34 L.R.A. 182, 64 Am. St. Rep. 329, 37 N. W. 1096; *Slatten v. Des Moines Valley R. Co.* 29 Iowa, 149, 4 Am. Rep. 205; *McMillin v. Staples*, 36 Iowa, 532; *Walker v. Chicago, R. I. & P. R. Co.* 71 Iowa, 658, 33 N. W. 224; *Ochiltree v. Chicago & N. W. R. Co.* 93 Iowa, 631, 62 N. W. 7; *Ochiltree v. Chicago & N. W. R. Co.* 96 Iowa, 246, 64 N. W. 788; *MacGinnis v. Marlborough-Hudson Gas Co.* 220 Mass. 575, L.R.A.1915D, 1080, 108 N. E. 364.

To subject a proprietor or owner to liability for damages caused by acts of an independent contractor, there must be negligence of such owner.

Hughbanks v. Boston Invest. Co. 92 Iowa, 267, 60 N. W. 640; *Humpton v. Unterkircher*, 97 Iowa, 509, 66 N. W. 776, 14 Am. Neg. Cas. 595; *Kelleher v. Schmitt & H. Mfg. Co.* 122 Iowa, 639, 98 N. W. 482; *Hoff v. Shockley*, 122 Iowa, 720, 64 L.R.A. 538, 101 Am. St. Rep. 289, 98 N. W. 573; *Teeters v. Des Moines*, — Iowa, —, 154 N. W. 317.

When the property destroyed or injured is so closely connected with the real estate on which it stands, or to which it is attached, that it has no value separate and independent of the real estate, or the injury is to the soil itself, the measure of damages is the difference in value between

the real estate before the injury and after it.

Rowe v. Chicago & N. W. R. Co. 102 Iowa, 290, 71 N. W. 409, 3 Am. Neg. Rep. 647; Koonz v. Hempy, 142 Iowa, 337, 120 N. W. 976.

Mr. Hazen I. Sawyer also for appellee.

Messrs. Hughes & McCoid, for appellee.

The party making use of powerful explosives will be liable for the damage approximately and naturally resulting therefrom, irrespectively of the question of negligence or want of skill in the blasting operations, and especially so when such blastings are carried on in a populous city or near the owner's property, and no license is obtained from the city authorities or otherwise to so blast.

Louden v. Cincinnati, 90 Ohio St. 144, L.R.A.1915E, 356, 106 N. E. 97; Fitz Simons & C. Co. v. Braun, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9; Toledo Brewing & Malting Co. v. Bosch, 41 C. C. A. 482, 101 Fed. 530; Sullivan v. Dunham, 161 N. Y. 290, 47 L.R.A. 715, 55 N. E. 923, 7 Am. Neg. Rep. 126; Hickey v. McCabe, 30 R. I. 346, 27 L.R.A.(N.S.) 425, 75 Atl. 404, 19 Ann. Cas. 783; Colton v. Onderdonk, 69 Cal. 155, 58 Am. Rep. 556, 10 Pac. 395; 17 Am. & Eng. Enc. Law, 2d ed. 909; Lewis, Em. Dom., 3d ed. § 229; Bradford Glycyerine Co. v. St. Mary's Hotel & Mfg. Co. 86 Ohio St. 560, 45 L.R.A. 858, 71 Am. St. Rep. 740, 54 N. E. 528, 6 Am. Neg. Rep. 674; Dill. Mun. Corp. § 729; Wheeler v. Norton, 92 App. Div. 368, 86 N. Y. Supp. 1095; 1 Thomp. Neg. § 764; 19 Cyc. 8, div. 4, note 35; Van Winter v. Henry County, 61 Iowa, 684, 17 N. W. 94; Edgington v. Burlington, C. R. & N. R. Co. 116 Iowa, 415, 57 L.R.A. 561, 90 N. W. 95.

The measure of damage for injuring a building by the use of explosives near it is the cost of restoring it to its former condition.

Fitz Simons & C. Co. v. Braun, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9; 3 Sutherland, Damages, p. 368; McMahon v. Dubuque, 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517, 5 Am. Neg. Rep. 147.

Where a duty is imposed by law or statute, and where more or less danger to others is necessarily incident to the performance of the work let to contract, the employer cannot shift it from himself to another so as to avoid liability should injury result to another from such wrongful acts or negligence in doing the work.

26 Cyc. 1559; Louden v. Cincinnati, 90 Ohio St. 144, L.R.A.1915E, 356, 106 N. E. 970; Allegheny Coke Co. v. Massey, 163 Ky. L.R.A.1916D.

792, 174 S. W. 499; Toledo Brewing & Malting Co. v. Bosch, 41 C. C. A. 482, 101 Fed. 530; St. Paul Water Co. v. Ware, 16 Wall. 566-574, 21 L. ed. 485-487; Fitz Simons & C. Co. v. Braun, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9; Sullivan v. Dunham, 161 N. Y. 290, 47 L.R.A. 715, 76 Am. St. Rep. 274, 55 N. E. 923, 7 Am. Neg. Rep. 126; Chicago v. Murdock, 212 Ill. 9, 103 Am. St. Rep. 221, 72 N. E. 46; Dill. Mun. Corp. § 792; Bennett v. Mt. Vernon, 124 Iowa, 537, 100 N. W. 349; Prowell v. Waterloo, 144 Iowa, 689, 123 N. W. 346; Brous v. Wabash R. Co. 160 Iowa, 701, 142 N. W. 416.

Weaver, J., delivered the opinion of the court:

The plaintiff is, and during the time mentioned in his petition was, the owner of two lots with buildings and improvements thereon in the city of Keokuk, Iowa. The defendant, having been granted authority therefor by act of Congress, has been engaged in constructing a dam across the Mississippi river at that place for the purpose of providing electric power to be sold to users thereof within the area reached or to be reached by its cables and supply lines. Among other things, the plan of this improvement contemplated the erection of a power house in connection with the dam at a point about 1,000 feet east of the west bank of the river on which the city is built. It also contemplated the construction of certain locks, spillways, and a canal. To do this work according to the plan required the blasting and removal of a very large amount of rock from its natural bed under the river, much of it to the depth of 25 feet. The work of this rock excavation was let to a contractor, the Hydraulic Engineering Company, which performed the service. The work was of such magnitude as to occupy two years or more in its completion, in the course of which heavy blasts were fired from day to day. The property owned by plaintiff is situated upon the bluff or highlands, one tract being four blocks and the other fourteen blocks west of the river.

In his petition plaintiff alleges that the blasting by a series of violent explosions was continued throughout a period of two years or more, and were of such powerful character that the concussion or jar thereof broke the glass in the windows of his buildings, cracked the walls, loosened and injured the plastering, and otherwise injured those structures, and that the damage suffered therefrom was \$3,000. He characterizes the acts of defendant as wrongful and negligent, and demands judgment for the recovery of his alleged damages. The de-

defendant's answer is a denial of all the allegations of the petition.

The evidence introduced in the case is not presented by the abstract, except by way of a brief general recital of the matters we have already stated, and the further statement that both plaintiff and defendant introduced evidence tending to support their respective claims under the issues made by the pleadings; that there was no proof that rock or other material were cast upon plaintiff's premises by the blasts; and that the injury complained of was caused solely "from the air concussion or earth vibration" set in action by the explosion of the blasts.

The issues having been submitted to a jury, a verdict was returned for the plaintiff for damages assessed at \$500. A motion by defendant to set aside the verdict and for new trial having been overruled, judgment was entered for plaintiff for \$500 and costs, and defendant appeals.

I. The initial proposition by appellant is that in its charge submitting the case to the jury the court erred in failing to instruct upon the law of negligence as applicable to this controversy. It is said the plaintiff charged negligence in the blasting, that such allegation was material to his right to recover damages, and without proof of the want of due care on defendant's part a verdict for plaintiff cannot be sustained.

It is true the plaintiff did charge the blasting was done negligently, and, if we are to hold that a showing of negligence was essential to his right to recover, then the exception is well taken, and appellant is entitled to a reversal. But our practice act provides (Code, § 3639) that a party shall not be required to prove more than is necessary to entitle him to relief asked for, and if in this case plaintiff was not required to allege negligence in order to state a cause of action, and did allege facts other than negligence upon which, if true, he was entitled to damages, and introduced evidence tending to support the same, then the failure to prove negligence would not be fatal to his right of recovery, and the failure of the court to instruct upon the subject of negligence would not be prejudicial error. *Engle v. Chicago, M. & St. P. R. Co.* 77 Iowa, 661, 37 N. W. 6, 42 N. W. 512; *Swiney v. American Exp. Co.* 144 Iowa, 348, 115 N. W. 212, 122 N. W. 957; *Ware Cattle Co. v. Anderson*, 107 Iowa, 234, 77 N. W. 1026. In the case at bar the plaintiff alleged that the acts complained of were wrongful as well as negligent, and under the rule above stated our inquiry is reduced to the single question whether injuries to property caused solely by jar, concussion, or vibration of earth and air produced or set in motion by blasting consti-

tute, under the circumstances stated, any wrong for which the law affords a remedy.

This question has had the attention of the courts in several other jurisdictions, but thus far we have had no occasion to pass upon it in the direct and concrete form presented by the record in the present case. An examination of the precedents develops a divergence of judicial opinion. There is a class of cases which, according to appellant's contention, hold that without allegation and proof of negligence damages of the kind suffered by the appellee herein cannot be recovered, while others adhere to the doctrine that a showing of negligence is not essential to the liability of a party who uses the dangerous agency of powerful explosives in such place or in such manner that the natural and proximate result thereof is injury to the person or property of another. Some of the cases cited by appellant appear to go to the full extent of the rule which appellant asks us to approve. For example, the Alabama court, in *Bessemer Coal, Iron & Land Co. v. Doak*, 152 Ala. 166, 12 L.R.A. (N.S.) 389, 44 So. 627, after some discussion of the authorities, indicates its approval of the rule that "if one, in blasting upon his own lands, invades the premises of his neighbor by throwing stones and debris thereon, he is liable for the resulting injury, but for any other injury, such as may result from the mere concussion of the atmosphere, sound, or otherwise, there is no liability, unless it is shown that the work was done negligently, and that the injury was the result of negligence, and not the result of blasting according to the usual methods and with reasonable care."

Such seems also to be the rule in New York. *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y. 267, 24 L.R.A. 105, 37 Am. St. Rep. 552, 35 N. E. 592; *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 17 L.R.A. 220, 30 Am. St. Rep. 649, 31 N. E. 328; *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149, 11 Am. Neg. Rep. 166; *Page v. Dempsey*, 184 N. Y. 245, 77 N. E. 9, 20 Am. Neg. Rep. 135. The proposition also finds some support in *Simon v. Henry*, 62 N. J. L. 486, 41 Atl. 692, and in *MacGinnis v. Marlborough-Hudson Gas Co.* 220 Mass. 575, L.R.A.1915D, 1080, 108 N. E. 364. The Michigan case cited by appellant (*Mitchell v. Prange*, 110 Mich. 78, 34 L.R.A. 182, 64 Am. St. Rep. 329, 67 N. W. 1096) does not appear to us to be in point.

It will be noted upon reading the cases to which we have referred and others of their class that, with few exceptions, they refer either to the effect of the use of explosives under the authority of or contract with the general government, or in

the construction of railways or canals by corporations endowed by the state with the power of eminent domain, or in excavating streets or highways under the authority of the state or local municipality, and, without conceding what is claimed by way of exemption from liability, even in such cases it may well be admitted that the effect of such circumstances is a question upon which there is room for plausible argument in support of the theory. The appellant herein, though clothed with license or consent from the Federal government to dam the Mississippi river, a navigable stream, is not in position to claim the immunities, if any, of a government contractor, and, although it proposes to supply electricity to the public within the territory which its lines may cover, it is to all intents and purposes a strictly private enterprise for private profit, and, even though it be clothed with power of eminent domain, it does not include authority to take or to destroy private property without compensation.

That what we may call the New York rule is not in harmony with the greater weight of authority is, we think, clearly demonstrable. The following are illustrative cases:

In a recent Ohio case the city of Cincinnati had let a contract to excavate a tunnel under its streets for use in supplying the city with water. A lot owner brought action against the city and the contractor, alleging that in doing the work high-power explosives were employed, with the result that the concussions and vibrations so produced injured and destroyed plaintiff's property. No negligence was alleged, and the defendants demurred to the petition. The trial court sustained the demurrer, but on appeal to the supreme court the ruling was reversed. The court states the question to be whether the owner of property may make use of powerful explosives on his own premises in the accomplishment of a lawful purpose, provided he uses due care, notwithstanding the necessary or natural or probable result thereof is to injure or destroy adjacent property. This, it will be seen, is precisely the proposition we have now before us. In sustaining the right of action the court says: "There are, of course, two very important considerations to be kept in mind in the disposition of a question of this character: First, to give to the owner the largest liberty possible in the use, occupation, and improvement of his own property consistent with the rights of others and the right to employ modern methods and machinery in accomplishing the improvements desired; second, that one may not use his own property to the injury of any legal right of another. L.R.A.1916D.

This maxim of the common law, '*Sic utere tuo ut alienum non laedas*,' is so well established and so universally recognized that it needs neither argument nor citation of authority in its support. But it must be conceded that this is no longer the law if the owner of a lot may employ such means in the improvement of his property as will naturally and necessarily result in the destruction of adjoining property. . . . If the means employed will, in the very nature of things, injure and destroy his neighbor's property, notwithstanding the highest possible care is used in the handling of the destructive agency, the result to the adjoining property is just as disastrous as if negligence had intervened. If one may knowingly destroy his neighbor's property in the improvement of his own, it is little consolation to the neighbor to know that his property was destroyed with due care and in a scientific manner." *Louden v. Cincinnati*, 90 Ohio St. 144, L.R.A.1915E, 356, 106 N. E. 970.

In a very similar case in Illinois, where the use of dynamite in constructing a tunnel caused vibrations and jars from which the plaintiff's building was injured, the court distinctly declines to follow the New York rule, and adopts the rule of the Ohio cases. *Fitz Simons & C. Co. v. Braun*, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9. To the same effect, see *Colton v. Onderdonk*, 69 Cal. 156, 58 Am. Rep. 556, 10 Pac. 395; *Hickey v. McCabe*, 30 R. I. 346, 27 L.R.A.(N.S.) 425, 75 Atl. 404, 19 Ann. Cas. 783; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 399; *Gossett v. Southern R. Co.* 115 Tenn. 376, 1 L.R.A.(N.S.) 97, 112 Am. St. Rep. 846, 89 S. W. 737; *Chicago v. Murdock*, 212 Ill. 9, 103 Am. St. Rep. 221, 72 N. E. 46; *Longtin v. Persell*, 30 Mont. 306, 65 L.R.A. 655, 104 Am. St. Rep. 723, 76 Pac. 699, 2 Ann. Cas. 198, 16 Am. Neg. Rep. 113; *Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co.* 60 Ohio St. 560, 45 L.R.A. 668, 71 Am. St. Rep. 740, 64 N. E. 528, 6 Am. Neg. Rep. 674; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, 2 Mor. Min. Rep. 194; *Cahill v. Eastman*, 18 Minn. 324, 10 Am. Rep. 184, Gil. 292.

The rule as deduced by Thompson in his work on Negligence, § 764, is stated to be that recovery may be had for injuries done by blasting: (1) Where dirt and stones are thrown by the blast upon the property, irrespective of the question of negligence; (2) where the work of blasting is done in a situation where it is necessarily dangerous to persons or property, whether the injury proceeds from the impact of rocks thrown or from atmospheric concussion, irrespective of the care or skill used; (3) in

all other cases liability will attach to the person or corporation carrying on the dangerous employment where the work has been negligently done. Even the court of New York has said it is "an elementary principle in reference to private rights that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others." This rule the court applied to a recovery of damages for injuries resulting from blasting done in the construction of a canal. *Hay v. Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279. In so doing the court says: "The use of land by the proprietor is not . . . an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade. . . . He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom."

He will not be allowed to accomplish a legal object by unlawful means.

The same court has distinctly and repeatedly held that one who by blasting casts rock or other substances upon the property of another is liable for the injury so done without regard to the question of negligence, and that the plea that blasting is a necessary operation, or that the work is being done under contract with the state, is no defense. *Sullivan v. Dunham*, 161 N. Y. 290, 47 L.R.A. 715, 76 Am. St. Rep. 274, 55 N. E. 923, 7 Am. Neg. Rep. 126; *St. Peter v. Denison*, 58 N. Y. 416, 17 Am. Rep. 258. These decisions that court has often reaffirmed, and still declares its adherence thereto, but seeks to distinguish them from the line of its other decisions above cited, by pointing out that in the *Cohoes Case* and in others following it the injury was done by casting debris upon the plaintiff's premises, while in cases of the kind we have now before us the injury complained of results from concussion of the atmosphere or from vibrations of the earth. The former, it is said, constitutes a physical invasion, a trespass, upon the plaintiff's property, while the latter does not. The deduction is neither obvious nor convincing. *Phys.* L.R.A.1916D.

ical invasion of the property of another does not necessarily imply an actual breaking or entering of the plaintiff's close by the wrongdoer in person, or casting upon his premises any particular kind of missile or other particular thing or substance. The employment of force of any kind which, when so put in operation, extends its energy into the premises of another to their material injury, and renders them uninhabitable, is as much a physical invasion as if the wrongdoer had entered thereon in person and by overpowering strength had cast the owner into the street. If, for example, a person interests himself in solar phenomena, and, while experimenting with a powerful sunglass, he accidentally focuses the instrument upon some inflammable material on the lot of his next-door neighbor, starting a blaze which results in injury and loss to the latter, can it be said there was no trespass, no actual invasion of the neighbor's premises? Or suppose one owning land bordering upon a small lake or pond finds that some desired improvement requires the blasting or cutting down of a rock bluff standing at the edge of the water. To accomplish this he places a powerful blast, fires it, and casts such a body of material into the pond as to create a miniature tidal wave, which, rolling across to the other side, does material injury to the property of another riparian owner. Is there no trespass or physical invasion of the neighbor's premises? It has often been held that the casting or discharge of noxious vapors or gases into the air which, spreading abroad, invade the home or place of business of another, constitutes an actual wrong. In a legal sense how does an injury inflicted by the act of one who casts a rock against his neighbor's house, or destroys his property by turning loose the ungoverned energy of water in motion, differ from an injury caused by one who voluntarily imparts destructive force and energy to the air, or who by the use of the almost limitless powers of modern explosives creates a little earthquake? On this subject the Rhode Island court says: "An act which in many cases is in itself lawful becomes unlawful when by it damage has accrued to the property of another. And it would make no material difference whether that damage, resulting proximately and naturally from the act of blasting by the defendant, was caused by rocks thrown against [plaintiff's] dwelling house or a concussion of the air around it. . . . In such case one who thus causes dangerous forces to pass through another's property should be held liable for the damage directly resulting therefrom. And there is no more reason for requiring that negligence be shown

in the one case than in the other." Hickey v. McCabe, 30 R. I. 346, 27 L.R.A.(N.S.) 425, 75 Atl. 404, 19 Ann. Cas. 783.

Speaking of the attempted distinction to which we have referred, the court in *Louden v. Cincinnati*, supra, says: "We are unable to distinguish between a case where a fragment of rock or a portion of the soil is thrown onto an adjoining property, and a case where the force of an explosion is transmitted through the soil and substratum, jarring, cracking, and breaking it, destroying the . . . foundation of the building, and wrecking the building . . . by a concussion of air around it, thereby doing far more injury than a fragment of rock could do. It is a distinction without a difference. If this terrific force may be set in motion by the owner of one parcel of ground, with full knowledge upon his part that such force will invade, damage, and destroy the property of the adjoining proprietor, what difference does it make how this force accomplishes the result that, in the very nature of things, must have been anticipated? Is not a concussion of the air, and jarring, breaking, and cracking the ground with such force as to wreck the buildings thereon, as much an invasion of the rights of the owner as the hurling of a missile thereon? If there is any difference whatever, it is purely technical, and ought to find no favor with the courts. Certainly the application of a force sufficient to crack the surface of the land, . . . to destroy the foundations of buildings, to break windows, and throw down chimneys is a direct invasion of property rights."

Likewise in the cited Illinois case, *Fitz Simons & C. Co. v. Braun*, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9, the court, referring to another case, said: "It is true that in that case there was an actual invasion of the property; . . . but liability . . . caused by actual invasion of the property, or by the concussion or vibration of the earth or air, is within the doctrine there announced. If one who, for his own purposes and profit, undertakes to perform a work by means of explosives inherently dangerous to the property of another, should be held liable for an injury occasioned by any substance cast by the explosives on the property of such other, it is only by the merest subtlety of reasoning he should be held not liable to respond for equal or greater damage caused by the concussion of the air or of the earth."

The rule thus affirmed seems to be the rule of reason, and to have the support of the better considered precedents.

The consideration urged upon us in oral argument, that appellant is engaged in the construction of a great work of general util-

ity and that the laws should be liberally construed to promote its purpose, is not without weight, where it can be indulged without sacrifice of principle. But, important as it may be that business progress and development shall not be fettered by over-technical interpretation of the laws affecting them, it is, to say the least, of equal importance that the courts maintain unimpaired all our constitutional and legal guaranties of personal and property rights. The individual citizen may be deprived of his home or other property by the proper exercise of the power of eminent domain, but it ought not to be said it can be lawfully destroyed without compensation, in the interest of a mere business enterprise, simply because such enterprise is of great magnitude and general public interest.

The Iowa cases cited by appellant are not out of harmony with the views here expressed. *Slatten v. Des Moines Valley R. Co.* 29 Iowa, 149, 4 Am. Rep. 205, quoted from by counsel, is not at all in point. The act there complained of involved no invasion of or physical injury to the plaintiff's property. The defendant, acting under grant of authority from the city, had constructed a bridge across the Des Moines river, and in building the necessary approach had raised the grade of the street in front of plaintiff's hotel, and for this he sought to recover damages. Under the statute as it then stood it was held that no recovery could be had except upon allegation and proof that the authority given to construct the bridge and approach had been exercised in a negligent or improper manner. The mere statement of the facts makes clear the inapplicability of the precedent to the question before us. Had the defendant in that case made use of some high explosive in the course of its work, and by the jar or concussion so produced shattered the walls, windows, and foundations of plaintiff's hotel, a very different proposition would have been presented to the court, and we may well assume that recovery of damages would not have been denied. Equally foreign to the discussion is *Walker v. Chicago, R. I. & P. R. Co.* 71 Iowa, 658, 33 N. W. 224. There the defendant, as a common carrier, was transporting a shipment of giant powder, which exploded, doing injury to plaintiff's property in that vicinity, and it was held that defendant could be made liable only upon a showing of negligence on its part. The defendant, as a common carrier, was acting in the line of its public duty in receiving and transporting the car with its load, and if, in so doing, it exercised all the care reasonably required under the circumstances, it was not liable for the results of an ex-

plosion not intentionally occasioned and occurring without its agency or its fault. The other precedents cited from our decisions are all of the same general character. None of them announce a rule or principle affecting the soundness or propriety of the rulings or judgment from which this appeal has been taken. The nearest in point perhaps are cases like *Ochiltree v. Chicago & N. W. R. Co.* 93 Iowa, 631, 62 N. W. 7, and others of that nature, where the wrong charged was the sounding of a steam whistle or the operation of a gasoline engine near the highway and the consequent frightening of teams. The obvious difference between these cases and the one at bar is in the fact that use of high explosives is inherently dangerous, and, when used in quantities sufficient to create violent disturbance of the earth and air, injury naturally results, or may reasonably be anticipated, to property within the area of such disturbance, without regard to the care exercised in doing the work or in guarding against its destructive effects; while with the exercise of due care in operating an engine or blowing a whistle, with like measure of care on the part of drivers, little, if any, danger is to be anticipated from the frightening of teams. The trial court did not err in failing to charge the jury that proof of negligence was necessary to plaintiff's recovery.

II. It is conceded that the work of making the rock excavation and the blasting incident thereto were done by a contractor to whom the job had been let by the appellant, and this, counsel argue, brings the case within the rule which exempts the owner from liability for the act or fault of an independent contractor. The rule thus invoked is of undoubted soundness as related to a proper case involving consideration of the law of negligence; but holding, as we do, that defendant's liability is not bottomed upon a charge of negligence in the ordinary sense of that word, the fact that the work was let to and done by a contractor is not a matter of decisive significance. That the work let to the contractor contemplated that it should be done by blasting is not disputed, and the whole defense and the argument in support thereof assume the necessity and propriety of the employment of explosives in such construction. The work being intrinsically dangerous, and, even when properly done, liable to be attended with injurious, if not destructive, results to buildings and property in the city in the immediate neighborhood of which the blasting was to be done, defendant could not relieve itself from liability by delegating the work to a contractor. *Prowell v. Waterloo*, 144 Iowa, 689, 123 N. W. 346. It is nowhere suggested or shown

that the contractors did other than the very thing they were employed and expected to do, and for any actionable injury resulting therefrom under such circumstances the owner is always liable. *Chicago v. Robbins*, 2 Black, 428, 17 L. ed. 304; *Robbins v. Chicago*, 4 Wall. 679, 18 L. ed. 432; *St. Paul Water Co. v. Ware*, 16 Wall. 566, 21 L. ed. 485. In the last-mentioned case the court says: "If the contractor does the thing which he is employed to do, the employer is as responsible for the thing as if he had done it himself, but if the act which is the subject of complaint is purely collateral to the matter contracted to be done, and arises indirectly in the course of the" employment, "the employer is not liable because he never authorized the work to be done."

Again in the same case it is said that where the "injury results . . . from the acts which the contractor agreed and was authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party."

Indeed, it would be a singular perversion of justice for the court to say that where an act, if done by the owner himself, renders him liable to a person thereby injured, without regard to any question of negligence, he may escape such consequences by the simple expedient of employing a contractor to do it for him. Dealing with a case where a contractor, in doing a public work for a city, necessarily used explosives, exercising therein all reasonable care, the city was held liable for the resulting injury to adjacent property. *Joliet v. Harwood*, 86 Ill. 110, 29 Am. Rep. 17. In disposing of the question the court says: "The work which the contractor was required by the city to do was intrinsically dangerous, however carefully or skilfully done. The right of recovery . . . does not rest upon a charge of negligence on the part of the contractor; it rests upon the fact that the city caused work to be done which was intrinsically dangerous,—the natural (though not the necessary) consequence of which was the injury to plaintiff's property."

The same rule was applied in *Fitz Simons & C. Co. v. Braun*, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9; *Louden v. Cincinnati*, 90 Ohio St. 144, L.R.A.1915E, 356, 106 N. E. 970; *Hawver v. Whalen*, 49 Ohio St. 69, 14 L.R.A. 828, 29 N. E. 1049; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L.R.A. 701, 24 N. E. 269; *Hughes v. Cincinnati & S. R. Co.* 39 Ohio St. 476. The true rule is well stated in the last-cited case as follows: "The employer cannot relieve himself from liability by contracting with others for the

performance of work, where the necessary or probable effect of the performance of the work would injure third persons."

The trial court correctly held that the rule exempting an owner from liability for the negligence of an independent contractor is not applicable to the instant case.

III. The court instructed the jury that, if found entitled to recover, the plaintiff's measure of damages was the reasonable cost of restoring the injured buildings to the condition they were in immediately before the injury thereto. This is said to be an incorrect statement, and that the true measure is the difference between the fair value of the property immediately before and immediately after such injury. The measure of damage for injury to real property is not invariable, and there may be circumstances under which either of the rules stated would be applicable. The rule stated by appellant is more often applied where the damage is permanent, or cannot well be expressed in specific items of injury capable of easy repair or remedy, but does affect in some substantial degree the value of the entire property as a unit. But where the injury is

susceptible of remedy at moderate expense, and the cost of restoring it may be shown with reasonable certainty, the rule given the jury by the trial court is entirely proper. *Shrieve v. Stokes*, 8 B. Mon. 453, 48 Am. Dec. 401; *Fitz Simons & C. Co. v. Braun*, 199 Ill. 390, 59 L.R.A. 421, 65 N. E. 249, 13 Am. Neg. Rep. 9; *Graessle v. Carpenter*, 70 Iowa, 166, 30 N. E. 392; *McMahon v. Dubuque*, 107 Iowa, 63, 70 Am. St. Rep. 143, 77 N. W. 517, 5 Am. Neg. Rep. 147.

IV. Exceptions to the court's instructions are based principally upon appellant's theory that its liability, if any, is for negligence, and upon the idea that the rule as to negligence of independent contractors is applicable to this case. The court has already passed upon those propositions adversely to the position of appellant, and they need not be further considered.

There is no error shown calling for a reversal of the judgment appealed from, and it is affirmed.

Evans, Ch. J., and Deemer and Preston, JJ., concur.

KENTUCKY COURT OF APPEALS.

MENGEL BOX COMPANY, Appt.,
v.

ANDREW M. SEA, Tax Receiver of the
City of Louisville.

(167 Ky. 193, 180 S. W. 347.)

Tax — exemption — addition to plant.

The addition of a plant for making paper boxes to one in which wooden ones have been manufactured is not within the operation of a tax exemption of any manufacturing establishment which shall be permanently located and operated within the city.

For other cases, see *Taxes*, I. f, 2, in Dig. 1-52 N. S.

(December 8, 1915.)

APPEAL by plaintiff from a judgment of the Chancery Branch, First Division, of the Circuit Court for Jefferson County, in defendant's favor in an action brought to enjoin defendant from enforcing the collection of a tax bill. Affirmed.

The facts are stated in the opinion.

Messrs. Humphrey, Middleton, & Humphrey, for appellant:

The question of the ownership of the

Note.—As to extension of exemption from taxation to addition to, or enlargement of, manufacturing plant, see annotation following this case, post, 112. L.R.A. 1916D.

new business is unimportant. The real test is whether the business itself is new.

Mengel Box Co. v. Louisville, 117 Ky. 735, 79 S. W. 256; *Continental Tobacco Co. v. Louisville*, 123 Ky. 173, 94 S. W. 11; *Jones Bros. v. Louisville*, 142 Ky. 759, 135 S. W. 301; *Victor Cotton Oil Co. v. Louisville*, 149 Ky. 149, 148 S. W. 10; *Louisville v. New York Baking Co.* 151 Ky. 758, 152 S. W. 980; *B. F. McCormick Lumber Co. v. Winchester*, 155 Ky. 494, 159 S. W. 997; *Louisville & N. R. Co. v. Louisville*, 143 Ky. 258, 136 S. W. 611.

Messrs. George Cary Tabb and Pendleton Beckley, for appellee:

A manufacturing establishment contemplates more than a new factory, even though an entirely different product is manufactured.

Jones Bros. v. Louisville, 142 Ky. 759, 135 S. W. 301.

The making of paper boxes is simply an enlargement of the old business, adopting new processes to keep abreast of the times, and plaintiff is not entitled to exemption.

Louisville & N. R. Co. v. Louisville, 143 Ky. 258, 136 S. W. 611; *Jones Bros. v. Louisville*, 142 Ky. 759, 135 S. W. 301; *Louisville v. New York Baking Co.* 151 Ky. 758, 152 S. W. 980; *B. F. McCormick Lumber Co. v. Winchester*, 155 Ky. 494, 159 S. W. 997.

Exemptions must be strictly construed.

Middlesboro v. New South Brewing & Ice

Co. 108 Ky. 351, 56 S. W. 427; Yazoo & M. Valley R. Co. v. Thomas, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68; Frederick Electric Light & P. Co. v. Frederick City, 84 Md. 599, 36 L.R.A. 130, 36 Atl. 362.

Hurt, J., delivered the opinion of the court:

This is an action by the appellant against the tax receiver of the city of Louisville, to enjoin the collection from it of the taxes levied by the city upon a portion of the real estate and personal property owned and used by it in the establishment conducted by it for the manufacturing of boxes, the portion of the property which it seeks to have declared exempt from taxation being that portion used by it in the manufacturing of paper boxes, the petition and amended petition, in substance, alleging that the appellant had been engaged for several years, previous to April, 1913, in manufacturing wooden boxes, and that the real estate owned and used by it in the manufacturing of wooden boxes had at some time previous to April, 1913, enjoyed an exemption from taxation for city purposes for five years, under and by virtue of the ordinance of the city upon that subject, that proposing to add the business of manufacturing paper boxes to its operations, it had erected a building in addition to the one used by it in manufacturing wooden boxes, upon the same lot which it used in manufacturing wooden boxes, and installed in it the machinery necessary for the making of paper boxes, and commenced to make paper boxes in April, 1913; that it had not theretofore engaged in making paper boxes, and that no one in the city had theretofore manufactured solid fiber paper boxes; that the making of paper boxes for commercial purposes had only been a manufacturing business since within ten years last past; that it used the additional building and machinery therein exclusively for the making of paper boxes; that it had secured the services of a new manager of its business, who knew how to manufacture paper boxes, and employed in the business of manufacturing paper boxes about one third as many men as it employed in making wooden boxes, and that it employed in making wooden boxes between 300 and 400 men; that it had erected a new manufacturing establishment and engaged in a new industry in the city, and was entitled, under § 2980a, Ky. Stat., and the ordinance of the city, which was approved on July 29, 1898, to have the property owned and used by it in the manufacturing of paper boxes exempted from taxation for city purposes for five years, as provided in the statute and ordinance, L.R.A.1916D.

supra; that in deciding upon a location for this addition to its business, it had considered locating it at Baltimore, Maryland, and Richmond, Virginia, as well as in the city of Louisville, and prayed as relief that the tax collector of the city be enjoined from the collection of such part of the tax bill as was assessed upon the property used by it in manufacturing paper boxes. A general demurrer was interposed to the petition and the petition as amended, which the court below sustained, and adjudged that the petition as amended be dismissed, to which the appellant excepted and appealed to this court.

The question here to be determined is, Did the petition, as amended, state facts upon which it was entitled to the relief sought?

The portion of § 170 of the Constitution which is applicable to the question for determination provides as follows: "The general assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation for a period not exceeding five years, as an inducement to their location."

Section 2980a, Ky. Stat. adopted in pursuance to the constitutional provision, supra, is as follows: "That the general council shall have power by ordinance to exempt from municipal taxation, for a period not exceeding five years, manufacturing establishments, as an inducement to their location within the city limits."

The general council of the city exercised the power granted it by the statute, supra, by an ordinance which was approved, as alleged in the petition, on July 29, 1898, and which provided, in substance, that in order to induce the location of more manufacturing establishments within the city limits, such establishment owned and operated by any person, firm, or corporation which shall have been, after the passage of the act authorizing the ordinance, permanently located and conducted within the city, shall be exempt from taxation for five years after the location and commencement of manufacturing thereat, upon all the property employed and used in conducting the business of such manufacturing establishment.

This court has several times construed the ordinance and statute as applied to different manufacturing establishments. In the case of Continental Tobacco Co. v. Louisville, 123 Ky. 173; 94 S. W. 11, the American Tobacco Company and John Finzer & Brother, were corporations each of which was engaged in manufacturing plug and smoking tobacco. They were sold to the Continental Tobacco Company, a separate and distinct corporation from the former

owners. The purchaser invested new capital and new machinery, and employed more men in the business, but it was held that it only amounted to an enlargement of the old plants and the addition of capital to going concerns, and the Continental Tobacco Company was not entitled to an exemption from taxation, under the provisions of the ordinance. It therefore follows that a mere change of ownership of a going concern and the addition of new capital, machinery, and a new management of the concern by the new owner, does not constitute such a manufacturing establishment, within the city limits, after the passage of the ordinance, which will be entitled to the exemption from taxation provided for in the ordinance. The court in the case said: "The object and purpose of the exemption of manufacturing establishments from the payment of taxes for a certain period was to induce the location of new establishments in the various cities of the commonwealth, to induce persons of capital and enterprise and business capacity to invest their money so as to build up the cities of the state."

In the case of *Jones Bros. v. Louisville*, 142 Ky. 759, 135 S. W. 301, the appellant was a corporation engaged in the manufacturing of cider, vinegar, molasses, and fruit products. It was created by the consolidation of three other corporations, one of which was a manufacturer of cider, vinegar, and fruit products, another of syrups and molasses, and the other of canned goods. Each of these corporations had enjoyed exemption from taxation under the ordinance under which the exemption is claimed in the case at bar. Two of the corporations were going concerns at the time of the merger. The corporation created by the merger increased the size of the plant and put more capital into the business, and manufactured all the products previously manufactured by the three concerns, and in addition made preserves, which had not theretofore been manufactured by either of them. This court held that it was not entitled to the exemption, and that it was not such a new manufacturing establishment as was contemplated by the ordinance. The court in the opinion said: "It is manifest that the sole object of the constitutional provision and statute in question is to exempt from taxation, for a period of five years, new manufacturing concerns, provided they invest their capital and locate their plants within the limits of the city offering by ordinance the inducement afforded by such exemption."

In *Louisville & N. R. Co. v. Louisville*, 143 Ky. 258, 136 S. W. 611, the appellant had for many years maintained its principal repair and construction shops, in which were employed about 1,400 men, at a certain

point in the city of Louisville, but in 1902 it commenced building new shops in another portion of the city, and occupied them in 1905. The old shops were then abandoned. The new shops were of the newest and latest model, and operated by electric power, on account of which nearly all the machinery in the old shops had to be abandoned and new machinery provided for the new shops. The old employees were kept, and in addition several hundred new men were given employment in the new shops. The character of the work done in the new and old shops was substantially the same, except that in the new shops locomotives were built, a work which the old shops did not do. The claim of the Louisville & Nashville Railroad Company for exemption from taxation of its new shops and machinery therein was denied by the court, which held that the city had not acquired any new business, within the meaning of the exemption ordinance.

"It has merely the exchange or substitution of a new and enlarged shop for an old shop. The statute evidently contemplates the bringing to the city of Louisville a business that had not theretofore existed there, . . . a 'new enterprise,' a 'new manufacturing establishment.'"

In the *Kentucky Electric Co. v. Buechell*, 146 Ky. 660, 38 L.R.A.(N.S.) 907, 143 S. W. 58, Ann. Cas. 1913C, 714, there was no question but that the enterprise was a new one in the city, but the decision in that case turned upon the question as to whether the business was a manufacturing establishment or not, and sheds no light upon the controversy here.

In *Victor Cotton Oil Co. v. Louisville*, 149 Ky. 149, 148 S. W. 10, a corporation which owned a factory in Louisville ceased operations in March and turned over its property to an agent to be sold. In a month or two several of its stockholders, with some other persons, organized a new corporation, and in October following purchased the plant of the old corporation, giving stock in the new corporation for it. The claim of the new corporation for exemption from taxation was denied, the court saying: "It was not contemplated by either the Constitution, the statute, or the ordinance that manufacturing establishments already established in the city shall be exempt from taxation for five years, when they change hands. . . . It does not include manufacturing establishments already in the city, although for any reason not in operation."

In *Louisville v. New York Baking Co.* 151 Ky. 758, 152 S. W. 980, which was a claim for exemption from taxation under the ordinance, *supra*, the court said: "The plain purpose of the constitutional provision, as

well as the statute and the ordinance, is to induce the location of new manufacturing enterprises in the city. Neither contemplates the exemption from taxation of manufacturing establishments already located in the city, which may be enlarged. . . . To bring itself within the constitutional provision and the ordinance, a concern must show that a new manufacturing business has been established in the city, not that an old business has been enlarged and improved or modified in some particulars."

In *B. F. McCormick Lumber Co. v. Winchester*, 155 Ky. 496, 159 S. W. 997, the Reliance Manufacturing Company owned a planing mill in Winchester, at which it dressed rough lumber and sold it at wholesale. It sold the plant to the McCormick Lumber Company, which was composed of persons who did not reside in the city. The new owners partly rebuilt the structure on the premises, built new buildings, and installed new machinery, different from the old machinery in use, and engaged in the business of manufacturing all kinds of lumber, and selling their products altogether by retail. It did not acquire any trade or custom by its purchase, because the old corporation had no retail trade. This court held that the new establishment was not exempt from taxation, upon the ground that no new business enterprise had been established in or brought into the city. The McCormick Company was simply continuing the planing mill business, which had been conducted there by the Reliance Manufacturing Company.

It will be observed that from the foregoing adjudication of this court a mere enlargement of an already existing manufacturing establishment, in the way of the addition of new buildings, new and additional machinery, new processes for manufacturing, new capital invested in the enterprise, a new management, the addition of other employees, or the acquisition by new persons of the ownership of an existing enterprise, do not make of it a manufacturing establishment which entitles its owners to have it exempted from taxation, under the provisions of the ordinance, statute, and section of the Constitution, *supra*. So, the question to be determined here is whether or not the manufacturing of paper boxes by the appellant is a new manufacturing establishment, within the meaning of the ordinance, or is it a mere enlargement of the manufacturing establishment which appellant was already conducting in the city? In the case of *Louisville & N. R. Co. v. Louisville*, *supra*, the company, in its old shops, did not manufacture locomotives, and did so in its new shops, having to use new

and different machinery in its manufacturing processes from that used in the old shops. Both shops did brasswork and flagging, made castings and froggings, prepared woodwork for use in repairing and building cars, both had boiler shops, machine shops, pattern shops, and foundries, and it was held that when the work done in the old and new shops was not materially different. In *Jones Bros. v. Louisville*, 142 Ky. 759, 135 S. W. 301, the new corporation made a preserve, which was not made by the old corporations, which by their merger created the new, but it was held that this was not a new industry, but a mere enlargement of the old business. In *B. F. McCormick Lumber Co. v. Winchester*, *supra*, it was held that the manufacturing of all kinds of woodwork, both for the exterior and interior of buildings, was not a different manufacturing establishment from the one owned by the Reliance Manufacturing Company, which only dressed rough lumber to be sold at wholesale. It seems that in the cases, *supra*, the products made by the enlargement of the manufacturing establishments were not different in a generic sense from the output of the older establishment. In the case at bar, the appellant was engaged in the manufacturing of wooden boxes. It had enjoyed an exemption from city taxation on the real estate used and its entire plant, under the ordinance, *supra*. Its management has never changed neither has its ownership. It has added the making of paper boxes to its business, at the same place and upon the same lot. It necessarily must install the machinery necessary to make paper boxes. Is not the making of paper boxes simply an expansion of its business of making boxes? Where the new business is merely an expansion of the old business, manifestly the exemption ought not to be allowed.

An exemption from taxation is a special privilege, and not enjoyed by all as a matter of common right, and the claimant of it, as well as others who make claims to special privileges, must submit to having the statutes and ordinances under which the privilege is claimed strictly construed, so as not to extend their terms as granting such privileges beyond the letter of such ordinances and statutes. *Kilgus v. Orphanage of Good Shepherd*, 94 Ky. 444, 22 S. W. 750; *Middlesboro v. New South Brewing & Ice Co.* 108 Ky. 351, 56 S. W. 427; *German Bank v. Louisville*, 108 Ky. 382, 56 S. W. 504.

It is concluded that the making of paper boxes and the additional building and machinery for it is not a new manufacturing establishment, induced to locate in the city

of Louisville by the provisions of the ordinance, *supra*, and therefore exempt from taxation, but is a mere enlargement and

expansion of the establishment for making boxes which appellant already had.

The judgment is therefore affirmed.

Annotation—Taxes: extension of exemption to addition to, or enlargement of, manufacturing plant.

Generally, as to taxation of manufacturing corporations in the United States, see note to *Williams v. Warren* (1903) 64 L.R.A. 33.

Constitutional provisions, ordinances, and statutes exempting manufacturing concerns from taxation are ordinarily designed to encourage the location of new industries by aiding them to make a beginning. Consequently, the conclusion of the court in *MENGEL BOX CO. v. SEA*, ante, 108, that the mere enlargement of an already existing manufacturing establishment, in the way of the addition of new buildings, new and additional machinery, new processes for manufacturing, new capital invested in the enterprise, a new management, and the addition of other employees, etc., does not make it a new manufacturing establishment within the operation of the tax exemption in question,—is not only sustained by *Continental Tobacco Co. v. Louisville* (1906) 123 Ky. 173, 94 S. W. 11; *Jones Bros. v. Louisville* (1911) 142 Ky. 759, 135 S. W. 301; *Louisville & N. R. Co. v. Louisville* (1911) 143 Ky. 258, 136 S. W. 611; *Vietor Cotton Oil Co. v. Louisville* (1912) 149 Ky. 149, 148 S. W. 10; *Louisville v. New York Baking Co.* (1913) 151 Ky. 758, 152 S. W. 980; *B. F. McCormick Lumber Co. v. Winchester* (1913) 155 Ky. 496, 159 S. W. 997, cited by the court in its opinion, but also by the purpose of the law creating the particular exemption in question, as well as that of such laws generally.

In addition to these decisions, it has also been decided that a statute exempting the buildings and machinery of certain factories from taxation "during their erection and for one year after they commence operations" does not apply to new machinery and new buildings for its accommodation added to a factory which has been in operation for a number of years. *Tallassee Mfg. Co. v. Spigener* (1873) 49 Ala. 262. The court said: "The purpose of the law was to aid the manufactories referred to to make a beginning, not to aid them after they had been in operation for a number of years. The latter is the case made in this bill. The factory in this case had been in successful operation for a number of years, and the machinery sought to be exempted was new machinery add-

ed to the old machinery, and the buildings erected were for the accommodation of this new machinery. The exemption of such additions goes beyond both the language and the policy of the act."

And in *Baugh, K. & Co. v. Ryan* (1874) 51 Ala. 212, it was decided that a statute for the encouragement of certain industries in the state of Alabama was intended to exempt from taxation, for the period prescribed, not factories, buildings, machinery, etc., already erected and in use, but such as were then in the process of erection, and such as might be afterwards erected within the period specified; and that the 1st section of the statute, which contained an evident mistake in the use of the words "before erected and used," must be read as if those words were omitted, or as if the word "not" were inserted before them. The court said: "These words, as they stand in the section, present a disjointed connection. By reference to the senate journal, an amendment of the bill is seen to have been made by inserting between the words 'machinery' and 'erection' the words 'in process of erection before and.' It thus appears that a mistake has been made, though it is not plain what was the mistake. The evident purpose of the law was to encourage the investment of money in such pursuits, and also in shipbuilding. The present loss of revenue would be more than recovered after the expiration of ten years; and if such works were not erected, the law would have no application. It was certainly not intended to exempt from taxation works already erected, and, perhaps, in use for more than ten years. The anxiety to increase the resources of the state is suggestive of some extreme necessity for so doing, lying in the prostration of the present industries of the state. It would have been in the highest degree inequitable to have cast what was considered a burden of taxation from any of the existing industries onto others equally depressed; whereas, it was eminently proper to give a respite from taxation to new undertakings. We decide that the act should be read as if the words 'before erected and used,' in the 1st section, were entirely omitted; or as if the word 'not,' was inserted immediately before them. The sense would

then be that the privileges of the act would be conferred on 'all buildings, factories, works, and machinery, in process of erection before and after the 1st day of January, A. D. 1873, until, etc.'"

In *Mengel Box Co. v. Louisville* (1904) 117 Ky. 735, 79 S. W. 255, where a box company had decided to close out its business and had ceased to make any new contracts, and was merely running for the purpose of completing unfinished contracts, when a corporation, a number of the members of which were members of the old concern, was organized and purchased the plant for the manufacture

of boxes, the court, in deciding that the new corporation was entitled to a tax exemption like that contended for in *Mengel Box Co. v. SEA*, ante, 108, said: "If the transaction had only been the enlargement of an old plant,—the mere addition of capital to a going concern,—the conclusion of the chancellor would have been sound, but the evidence does not disclose this state of facts. The old plant was dead. It was not to be merely enlarged by the transaction, but the property was to go as a small part of the new plant." W. W. A.

MARYLAND COURT OF APPEALS.

GEORGE E. FREY, Appt.,

v.

GEORGE K. MCGAW et al.

(— Md. —, 95 Atl. 960.)

Judgment — lien on estate by entirety.

1. An entire judgment against tenants by entireties binds the estate so held.

For other cases, see *Judgment*, III. b, in *Dig. 1-52 N. S.*

Levy — on estate by entireties after discharge in bankruptcy.

2. Execution upon a judgment which is a valid lien on an estate by entireties at the time bankruptcy proceedings are instituted against the husband may be levied upon the property after he is discharged in bankruptcy and the death of the wife has vested absolute title in him.

For other cases, see *Bankruptcy*, V. in *Dig. 1-52 N. S.*

Same — choice of property.

3. A levy under a judgment which was a lien on an estate by entireties, of an execution upon the estate, after it has passed to the husband by the death of the wife, is not defeated by the fact that the wife had other property upon which it might have been levied.

For other cases, see *Marshaling Assets and Securities*, in *Dig. 1-52 N. S.*

Parties — proceeding to subject estate by entireties to execution — representatives of wife.

4. The representatives of a wife who died seised of property by entireties with her husband are not necessary parties to a proceeding to subject the property to execution under a judgment which was a lien on the estate at the time of her death.

For other cases, see *Parties*, II. a, 8, in *Dig. 1-52 N. S.*

(November 10, 1915.)

Note. — As to discharge of liability of one spouse on judgment against both as affecting lien on estate by entireties, see annotation following this case, post, 115. L.R.A.1916D.

APPEAL by complainant from a judgment of the Circuit Court, No. 2, of Baltimore City, dismissing a bill filed to restrain proceedings to subject certain property to execution under a judgment. Affirmed.

The facts are stated in the opinion.

Messrs. Frank G. Turner and John M. Dandy, Jr., for appellant.

Mr. B. H. Hartogensis, for appellees:

The lien of appellees' judgment against the estate held by the entirety has not been made void.

Eachbach v. Pitts, 6 Md. 71; *Miller v. Wilson*, 32 Md. 301.

This lien was not voided by the discharge of the husband in bankruptcy after more than four months after judgment entered.

Collier, Bankr. pp. 362, 964, 966, 967; *Blick v. Nimmo*, 121 Md. 142, 88 Atl. 116; 3 *Remington Bankr.* pp. 2448, 2471, §§ 2668, 2709; 2 *Poe*, Pl. & Pr. § 810, p. 959; *American Surety Co. v. Spice*, 119 Md. 1, 85 Atl. 1031; *Bassett v. Thackara*, 72 N. J. L. 81, 16 *Am. Bankr. Rep.* 786, 60 Atl. 39; *Paxton v. Scott*, 10 *Am. Bankr. Rep.* 81; *Tennessee Producer Marble Co. v. Grant*, 14 *Am. Bankr. Rep.* 288, 67 C. C. A. 676, 135 Fed. 322; *Pickens v. Roy*, 187 U. S. 177, 47 L. ed. 128, 23 Sup. Ct. Rep. 78; *Loveland*, Bankr. 3d ed. pp. 545, 546, 608; 2 *Loveland Bankr.* 4th ed. p. 136; *Metcalf Bros. v. Barker*, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67, 9 *Am. Bankr. Rep.* 36; *Re Koslowski*, 18 *Am. Bankr. Rep.* 723, 153 Fed. 823; *Blair v. Brailey*, 34 *Am. Bankr. Rep.* 12; *Re Schow*, 32 *Am. Bankr. Rep.* 494; *Re Blair*, 6 *Am. Bankr. Rep.* 206, 108 Fed. 529; *Keystone Brewing Co. v. Schermer*, 31 *Am. Bankr. Rep.* 279.

The lien after the wife's death attached still to the entirety.

Brewer v. Bowersox, 92 Md. 576, 48 Atl. 1060; *Jordan v. Reynolds*, 105 Md. 293, 9

L.R.A.(N.S.) 1026, 21 Am. St. Rep. 578, 66 Atl. 37, 2 Ann. Cas. 51.

The title to any estate formerly in complainant vests in his trustee.

1 Remington, Bankr. p. 760, § 970; Re Beihl, 28 Am. Bankr. Rep. 310, 197 Fed. 870.

The execution having begun on a legal judgment, the sheriff may sell less than he has levied on, but not more than necessary to make the amount of the execution.

2 Poe, Pl. & Pr. § 662; Hanson v. Barnes, 3 Gill & J. 359, 22 Am. Dec. 322.

Equity will not assume jurisdiction where the remedy at law is plain, adequate, and complete.

Phelps Juridical Eq. p. 258; Pom. Eq. Jur. § 911; Dilly v. Barnard, 8 Gill. & J. 189; Twigg v. Hopkins, 85 Md. 301, 37 Atl. 24; Home L. Ins. Co. v. Selig, 81 Md. 200, 31 Atl. 503; Jenkins v. Simms, 45 Md. 532; Tiernan v. Hammond, 41 Md. 548; Gorsuch v. Thomas, 57 Md. 339; Brumbaugh v. Schnebly, 2 Md. 320; Pfeltz v. Pfeltz, 14 Md. 381; Norris v. Campbell, 27 Md. 688; Webster v. Hardisty, 28 Md. 592.

Stockbridge, J., delivered the opinion of the court:

For the decision of this appeal it is scarcely necessary to do more than to understand clearly the facts out of which it arises in their proper relation to one another. On the 3d of April, 1913, a judgment was entered by confession in the Baltimore city court in favor of the appellees against George E. Frey and Jennie E. Frey, for the sum of \$270. Being a judgment against joint defendants it was an entirety. Ewing v. Rider, 125 Md. 149, 93 Atl. 409.

At the time of the entry of this judgment George E. and Jennie E. Frey, his wife, owned as tenants by entireties, but subject to mortgage, a leasehold lot of ground on Linden avenue in the city of Baltimore. By the provisions of Code of Public General Laws, art. 26, § 19, the entry of a judgment makes it a lien upon leasehold estates as well as real property, except as to certain enumerated estates, of which a tenancy by the entireties is not one. An actual levy on real and leasehold property is not requisite to perfect the lien. The judgment being an entirety, and the estate of the Freys in the Linden avenue property being one by the entireties, the lien of the judgment attached to the property. What does and what does not constitute a lien depends upon the statutes of each state. Re Koslowski (D. C.) 153 Fed. 823.

The case as presented is entirely different from what it would have been if the judgment had been against either Mr. or L.R.A.1916D.

Mrs. Frey alone. This arises from the peculiar nature of an estate by entireties. It has been repeatedly held in this state that where a judgment is recovered against one of two tenants by the entireties no lien can attach to the interest of one (Jordan v. Reynolds, 105 Md. 288, 9 L.R.A.(N.S.) 1026, 121 Am. St. Rep. 578, 66 Atl. 37, 12 Ann. Cas. 51, and cases there cited), but it has never been held in this state or elsewhere that in the absence of statutory exemption, where there is an entire judgment against joint defendants, no lien is imposed upon estates or interests in land held by the entireties.

On the 9th February, 1914, George E. Frey filed his voluntary petition to be adjudicated a bankrupt, and two days later the present appellees, the judgment creditors of Mr. and Mrs. Frey, appeared by petition in the bankruptcy proceedings and asked to be allowed to proceed upon their judgment. On February 21st, George E. Frey answered their petition, and in opposition to granting the prayer of the petition, set up the fact that he and his wife had filed a motion in the city court to have the judgments stricken out. The motion to strike out the judgment was in fact filed on the same day as the answer to the petition. Upon hearing, the motion was denied on the 13th March following, and thereafter, on May 5th, the order of the district court of the United States granting the appellees leave to proceed on their judgment was made absolute. A fieri facias was issued upon the judgment, on which a return of nulla bona was made. Nothing further transpired until November 7, 1914, when George E. Frey was discharged in bankruptcy.

No attempt appears to have been made by the bankrupt trustee to make claim to any interest in the Linden avenue property. He probably regarded it as valueless for the creditors under the doctrine announced in Re Beihl (D. C.) 197 Fed. 870, cited and adopted in Remington on Bankruptcy, § 970, p. 760, as follows: "In some jurisdictions the common-law rule that property held by husband and wife jointly is held in entirety, without possibility of severance, still prevails. Each has only an expectancy, for upon the death of one of the other takes the estate; and, although the husband's trustee in bankruptcy is undoubtedly clothed with the husband's interest, whatever that may be, his right to it must await the contingency of the husband surviving the wife."

About two months after the discharge, namely on January 26, 1915, Jennie E. Frey died, and by operation of law the entire estate in the Linden avenue property was then vested in George E. Frey, but it

necessarily was subject to any valid outstanding liens against the property, whether such lien was in the form of a mortgage, or a judgment which by statute was made a lien upon real and leasehold estates. The judgment lien of the appellees was not void under the bankrupt act, § 67, having been entered more than four months prior to the petition for adjudication of bankruptcy, nor was it void for any reason in its obtention. This was established by the Baltimore city court when it overruled the motion to strike out the judgment. The discharge of the bankrupt was only personal to the debtor. It was entirely without effect as to any liens subsisting at the time. *Collier, Bankr. p. 362; Remington, Bankr. § 2668; Blick v. Nimmo, 121 Md. 142, 88 Atl. 116.*

The writ of *fi. fa.* issued in May, 1914, having been returned *nulla bona*, the appellees, in April of this year, 1915, again directed the writ to issue, and under that a levy was made upon the Linden avenue property. The bill in this case was then filed by George E. Frey to restrain proceedings under the writ. A demurrer to the bill was interposed and sustained, and the bill was dismissed "without prejudice to the right of the complainant to proceed in the case pending against him in the Baltimore city court, being the execution, by way of *feri facias*, on a judgment in said court in the matter of George McGaw et al. v. George Frey and Jennie Frey."

It was earnestly argued in support of the demurrer that there was a complete, adequate remedy at law, and for that reason alone the demurrer should be sustained. This court is not called on to rule specifically on this point in the present case, and without so deciding it may well be that conditions might arise in which it would be appropriate for the equity court to take jurisdiction, even though there was a remedy at law of which a plaintiff might avail himself.

Among other grounds it is urged in behalf of the appellant that Jennie E. Frey left other property than that on Linden avenue against which the defendants in this suit might have proceeded, and that though administration has been granted upon her estate there has been no attempt to bring her representatives into these proceedings.

The answers to both of these contentions are obvious.

A plaintiff who has recovered a judgment is not required to look to any one piece of property rather than another for the purpose of enforcing it. He may proceed against such property of his debtor as he thinks most likely to produce sufficient to satisfy his claim, in the easiest and least expensive manner. The only limitation to which he is subject is that he is entitled to have but one satisfaction of his claim.

To the second objection the answer is that the Linden avenue property formed no part of the estate of Jennie E. Frey. Upon her death the interest to which she had been entitled devolved upon her husband by operation of law, subject to all valid outstanding liens. He acquired no right in it through the medium of administration upon her estate. So far as this property was concerned, therefore, her representatives were neither necessary nor proper parties to the proceeding.

From the foregoing considerations it follows that the circuit court, No. 2, of Baltimore city, was correct in sustaining the demurrer and dismissing the bill. This court cannot agree with that portion of the decree which makes the dismissal of the bill "without prejudice to the right of the complainant to proceed in the Baltimore city court."

As already shown, the judgment was an entire one (*Ewing v. Rider, 125 Md. 149, 93 Atl. 409*); a motion to set it aside had been made on behalf of both defendants, and denied. Nothing appears to have been done in the city court subsequent to the issue of the writ of *fi. fa.* in April of this year, and nothing could have been done by a judgment debtor who died before the issuance of the writ. Nor is any valid reason given in the bill to justify a quashing of that writ. There was, however, no appeal taken by the appellees, and therefore the question of the propriety of so much of the decree as dismissed the bill "without prejudice to the right of the complainant to proceed in the Baltimore city court" is not before us for any action.

Decree affirmed; the appellant to pay the costs.

Annotation—Discharge of liability of one spouse on judgment against both as affecting lien on estate by entireties.

The question as to the effect of a judgment against individuals as lien on interest of tenant by entirety is covered in notes appended to *Jordan v. Reynolds, 9 L.R.A.(N.S.) 1026*, and to *Beihl v. Mar-L.R.A.1916D.*

tin, 42 L.R.A.(N.S.) 555. And the question of the liability of an estate by entireties for the husband's debts is treated in a note in 36 L.R.A.(N.S.) 205; and the validity of encumbrance by husband

and wife of property held by the entireties to secure the individual debt of the husband, in a note in 66 L.R.A. 632.

No case has been found other than *FREY v. MCGAW*, ante, 113, which considers the specific question here raised. In this connection, however, a case of interest is *Humberd v. Collings* (1897) 20 Ind. App. 93, 50 N. E. 314, which holds that an assessment against an estate by entirety becomes invalid as to both parties where, by reason of irregularities,

it is set aside as to the husband. The court reasoned that since the husband was released from the assessment, it was equivalent to releasing his lands which were subject to such assessment, and that while the wife had not been released, yet since he was in possession of the property and had the right of possession as tenant by entirety, the effect of the release was to relieve the land from the lien of the assessment as to both husband and wife. A. G. S.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MUNN & COMPANY, Resp.,
v.
THE AMERICANA COMPANY et al., Appts.

(83 N. J. Eq. 309, 91 Atl. 87.)

Unfair trade — grounds for relief.

1. The basis of suits to enjoin the use of the complainant's name is the damage or possibility of damage to the complainant, not the damage or probability of damage to the public; fraudulent conduct on the part of the defendant is a necessary element, but fraudulent conduct without damage to the complainant does not suffice.

For other cases, see Injunction, I. m, in Dig. 1-52 N. S.

Same — necessity of clean hands.

2. Since it is the complainant who is to be protected in suits to enjoin the use of his name, he must come into court with clean hands.

For other cases, see Equity, III. b, in Dig. 1-52 N. S.

Same — deception — right to relief.

3. Where the complainant and defendant agreed that an encyclopedia should be represented to the public as the work of the complainant, in order to avail themselves of its reputation to attract subscribers for the book, the complainant cannot be heard to complain of conduct in which it joined and by which it profited.

For other cases, see Equity, III. b, in Dig. 1-52 N. S.

Same — denial of relief — act of court.

4. Where complainant and defendant agreed that an encyclopedia should be represented to the public as the work of the complainant, in order to avail themselves of its reputation to attract subscribers for the book, and subsequently the complainant terminated the agreement and sought to enjoin the use of its name, the court de-

nied relief because the complainant did not come into court with clean hands, although the point was not raised by the defendant in its answer.

For other cases, see Equity, III. b, in Dig. 1-52 N. S.

Equity — absence of clean hands — effect.

5. Where a complainant's conduct has been such that he does not come into court with clean hands, the disqualification applies only to the particular matter or transaction with which the wrongful conduct has to do, and he may have relief in other respects.

For other cases, see Equity, III. b, in Dig. 1-52 N. S.

(White, J., dissents.)

(June 15, 1914.)

APPEAL by defendants from a decree of the Chancery Court enjoining them from the use of the name Scientific American in connection with the publication of the Encyclopedia Americana. Modified.

The facts are stated in the opinion.

Messrs. Robert H. McCarter and Conover English for appellants.

Messrs. Arthur H. Masten and Sinclair Hamilton, with Messrs. Fort & Fort, for respondent.

Defendants had no right to use the name "Scientific American" except under license.

International Silver Co. v. William H. Rogers Corp. 66 N. J. Eq. 119, 57 Atl. 1037, 2 Ann. Cas. 407, affirmed in 67 N. J. Eq. 646, 110 Am. St. Rep. 506, 60 Atl. 187, 3 Ann. Cas. 804; *L. Martin Co. v. L. Martin & W. Co.* 75 N. J. Eq. 39, 71 Atl. 409, affirmed in 75 N. J. Eq. 257, 21 L.R.A. (N.S.) 526, 72 Atl. 294, 20 Ann. Cas. 67; *Edison v. Edison Polyform & Mfg. Co.* 73 N. J. Eq. 136, 67 Atl. 392; *Edison Storage Battery Co. v. Edison Automobile Co.* 67 N. J. Eq. 44, 56 Atl. 861; *Walter v. Ashton* [1902] 2 Ch. 282, 71 L. J. Ch. N. S. 839, 87 L. T. N. S. 196, 18 Times L. R. 445, 51 Week. Rep. 131; *Elgin Nat. Watch Co. v.*

Headnotes by SWAYZE, J.

Note.—As to protection of public as ground for injunction against misuse of trademark or tradename, see annotation following this case, post, 119. L.R.A.1916D.

Loveland, 132 Fed. 41; Kingsley v. Jacoby, 28 Abb. N. C. 451, 20 N. Y. Supp. 46.

The defendants, having begun the use of the name "Scientific American Compiling Department" under agreement, are estopped from asserting the right to use it independently of agreement.

In any event, the misrepresentation and wrongful use of the name by the defendants would entitle the complainant to insist upon the discontinuance of the use of the name.

The complainant is not barred by estoppel or laches.

Menendez v. Holt, 128 U. S. 514, 32 L. ed. 526, 9 Sup. Ct. Rep. 143.

The complainant is not estopped by its co-operation and assistance rendered under the agreement.

McCardel v. Peck, 28 How. Pr. 120; Amoskeag Mfg. Co. v. Garner, 54 How. Pr. 297.

Neither the agreement of 1904 nor the conduct of complainant thereunder constituted a fraud upon the public.

The charge of fraud is a grave one to make, and it cannot be presumed, but must be clearly proved. An essential element is intent.

Clark Thread Co. v. Armitage, 67 Fed. 896; Sartor v. Schaden, 125 Iowa, 696, 101 N. W. 511; Gluckman v. Straueh, 99 App. Div. 361, 91 N. Y. Supp. 223, affirmed in 186 N. Y. 560, 79 N. E. 1106; Nelson v. Winchell & Co. 203 Mass. 75, 23 L.R.A. (N.S.) 1150, 89 N. E. 180; Johnson v. Seabury, 71 N. J. Eq. 750, 12 L.R.A. (N.S.) 1201, 124 Am. St. Rep. 1007, 67 Atl. 36, 14 Ann. Cas. 840; George G. Fox Co. v. Best Baking Co. 209 Mass. 251, 95 N. E. 747; Movie Nerve Food Co. v. Modox Co. 153 Fed. 487; Clinton E. Worden & Co. v. California Fig Syrup Co. 42 C. C. A. 383, 102 Fed. 334; Fleischmann v. Fleischmann, 7 App. Div. 280, 39 N. Y. Supp. 1002.

Swayze, J., delivered the opinion of the court:

The basis of suits of this character is the damage or possibility of damage to the complainant, not the damage or probability of damage to the public. The question sometimes discussed is whether relief may be rested on a personal basis alone, or whether damage to property rights is necessary,—a question left undecided in this court in *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 926, 14 L.R.A. (N.S.) 304, 67 Atl. 97. In an early English case the court refused an injunction to restrain the sale of a quack medicine under the name of the complainant, an eminent physician. *Clark v. Freeman*, 11 Beav. 112, 17 L. J. Ch. N. S. 142, 12 Jur. 149. And although the case is not of great authority, the criticism upon it L.R.A.1916D.

was not due to the fact that the court refused at the suit of an individual to restrain a fraud upon the public, but to the fact that it overlooked the property right of a man in his own name. *Maxwell v. Hogg*, L. R. 2 Ch. 307, 36 L. J. Ch. N. S. 433, 16 L. T. N. S. 130, 15 Week. Rep. 467. The court of chancery has held that there is such a right. *Edison v. Edison Polyform & Mfg. Co.* 73 N. J. Eq. 136, 67 Atl. 392. Although damage is the basis of the suit, the mere fact of damage or possibility of damage is not enough, since damage may result from lawful acts, such as legitimate competition. Fraudulent conduct on the part of the defendant is a necessary element. *International Silver Co. v. Rogers*, 71 N. J. Eq. 560, 563, 63 Atl. 977. But fraudulent conduct without damage to the complainant does not suffice. The case upon which the complainant relied was expressly put upon the ground of the liability of the complainant to loss. *Walter v. Ashton* [1902] 2 Ch. 282, 71 L. J. Ch. N. S. 839, 87 L. T. N. S. 196, 18 Times L. R. 445, 51 Week. Rep. 131.

The very discussion suffices to show that, although fraudulent conduct which may deceive the public is a necessary element, it is the private loss of the complainant that is to be prevented, not the public injury arising to others from the fraudulent use of the complainant's name. This is in consonance with general principles. It is unnecessary to dwell upon the point. Its importance in the present case is due to its bearing upon the standing of the complainant to maintain its bill. If it were the public that is to be protected, the conduct of the complainant ought not to prevent relief. Since it is the complainant that is to be protected, the well-established maxim of equity is applicable; the complainant must come into court with clean hands.

The facts found by the learned vice chancellor establish an agreement on the part of the complainant and the Americana Company to make money out of the public by representing the encyclopedia as the work of the Scientific American, and thereby availing themselves of the reputation of that journal to attract subscribers for the book. The adoption of the name Scientific American Compiling Department cannot be otherwise explained. The word "department" in that expression can hardly convey to the ordinary mind any other meaning than Department of the Scientific American; and the language of the letter addressed by Munn & Company, to the American people, under date of May, 1906, is carefully chosen to convey the same impression without saying so in express words. The encyclopedia is therein said to be issued under the direct

editorship and personal supervision of the editor of the *Scientific American*, although his actual connection with the work was slight; he is said to be assisted by a board of eminent department editors; the natural impression conveyed is that they were editors of departments of the *Scientific American*, since nothing else is mentioned that could have departments; in fact, so far as appears, no editor of the *Scientific American* except Mr. Beach was connected with the encyclopedia. The book is said to be a great work "published by the *Scientific American Compiling Department*," with the full co-operation of Munn & Company, who add that they are certain that it will be found standard in its information and fully equal to the reputation of the *Scientific American* for accuracy and reliability. The gravamen of the complainant's bill is that Munn & Company will be injured in their good business reputation by the fraud of the defendants in palming off the book upon the public as a work connected with the *Scientific American*. Yet that is the very scheme in which the parties joined for years prior to 1911. We think the complainant cannot now be heard to complain of conduct in which they formerly joined and by which they profited. It makes no difference whether the encyclopedia is valuable or not, nor whether purchasers thereof have been damaged; it is enough that they have been or may have been beguiled of their money because the complainant's representations, and the representations of the defendant to which the complainant assented, persuaded them that they were buying a work which was made better by the co-operation of the *Scientific American*. We think that the complainant, when it tires of its bargain and seeks to enjoin the defendant from further profiting by the supposed connection, does not come into court with clean hands. Fraudulent conduct which the law would enjoin but for the agreement of the parties to exploit the public is as inimical to public policy as gambling in cotton, which is condemned by statute, and the rule applied in *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, 45 Atl. 611, is applicable to the present case. The principle applied in the law courts in *Hope v. Linden Park Blood Horse Assn.* 58 N. J. L. 627, 55 Am. St. Rep. 614, 34 Atl. 1070, and *Wyckoff v. Weaver*, 66 N. J. L. 648, 52 Atl. 356, is in effect the same.

The failure of the defendants to question in their answer the standing of the complainants is not material. This very point was made and overruled by this court in *Minzesheimer v. Doolittle*, supra. As we there said, the court will not, for any delinquency of the defendant, lend its assistance to a violation of law; and so it will L.R.A.1916D.

not assist one who has joined in an effort to deceive the public to prevent his associate from continuing to do the very thing to which he has previously assented.

We think therefore that the decree must be reversed; but it does not follow that the complainant is not entitled to some of the relief granted. The disqualification applies only to the particular matter or transaction with which the wrongful conduct had to do. *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424. In this case the complainant's wrongful conduct had, to do with the exploiting of the encyclopedia under the name of *Scientific American Compiling Department*. The complainant is not shown to have assented to the use of the name *Scientific American* for any other purpose. So far as the decree enjoins the *Scientific American Compiling Department* from using its corporate name, it must be reversed; so far as it enjoins the use of the name *Scientific American* in other ways, it must be affirmed. The defendants are entitled to costs in this court.

White, J., dissenting (filed June 29, 1914):

I concur in the legal principles enunciated in the foregoing opinion, but dissent from a finding of fact by this court the existence of which, besides seeming to me quite doubtful, was not raised by the pleadings, nor tried as an issue, nor considered nor found as a fact by the vice chancellor who tried the cause. Under such circumstances, it may well be that the record discloses scant proof in denial of what no one has seen fit to assert. This court's finding of fact is that the publication of the *Encyclopedia Americana* under the published name of "*Scientific American Compiling Department*," and other representations to the effect that the work was edited and issued under the direct editorship and supervision of the editor and editorial organization of the *Scientific American*, were a fraud upon the public. This finding obviously depends upon whether or not these representations were in fact false or true, and that question was not put at issue, tried, nor decided in the court from the decree of which this appeal is taken. It is true the vice chancellor found that, as between the business organizations of the complainants and of the defendants below, the former had contributed toward the co-operative enterprise (1) the reduction of the regular yearly subscription price of the *Scientific American* magazine, and (2) the exclusive right during the period of the contract to the use of the name "*Scientific American Compiling Department*," and had received in return an assurance of at least 10,000 new subscriptions

per year to the Scientific American magazine and the payment of the special price therefor; but these findings were in connection with the discussion of the question of an accounting and of the nature of the privilege for the use of the name. They did not pretend to relate to the question of a fraud upon the public, and that question was not considered. The evidence showed that in fact the editor in chief of the Scientific American, Mr. Beach, was made editor in chief of the new work, the encyclopedia, and that he helped select the authors of the treatises going into the work, and that the reference bureau and the plates of the Scientific American were largely, or at least to an extent, used in getting up and printing the encyclopedia.

From this it would seem, and doubtless if the question of a fraud upon the public had been raised or considered it would have otherwise appeared, that the complainants took ample means to see that the encyclopedia was of the high character which the representations that it was edited by the editor in chief of and issued in connection with the Scientific American gave the public the right to expect (in this connection it is significant that no subscriber has appeared to allege that the work was in fact otherwise than of this high character), and, if this was true, I think there was no fraud upon the public. The representations amounted to nothing except in so far as they were a guaranty of the care on the part of the Scientific American people that the work would accord in high character with what their reputation gave the public the right to expect from them. Purchasers of the work were not interested in the typesetters nor in the bookbinders or other mechanics whose labor went into the produc-

tion of the encyclopedia, except in so far as the result of their labor was concerned; nor were they otherwise interested in the individuality of the authors who wrote the articles comprising the work, nor in how the profits from its sale were divided up. Everyone would, of course, know that the encyclopedia is not written by the editor in chief, nor by the assistant editors of the Scientific American, but that necessarily a large number of authorities would be employed to write about subjects upon which they were specialists. The artistic success of the encyclopedia would, of course, therefore depend, more than upon anything else, upon the judicious selection of these specialist authors. That selection is what stamped the character of the work, and that selection was one of the important things to which the editor in chief of the Scientific American gave his attention.

Apparently, therefore, the public got exactly what complainants undertook they should get, and I cannot see where there was any fraud upon the public either practised or attempted. Certainly, as I view it, the fraud is not so apparent that, in a case where it was not in issue and no one thought of either proving or disproving it, a court of appeal should lay hold of it on its own motion, not only to deprive complainants of what I think would otherwise be their clear right to protect their property right in their business name, but also to perpetuate, in the continued use of the name Scientific American in connection with future editions of the encyclopedia, what, now that the Scientific American editorship and co-operation has been withdrawn, will hereafter certainly be, as I think it was not before, a fraud upon the public.

Annotation—Protection of public as ground for injunction against misuse of trademark or tradename.

While, as hereinafter more specifically pointed out, the doctrine has been asserted that one of the grounds for interference by equity to protect a trademark or tradename against simulation on the ground of unfair competition is to prevent a fraud and deceit being perpetrated on the public by palming off upon consumers the goods or articles of one manufacturer for those of another in which the public has confidence, yet it may be doubted if, by such declarations, more is intended than merely to lay down as a ground for granting injunctive relief to the plaintiff where he is being injured in a property right, that the action of the defendant is mislead-

ing and deceiving the public to the injury of the latter, as well as to the injury of the plaintiff. These cases can hardly be relied upon as sustaining the view that, although the producer or manufacturer of an article has no legal right or ground for injunctive relief in his own behalf against the simulation of the tradename or trademark applied to the article he produces, nevertheless if it appears that the public will be deceived and misled by such simulation, relief will be given. *MUNN & Co. v. AMERICANA Co.* ante, 116, is direct authority that the right to relief must be based upon the equities and title of the plaintiff rather than upon any injury to

the public, and this holding is in harmony with that of other cases where the question has specifically been presented.

Thus, in *Weener v. Brayton* (1890) 152 *Mass.* 101, 8 *L.R.A.* 640, 25 *N. E.* 46, where the plaintiff was held not entitled to relief on the ground that any right of his was being violated, the rule is declared that it is necessary "for those who claim that their right of property in a trademark has been invaded, to show that they are in some way by themselves, or with others, the owners thereof by reason of some business which they are transacting together, and to which its use is incident, and that it is not merely a personal privilege which they possess as members of a particular association of wide extent and embracing many persons of varied interest, to advertise, or have advertised by those by whom they are employed, the articles made by them as being made by members of such association." And the court points out that it will be found that where "an injunction has been granted or an action maintained, it has been at the instance of one who was himself a manufacturer, dealer in, or owner of the articles which were fraudulently represented by the counterfeited labels, wrappers, or advertisements to be his. In such case the fraud complained of would have a natural and inevitable tendency to lessen the sales, affect the reputation of the articles manufactured or dealt in, and injure the business of the complainant, and would thus afford him a ground for relief by reason of the special and peculiar damage which he would sustain or to which he might be exposed. The plaintiffs show by their bill that they have a right to use the label in question, and that it is a valuable privilege; but although they aver that they have suffered loss by the use of it by the defendant, they do not show that any business which they pursue has been affected, or that they can have sustained any definite loss or any injury except that which must be extremely remote and purely speculative."

And in *American Washboard Co. v. Saginaw Mfg. Co.* (1900) 50 *L.R.A.* 609, 43 *C. C. A.* 233, 103 *Fed.* 281, it is said that the "plaintiff comes into a court of equity in such cases for the protection of his property rights. The private action [relief] is given not for the benefit of the public, although that may be its incidental effect, but because of the invasion by defendant of that which is the exclusive property of complainant." *L.R.A.* 1916D.

Much to the same effect is *Leather Cloth Co. v. American Leather Cloth Co.* (1863) 4 *De G. J. & S.* (Eng.) 137, affirmed (1865) 11 *H. L. Cas.* 523. In this case the plaintiff was denied relief in his own behalf on the ground of false representations in his trademark, and Lord Chancellor Westbury took occasion to say that "imposition on the public, occasioned by one man selling his goods as the goods of another, cannot be the ground of private action or suit. In the language of Lord Thurlow in *Webster v. Webster* (1791) 3 *Swanst.* (Eng.) 492, 19 *Revised Rep.* 258, 'the fraud upon the public is no ground for the plaintiff's coming into this court.'"

And in *Levy v. Walker* (1878) *L. R.* 10 *Ch. Div.* (Eng.) 436, it is declared that the ground of injunctive relief is "solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business," and not to protect the public from being misled.

As already suggested, a doctrine has occasionally been asserted indicating that the protection of the public from fraud and deception is a sufficient ground for granting relief to the manufacturer or producer of an article against the simulation of the article, or the mark or name applied to it or used in the business of the producer. Thus, in *Matsell v. Flanagan* (1867) 2 *Abb. Pr. N. S.* (N. Y.) 459, in enjoining the use of a tradename in which the plaintiff had no exclusive proprietary interest, the rule is asserted that the enforcement of the doctrine that trademarks shall not be simulated does not depend entirely upon the alleged invasion of individual rights, but as well upon the broad principle that the public are entitled to protection from the use of previously appropriated names or symbols in such manner as may deceive them by inducing or leading to the purchase of one thing for another. And this rule is approved in *American Grocer Pub. Asso. v. Grocer Pub. Co.* (1876) 51 *How. Pr.* (N. Y.) 402. And the case was also cited with approval in *Imperial Mfg. Co. v. Schwartz* (1903) 105 *Ill. App.* 525, wherein the court asserts the rule to be that "the public are entitled to protection from being misled to trade with parties not known to them, under the impression that they are doing business with an established firm or person with whom they have been accustomed to deal." But in this case the corporation invoking equity aid had a right to its corporate name, although not exclusive,

except as it might receive protection on the ground of unfair competition. And this was also the situation in *Matsell v. Flanagan* (N. Y.) *supra*. And this was also true as to *McFell Electric & Teleph. Co. v. McFell Electric Co.* (1903) 110 Ill. App. 182, which follows *Imperial Mfg. Co. v. Schwartz*.

Supporting this doctrine, in *Grocers Journal Co. v. Midland Pub. Co.* (1907) 127 Mo. App. 356, 105 S. W. 310, the court points out that the doctrine of unfair competition is based on two grounds. First, that the man who has established a reputation for his goods by the excellence of his product, under a certain mark or symbol indicating its origin or manufacture, is entitled to be protected in the enjoyment of the good will and the fruits and reputation of the business thus established. And second, the purchasing public are entitled to have precisely what they have purchased, and hence will be protected against the simulation of an article or its name for the

purpose of palming off the counterfeit for the original.

Although not in point on its facts, attention is called to the case of *Memphis Keeley Institute v. Leslie E. Keeley Co.* 16 L.R.A.(N.S.) 921, holding that equity will not aid the manufacturer of a secret medicine, the sale of which has been built up by fraudulent representations to the public as to its ingredients, by requiring the cancelation of a contract of an institution purporting to administer such remedies, upon the theory that failure to grant such relief would enable the defendant to impose upon the public by claiming the right to administer the remedies. The case of *Seattle Electric Co. v. Snoqualmie Falls Power Co.* 1 L.R.A.(N.S.) 1032, and note, as to equitable enforcement for a limited time, to prevent a public inconvenience, of a contract which is against public policy, are also referred to as of collateral interest in this connection. A. G. S.

NORTH CAROLINA SUPREME COURT.

GALLIARD EWDARDS, Admr., etc., of
Jesse Edwards, Deceased, Appt.,
v.

INTERSTATE CHEMICAL CORPORATION.

(— N. C. —, 87 S. E. 635.)

Death — recovery by person injured — action by representative.

A satisfied judgment for injuries inflicted by another's negligence, in favor of the person injured, bars an action under the statute by his personal representative for death resulting from the injury.

For other cases, see *Death*, IV. in *Dig.* 1-52 N. S.

(Clark, Ch. J., dissents.)

(January 12, 1916.)

Note. — The question as to the effect of a judgment in an action for a personal injury as a bar to an action for the death of the person injured as a result of the injury is considered in a note appended to *St. Louis & S. F. R. Co. v. Goode*, L.R.A.1915E, 1152, which is cited in *EDWARDS v. INTERSTATE CHEMICAL CORP.* In a note appended to *Kelliher v. New York C. & H. R. R. Co.* L.R.A.1915E, 1178, the question is considered as to the right of action for injuries resulting in death when any action by the injured person to recover for his injuries was barred by the statute of limitations at the time of his death. And in the same L.R.A.1916D.

APPEAL by plaintiff from a judgment of the Superior Court for Mecklenburg County dismissing an action brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Affirmed.

Statement by Hoke, J.:

Civil action to recover damages for death of intestate caused by alleged negligence of defendant company, heard on demurrer to answer. The facts relevant to the inquiry are sufficiently embodied in the judgment of his Honor overruling the demurrer in terms as follows: "This cause coming on to be heard before his Honor, James L. Webb, judge presiding at said September term, 1915, of the Mecklenburg superior court, and being heard upon the complaint filed by the plaintiff, the answer filed by the defendant, and the demurrer filed by the plaintiff to the further defense set up in defendant's answer; and it appearing to

volume at page 1185, there is reported the North Carolina case of *Causey v. Seaboard All Line R. Co.*, which holds that the bar by the lapse of time of one's right of action for personal injuries does not affect the right of his administrator to maintain the statutory action for such injuries where they resulted in death, the action being in behalf of the statutory beneficiaries.

Upon first impression it might appear that the decision of the North Carolina court in *EDWARDS v. INTERSTATE CHEMICAL CORP.*, that the recovery by the injured person of a judgment for the injuries and satisfaction thereof are a bar to an action

the court from the pleadings referred to that this action is brought by the plaintiff on account of the death of intestate, alleged to have been caused by the negligence of the defendant, and it appearing from the further defense set up in the defendant's answer that the plaintiff's intestate, Jesse Edwards, prior to his death, brought an action for damages on account of the same injuries involved in the present action which the plaintiff in this action alleges resulted in her intestate's death; that the said action of Jesse Edwards v. Interstate Chemical Corporation was duly tried, and judgment rendered therein for the plaintiff, and that said judgment has been duly satisfied by the defendant, all of which will more fully appear by reference to the further defense set out in the defendant's answer, the plaintiff having filed a demurrer to said further defense admitting the truth of the allegations contained therein,—now, therefore, it is hereby considered, ordered, and adjudged that the said demurrer filed by the plaintiff be overruled, and that the plaintiff's action be, and it hereby is, dismissed by order of the court."

Plaintiff excepted and appealed.

Messrs. E. R. Preston and Duckworth & Smith, for appellant:

Plaintiff's right of action is not barred by the fact that her husband, during his lifetime, recovered a judgment against the defendant company for personal injuries and sufferings which later resulted in his death.

Boliok v. Southern R. Co. 138 N. C. 373, 50 S. E. 689; Hulbert v. Topeka, 34 Fed. 510; Bowes v. Boston, 155 Mass. 344, 15 L.R.A. 365, 29 N. E. 633; Hurst v. Detroit City R. Co. 84 Mich. 539, 48 N. W. 44; Putman v. Southern P. Co. 21 Or. 230, 27 Pac. 1033; Brown v. Chicago & N. W. R. Co. 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255; Legg v. Britton, 64 Vt. 652, 24 Atl. 1016; Causey v. Seaboard Air Line R. Co. 166 N. C. 7, L.R.A.1915E, 1185, 81 S. E. 918; Hartness v. Pharr, 133 N. C. 570, 98 Am.

St. Rep. 725, 45 S. E. 901; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 230, 38 L. ed. 422, 14 Sup. Ct. Rep. 579; Clare v. New York & N. E. R. Co. 172 Mass. 211, 51 N. E. 1083; Stewart v. Union Electric Light & P. Co. 104 Md. 332, 8 L.R.A.(N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49; Sturges v. Sturges, 126 Ky. 80, 12 L.R.A.(N.S.) 1014, 102 S. W. 884; Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; Donahue v. Drexler, 82 Ky. 157, 56 Am. Rep. 886; Meyer v. Zoll, 119 Ky. 480, 84 S. W. 543; 8 R. C. L. 732; Mahoning Valley R. Co. v. Van Alstine, 77 Ohio St. 395, 14 L.R.A.(N.S.) 893, 83 N. E. 601; Buck v. Arcata & M. River R. Co. 125 Cal. 364, 73 Am. St. Rep. 52, 57 Pac. 1066; Brown v. Chattanooga Electric R. Co. 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415.

Mr. John M. Robinson, for appellee:

The satisfaction of the former judgment was a bar to the present action.

Louisville R. Co. v. Taylor, 27 L.R.A.(N.S.) 176, note; Tiffany, Death by Wrongful Act, § 124; Shearm. & Redf. Neg. § 140; Hutchison, Carr. 3d ed. § 1391; Thomp. Neg. § 7024; White, Personal Injuries, § 57; Dresser, Employers' Liability, p. 140; 3 Elliott, Railroads, § 1376; Cooley, Torts, 2d ed. 309; 13 Cyc. 325; 8 Am. & Eng. Enc. Law, 870; Thompson v. Ft. Worth & R. G. R. Co. 1 Ann. Cas. 232 and note, 97 Tex. 590, 80 S. W. 990; Read v. Great Eastern R. Co. L. R. 3 Q. B. 355, 9 Best & S. 714, 37 L. J. Q. B. N. S. 278, 18 L. T. N. S. 822, 16 Week. Rep. 1040; Griffiths v. Dudley, L. R. 9 Q. B. Div. 357, 51 L. J. Q. B. N. S. 549, 47 L. T. N. S. 10, 30 Week. Rep. 797; Louisville, E. & St. L. R. Co. v. Clarke, 152 U. S. 232, 38 L. ed. 422, 14 Sup. Ct. Rep. 579; Michigan C. R. Co. v. Vreeland, 227 U. S. 70, 57 L. ed. 421, 33 Sup. Ct. Rep. 192; Littlewood v. New York, 89 N. Y. 24, 42 Am. Rep. 271; Strode v. St. Louis Transit Co. 197 Mo. 623, 95 S. W. 851, 7 Ann. Cas. 1084; Southern Bell Teleph. & Teleg. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881; Price v. Richmond & D. R. Co. 33 S. C. 556, 26 Am. St.

by his personal representative where the injury subsequently resulted in death, although the latter action is in behalf of the statutory beneficiaries, is inconsistent with the holding of that court in the Causey Case referred to. If, however, the distinction pointed out in the note to the Kelliher Case, between an action and a right of action, is kept in mind, the two decisions may be reconciled on the ground that the recovery of a judgment by the deceased in his lifetime for the injury and the satisfaction thereof destroyed the right of action which the deceased had. The operation of the statute of limitations did not, L.R.A.1916D.

however, destroy the decedent's cause of action, but it merely operated to bar the remedy; hence the cause of action existed at the time of his death, and the remedy for the enforcement thereof in behalf of the statutory beneficiaries would not necessarily be affected by the fact that the decedent's remedy was barred in his lifetime. As pointed out in the note to the Kelliher Case, however, the cases are not in harmony as to the effect on the right of action in behalf of the statutory beneficiaries, of the fact that the remedy of the deceased to recover for the injuries was barred by lapse of time when he died.

Rep. 700, 12 S. E. 413; *Hecht v. Ohio & M. R. Co.* 132 Ind. 507, 32 N. E. 302; *Hill v. Pennsylvania R. Co.* 178 Pa. 223, 35 L.R.A. 196, 56 Am. St. Rep. 754, 35 Atl. 997; *Mooney v. Chicago*, 239 Ill. 414, 88 N. E. 194; *State use of Melitch v. United R. & Electric Co.* 121 Md. 457, L.R.A.1915E, 1163; *Sewell v. Atchison, T. & S. F. R. Co.* 78 Kan. 1, 96 Pac. 1007; *Mehegan v. Boyne City, G. & A. R. Co.* 178 Mich. 694, L.R.A.1915E, 1170, 141 N. W. 905, 148 N. W. 173; *Perry v. Philadelphia, B. & W. R. Co.* 1 Boyce (Del.) 399, 77 Atl. 725; *Atchison, T. & S. F. R. Co. v. Farrow*, 6 Colo. 498; *Goodsell v. Hartford & N. H. R. Co.* 33 Conn. 52; *Brown v. Chattanooga Electric R. Co.* 101 Tenn. 252, 70 Am. St. Rep. 666, 47 S. W. 415; *Legg v. Britton*, 65 Vt. 652, 24 Atl. 1016; *Lubrano v. Atlantic Mills*, 19 R. I. 129, 34 L.R.A. 797, 32 Atl. 205; *Hoover v. Chesapeake & O. R. Co.* 46 W. Va. 268, 33 S. E. 224.

Hoke, J., delivered the opinion of the court:

The question presented in the record has been much considered by the courts, and it has been very generally held—a position in which we fully concur—that the statute conferring a right of action for wrongfully causing the death of another, usually to be prosecuted by the personal representative, does not, and was not intended to, confer such right when the intestate, the injured party, had been compensated for the injury during his life, and had received such compensation in full adjustment of his claim. The legislation on the subject in this country is, to a large extent, modeled upon an English statute, commonly known as Lord Campbell's act, Stat. 9 & 10 Vict. chap. 93, our own law (Revisal, §§ 59, 60) being substantially a reproduction of the English statute; and the construction put upon the law in England was that the action would not lie if the injured party had, during his life, received satisfaction for the wrong, these courts being of opinion that it was the purpose and meaning of the statute to deprive the wrongdoer of the protection oftentimes afforded by reason of the common-law principle that actions of this character died with the person. *Read v. Great Eastern R. Co.* (1868) L. R. 3 Q. B. 555. In that action, it was shown that the injured party, deceased, had accepted a sum of money in full satisfaction for the wrong, and the plea in bar was held a good defense. *Blackburn*, Judge, delivering the principal opinion, said in part: "Before that statute [Lord Campbell's act] the person who received a personal injury and survived its consequences could bring an action and recover damages for the injury, L.R.A.1916D.

but if he died from its effects, then no action could be brought. To meet this state of the law, the [act of Stat.] 9 & 10 Vict. chap. 93, was passed," etc.—and Lush, Judge, concurring, said in part: "I am of the same opinion. The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim, 'Actio personalis moritur cum persona,' would have applied. It only points to a case where the party injured has not recovered compensation against the wrongdoer."

This construction of the law has been very generally adopted by the courts of this country, whether the statutory action is considered a new right or a continuation of the old, and there is very little to be added to the cogent reasoning which they have presented in support of the position. *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881; *Thompson v. Ft. Worth & R. G. R. Co.* 97 Tex. 590, 80 S. W. 990, 1 Ann. Cas. 231; *Price v. Richmond & D. R. Co.* 33 S. C. 556, 26 Am. St. Rep. 700, 12 S. E. 413; *Hecht v. Ohio & M. R. Co.* 132 Ind. 507, 32 N. E. 302; *Mooney v. Chicago*, 239 Ill. 414, 88 N. E. 194. And cases in Supreme Court of the United States and text-books of approved excellence recognize and approve the principle. *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59-70, 57 L. ed. 417-421, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176; *Tiffany, Death by Wrongful Act*, 2d ed. § 124; 3 Elliott, Railways, 2d ed. § 1376; 8 Am. & Eng. Enc. Law, p. 870; 13 Cyc. p. 325. In the citation to *Tiffany*, the author says: "If the deceased in his lifetime has done anything that would operate as a bar to a recovery by him in damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. Thus, a release by the injured party of his right of action, or a recovery of damages by him for the injury, is a complete defense in the statutory action."

In *Vreeland's Case*, Associate Justice Lurton, delivering the opinion, said: "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury."

A very satisfactory statement of the principle and the reasoning upon which it is properly made to rest will be found in the New York case of *Littlewood v. New York*,

89 N. Y. 24, 42 Am. Rep. 271, where Rapallo, Judge, delivering the opinion, in part said: "The counsel for the plaintiff is sustained by the authorities in the proposition upon which he mainly bases his argument in this case, viz., that the right of action given by the act of 1847 to the personal representatives of one whose death has been caused by the wrongful act, neglect, or default of another is a new right of action created by the statute, and is not a mere continuation in the representatives of the right of action which the deceased had in his lifetime. But it seems to me that this is not the point upon which the case turns, and that the true question is whether, in enacting the statute, the legislature had in view a case like the present, where the deceased in his lifetime brought his action, recovered his damages for the injury which subsequently resulted in his death, and received satisfaction for such damages, and whether it was intended to superadd to the liability of a wrongdoer who had paid the damages for an injury, a further liability in case the party afterward died from such injury, for the damages occasioned by his death, to his next of kin; or whether the intention of the statute was to provide for the case of an injured party who had a good cause of action, but died from his injuries without having recovered his damages, and in such a case to withdraw from the wrongdoer the immunity from civil liability afforded him by the common-law rule that personal actions die with the person, and to give the statutory action as a substitute for the action which the deceased could have maintained had he lived. There can be no doubt that the legislature had power to create the double liability contended for, nor would it necessarily involve any inconsistency. The damages of the party injured are different and distinguishable from those which his next of kin sustained by his death, and no double recovery of the same damages would result. But it is equally clear that the legislature might give to the representatives the statutory right of action only as a substitute for the damages which the deceased was prevented by his death from recovering, and the question now is, What was their intention in this respect? The language of the act plainly indicates, I think, that the framers had in view the common-law rule, 'Actio personalis,' etc., and that their main purpose was to deprive the wrongdoer of the immunity from civil liability afforded by that rule. The . . . gist of the 1st section is that the wrongdoer 'shall be liable to an action for damages notwithstanding the death of the person injured and though the death shall have been caused under such

circumstances as amount in law to a felony.' It does not provide that the wrongdoer shall be liable notwithstanding that he shall have satisfied the party injured, or notwithstanding that the latter has recovered judgment against him, or notwithstanding any other defense he might have had at the time of the death, but merely that the death of the party injured shall not free him from liability, showing that this is the point at which the statute is aimed. The condition upon which the statutory liability depends is declared to be 'that the act, neglect, or default is such as would (if death had not ensued), have entitled the party injured to maintain an action and recover damages,' etc. This language is accurate if the act was intended to apply to the case of a party who, having a good cause of action for a personal injury, was prevented by the death which resulted from such injury, from pursuing his legal remedies, or who omitted in his lifetime to do so. It precisely fits such a case, but it is singularly inappropriate to the case of one who has in his lifetime maintained the action and actually recovered his damages. The form of expression employed in the act shows that the legislature had in mind the case of a party entitled to maintain an action, but whose right of action was by the rule of the common law extinguished by his death, and not the case of one who had maintained his action and recovered his damages. This still more strongly appears by reference to the words of the act which describe the wrongdoer against whom a right of action is given. He is not described by any language which is applicable to a party against whom judgment has been obtained by the deceased for the injury, but as 'the person who would have been liable if death had not ensued.' And the enactment is that this person shall be liable notwithstanding the death. It seems to me very evident that the only defense of which the wrongdoer was intended to be deprived was that afforded him by the death of the party injured, and that it is, to say the least, assumed throughout the act that at the time of such death the defendant was liable. In the present case the defendant does not answer the description of 'the person who would have been liable if death had not ensued.' It would not have been liable if the injured party were living, for the former judgment would be a complete bar. The statute may well be construed as meaning that the party who at the time of the bringing of the action 'would have been liable if death had not ensued' shall be liable to an action notwithstanding the death," etc.

These views of the learned judge, arising chiefly from the language of the statute, derive strong support from the suggestion that, although the statute may be considered in some respects as creating a new right of action, it has its foundation in a single wrong, and it is not likely that the legislature would intend to subject the wrongdoer to additional liability when he has made compensation to the injured party in his lifetime in full adjustment of the wrong done him. And, further, to hold that, notwithstanding such adjustment, the offender might at some time in near or distant future be subjected to an additional claim for damages on the death of the party injured, would be to impose upon such a claim an undue and prejudicial restriction, and would oftentimes prevent the injured party in his lifetime from realizing in his sore need a satisfactory and present compensation. A wrongdoer would be little inclined and hardly justified in offering adequate adjustment with such a possibility hanging over him.

We were referred by counsel to the case of *Causey v. Seaboard Air Line R. Co.* 166 N. C. 5, L.R.A.1915E, 1185, 81 S. E. 917, as being in contravention of our present ruling, but we do not so interpret the decision. In that case the question presented was whether the statute of limitations commenced to run from the time of the injury or from the death of the injured party, and the court, in adopting the latter period, held that the statute in that respect must be considered as conferring a new right of action; and, the statute of limitations in cases of this character, dealing only with the remedy, the statute would only commence to run from the time when, by the terms of the statute, the right of action arose, to wit, the death. True, in support of this position, it was said that the words of this act, conferring the right in cases "where, if the injured party had lived, he could maintain an action for damages," were only descriptive of the class of actions to which the statute referred, and did not operate to constitute it a survival of the old action. While this is certainly true on the facts there presented and in so far as the statute of limitations is concerned, it was by no means held, nor was it intended to hold, that this was all the significance that the language should receive in the further interpretation of the statute, nor was it decided in that case, or intended to be, that the statutory action, having for its basis one and the same wrong, was to be regarded as so entirely separate and distinct that an additional recovery could be had, notwithstanding that all claim for damages therefor had been

fully adjusted in the lifetime of the injured party. And in case of *Bolick v. Southern R. Co.* 138 N. C. 370, 50 S. E. 689, to which we were also referred, the only question decided in that case was that the statutory action did not accrue till the death of the injured party, and could not therefore be incorporated by amendment with an action which had been instituted by the deceased in his lifetime.

It will be noted in *Bolick's Case*, that no compensation for the wrong had been received by the deceased, and therefore a cause of action existed in him at the time of his death, thus bringing the case under the exact language of the statute, and while the statutory right could not be pursued in the original action, the present chief justice, delivering the opinion, said: "When death occurs pending an action for personal injuries, such cause is merged in the action for the death, and the only remedy is that given under § 1498 of the Code [now Revisal, § 59],"—thus recognizing that to come within the language of the statute there must have been a cause of action existent at the time of his death. See notes to recent case of *St. Louis & S. F. R. Co. v. Goode*, L.R.A.1915E, at page 1152, and State use of *Melitch v. United R. & Electric Co.* L.R.A.1915E, at page 1163.

There is no error in the judgment, and the same must be affirmed.

Clark, Ch. J., dissenting:

As said in *Bolick v. Southern R. Co.* 138 N. C. 370, 50 S. E. 689, "A cause of action for death by wrongful act cannot accrue until the death," and it was held that therefore it could not be set up by amendment to an action which had been instituted by the deceased himself for injuries which subsequently resulted in his death. It will surely follow from this that they are, so to speak, independent causes of action, and that a recovery for or the compromise of a cause of action for personal injuries by the deceased could not possibly bar an action for his wrongful death, which could only accrue subsequent thereto by his death. Whatever may be the opinion of the individual members of this court, whether a cause of action should be maintainable for wrongful death, this is not a matter for the courts, but for legislation. Formerly such cause of action could not be maintained. The legislature has now provided that such cause of action can be asserted. In this case, there has been a death, and the complaint alleges that it was caused by the negligence of the defendant. No one can recover for such cause of action except the administrator or executor of the deceased. *Killian v. Southern R. Co.*

128 N. C. 261, 38 S. E. 873, where the history of this legislation is given. It is now asserted by the personal representative for the first time. It has not been paid, and it has not been compromised, and it did not exist until the death of his intestate, who could not, and indeed did not attempt to, settle for such wrongful death.

It is true that in this action there should not be allowed any recovery for the physical pain and injury suffered by the intestate, which is usually an element in the damages recoverable for wrongful death, as this element has already been paid for. But the damages sustained by the wrongful death were given by the statute, and accrued subsequent to the recovery of the judgment by the intestate for his physical injuries, and the statute does not contemplate that payment for injuries and physical sufferings to the plaintiff's intestate should bar the family of the decedent from recovering for their loss of the value of his services to them. This is a subsequent and greater damage, and accrues to a different party.

It is true that the legislature might amend the statute to so provide. But it is very doubtful, considering the object of the statute, which is principally to provide for the dependent family of the decedent, that the legislature would so enact. Certainly it is not so enacted, and there is nothing in the wording of the statute which intimates to the court that the general assembly so intended.

In *Bolick v. Southern R. Co.* 138 N. C. 373, 50 S. E. 689, it was held: "It is no defense to an action to recover for the wrongful killing of the intestate that he had in his lifetime recovered a judgment against the same defendant for personal injuries which resulted in his death."

The opinion added: "We think this was correctly held, for there the death was a cause of action accruing subsequent to the judgment."

In *Whitehurst v. Atlantic Coast Line R. Co.* 160 N. C. 2, 75 S. E. 812, the court, citing *Bolick v. Southern R. Co.* supra, held that where the plaintiff's intestate began an action for personal injuries and died before its termination, his personal representative could bring an action for the wrongful death.

In *Broadnax v. Broadnax*, 160 N. C. 432, 42 L.R.A.(N.S.) 725, 76 S. E. 216, it was held, again citing *Bolick v. Southern R. Co.* supra, that the amount of damages recovered for a wrongful death is not liable to be applied in payment of debts and legacies, and that such cause of action did not exist until the statutes therein recited, beginning with chapter 39, Laws 1854-55, L.R.A.1916D.

and succeeding statutes, which are now Revised 1905, §§ 59, 60. It follows inevitably that, as the action can only be brought by the personal representative, the decedent could not recover or compromise for such cause of action if he had attempted to do so, which he did not in this case.

In *Watts v. Vanderbilt*, 167 N. C. 567, 83 S. E. 813, it was held, citing *Bolick v. Southern R. Co.*, that actions for injuries to the person do not survive. It was these injuries that the intestate recovered for. It is certainly based upon authority and reason, and settled by the above decisions, that the cause of action for which the deceased recovered judgment is an entirely separate and distinct cause of action from that for wrongful death for which this action is brought. The cause of action for personal injuries would have abated at the death of the decedent. The cause of action for wrongful death did not accrue till the death, and is created by the statute and in favor of a different party. A recovery or a compromise for the former being an entirely separate and distinct matter, both in law and fact and in a different right, such judgment or compromise cannot bar a recovery by the plaintiff for this entirely separate and distinct action for wrongful death.

This case depends upon the construction of our own statute, but the conclusion reached in this dissent is sustained by many decisions upon similar statutes elsewhere. *Sturges v. Sturges*, 126 Ky. 80, 12 L.R.A.(N.S.) 1014, 102 S. W. 884; *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67; *Donahue v. Drexler*, 82 Ky. 157, 56 Am. Rep. 886; *Meyer v. Zoll*, 119 Ky. 480, 84 S. W. 543.

In *Donahue v. Drexler*, 82 Ky. 157, 56 Am. Rep. 886, it was held that a settlement by the decedent in his lifetime for injuries occasioned by assault and battery was no bar to an action by his widow for damages on account of his death caused thereby; the latter action being maintainable under the laws of that state.

In 8 R. C. L. 732, it is said: "Authorities are not wanting which take the view that under the survival act and the death act, two separate and distinct causes of action are created which may coexist, but have no connection, and that these two actions may be prosecuted concurrently. *Davis v. St. Louis, I. M. & S. R. Co.* 5 Ark. 117, 7 L.R.A. 283, 13 S. W. 801; *Texarkana Gas & El. Co. v. Orr*, 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. E. 66; *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881; . . . *Stewart v. United Electric Light & P. Co.* 8 L.R.A.(N.S.) 384, and note (104 Md.

332, 118 Am. St. Rep. 410, 65 Atl. 49; *Bowes v. Boston*, 155 Mass. 344, 15 L.R.A. 365, 29 N. E. 633; . . . *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255."

The two actions, though prosecuted (under those statutes) by the same personal representative, are not in the same right, and hence a recovery and satisfaction in one is not a bar to recovery in the other. *Mahoning Valley R. Co. v. Van Alstine*, 77 Ohio St. 395, 14 L.R.A.(N.S.) 893, 83 N. E. 601. These decisions proceed on the ground that a statute similar to Lord Campbell's act creates a new cause of action, while the survival statute merely saves to the personal representative of the deceased an action which he could have brought in his lifetime for injuries arising from negligence and default, and that it must necessarily follow that neither action is an alternative or substitute for the other, and consequently they both may be maintained. *Stewart v. United Electric Light & P. Co.* 104 Md. 332, 8 L.R.A.(N.S.) 384, 118 Am. St. Rep. 410, 65 Atl. 49; *Causey v. Seaboard Air Line R. Co.* 166 N. C. 5, L.R.A.1915E, 1185, 81 S. E. 917.

Any injustice to the defendant, it was held, could be prevented by the trial judge limiting the recovery in the survival action for personal injuries to the loss occasioned to the deceased prior to his death, and in the action for the wrongful death to the pecuniary loss sustained by the beneficiaries under such act. *Stewart v. United Electric Light & P. Co.* supra; *Brown v. Chicago & N. W. R. Co.* 102 Wis. 137, 44 L.R.A. 579, 77 N. W. 748, 78 N. W. 771, 5 Am. Neg. Rep. 255. In *Burk v. Arcata & M. River R. Co.* 125 Cal. 367, 73 Am. St. Rep. 52, 57 Pac. 1065, it is said: "Under our statute the injured person might survive long enough to sue and recover damages or to settle with the wrongdoer, and then by his death a new cause of action would accrue to his heirs."

In *Brown v. Chattanooga Electric R. Co.* 70 Am. St. Rep. 684, note, it was held: If "a statute makes the killing of a passenger of a railroad corporation through gross negligence punishable by a penalty payable to the widow and children or next of kin, such passenger cannot release the corporation from liability, and therefore his agreement to do so cannot bar an action brought for his death by an administrator for the benefit of the persons entitled to the penalty."

In the same case it is said: "It is an action for damages arising from the mere fact of death, not damages to the deceased, but damages to his successors under the statute. Therefore we cannot comprehend the reasoning which enables an injured person to release a cause of action which has not accrued, and cannot accrue until his death, and which then accrues to third persons. It would be necessary to support such a conclusion that we admit that a person has a right of action for his own death. A greater degree of absurdity would not be attained in the enactment of a statute making suicide punishable as murder in the first degree."

Upon the authorities, and it would seem upon the logic and the letter of the statute, the plaintiff's right of action in this case is an entirely separate and distinct cause of action from that for which his intestate recovered, and is not barred by the judgment recovered by such intestate for the personal injuries sustained which later resulted in his death and the creation thereby of the cause of action in favor of his personal representative for the benefit of those entitled to share in the distribution of his personal property. *Revisal 1905, § 59.* This recovery, it is expressly stated, shall be "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." *Revisal 1905, § 60.* These could not possibly have accrued to the intestate or have been estimated in his favor."

CALIFORNIA SUPREME COURT. (In Banc.)

ETHEL C. MACKENZIE

v.

JOHN P. HARE et al.

(165 Cal. 776, 134 Pac. 713.)

Citizenship — marriage of woman to foreigner.

1. Under the Federal statute declaring

Note. — As to effect of marriage on woman's status as an alien, see annotation following this case, post, 132.
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that any American woman who marries a foreigner shall take the nationality of her husband, the marriage of a native-born woman to a resident foreigner destroys her right to suffrage as conferred by a state Constitution upon every native citizen of the United States.

For other cases, see *Citizenship*, in *Dig.* 1-52 N. 8.

Same — Federal Constitution — effect.

2. The provision of the Federal Constitution that all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States does not prevent legislation to the effect that

marriage of a native woman to an alien will render her an alien, since a citizen may renounce his citizenship.

For other cases, see Citizenship, in Dig. 1-52 N. S.

(August 5, 1913.)

APPPLICATION for a writ of mandamus to compel defendants as members of the board of election commissioners of the city and county of San Francisco to register plaintiff as a qualified voter of said city and county. Denied.

The facts are stated in the opinion.

Mr. Milton T. U'Ren, for petitioner:

An American woman marrying an alien does not lose her citizenship by reason of said marriage, if she continues to reside within the jurisdiction of the United States.

15 Ops. Atty. Gen. 599; 10 Ops. Atty. Gen. 321; Ruckgaber v. Moore, 104 Fed. 947; Comitiss v. Parkerson, 22 L.R.A. 148, 56 Fed. 556; Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666; Beck v. McGillis, 9 Barb. 35.

Petitioner, having been born within the United States, subject to the jurisdiction thereof, is a citizen of the United States.

7 Cyc. 137; Inglis v. Sailor's Snug Harbour, 3 Pet. 99, 7 L. ed. 617; Dawson v. Godfrey, 4 Cranch, 321, 2 L. ed. 634; United States v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

A woman is a citizen of the United States within the meaning of the 1st section of the 14th Amendment to the Constitution of the United States.

Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627; State ex rel. McCampbell v. County Ct. 90 Mo. 593, 2 S. W. 788; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Re Lockwood, 154 U. S. 116, 38 L. ed. 929, 14 Sup. Ct. Rep. 1082; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676, 3 Am. Crim. Rep. 647; Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666.

Actual removal is necessary to constitute expatriation.

14 Ops. Atty. Gen. 295; Morse, Citizenship, § 179; 6 Am. & Eng. Enc. Law, 31; 9 Ops. Atty. Gen. 62; 7 Cyc. 145, 146.

Citizenship cannot be taken away from any citizen by Congress, and can be only given up voluntarily and as an inherent right.

United States v. Wong Kim Ark, 169 U. S. 703, 42 L. ed. 910, 18 Sup. Ct. Rep. 456; Re Look Tin Sing, 10 Sawy. 353, 21 Fed. 910.

Messrs. Thomas V. Cator and William McDevitt, for respondents:

Marriage confers the citizenship of the husband upon the wife, ipso facto, regard- L.R.A.1916D.

less of the residence of the wife, or whether she ever resided in the United States.

Kane v. McCarthy, 63 N. C. 299; Headman v. Rose, 63 Ga. 458; Ware v. Wisner, 50 Fed. 310; Kelly v. Owen, 7 Wall. 496, 19 L. ed. 283; Dorsey v. Brigham, 177 Ill. 256, 42 L.R.A. 809, 69 Am. St. Rep. 228, 52 N. E. 303; Pequinot v. Detroit, 16 Fed. 211; Hopkins v. Fachant, 65 C. C. A. 1, 130 Fed. 839; United States v. Kellar, 11 Biss. 314, 13 Fed. 82; Leonard v. Grant, 6 Sawy. 603, 5 Fed. 13; Hakey v. Beer, 52 Hun, 366, 5 N. Y. Supp. 334; People v. Newell, 38 Hun, 79; Gumm v. Hubbard, 97 Mo. 311, 10 Am. St. Rep. 312, 11 S. W. 61; Kircher v. Murray, 54 Fed. 617; Re Nocila, 106 C. C. A. 464, 184 Fed. 322; 14 Ops. Atty. Gen. 402.

All writers on the law of citizenship treat marriage as a mode of expatriation.

Cockburn, Nationality, p. 24; Leonard v. Grant, 6 Sawy. 603, 5 Fed. 11; Van Dyne, Naturalization, 1907, ed. pp. 333-357, 227; Van Dyne, Citizenship (see head "Expatriation"); 2 Wharton, Int. Law Dig. 420, § 186; 3 Moore, Int. Law Dig. p. 448; Webster, Citizenship, 297, 298; Brannon, 14th Amend. p. 28; Bouve, Exclusion of Aliens, pp. 389, 390.

Marriage by a woman to an alien is a mode of naturalization, by the principles of international comity, evidenced by statute in England and the United States, and evidenced either by statute or consent in civilized nations.

Van Dyne, Naturalization, 1907, ed. p. 227; Kelly v. Owen, 7 Wall. 496, 19 L. ed. 283; United States v. Kellar, 11 Biss. 314, 13 Fed. 82; Leonard v. Grant, 6 Sawy. 603, 5 Fed. 11; Reg. v. Manning, 2 Car. & K. 887, Temple & M. 155, 1 Den. C. C. 467, 19 L. J. Mag. Cas. N. S. 1, 13 Jur. 962.

Shaw, J., delivered the opinion of the court:

Application in this court for a writ commanding defendants, as members of the board of election commissioners of the city and county of San Francisco, to register the plaintiff as a qualified voter of said city and county.

The plaintiff was born and ever since has resided in the state of California. On August 14, 1909, being then a resident and citizen of this state and of the United States, she was lawfully married to Gordon Mackenzie, a native and subject of the Kingdom of Great Britain. He had resided in California prior to that time, still resides there, and it is his intention to make this state his permanent residence. He has not become naturalized as a citizen of the United States, and it does not appear that he

intends to do so. Ever since their marriage the plaintiff and her husband have lived together as husband and wife. On January 22, 1913, she applied to the defendants to be registered as a voter. She was then over the age of twenty-one years, and had resided in San Francisco for more than ninety days. Registration was refused to her on the ground that by reason of her marriage to Gordon Mackenzie, a subject of Great Britain, she thereupon took the nationality of her husband, and ceased to be a citizen of the United States. The soundness of this objection is the question to be decided.

The qualifications necessary to entitle a person to the privilege of suffrage and the right of registration as a voter in this state are fixed, declared, and controlled by § 1 of article 2 of the state Constitution, as amended on October 10, 1911. The purpose of the amendment was to extend the privilege of suffrage to women. The portion of the section upon which the decision of this case depends is the opening clause, giving the privilege of suffrage to "every native citizen of the United States" who possesses the other qualifications mentioned in the subsequent parts of the section. It declares that persons having the qualifications stated shall "be entitled to vote at all elections." As it is admitted that the plaintiff possesses all the other qualifications required, the sole question presented is whether or not, upon the facts we have stated, she is a "native citizen of the United States." If she comes within that definition, she is entitled to registration as demanded. She was a citizen of the United States prior to her marriage to Mackenzie. No event affecting her status as a citizen, except said marriage, has occurred since that time. She therefore still remains a citizen of the United States, unless she has lost her citizenship by her marriage with an unnaturalized resident alien. *Hauenstein v. Lynham*, 100 U. S. 484, 25 L. ed. 628.

The status of persons as citizens or aliens, respectively, is controlled entirely by the Constitution of the United States and the acts of Congress passed in pursuance thereof. We must look solely to them to ascertain whether or not the plaintiff is a citizen and, as such, a voter entitled to registration.

And in determining their meaning and effect the state courts are bound by the interpretation put upon them by the courts of the United States.

Prior to any legislation on the subject by Congress, there was some uncertainty and conflict of authority concerning the right of expatriation. The question first L.R.A.1916D.

arose in 1795, in *Talbot v. Janson*, 3 Dall. 133, 162, 1 L. ed. 540, 552, where Iredell, J., discusses it at length, stating his conclusion to be that a citizen could not denationalize himself without the consent of his government. The other justices expressed no opinion on the point. Similar views were stated in *Shanks v. Dupont* (1830) 3 Pet. 246, 7 L. ed. 668, *Inglis v. Sailor's Snug Harbour* (1830) 3 Pet. 101, 125, 7 L. ed. 618, 626, and in *United States v. Gillies* (1815) Pet. C. C. 161, Fed. Cas. No. 15,206. In *Shanks v. Dupont*, the court said, per Story, J.: "The general doctrine is that no person can, by any act of their own, without the consent of the government, put off their allegiance and become aliens." And on this ground it was held that the marriage of a woman citizen with an alien did not change her allegiance to the United States. There was at that time no legislation permitting expatriation. In *Stoughton v. Taylor*, 2 Paine, 661, Fed. Cas. No. 7,558, it is said that the right of expatriation is fundamental and inherent. To the same effect, see *Alsberry v. Hawkins*, 9 Dana, 178, 33 Am. Dec. 546. Other state courts were of the same opinion. The denial of the right of voluntary expatriation was somewhat inconsistent with the laws of the United States providing for the naturalization of foreigners, the first of which was enacted in 1779. Act March 26, 1790, chap. 3, 1 Stat. at L. 103. The question was practically set at rest by the act of July 27, 1868. 15 Stat. at L. 223, chap. 249, U. S. Rev. Stat. § 1999, Comp. Stat. 1913, § 3955, 1 Fed. Stat. Anno. p. 788. The preamble thereof declares that the right of expatriation is a natural and inherent right of all people. The body of the act declares further that any decision of any officer of the government denying, restricting, or impairing the right of expatriation is "inconsistent with the fundamental principles of this government." This language seems to be but little more than a legislative declaration of national policy. But it clearly is operative in this, that it gives the consent of the national government to the expatriation of any citizen by his or her voluntary act. If such consent of the nation is essential to a valid expatriation, this law is evidence thereof. The absolute right of expatriation is now recognized as the settled doctrine of this country. *Browne v. Dexter*, 66 Cal. 40, 4 Pac. 913; *Kane v. McCarthy*, 63 N. C. 302; *Burton v. Burton*, 1 Keyes, 359, 1 Abb. App. Dec. 271; *Kelly v. Owen*, 7 Wall. 496, 19 L. ed. 283; *Re Look Tin Sing* (C. C.) 10 Sawy. 353, 21 Fed. 905. In the case last cited the court says: "The United States recognize the right of every-

one to expatriate himself and choose another country." In view of the contention to be hereafter mentioned, it is to be noticed that this case was decided after the adoption of the 14th Amendment.

The first legislation by Congress in regard to the status of married women as citizens was the act of 1855. Act Feb. 10, 1855, chap. 71, 10 Stat. at L. 604, U. S. Rev. Stat. § 1994, Comp. Stat. 1913, § 3948, 1 Fed. Stat. Anno. p. 786. Section 2 is as follows: "That any woman who might lawfully be naturalized under the existing laws, married, or who shall be married, to a citizen of the United States, shall be deemed and taken to be a citizen." In the Revised Statutes the words "and taken" are omitted. The effect of this statute is that every alien woman who marries a citizen of the United States becomes perforce a citizen herself, without the formality of naturalization, and regardless of her wish in that respect. *Kane v. McCarthy*, 63 N. C. 302; *Kelly v. Owen*, 7 Wall. 496, 19 L. ed. 283. It is not entirely certain that, under our state Constitution, such citizenship would entitle such foreign-born woman to vote. Our Constitution confers that privilege only on three classes of persons: First, native citizens; second, those who became citizens under the treaty of Queretaro, or, as it is commonly called, the treaty of Guadalupe Hidalgo; and, third, naturalized citizens. An alien woman who marries a citizen thereby herself becomes a citizen; but there may be doubt if she thereby becomes a naturalized citizen within the meaning of the Constitution. This is, of course, a question not here involved. We mention it only to call attention to the distinction, and to make it clear that we have not decided it.

The act of 1855 determines the citizenship of an alien woman who marries a citizen. We have in this case the converse of the proposition; the effect of the marriage of a native female citizen to a man who is not a citizen, but is a subject of some other country. In *Pequignot v. Detroit* (1883; C. C.) 16 Fed. 211, Judge Brown, afterward justice of the United States Supreme Court, decided that an alien woman who had become a citizen under the aforesaid act of 1855 by marrying a citizen, and who was divorced from that husband and thereafter married an unnaturalized alien, lost her citizenship by the last marriage and again became an alien, although both she and her last husband continued to reside in this country with the intention of remaining. In *Ruckgaber v. Moore* (C. C.) 104 Fed. 947, decided in 1900, the court held that a native woman who marries a French citizen and there-

after resides with him in France thereby loses her American citizenship and becomes a citizen of France, adding, however, that to accomplish this result she must, by residence abroad, or other equivalent act, express her intention to renounce her former citizenship by her marriage. Similar views were expressed in *Trimble v. Harrison*, 1 B. Mon. 147. In *Comitis v. Parkerson* (C. C.) 22 L.R.A. 148, 56 Fed. 556, decided in 1893, the court held that a native-born woman who had married an alien subject of Italy, permanently residing in the United States and intending to continue therein, did not thereby lose her citizenship, but remained a citizen of this country. The court said that the power to declare how the right of expatriation should be exercised, as well as that of naturalization, was exclusively in Congress; that expatriation could not take place without the consent of the United States, and that "Congress has made no law authorizing any implied renunciation of citizenship." It was mainly on this ground that the court rested its conclusion, although it was also said that, in the absence of any law of Congress as to the method of expatriation, it could not be said to take place, unless it was manifested by a removal from this country and a residence elsewhere. See also *Beck v. McGillis*, 9 Barb. 49; *Shanks v. Dupont* (1830) 3 Pet. 246, 7 L. ed. 668; *Jennes v. Landes* (C. C.) 84 Fed. 74; *Kreitz v. Behrensmeyer*, 125 Ill. 197, 198, 8 Am. St. Rep. 349, 17 N. E. 232.

When an alien and a citizen intermarry, they not infrequently return to reside, either temporarily or permanently, to the country of the alien spouse, thereby giving rise to questions concerning their rights as citizens or aliens of the respective countries, from which there have ensued international disputes to be discussed and settled by diplomatic correspondence between the United States and the foreign country. The fact that the courts of this country have held variant opinions on some phases of the subject has caused some perplexity in the state department, and like diversity of opinions has appeared from time to time in the correspondence of that department. All the courts have agreed, however, that the entire subject of naturalization and expatriation, including the method by which each might or could be accomplished and manifested, is a matter within the exclusive control of Congress. Under these conditions, the United States Senate, on April 13, 1906, passed a joint resolution for the appointment of a commission to "examine into the subjects of citizenship of the United States, expatriation, and protection abroad," and make a report with proposals

for legislation thereon. In June, 1906, the house committee on foreign affairs, to which this resolution had been referred, requested the secretary of state to select three men connected with the state department, familiar with the subject, to investigate and make the desired report and recommendations. In pursuance of this request, Hon. Elihu Root, then secretary of state, directed Mr. James B. Scott, solicitor for the department of state, Mr. David Jaynes Hill, then minister to the Netherlands, and Mr. Gaillard Hunt, chief of the passport bureau, to make an inquiry, report, and proposals for legislation, as requested. These gentlemen proceeded, and on December 18, 1906, they made an elaborate and exhaustive report of 538 pages, with recommendations for legislation covering all the phases of the subject except that of naturalization, which was already provided for. With this document before it, Congress framed an act which became a law of March 2, 1907. 34 Stat. at L. 1228, chap. 2534, Comp. Stat. 1913, § 3960, Fed. Stat. Anno. Supp. 1909, p. 69. This act now controls the subject referred to, including that involved in this case. Section 3 thereof is practically decisive of the case before us, and it is as follows: "That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein."

There is no escape from the conclusion that, under the provisions of this section, the plaintiff in this case, when she married Gordon Mackenzie, a British subject, thereupon took the nationality of her husband and ceased to be a citizen of the United States. Just as an alien woman who marries a citizen becomes a citizen herself, whether she wishes it or not, as the cases we have cited declare, so a female citizen who marries an alien becomes herself an alien, whether she intends that result as the consequence of her marriage or not. She must bow to the will of the nation, as expressed by the act of Congress. Owning to the possibility of international complications, the rule has generally prevailed, from considerations of policy, that the wife should not have a citizenship nor an allegiance different from that of her husband. The section aforesaid was intended to put this general doctrine into statutory form. When, after Congress by this act had declared that her marriage to an alien would

accomplish her expatriation, and she thereafter married an alien, she is conclusively presumed to have intended thereby to renounce her citizenship of the United States and become a subject of Great Britain.

It is suggested that the object of the act, as expressed in its title, was to legislate solely for the protection of citizens abroad, and therefore that it should not be construed to apply to women who marry here and continue to reside in this country, or who marry an alien permanently residing in this country. As has been stated in reciting the origin of the act, such persons frequently remove to the country of which the husband is a subject, or to other foreign countries. It was the obvious purpose to provide a rule which should govern in cases of that kind. Furthermore, the language of the section shows that it contemplates that an American woman included within its terms will in some cases reside in the United States after contracting the marriage with the alien, and that it intends that she shall continue to have the nationality of her husband during such residence here, so long as the marriage relation continues. The interpretation contended for would be contrary to this provision, and therefore it is not permissible.

Plaintiff's counsel also contends that the act of Congress is contrary to the opening sentence of the 14th Amendment to the Constitution of the United States, declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." In support of this position they cite *Re Look Tin Sing* (C. C.) 10 Sawy. 353, 21 Fed. 905, and *United States v. Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456. In the first-mentioned case, which was decided in 1884, Justice Field, of the United States Supreme Court, writing the decision for the circuit court of the United States for the district of California, held that a person born in the United States of Chinese parents residing therein at the time of his birth, and not members of the diplomatic force of China, was a native citizen of the United States, and was not subject to the act of Congress forbidding the re-entry into this country of Chinese who had returned temporarily to China, except where they had obtained a certificate allowing such return. This decision declares that a native-born person of any race is a citizen, under the aforesaid provision of the 14th Amendment, and it follows the familiar rule that such person remains a citizen so long as he chooses, provided he does no act which, under our laws, will have the effect of

renouncing or forfeiting such citizenship. The Chinese exclusion act, it was held, did not affect the right of citizenship. But the quotation we have already given from this case shows that the court did not intend to hold, and did not hold, that the 14th Amendment forbids expatriation, or takes from Congress the power to legislate concerning it. In *United States v. Wong Kim Ark*, the same question was involved, and the same conclusion was reached. In the course of its very elaborate discussion of the proposition that the 14th Amendment affirms the "ancient and fundamental rule of citizenship by birth within the territory" (169 U. S. page 693) the court said (169 U. S. page 703): "The power of naturalization, vested in Congress by the Constitution, is a power to confer citizenship, not a power to take it away." From this remark it is argued that a native-born citizen, cannot, since the adoption of that Amendment, renounce his citizenship. But this by no means follows. The court in the quoted sentence was speaking of the power of Congress to deprive a person of his citizenship without his consent and for no sufficient or reasonable cause. In the next paragraph of the opinion the court says (page 704): "Upon the facts agreed in this case, the American citizenship which Wong Kim Ark acquired by birth within the United States has not been lost or taken away by anything happening since his birth. No doubt he might himself, after coming of age, renounce his citizenship, and become a citizen of the country of his parents or of any other country." Thus, the opinion relied on itself recognizes and declares that citizenship may be renounced, notwithstanding the provisions of the 14th Amendment. As we have held that the act of the plaintiff here in marrying an alien was in

effect a renunciation of her citizenship, it follows that she is not prevented from committing this act of expatriation by the aforesaid provision of the 14th Amendment.

We think it advisable to state here that the question of the effect of the marriage of a native female citizen to an alien, where such marriage had taken place before the passage of the act of 1907 aforesaid, is a question not involved in this case. It is not, therefore, to be deemed as a decision upon the question whether the section of the act of Congress above quoted was applicable to and operated upon citizens of the United States who were at that time married to alien husbands. From what we have said the conclusion is clear that the plaintiff here is not now a citizen of the United States, within the meaning of the act of Congress above quoted, and, as that act controls the question of her citizenship, and her right to vote is made by our Constitution, as amended in 1911, dependent upon her status as a citizen of the United States, and does not exist unless she is such citizen, she is not entitled to the exercise of the privilege of suffrage, and cannot demand registration as a voter.

It is ordered that the writ applied for be denied.

We concur: Beatty, Ch. J.; Angellotti, J.; Lorigan, J.; Sloss, J.; Melvin, J.; Henshaw, J.

Petition for rehearing denied September 4, 1913.

Affirmed by the Supreme Court of the United States, December 6, 1915, 239 U. S. 299, 60 L. ed. —, 36 Sup. Ct. Rep. 106.

Annotation—Effect of marriage on woman's status as an alien.

Earlier cases covering the question under annotation will be found in the note to *Comitis v. Parkerson*, 22 L.R.A. 149.

Alien marrying citizen.

As pointed out in the earlier note, the United States, in 1855, adopted a law § 1994, U. S. Rev. Stat. Comp. Stat. (1913, § 3948) which provided that "any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." And so by virtue of this section it has been held that an alien woman who marries a citizen of the United States, whether naturalized or native born, becomes herself a citizen. *Ware v. Wisner* (1883) L.R.A.1916D.

50 Fed. 310; *Hopkins v. Fachant* (1904) 65 C. C. A. 1, 130 Fed. 839; *Sprung v. Morton* (1910) 182 Fed. 330; *Re Nicola* (1911) 106 C. C. A. 464, 184 Fed. 322, affirming *United States ex rel. Nicola v. Williams*, 173 Fed. 626; *Ex parte Grayson* (1914) 215 Fed. 449; *Belcher v. Farren* (1891) 89 Cal. 73, 26 Pac. 791; *Dorsey v. Brigham* (1898) 177 Ill. 250, 42 L.R.A. 809, 69 Am. St. Rep. 228, 52 N. E. 303; *Gumm v. Hubbard* (1888) 97 Mo. 311, 10 Am. St. Rep. 312, 11 S. W. 61; *Potter v. Hall* (1901) 11 Okla. 173, 65 Pac. 841.

And in *Broadis v. Broadis* (1898) 86 Fed. 951, it was held that since the passage of the act of July 14, 1870, which

extended the naturalization laws to aliens of African nativity or descent, § 1994 applies to an alien woman of African descent who married a negro citizen of the United States, so that a Federal court would not have jurisdiction of an action brought against her by a citizen of the state in which she resided.

And so, although, subsequently to the marriage and before reaching the United States, such a one contracts a contagious disease which would have warranted her exclusion were she an alien, she cannot be excluded as an alien. *Re Nicola* (Fed.) supra.

And an alien woman who, pending proceedings for her deportation, marries a citizen of the United States, becomes herself a citizen and is entitled to her discharge. *Hopkins v. Fachant* (1904) 65 C. C. A. 1, 130 Fed. 839.

And a foreign-born woman who is entitled to citizenship under this section may acquire land under the homestead laws. *Potter v. Hall* (1901) 11 Okla. 173, 65 Pac. 841.

And in *Ware v. Wisner* (1883) 50 Fed. 310, it was held that under § 1994 non-resident alien women who married United States citizens who were residents abroad became United States citizens so as to be entitled to take by inheritance under the laws of Iowa.

So, also, foreign-born women married to American citizens have the right to vote at school elections, under *Starr & C. Anno. Stat.* 1896, chap. 46, p. 1741, ¶ 342, if they have the specified qualifications as to age and residence. *Dorsey v. Brigham* (1898) 177 Ill. 250, 42 L.R.A. 809, 69 Am. St. Rep. 228, 52 N. E. 303.

But the marriage of an alien woman with a citizen after she has voted at a school election would not have any retroactive effect to make her vote valid. (Ill.) *Ibid.*

So, an alien woman who, pending proceedings to deport her as a prostitute, marries an American citizen, becomes a citizen, and an order of deportation cannot issue until her citizenship is revoked and she is relegated to the status of an alien. *Ex parte Grayson* (1914) 215 Fed. 449, appeal dismissed in (1915) 134 C. C. A. 666, 219 Fed. 1022. The court stated that in this case the woman did not belong to an excluded race, but was claimed to be excluded because of immoral character, and pointed out that it has been held that the clause in § 1994, Comp. Stat. 1913, § 3948, "might herself be lawfully naturalized," applies to the race or class or nationality of persons who are excluded from citizenship, and L.R.A.1916D.

not to the personal qualification of the individual whose class or race is not excluded, and does not apply to the character of the individual, and so distinguished *Low Wah Suey v. Backus*, infra.

But in *Ex parte Kaprielian* (1910) 188 Fed. 694, it was held that an alien woman who, after a deportation order had issued because she was afflicted with contagious disease, marries an American citizen, is not relieved from the order of deportation on the ground that she has become an American citizen. The court stated that it was no part of the intended policy of § 1994 to annul or override the immigration laws so as to authorize the admission into the country of the wife of a naturalized alien not otherwise entitled to enter, and an alien woman who is of a class of persons excluded by law from admission to the United States does not come within the provision of that section. The court distinguished *Hopkins v. Fachant* (Fed.) supra, stating that in that case the deportation order was held to have been arbitrarily and unlawfully issued, and the woman was married pending the decision on that question. *Ex parte Kaprielian*, it will be seen, is in conflict with the view taken in *Ex parte Grayson* (1914) 215 Fed. 449, as to the effect of § 1994. It would seem, however, that *Ex parte Grayson* has reason and authority on its side, and that the only way deportation can be affected in such a case would be by relegating the woman to her former status as an alien by the revocation of her citizenship.

In *Hatch v. Ferguson* (1893) 57 Fed. 959, it was held that an Indian woman, by reason of her having married a citizen of the United States, and also having voluntarily taken her residence apart from the tribe to which she belonged, and having adopted the habits of civilized life, became a citizen of the United States, and so was entitled to prosecute an action in the Federal court against citizens of a state other than that of which she was resident.

The following cases involving the rights of alien Chinese women who marry Chinamen born in the United States have been included, although not strictly within the scope of this annotation, the decisions turning not on their status as citizens, they belonging to the excluded race, but on their right to remain as the lawful wives of American citizens:

In *Tsoi Sim v. United States* (1902) 54 C. C. A. 154, 116 Fed. 920, a foreign-born Chinese woman who had been law-

fully in this country up to the time of the passage of the Federal statutes requiring Chinese laborers in this country to procure a certificate of registration failed to register under the statute and so was liable to deportation, but before her arrest she was married to a Chinaman, born in, and a citizen of, the United States. In remanding the cause and ordering her discharge from custody on the ground that, although, under a strict construction of the statute, she could be deported, yet she would nevertheless have the unquestioned right to return and to be admitted into and remain in this country as the lawful wife of an American citizen, the court said that it was manifest that Congress never intended by the passage of the law to have it apply to a case like the present; that "appellant did not come to this country fraudulently or in violation of any law. She did not get married in order to evade deportation. Her marriage was not fraudulent, but lawful and in accordance with the usages and customs of our law. Whatever effect her error of omission in failing, during a few years of her infancy, to obtain a certificate of registration, if any she was entitled to, it certainly did not deprive her of the right to marry an American citizen lawfully domiciled in this country. This she did. By this act her status was changed from that of a Chinese laborer to that of a wife of a native-born American. Her husband is not before the court, but his rights as well as hers are involved. The law is well settled that one born in the United States of Chinese parents who were permanently domiciled here, though an alien, is a citizen of the United States and cannot be excluded therefrom or denied the right of entry. . . . The wife has the right to live with her husband, enjoy his society, receive his support and maintenance and all the comforts and privileges of the marriage relations. These are her, as well as his, natural rights. By virtue of her marriage her husband's domicile became her domicile, and thereafter she was entitled to live with her husband and remain in this country."

But a foreign born Chinese woman, though married to a Chinaman of American birth, was held in *Low Wah Suey v. Backus* (1912) 225 U. S. 460, 56 L. ed. 1165, 32 Sup. Ct. Rep. 734, to be an alien within the meaning of the provisions of the act of February 20, 1907, as amended by act of March 26, 1910, for the deportation of any alien found as an inmate of a house of prostitution within L.R.A.1916D.

three years subsequently to her entry into the United States. The court stated that she was a Chinese person not born in this country, and could not become a naturalized citizen under the laws of the United States, not being of that class who could be lawfully naturalized, and so, being incapable of naturalization herself although the wife of a Chinaman of American birth, she remained an alien and subject to the terms of the act. The court added: "The object of the act was to exclude alien prostitutes, or if they entered and were found violating the statute within the period prescribed, to return them to the country whence they came. A married woman may be as objectionable as a single one in the respects denounced in the law. There is nothing in the terms of the act showing the congressional purpose to exclude from its provisions an alien who had previously married or who might marry an American citizen. Indeed, if this construction were adopted the marriage of such alien to a countryman of American citizenship who might be ignorant of the conduct of the alien, or willing to condone it, would afford an easy means of evading the statute. In the present case, in view of the finding of the immigration officer, approved by the Secretary of Commerce and Labor, it must be taken as true that, . . . notwithstanding her marriage relation, [she] was found in a house of prostitution in violation of the statute. This situation was one of her own making; and conceding her right to come into the United States and dwell with her husband because of his American citizenship, it is obvious that such right could have been retained by proper conduct on her part, and was only lost upon her violation of the statute; she, being an alien, thereby forfeiting her right to longer remain in this country."

Citizen marrying an alien.

Prior to the act of March 2, 1907 (see *infra*), there was some conflict of opinion as to whether a native-born American woman by marrying an alien became herself an alien, although latterly the courts were inclined to the view that if she continued to reside in the United States with no intention of giving up that residence, she retained her citizenship, but otherwise if she went abroad and took up her residence there. See cases in earlier note.

So, since the earlier note, it was held in *Wallenburg v. Missouri P. R. Co.* (1908) 159 Fed. 217, a case involving

jurisdiction of the Federal court on the ground of diversity of citizenship, that a woman, a citizen of the United States, did not lose that citizenship by marrying an alien, at least so long as she continued to reside in the United States. No reference is made to the act of 1907.

But in *Ruckgaber v. Moore* (1900) 104 Fed. 947, 31 N. Y. Civ. Proc. Rep. 310, affirmed without opinion in 52 C. C. A. 587, 114 Fed. 1020, it was held that by virtue of § 1999 of the Rev. Stat. Comp. Stat. 1913, § 3955, which proclaims that expatriation is an inherent right, and of the statutes of France making an alien woman who marries one of their subjects herself a subject, a native-born American woman who married a citizen of France and went there to reside permanently must be regarded as a non-resident alien.

In *Roa v. Collector of Customs* (1912) 23 Philippine, 315, where the facts arose prior to the act of March 2, 1907, it was held that a Filipina who had married a Chinaman took his nationality during her coverture, but that after his death she reverted ipso facto to her former status. Judge Trent, in a note appended to his decision in this case, stated: "The inquiry in this case was the status of the law upon the questions therein involved in the absence of statutory enactment. The act of Congress of March 2, 1907, being in part declaratory of what the law was in the United States, confirms the principles announced in the foregoing decision as applicable to cases arising in this country."

In *Jenns v. Landes* (1898) 85 Fed. 801, under a Canadian statute which provides that "a married woman shall, within Canada, be deemed to be a subject of the state of which her husband is for the time being a subject," an American woman who married a subject of Great Britain domiciled in Canada was held to be an alien and so could sue in the Federal courts. The court stated that the only serious question arising was as to the construction and effect of the Canadian statute of 1886, and said: "The words of the act appear to be qualified and limited, and it is contended that it does not confer naturalization upon women married to Canadians except temporarily while they remain within Canada. Conceding this point, still the complainant is now, and at the time of commencing this suit was, naturalized in Canada and permanently domiciled there. If, by removing from Canada, her status as to her citizenship should be changed, still the jurisdiction of this court would

not be divested. Where the jurisdiction of a United States circuit court depends upon the citizenship or alienage of the parties, the jurisdictional fact must exist at the time when the jurisdiction is first invoked, and after the jurisdiction has attached it does not become divested by subsequent changes of residence or alteration of the status of the parties as citizens or aliens."

In order to do away with the confusion which resulted from the lack of harmony among the decisions, it was enacted that "any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or if residing in the United States at the termination of the marital relation by continuing to reside therein." 34 U. S. Stat. at L. 1228, chap. 2534, Comp. Stat. 1913, § 3960.

MACKENZIE v. HARE, ante, 127, held that the statute controls the status of a native-born woman who marries an alien, and that by such marriage she loses her citizenship, and in this case the right of suffrage conferred on her by the Constitution of California, and this although married to an alien who has a permanent residence in this country. This decision was affirmed by the United States Supreme Court in (1915) 239 U. S. 299, 60 L. ed. —, 36 Sup. Ct. Rep. 106. That court not only rejected the contention of counsel that the act, in view of its history and purpose, should be confined in its application to the status of citizens "abroad," but also the contention that the act, if applied to a married woman who continues to reside in the United States, exceeds the power of Congress.

And in harmony with *MACKENZIE v. HARE* is *Re Martorana* (1908) 159 Fed. 1010, which held that an American woman who married an alien was incompetent to be a voucher for a petitioner for naturalization as, under the act of March 2d, 1907, she became an alien by marrying an alien, even though she continued to reside in the United States and had no intention of residing elsewhere.

In *Re Ciliberti* (1911) 20 Pa. Dist. R. 489, application for a liquor license, where remonstrants alleged that the petitioner had become an alien by marrying a foreigner, it was held that, as the husband of the petitioner had resided in this country three years, and had made a bona fide declaration of becoming a

citizen of the United States, he was not a foreigner within the meaning of the act of 1907, and so the petitioner, being an American citizen and intending so to remain, did not by her marriage lose her citizenship.

It will be observed that in both the

opinion of the state court and of the United States Supreme Court in *MACKENZIE v. HARE*, it is stated that there was no evidence that the husband intended to become a citizen, but there is otherwise no allusion to the point in the argument of the courts. J. H. B.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

HANOVER STAR MILLING COMPANY
v.
ALLEN & WHEELER COMPANY, Appt.

(208 Fed. 513.)

Trademarks — territorial limitation.

1. The doctrine that trademarks are without territorial limitation means only that the right to protection against simulation is not limited to the territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark; and not that a prior appropriation of a trademark entitles its appropriator to exclude others from using it, irrespective of the extent of his business territory.

For other cases, see Trademarks, I. in Dig. 1-52 N. S.

Same — right to enjoin use of trademark outside of complainant's business territory.

2. The prior appropriator of the words "Tea Rose" as a trademark for flour is not entitled to enjoin the use of the same trademark, which has been adopted in good faith by a manufacturer of flour with no knowledge that anyone else was using or had used those words in such a connection, in a territory in which it has never sold its "Tea Rose" brand, and where the name has come to mean defendant's flour, and nothing else. *For other cases, see Injunction, I. m, in Dig. 1-52 N. S.*

Injunction — review — misapplication of law.

3. Though an order granting or denying a preliminary injunction will not be disturbed except for an abuse of discretion, a proper discretion does not include the misapplication of the law to conceded facts.

For other cases, see Appeal and Error, VII. i, 5, in Dig. 1-52 N. S.

Trademark — right to injunction — complainant's use of other brands.

4. An injunction will not issue to protect a trademark where, so far as appears, goods sold by complainant in the same ter-

ritory under other brands are the same goods and of the same quality.

For other cases, see Injunction, I. m, in Dig. 1-52 N. S.

(April 21, 1913.)

A PPEAL by defendant from an order of the District Court of the United States for the Eastern District of Illinois, granting a preliminary injunction to restrain the infringement of a trademark. Reversed.

The facts are stated in the opinion.

Argued before Baker, Circuit Judge, and Anderson and Sanborn, District Judges.

Messrs. Henry Fitts, Edgar L. Clarkson, James E. Morrisette, and Louis Clements for appellant.

Messrs. L. O. Whitnel, H. L. Browning, Thomas E. Gillespie, and J. Fred Gilster for appellee.

Baker, Circuit Judge, delivered the opinion of the court:

This is an appeal from a preliminary injunction. Bill, affidavits, counter affidavits, and exhibits disclose the following facts:

Complainant (appellee), an Ohio corporation, owns and operates a flour mill at Troy, Ohio. Since 1872 it has used the words "Tea Rose" as a common-law trademark to designate one of its makes of flour. Though its bill and affidavits say generally that its trade extended throughout the United States, the only particulars exhibited disclose that its trade was within the territory north of the Ohio river. And the showing of defendant clearly establishes, on the present record, that complainant never had any trade in its "Tea Rose" brand in the southeastern territory comprising Georgia, Florida, Alabama, and Mississippi. In recent efforts to establish a trade in said southeastern territory, complainant has used only its "Trojan" and "Eldean Patent" brands. Complainant did not learn until in 1912, shortly before the bringing of this suit, that defendant had built up and was conducting an extensive trade in a "Tea Rose" brand of flour throughout said southeastern territory.

Defendant is an Illinois corporation, owning and operating a flour mill at Germantown, Illinois. Continuously since 1893

Note. — As to territorial extent of right in trademark or tradename used in limited locality where used by another in a different locality, see annotation following this case post, 143.
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defendant has used the words "Tea Rose" in marking it flour sacks. Beginning in 1904 defendant conducted an active campaign to build up a large trade in its "Tea Rose" flour in said southeastern territory, with the result that when this suit was filed defendant's sales of "Tea Rose" flour in that market amounted to more than \$150,000 a year. Defendant adopted "Tea Rose" as its mark in perfect good faith, with no knowledge that anyone else was using or had used those words in such a connection. In the flour trade in said southeastern territory the mark "Tea Rose" has come to mean defendant's flour, and nothing else.

If this were what is commonly known as an "unfair competition" case in distinction from a technical "trademark" case, complainant could not be given any relief for two reasons: (1) There is not and never has been any competition between the two flours in the same markets, hence no "unfair" competition, no palming off of defendant's flour as complainant's, no trespass committed or threatened upon complainant's established good will. And (2) if the words "Tea Rose" were open to common use, like the family name of the maker, or the geographical designation of the place of manufacture, or words descriptive of the grade of the goods, the make-ups of the two bags are so distinctive in color, lettering, wording, and names and addresses of makers, that, from a comparison alone, it could not be found that confusion would be likely to result. On the facts as now presented this case therefore turns on the correctness of complainant's insistence that, the words "Tea Rose" being proper for adoption as a technical trademark, and complainant having appropriated the mark and applied it to its flour, thereby complainant acquired the mark as its property, and had the right to exclude others from using it in the flour trade throughout the territory of the United States, irrespective of the questions of how far complainant's trade, reputation, and good will actually extended, and whether defendant had interfered or was threatening to interfere with complainant's established business.

Use of an arbitrary and distinctive mark to indicate the origin or ownership of articles of trade—the dealer's "commercial signature"—is very old. It may have begun because the general run of consumers of those ancient times could not have read the dealer's business name and address if he had written them upon his articles in the vernacular. And throughout, the question whether or not a trademark is property has often been mooted. Lord Langdale, in *Perry v. Truefitt*, 6 Beav. 73: "I own it does not

seem to me that a man can acquire a property merely in a name or mark." Vice Chancellor Sir W. Page Wood, in *Collins Co. v. Brown*, 3 Kay & J. 423: "It is now settled law that there is no property whatever in a trademark." Lord Herschell, in *Reddaway v. Banham*, [1896] A. C. 199, 65 L. J. Q. B. N. S. 381, 74 L. T. N. S. 289, 44 Week. Rep. 638, 25 Eng. Rul. Cas. 193: "I doubt myself whether it is accurate to speak of there being property in a trademark." On the other hand, the books are full of cases in which, by implication or direct statement, it is declared that trademarks are property. But the dispute is only apparent; the minds of the various courts are found to be in accord when the basis of the cause of action and the reason for granting injunctive relief are considered.

In *Perry v. Truefitt*, supra: "I think that the principle on which both the courts of law and of equity proceed in granting relief and protection in cases of this sort is very well understood. A man is not to sell his own goods under the pretense that they are the goods of another man. He cannot be permitted to practise such a deception, nor to use the means which contribute to that end. He cannot, therefore, be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

In *Collins Co. v. Brown*, supra: "A person may acquire a right of using a particular mark for articles which he has manufactured, so that he may be able to prevent any other person from using it, because the mark denotes that articles so marked were manufactured by a certain person; and no one else can have a right to put the same mark on his goods, and thus to represent them to have been manufactured by the person who originally used that particular mark. That would be a fraud upon the person who first used the mark in the market where his goods are sold. The simplest case is where a man puts his name and address on the goods which he manufactures; it would be unlawful for another manufacturer to put that name and address on his goods, because to do so would be to give to all the world the impression that they were manufactured by the person whose name and address they bore.

"The simple question in these cases is: Has the plaintiff, by the appropriation of a particular mark, fixed in the market where his goods are sold a conviction that the goods so marked were manufactured by him; and if so, and if no one else has been in the habit of using that mark, another man

has not the right to use that mark, so as to commit the fraudulent act of palming off his own goods as being the goods of the person who is known to have been in the habit of using it."

So it is evident that those who deny that trademarks are property agree with the others that complainants are entitled to protection in the use of trademarks. And both sides meet in finding that the cause of action is the injury done or threatened to a complainant's trade in which he has used the marks in question to designate the origin or ownership of his goods, and that the appropriate relief is to enjoin the defendant from using the marks to divert trade that otherwise would have gone or would go to the complainant. Whether trademarks are accurately called property or not, it is clear that some of the rights that are incident to property do attach to them; and therefore, just as courts sometimes state jurisdictional facts by describing corporation parties as "citizens," it may be convenient to speak of trademarks as "property," as a short way of expressing a limited truth that requires ampler means for a complete and accurate statement. And that limited truth is as compactly defined as anywhere else in *Weston v. Ketcham*, 51 How. Pr. 455: "There is no such thing as a trademark in 'gross,' to use that term by analogy. It must be 'appendant' of some particular business in which it is actually used upon or in regard to specific articles."

It is not the trademark, but the trade, the business reputation, and good will, that is injured; and the property or right in the trade is protected from injury by preventing a fraud-doer from stealing the complainant's trade by means of using the complainant's "commercial signature."

From these considerations of the nature of trademarks and the basis and scope of trademark suits, it would follow that complainant in this case has no property in the mark "Tea Rose," like property in its mill and wheat and flour; has no monopoly of the use of the mark, like the monopoly of a patent or a copyright; has no right at all to the mark "in gross," but a right only to the extent that the mark is "appendant" to its trade; has no basis of complaint except for injury to its business; and (since defendant has traded honestly in markets where complainant is unknown, and has neither committed nor threatened an injury to complainant's reputation and good will) has no cause of action in equity. But complainant nevertheless relies upon expressions to the effect that trademarks are without "territorial limitation," are the exclusive property of their first adopters throughout the sovereignty within which they were L.R.A.1916D.

anywhere applied by them to articles of commerce, and contends that the "unfair competition" cases in which the concurrent use of marks or names not susceptible of adoption as technical trademarks was permitted, provided fraud and deception were sufficiently guarded against, have no application. It is proper, therefore, to inquire: What is the nature of the differences between "unfair competition" and "technical trademark" cases? And in what sense, if any, is it true that trademarks have no territorial limitations?

When suits were based solely upon the fraudulent use of technical trademarks, very frequently the controversies were confined to the defense that the marks in question were not susceptible of exclusive appropriation. Under the influence of the fact that the upholding of that defense would defeat a "trademark" suit, courts have sustained as "trademark" cases many that to-day would probably be classed as "unfair competition." But complainants soon began to reply: If it be true that these marks have no primary signification that we are the originators or owners of the articles so marked, nevertheless consumers in the markets where our goods are sold have come to recognize them as ours by means of these marks, which have thus acquired a secondary meaning that points to us as originators or owners, and the defendant has no more equitable right to use that mark in its secondary meaning than any mark of primary meaning as a mask for robbing us of our trade. This reply called sharp attention to the foundation of the "trademark" suit and the reason for granting injunctive relief, and it was seen that, inasmuch as the trade, not the mark, was the property involved, and that the remedy was to stop the defendant's dishonesty in trade, it was immaterial whether the fraud-doer was filching trade by means of using others' marks in their primary meaning, or others' marks in their secondary meaning, or others' real names or nicknames, or simulated dress, or merely oral misrepresentations apart from all marks, names, or dress upon the articles. 38 Cyc. 680 and 756, and cases cited.

If a dealer adopts an arbitrary mark that is then meaningless in trade, his application of it to his article creates its only meaning. He is entitled to protection in the use of that meaning as appendant to his trade. If a dealer marks his shaving soap by the family name of "Williams," or his ale by the name of the village of "Stone," or his starch by the name of the hamlet of "Glenfield," his application of the name does not create its only meaning; but, if his trade creates a new meaning for

the name, then he is entitled to just as full protection in the use of that meaning as if that were the only one. Others may use the common word in its common meaning, but they cannot use it in the particular meaning created by the complainant.

In both the "trademark" and the "unfair competition" cases the ground of the action and the reason for the remedy are identical. They are all cases of unfair competition in trade, and the remedy is to tie the hands of the unfair trader. To the extent that differences exist, they pertain, not to the underlying principle, but to the methods and degrees of proof required to enforce the principle. If a dealer has adopted a true trademark, his trade has given the mark its only meaning, and he need produce no other proof respecting meaning. If he has applied to his article a mark or name that had an existing meaning, it is incumbent on him to establish the fact that his trade has added a new meaning that is exclusively appendant to his trade. If a defendant has put into a common market his articles bearing another dealer's technical trademark, no further proof of fraud is required. If a defendant has put into a common market his articles bearing a mark or name that had a common meaning, the complainant must show that the defendant is using the mark or name, not in its common meaning, but in its new meaning created by the complainant. In "trademark" cases, it is sometimes said that proof of fraudulent intent need not be made. This is hardly accurate; the truth being that proof of knowing use carries proof of intent. In "unfair competition" cases, it is sometimes said that proof of actual intent must be furnished. But if by this it is declared that to uncover the defendant's malevolent purpose is enough, the statement goes too far, for an intention to filch business, unaccompanied by any efficient means, is not actionable. The intent that makes the defendant liable is the intent that is found in his proven acts. Now, inasmuch as these differences, and any others we have ever noticed, relate to the methods and degrees of proof, and not to the nature and principle of the suit, it follows that "unfair competition" cases are applicable to the determination of the nature and principle of this suit. And in "unfair competition" cases, "of course there must be actual competition before there can be any unfair competition." 38 Cyc. 760, and notes. And since a "trademark" suit is an "unfair competition" suit in nature and principle, complainant in this suit has no standing because there is no competition.

"Unfair competition" cases are likewise L.R.A.1916D.

in point on the question: In what sense, if any, is it true that trademarks have no territorial limitations?

In *Levy v. Waitt*, 25 L.R.A. 190, 10 C. C. A. 227, 21 U. S. App. 394, 61 Fed. 1008, Levy was the elder adopter of the word "Blackstone" (geographical) as a brand for cigars. At the time of the suit Levy had a large trade in his Blackstone cigars in New York and the West, and Waitt had built up an extensive business in his Blackstones in New England. Waitt adopted the word "Blackstone" without knowledge of its previous use by Levy. Before Waitt established his New England trade, Levy had sold some of his Blackstone cigars in New England. But the sales were few and intermittent and resulted in no trade. To New England dealers and consumers the word Blackstone pointed to Waitt as the maker. Inasmuch as Levy had no property right in the brand except as appendant to his trade,—no property right beyond insisting that the public be not deceived to the injury of his trade,—he had no rights against Waitt in New England, whatever might be his rights in the use of that brand against Waitt or others elsewhere.

In *Cohen v. Nagle*, 190 Mass. 4, 2 L.R.A. (N.S.) 966, 76 N. E. 276, 5 Ann. Cas. 553, the complainant Cohen adopted the word "Keystone" to identify a brand of his cigars, and built up a large trade therein throughout New England. He believed that he was the originator of the word as applied to cigars; but, before his time, the word was used as a brand in the cigar business in the Middle and Western states. Defendant Nagle, after Cohen had established his New England trade, began marketing in New England Keystone cigars which he purchased from a manufacturer in Pennsylvania, where it was claimed that the manufacturer had a lawful right to use that word as a brand for cigars. The trial court protected Cohen by an injunction limited territorially to New England. On appeal the decree was affirmed, the majority holding that, inasmuch as Cohen had not taken a cross appeal, no question whether he had trade rights beyond the limits of his trade was before the court. Three justices expressed the view that Cohen's trade rights did not extend beyond the limits of his trade.

Carroll, in *Maryland*, and *McIlvaine*, in *New York* (C. C.) 171 Fed. 125, had each in his locality established a trade in Baltimore Club whisky. About thirty years later Carroll extended his trade to New York, and sought to stop McIlvaine on the ground that Carroll was the originator of the brand. It was held in substance that, conceding priority to Carroll, and independent-

ly of whether the brand was a technical trademark or merely a tradename, Carroll was not entitled to an injunction, because it was not Carroll's prior appropriation of the mark or name, but his prior appropriation of trade through the use of the mark or name, that was to be protected.

These cases indicate to us that it is true in a sense that trademarks are without territorial limitation; but not in the sense meant by complainant. The sense we perceive is one that goes back to the foundational purpose of the trademark suit. Since it is the trade, and not the mark, that is to be protected, a trademark acknowledges no territorial boundaries of municipalities or states or nations, but extends to every market where the trader's goods have become known and identified by his use of the mark. But the mark, of itself, cannot travel to markets where there is no article to wear the badge and no trader to offer the article.

Contrary to this view, certain cases are to be noticed.

In *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170, Derringer was a manufacturer of pistols at Philadelphia, Plate at San Francisco. This statement appears in the opinion: "The manufacturer at Philadelphia, who has adopted and uses a trademark, has the same right of property in it at New York or San Francisco that he has at his place of manufacture."

Yes, if Derringer was selling his pistols in the San Francisco market or any market where Plate was trying to palm off his pistols as Derringer's; and we find nothing in the report to show that such was not the fact.

In *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769, Johnson was the assignee of the property and good will, including a trademark, of a distillery business at Cincinnati. Kidd was causing whisky to be sold in New Orleans under the same trademark. Johnson obtained in the United States circuit court for the district of Louisiana an injunction, which was affirmed on appeal. The question was the validity and extent of the assignment of the trademark. Among other things, the court said: "That transfer was plainly designed to confer whatever right Pike possessed. It, in terms, extends the use of the trademark to Mills, Johnson, & Company, and their successors. Such use, to be of any value, must necessarily be exclusive. If others also could use it, the trademark would be of no service in distinguishing the whisky of the manufacturer in Cincinnati; and thus the company [the assignee of the business and the mark] would lose all the benefit arising from the reputation the whisky there manufactured

had acquired in the market. *The right to use the trademark is not limited to any place, city, or state, and therefore must be deemed to extend everywhere.* Such is the uniform construction of licenses to use patented inventions. If the owner imposes no limitation of place or time, the right to use is deemed co-extensive with the whole country, and perpetual."

Complainant lays stress on the sentence we have italicized. But the context shows, we think, that trademarks were not classed with patent monopolies; that the comparison was between the assignments, not the things assigned; that, inasmuch as Pike had given an unrestricted assignment, "the (assignee's) right to use the trademark is not limited to any place;" that, though the distillery was located at Cincinnati, the good will of the business and the trademark as the badge thereof could extend throughout the country; and that, since the thing to be protected was "the reputation the whisky there manufactured (at Cincinnati) had acquired in the market," an injunction should be granted to keep the pirate Kidd out of any market in which the whisky had acquired a reputation. And nothing in the reported case indicates that the genuine Pike's Magnolia Whisky was not sold and well known in the New Orleans market.

In *Griggs, C. & Co. v. Erie Preserving Co.* (C. C.) 131 Fed. 359, complainant was a wholesale grocer at St. Paul, dealing in canned goods under the common-law trademark, "Home Brand," adopted in 1889, and having a trade extending through Minnesota, Wisconsin, North and South Dakota, and Montana. Defendant later came into the same territory and undermined complainant's trade by use of the same mark. In 1877 Fry & Company, a Pennsylvania corporation, had adopted the identical mark, and in 1885 and 1892 registered the mark under the numbers 11,850 and 20,913. Complainant, learning this in 1900, took a license or limited assignment from Fry to use this registered trademark in said northwestern territory. The extent of Fry's trade is not stated; but, seemingly, complainant, in establishing its trade, had not come into collision with Fry. At any rate, Fry's license or assignment does not profess to convey to complainant Fry's business, reputation, and good will, or any part thereof; and throughout the territory in question the mark "Home Brand" pointed exclusively to complainant as producer. On the ground that Fry's license or assignment of the registered mark gave complainant an exclusive proprietary interest in Home Brand within said northwestern territory, the defendant was enjoined. The decree, we be-

lieve, is sustainable on the underlying principle of the trademark suit and on the analogies of the Blackstone, Keystone, and Baltimore Club cases. But, in looking to the decision as authority for complainant's proposition that a trademark has an existence independent of the trade to which it is appendant, we suggest that the registry statute does not purport to create a new right, but only to regulate a pre-existing right; that the regulation is confined to commerce with foreign nations and Indian tribes, and does not touch the interstate and intrastate commerce in which the parties to the suit were competing; and that the cases of *Kidd v. Johnson*, 100 U. S. 617, 25 L. ed. 769, and *Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co.* 37 C. C. A. 146, 95 Fed. 457, as we read them, are not authorities for the proposition that Fry's license or limited assignment of the registered trademark, unaccompanied by any transfer of business and good will, was effectual to give complainant a monopolistic right in Home Brand in interstate and intrastate commerce in said northwestern territory.

Hygeia Distilled Water Co. v. Consolidated Ice Co. (C. C.) 144 Fed. 139, is a case wherein the complainant, beginning in 1885, built up a trade in distilled water under the trademark "Hygeia" in the territory of New York and "other states" unnamed. In 1890 defendant innocently adopted the same trademark for its distilled water, and acquired a trade in "Pittsburgh and the surrounding territory." Each party remained in ignorance of the other and its doings until 1904, shortly before the start of the suit, when complainant's counsel notified defendant to quit. Down to that time, therefore, the mark "Hygeia" was a warrant to the consumers in Pittsburgh and vicinity that defendant was the producer of the water they wanted. The injunction against defendant consequently involves the proposition that complainant, by adopting the mark in 1885 and then applying it to its product in New York, acquired a monopoly of the mark, good for nineteen years and all the years, and dominant in the Pittsburgh market and all the markets of the United States, irrespective of the extent to which complainant had entered the markets. The opinion disposes of the question by saying that complainant's right to an injunction is not affected by "the fact that complainant has not, up to this time, extended its trade to the locality occupied by the respondent," and by citing *Derringer v. Plate*, 29 Cal. 296, 87 Am. Dec. 170, and *Hopkins, Trademarks*, § 13.

Derringer v. Plate has already been considered. In § 13 of *Hopkins* the general L.R.A.1916D.

statement is not made that a trademark has no territorial limitation, but, "unlike a patent, a trademark has no territorial limitation." If by this it is meant that a patent is a sovereign grant and has no force beyond the territorial limits of the sovereignty, while a trademark, which is of a different nature, is not restricted by the bounds of states or nations or continents, but goes wherever the trade to which it is appendant goes, the statement affords complainant no comfort. And that such was the intended meaning seems to be evidenced by the citation of *Collins Co. v. Cohen*, 3 Kay & J. 428, as supportive of the text. In that case complainant Collins was an American manufacturer who had a large trade and a high reputation not only in the United States, but also in various foreign countries, including Cuba and Australia; but no factory, no trade, no good will, no marks, registered or unregistered, in England. Defendant was a manufacturer at Sheffield, England, who was exporting his goods to Cuba and Australia and there undermining complainant's trade by using complainant's commercial signature. One of the defenses was that, as complainant had no trade rights in England that had been trespassed upon by the defendant in England, the case in England was not maintainable. It was also argued that there was nothing to show that the laws of Cuba and Australia did not allow traders to cheat others by palming off goods under forged commercial signatures. Vice Chancellor Wood replied: "I apprehend that every subject of every country, not being an alien enemy,—and even to an alien enemy the court has extended relief in cases of fraud,—has a right to apply to this court to have a fraudulent injury to his property arrested. And here the plaintiffs have the right—a right recognized, I imagine, everywhere in the world, or at least in every civilized community—of saying, 'We, being the manufacturers of certain goods, claim that another man shall not manufacture goods and put upon them our trademark and then pass them off as manufactured by us.'"¹

We find nothing in conscience or in reason or in persuasive precedents that should induce us to permit complainant to dominate the southeastern markets in question, where "Tea Rose" means defendant, and thus absorb or take over the valuable trade that defendant in good faith has built up

¹Compare *Richter v. Reynolds*, 8 C. C. A. 220, 17 U. S. App. 427, 59 Fed. 577; *Carlsbad v. Kutnow*, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 167; *Vacuum Oil Co. v. Eagle Oil Co.* (C. C.) 122 Fed. 105.

in virgin territory. If this may be done, then the trademark doctrine, which started out to prevent defendants from deceiving consumers to complainants' injury, has come to protect complainants in deceiving consumers to complainants' advantage, at the expense of defendants.

If the junior has not established his trade in good faith, or, if having appropriated certain markets in an honest belief, he should attempt to forestall the elder trader by hastening into markets the elder was arranging to occupy, it might be that equity would have no difficulty in recognizing an inchoate right in the elder to precedence and dominance, for honesty and fair dealing should always be a strong appeal to conscience; but no such questions are here, because, on the present record, defendant's honesty and fairness stand unquestionable.

Another route leads to the same destination: If complainant has trade rights irrespective of the existence of its trade, whence do they come? Monopolies are in derogation of common right; they are special privileges. Every lawful monopoly is a grant from the sovereign to a selected favorite, designated by person or by class. Ohio, complainant's sovereign state, has not by Constitution or statute granted it a monopoly of the use of the mark. The Federal government has constitutional authority to grant monopolies for limited times to inventors and authors; but complainant is neither, and a trademark may endure forever. How far Congress might go under the commerce clause (*Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *Sarrazin v. W. R. Irby Cigar & Tobacco Co.* 46 L.R.A. 541, 35 C. C. A. 496, 93 Fed. 624), it is needless to inquire, for the Federal statute is not concerned with the commerce in which these parties were engaged. So, if the monopoly here sought is the creature of law, it must be of the common law. First. Trade rights were not created by the common law. They are a part of man's natural rights. Man preceded the common law, which recognized, but did not create, the rights he was theretofore exercising. The most the common law did was to regulate their use, or, rather, to adopt and enforce the usages of honest commerce. If, because the common law recognizes and regulates a man's right to trade, it be claimed that the common law created the right, then the common law might also be called the author of his life, liberty, and happiness. And if it be said that a man has a "monopoly" in

his own life or liberty or trade, then the word is wrongly used. Second. But if a monopoly in a trademark is created or affirmatively granted by the common law, by what common law? We need not consider the mooted question whether, generally, there is a common law of the United States, or whether the common law administered by the Federal courts in the several districts is the common law of the respective states, for, with regard to the common law of trademarks, it is settled that the right does not arise under "the Constitution and laws of the United States." If it did so arise, the Federal courts, regardless of the citizenship of the parties, would have jurisdiction to protect the right throughout the territory of the United States. *Elgin Nat. Watch Co. v. Illinois Watch Case Co.* 179 U. S. 665, 45 L. ed. 365, 21 Sup. Ct. Rep. 270; *Warner v. Searle & H. Co.* 191 U. S. 202, 48 L. ed. 146, 24 Sup. Ct. Rep. 79. If not created by the Federal law, then the supposed monopoly must have been created by the law of Ohio; and, if so, complainant's monopoly created by that law can have no extraterritorial effect.

Though an order granting or denying a preliminary injunction will not be disturbed except for an abuse of discretion, a proper discretion does not include the misapplication of the law to conceded facts. *Winchester Repeating Arms Co. v. Olmsted*, 121 C. C. A. 615, 203 Fed. 493.

A further reason appears why complainant's showing did not justify the issuance of an injunction. Defendant proved that complainant's sales of flour in the territory in question were made under the brands "Trojan" and "Eldean Patent." If this was the same flour as its "Tea Rose," made from the same wheat and taken from the same flour bins, to permit complainant to add "Tea Rose" flour would simply tend to confuse trade in those markets, or only come to indicate a difference of grade that did not exist. *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 467, 37 L. ed. 1144, 1147, 14 Sup. Ct. Rep. 151. Complainant, necessarily knowing the whole truth respecting this matter, did not meet the situation exhibited by defendant.

The decree is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

Affirmed by the Supreme Court of the United States, March 6, 1916, in 240 U. S. 403, 60 L. ed. —, 36 Sup. Ct. Rep. 357.

Annotation—Territorial extent of right in trademark or tradename used in limited locality where used by another in a different locality.

This note supplements a note on the same subject appended to *Eastern Outfitting Co. v. Manheim*, 35 L.R.A.(N.S.) 251.

The rule stated in the earlier note that a right may be acquired in different localities by different persons to use the same trademark or tradename for the same purpose finds support in the holding of *HANOVER STAR MILL CO. v. ALLEN & W. Co.* ante, 136, which was affirmed by the Federal Supreme Court (1916) 240 U. S. 403, 60 L. ed. —, 36 Sup. Ct. Rep. 357. In the latter court the rule is stated that "into whatever markets the use of a trademark has extended, or its meaning has become known, there will the manufacturer or trader whose trade is pirated by an infringing use be entitled to protection and redress. But this is not to say that the proprietor of a trademark, good in the markets where it has been employed, can monopolize markets that his trade has never reached, and where the mark signifies not his goods, but those of another." In further amplification of this latter statement, in the former part of the opinion it is said that "where two parties independently are employing the same mark upon goods of the same class, but in separate markets, wholly remote the one from the other, the question of prior appropriation is legally insignificant; unless, at least, it appear that the second adopter has selected the mark with some design inimical to the interests of the first user, such as to take the benefit of the reputation of his goods, to forestall the extension of his trade, or the like."

The court reversed on this point *Met-calf v. Hanover Star Mill Co.* (1912) 122 C. C. A. 483, 204 Fed. 211, a case involving the same trademark as that involved in the case under annotation. Protection to the trademark was denied by the circuit court of appeals on the ground that the plaintiff had no exclusive right thereto, and the defendant was not guilty of unfair competition. The Federal Supreme Court on this point held that, as against the defendant in that case, the plaintiff was entitled to relief on the ground of unfair competition.

In disposing of the general question of the territorial scope of trademarks, Mr. Justice Holmes, in a concurring opinion in the Federal Supreme Court case referred to, points out that a trade-

mark or tradename in territorial scope should be state wide, but that it should not extend beyond the state lines except as it receives recognition in other states. Hence, if a mark has been used and given a reputation in one state, that state may well say that those who have spent their money innocently in giving it its local value are not to be defeated by proof that others have used the mark earlier in another jurisdiction more or less remote.

The doctrine that a trademark will be protected only to the extent of territory where it has been used was applied in *Thomas J. Carroll & Son Co. v. McIlvaine & Baldwin* (1910) 105 C. C. A. 314, 183 Fed. 22, where the original appropriator of a trademark for goods sold in Baltimore and vicinity, on the ground of laches, was denied the right to enjoin the use by another of the same trademark on a similar class of goods in the city of New York and vicinity, where the subsequent appropriation was in good faith and had been applied to the goods for some years before the proceeding in question was taken. This was also the doctrine of *B. Payn's Sons Tobacco Co. v. Payette* (1914) 86 Misc. 276, 149 N. Y. Supp. 183, affirmed without opinion in (1915) — App. Div. —, 155 N. Y. Supp. 1095, wherein the court refused to enjoin the use by defendant of a trademark on cigars in a different locality from that in which the plaintiff had used it to designate his brand of cigars. Both of these localities were within the state.

And in *Dominion Flour Mills Co. v. Morris* (1912) — Ont. —, 2 D. L. R. 830, a plaintiff was denied the right to protection of a trademark to designate its product, where the same mark was used in other sections of the country by other manufacturers to designate a similar product, without any intention of passing off the same as the product of the plaintiff, and with an equal claim with the plaintiff to an independent right of user.

And in further support of this doctrine see *C. A. Briggs Co. v. National Wafer Co.* (1913) 215 Mass. 100, 102 N. E. 87, Ann. Cas. 1914C, 926, an unfair competition case, wherein the court refused to protect a trademark beyond the extent of territory in which the plaintiff had actually used it to designate his product. And see also *W. A. Gaines &*

Co. v. Rock Springs Distilling Co. (1915) — C. C. A. —, 226 Fed. 531, wherein the two conflicting theories as to trademark protection as to territorial scope are stated, but the court finds it unnecessary to determine which of them is the correct doctrine.

In a recent tradename case, *Kaufman v. Kaufman* (1916) 223 Mass. 104, 111 N. E. 691, in denying relief to one retailer against the use of his tradename by another retailer in a different section of the same state, the doctrine is stated that "the plaintiff is entitled to relief only on the ground of unfair trade competition or interference with his established rights. The tradename and symbols of the plaintiff cannot extend into regions where his goods are not sold, where he has no customers, and where he has no trade. There can be no recovery unless it appears that there has been a wrongful appropriation by the defendant of trade which belonged to the plaintiff. The mere use of a tradename which one person has found highly successful in bringing his goods to the favorable attention of the public in one business territory, by another person in another business territory, constitutes no actionable wrong. Actual or probable deception of the public to the harm of the plaintiff is the basis of the action. There

can be no unfair competition unless the plaintiff is actually a rival for the trade which the defendant secures."

In *Pfugh v. Eagle White Lead Co.* (1911) 107 C. C. A. 659, 185 Fed. 769, writ of certiorari denied in (1911) 220 U. S. 615, 55 L. ed. 610, 31 Sup. Ct. Rep. 719, a name used as a trademark and tradename was denied protection as to territory in which the defendant had been the first user as a trademark for similar goods. The court said that the plaintiff did not have the exclusive right to the use of the trademark, owing to its use by others in different sections of the country, and that having acquiesced for years in its use by other manufacturers on a similar product, it was estopped to assert the right to the exclusive use of the word as a trademark or tradename.

On this point attention is called to the opinion of the Federal Supreme Court, already referred to, wherein it is said that the rule that property in a trademark is not limited in its enjoyment by territorial bounds, but may be asserted and protected wherever the law affords a remedy for wrongs, is true in a limited sense, "but the mark of itself cannot travel to markets where there is no article to wear the badge and no trader to offer the article." A. G. S.

MINNESOTA SUPREME COURT.

WILLIAM H. JACOBSON, Resp.,

v.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Appt.

(— Minn. —, 156 N. W. 251.)

Trial — special issues — discretion.

1. The matter of submitting special issues to a jury in an action at law rests in the sound discretion of the trial court; and the discretion extends also to the form and substance of the special issues so submitted. There was no abuse of the discretion in this case.

For other cases, see *Appeal and Error*, VII i, 6, in *Dig. 1-52 N. S.*

Headnotes by BROWN, Ch. J.

Note. — As to effect of representation or undue influence by a physician to avoid release of liability in a cause of action for injury negligently inflicted, see notes to *Viallet v. Consolidated R. & Power Co.* 5 L.R.A.(N.S.) 663, and *Haigh v. White Laundry Co.* 50 L.R.A.(N.S.) 1091.

Generally, as to avoidance of release of claim for personal injuries, for mistake, see annotation to *McIsaac v. McMurray*, L.R.A. 1916B, 776. L.R.A.1916D.

Rescission — release — fraud.

2. A settlement and release of a cause of action induced and procured by false representations of material facts, the falsity of which was unknown to the person making them, may be rescinded and avoided, though there was no fraudulent or other wrongful intent to deceive or defraud.

For other cases, see *Release*, III. in *Dig. 1-52 N. S.*

Same — statements by physician.

3. Plaintiff was injured while a passenger on one of defendant's trains. Soon after defendant's physician made a physical examination of plaintiff's person, and, to induce or cause him to act thereon, represented that he had suffered no serious injury, had no broken bones, and would recover in the course of two or three weeks. It is held that the representations were material, plaintiff had the right to rely thereon in effecting a settlement with defendant, and, since the representations were untrue in fact, though the falsity was not known to the physician at the time, and were not made with intent to deceive, plaintiff had the right to rescind the settlement. Such facts constitute fraud in law.

For other cases, see *Release*, III. in *Dig. 1-52 N. S.*

Appeal — instructions.

4. The instructions of the trial court up-

on the question of expert opinion evidence held not prejudicial to the rights of defendant.

For other cases, see *Appeal and Error*, VII. m, 4, a, (4), in *Dig. 1-52 N. S.*

(January 28, 1916.)

APPEAL by defendant from an order of the District Court for Blue Earth County denying a new trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. **Affirmed.**

The facts are stated in the opinion.

Messrs. C. J. Laurisch and Webber & Lees, for appellant:

The special findings submitted by the court furnished absolutely no information, and where special findings are submitted they should be so framed as to constitute a finding of fact which would support a recovery.

Kerkhof v. Atlas Paper Co. 68 Wis. 674, 32 N. W. 766; Indiana, B. & W. R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121; 20 Enc. Pl. & Pr. 296; 17 Enc. Pl. & Pr. 304-311; Clegg v. Waterbury, 88 Ind. 21; Cole v. Boyd, 47 Mich. 98, 10 N. W. 124; Beecher v. Galvin, 71 Mich. 391, 39 N. W. 469; Mechanics' Bank v. Barnes, 86 Mich. 632, 49 N. W. 475; Benton v. St. Louis & S. F. R. Co. 25 Mo. App. 155.

The charge to the jury upon the question of expert opinion evidence was prejudicial to defendant's rights.

Thomas v. State, 40 Tex. 66; Jarrett v. Jarrett, 11 W. Va. 627; Pitts v. State, 43 Miss. 472; Louisville, N. O. & T. R. Co. v. Whitehead, 71 Miss. 451, 42 Am. St. Rep. 472, 15 So. 800; Chandler v. Thompson, 30 Fed. 38; Chandler v. Barrett, 21 La. Ann. 58, 99 Am. Dec. 701; Gustafson v. Seattle Traction Co. 28 Wash. 227, 68 Pac. 721; Tinney v. New Jersey S. B. Co. 12 Abb. Pr. N. S. 1; Lawson, Expert & Op. Ev. p. 230; Choice v. State, 31 Ga. 424; Cohen v. Riesenbergh, 69 Misc. 599, 126 N. Y. Supp. 77; Atchison, T. & S. F. R. Co. v. Thul, 32 Kan. 255, 49 Am. Rep. 484, 4 Pac. 352.

An intent to deceive is an essential element of deceit; a false representation is not actionable unless it was made with a fraudulent intent.

Wilder v. DeCou, 18 Minn. 470, Gil. 421; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Kelly v. Pioneer Press Co. 94 Minn. 448, 103 N. W. 330; Faribault v. Sater, 13 Minn. 223, Gil. 210; Riggs v. Thorpe, 67 Minn. 217, 69 N. W. 891.

Messrs. F. W. Root and Nelson J. Wilcox also for appellant.

Messrs. S. B. Wilson, J. W. Schmitt, and H. L. Schmitt, for respondent:

A party is liable for fraud or deceit if L.R.A.1916D.

a false representation is made of an existing material fact that may be known, knowing such representation to be false, with intention to induce the one to whom such representation is made to rely upon it and to act upon such reliance, and such person to whom such representation is made acting with reasonable prudence is deceived by such fraud, and is induced to act upon such representation to his pecuniary damage.

Marple v. Minneapolis & St. L. R. Co. 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D, 1082; Brooks v. Hamilton, 15 Minn. 26, Gil. 10; Wilder v. DeCou, 18 Minn. 470, Gil. 421; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Martin v. Hill, 41 Minn. 337, 43 N. W. 337; Bullitt v. Farrar, 42 Minn. 8, 6 L.R.A. 149, 18 Am. St. Rep. 485, 43 N. W. 566; Haven v. Neal, 43 Minn. 315, 45 N. W. 612; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Hedin v. Minneapolis Medical & S. Inst. 62 Minn. 146, 30 L.R.A. 417, 54 Am. St. Rep. 628, 64 N. W. 158; Riggs v. Thorpe, 67 Minn. 217, 69 N. W. 891; Haigh v. White Way Laundry Co. 164 Iowa, 143, 50 L.R.A.(N.S.) 1091, 145 N. W. 473; Texas C. R. Co. v. Neill, — Tex. Civ. App. —, 159 S. W. 1180; Tatman v. Philadelphia, B. & W. R. Co. — Del. —, 85 Atl. 716; Missouri, K. & T. R. Co. v. Reno, — Tex. Civ. App. —, 146 S. W. 207; Carroll v. United R. Co. 157 Mo. App. 247, 137 S. W. 303; Missouri, K. & T. R. Co. v. Maples, — Tex. Civ. App. —, 162 S. W. 426; St. Louis & S. F. R. Co. v. Reed, 37 Okla. 350, 132 Pac. 355; St. Louis, I. M. & S. R. Co. v. Hambright, 87 Ark. 614, 113 S. W. 803; Bradley v. Tolson, 117 Va. 467, 85 S. E. 466; Hilligas v. Kuns, 86 Neb. 68, 26 L.R.A.(N.S.) 284, 124 N. W. 925, 20 Ann. Cas. 1124.

It was not necessary as a condition precedent to the bringing of this action for Jacobson to tender back the \$150.

Marple v. Minneapolis & St. L. R. Co. 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D, 1082; Merrill v. Pike, 94 Minn. 186, 102 N. W. 393, 17 Am. Neg. Rep. 582; Rase v. Minneapolis, St. P. & S. Ste. M. R. Co. 118 Minn. 437, 137 N. W. 176; Valley v. Crookston Lumber Co. 128 Minn. 387, 151 N. W. 137; Reddington v. Blue, 168 Iowa, 34, 149 N. W. 933; Woods v. Wikstrom, 67 Or. 581, 135 Pac. 192; St. Louis & S. F. R. Co. v. Richards, 23 Okla. 256, 23 L.R.A.(N.S.) 1032, 102 Pac. 92; Carroll v. United R. Co. 157 Mo. App. 247, 137 S. W. 303.

Under the evidence, the trial court was more than justified in instructing the jury as to the weight to be given to the expert testimony as it did.

Moratzky v. Wirth, 74 Minn. 146, 76 N. W. 1032; State v. James, 123 Minn. 487, 144 N. W. 216; Ball v. Skinner, 134 Iowa,

298, 111 N. W. 1022; *Morrow v. National Masonic Acci. Asso.* 125 Iowa, 633, 101 N. W. 468; *Hull v. Detroit United R. Co.* 158 Mich. 682, 123 N. W. 571; *Bird v. Hart-Parr Co.* 165 Iowa, 542, 146 N. W. 74; *Nordyke & M. Co. v. Whitehead*, — Ind. —, 106 N. E. 867; *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807.

Defendant's request for an instruction that unless the jury found that the plaintiff sustained a fracture of bones, they would have to return a verdict for the defendant, was properly refused.

Marple v. Minneapolis & St. L. R. Co. 115 Minn. 262, 132 N. W. 333, Ann. Cas. 1912D, 1082.

Whether or not special findings shall be submitted to a jury in a given case is purely and conclusively within the discretion of the trial court.

Morrow v. St. Paul City R. Co. 74 Minn. 480, 77 N. W. 303.

A special verdict should not require the jury to write out the evidence.

22 Am. & Eng. Enc. Law, 995; *Ohlweiler v. Lohmann*, 88, Wis. 75, 59 N. W. 678; *Schumaker v. Heinemann*, 99 Wis. 251, 74 N. W. 785; *J. I. Case Plow Works v. Niles & S. Co.* 107 Wis. 9, 82 N. W. 568.

Brown, Ch. J., delivered the opinion of the court:

Action for personal injuries in which plaintiff had a verdict, and defendant appealed from an order denying a new trial.

Plaintiff was a passenger upon one of defendant's accommodation trains running between Wells and Mankato. The train was wrecked and plaintiff was injured. The accident occurred on July 5, 1913, and plaintiff was removed to a hospital at Mankato, where he was given treatment by the defendant's local physician. On July 7th, two days after the injury, and when plaintiff was still at the hospital, a claim agent representing defendant called upon him and effected a settlement, paying to plaintiff in full for his injuries \$150. Plaintiff signed and delivered the usual formal release. It was represented to him at the time of the settlement by the company physician, and also by the claim agent, that his injuries were not serious, and that he would fully recover within three or four weeks. Within a few days thereafter plaintiff left the hospital and returned to his home at Mapleton, some 25 miles from Mankato. It appears that he was unable to walk unassisted, and defendant's physician supplied him with a pair of crutches. He thereafter occasionally returned to Mankato for further treatment, but, not recovering as rapidly as represented by the physician, he applied, on August 4th, to other physicians

for relief. A thorough examination was made, an X-ray photograph taken of his back and hips, and the new physicians discovered what they termed an impacted fracture of the neck of the femur of the left leg, an injury to the sacroiliac joint, a curvature of the spine, and a shortening of one of the legs. Thereupon he brought an action against the company to recover for his injuries, claiming that the settlement and release were obtained by fraud. That action was transferred to the Federal court, where, after trial, it was dismissed without prejudice, and thereupon plaintiff brought the present action, joining therein the engineer and conductor of the train as parties defendant. When the cause was called for trial, defendant company conceded liability for the injuries sustained by plaintiff, but claimed that settlement therefor had been made, and the sole issue litigated, aside from the nature and character of the injuries and the question of damages, was whether the release was obtained by fraud. The action was dismissed as to the individual defendants.

The assignments of error challenge the ruling of the court in refusing to submit to the jury certain special questions in the language and form requested by defendant, and certain of its instructions and refusals to instruct the jury. We dispose of these in their order.

1. At the conclusion of the trial, counsel for defendant requested the court to submit to the jury certain special questions embodying the issue whether either the claim agent or the defendant's physician at the time of the settlement made any false and fraudulent statements as to the character of plaintiff's injuries with intent to deceive and defraud him, and if such statements were found by the jury to have been made to indicate what they were. The court refused to submit the question in the form presented, but did submit two distinct questions embodying the substance of those presented by the defendant with the exception that the intent to deceive was eliminated, and the jury was not required to state what the false statements were. In point of substance the special question submitted called for the general conclusion whether any false and fraudulent statements were made to bring about the settlement. The contention is that, though it was discretionary with the court to submit or not submit special issues to the jury (*Morrow v. St. Paul City R. Co.* 74 Minn. 480, 77 N. W. 303), having decided to submit them, they should have been so framed as to require the jury to state in their answer the facts called for by the questions proposed by defendant, and that, since the questions in fact submitted

called only for the general conclusions of the jury, there was an abuse of discretion entitling defendant to a new trial. In this we do not concur. As conceded by counsel, the question whether special issue shall be submitted to a jury in a case of this kind rests wholly in the discretion of the court. The matter so resting with the trial court, it necessarily follows that the form of the question or issue to be so submitted rests also in its discretion, in the exercise of which in this case we discover no substantial reasons for serious criticism. 11 Enc. Pl. & Pr. 667. Decisions from courts of those states where by statute special issues are required to be submitted to the jury are not in point.

2. Defendant requested the court to charge the jury that fraud and intention to deceive were necessary ingredients of plaintiff's cause of action in so far as the validity of the release was concerned, and that, unless the jury found that the statements made to plaintiff at the time of the settlement, by the physician and claim agent, as to the nature and character of plaintiff's injuries, were made with a knowledge of their falsity and with intent to deceive plaintiff, the release could not be set aside, and plaintiff must fail in the action. The court refused to so instruct, and it may be conceded that the general charge did not include the element of intentional deception.

The physician of the company testified that soon after plaintiff was taken to the hospital he made a careful examination of his body with a view of determining the nature and character of his injuries, as a result of which he found no broken bones, and that the only injury suffered by plaintiff was in the form of bruises, from which he would soon recover. At the time of the accident plaintiff was seated in the accommodation coach of the train. This was derailed, and for some distance passed over the cross-ties, and violently bumped up and down until it came to a stop. Whatever injuries plaintiff received came from this violent bumping as the car passed over the ties. A fellow passenger received a dislocated ankle. The theory of plaintiff's case was that this violence resulted in an impacted fracture of the femur and dislocation of the sacroiliac joint. The company's physician did not discover either injury, if either existed, by his examination. He advised the claim agent that plaintiff had no serious injury, and plaintiff testified that he stated to him at the time he introduced the claim agent: "He told me I was just bruised a little; that I would be well in ten days or two weeks, and capable of going to work; that I didn't have any

broken bones; and that I had better go ahead and settle."

The physician denied having advised plaintiff to go ahead and settle with the claim agent, though he admitted that he stated to plaintiff that he had no broken bones, had been bruised only, and would be well and able to go to work in two or three weeks. The same representations were made by the claim agent. Plaintiff further testified that in making the settlement he relied upon such statements and representations, and believed the same to be true, and the record will not justify the conclusion that he was chargeable with negligence in acting thereon.

Defendant's contention is that to entitle plaintiff to rescind the release it was incumbent upon him to show that he was induced to execute it by the intentional deception of the physician and claim agent, and that the court erred in not so charging the jury. We do not sustain the point. It may be conceded that an essential element of the old common-law action of deceit is intentional fraud and deception, and that, as a general rule, no recovery can be had in such an action where intentional deception does not appear. And there are many authorities holding to a strict application of the rule, and as requiring an affirmative showing of an intent to defraud and deceive in all cases where relief is sought on the ground of fraudulent representations. As thus strictly applied, much injustice has resulted, and the courts have ingrafted upon the rule modifications and qualifications, and the present trend of judicial opinion does not require in all cases a showing of an evil intent. The injury suffered by the defrauded party may be just as great whether the fraud was intentional or unintentional. So in actions the result of which places the parties in statu quo, restoring to each what he parted with, equity will grant relief where the representations which induced and brought about the contract were, in fact, false, though made in good faith; the additional requirement being that the representations must appear to have been material, not mere opinion, and of a character to justify reliance thereon by the defrauded party. In such cases the courts grant relief either upon the ground of fraud in law, sometimes spoken of as constructive fraud, or mutual mistake. It is not material whether it be termed fraud in law or mistake; the result is the same in either case. The rule now often applied is tersely summed up by the Iowa supreme court in the statement that "a party cannot falsely assert a fact to be true and induce another to rely upon such statement to his prejudice, and thereafter hide behind a claim that he

did not know it was false at the time he asserted it." *Haigh v. White Way Laundry Co.* 164 Iowa, 143, 50 L.R.A.(N.S.) 1091, 145 N. W. 473.

The rule has frequently been stated and applied in our former decisions, both in actions for a rescission of the contract and where the alleged fraud has been presented as defensive matter. *Dunnell's Dig.* 3819; *Drake v. Fairmont Drain Tile & Brick Co.* 129 Minn. 145, 151 N. W. 914; *Brooks v. Hamilton*, 15 Minn. 26, Gil. 10; *Hedin v. Minneapolis Medical & S. Inst.* 62 Minn. 146, 35 L.R.A. 417, 54 Am. St. Rep. 628, 64 N. W. 158; *Busterud v. Farrington*, 36 Minn. 320, 31 N. W. 360. It was held in *Bullitt v. Farrar*, 42 Minn. 8, 6 L.R.A. 149, 18 Am. St. Rep. 485, 43 N. W. 566, that it is a fraud for one to make an unqualified representation not knowing whether it is true or false, and that an unqualified statement amounts to an affirmation as of one's own knowledge. Numerous decisions in other states support the same doctrine. 14 Am. & Eng. Enc. Law, 94; *Holcomb v. Noble*, 69 Mich. 396, 37 N. W. 497; *Johnson v. Gulick*, 46 Neb. 817, 50 Am. St. Rep. 629, 65 N. W. 883; *Pattison v. Seattle*, R. & S. R. Co. 55 Wash. 625, 104 Pac. 825; *Carroll v. United R. Co.* 157 Mo. App. 247, 137 S. W. 303; *Missouri, K. & T. R. Co. v. Maples*, — Tex. Civ. App. —, 162 S. W. 426; *Kathan v. Comstock*, 28 L.R.A.(N.S.) 201, and cases cited in note (140 Wis. 427, 122 N. W. 1044). In the case at bar the physician representing defendant made a physical examination of plaintiff a short time after the accident. Upon the examination so made he represented to plaintiff the facts heretofore stated, which were repeated by the claim agent. The jury was fully justified in finding that the representations were, in fact, untrue, though not intentionally so, and that they were made to induce a settlement of plaintiff's claim for damages. Plaintiff relied, and had the right to rely, upon the representations, and the jury properly found that he was induced thereby to make the settlement and sign the release. This brings the case within the rule of the authorities cited. The representations, aside from the statement that no bones were broken, were of matters of substance, and not the mere opinion of the physician. *Marple v. Minneapolis & St. L. R. Co.* 115 Minn. 262, 132 N.W. 333, Ann. Cas. 1912D, 1082. The trial court was therefore not in error in refusing the requested instructions that an intention to deceive was an essential to plaintiff's right to recover, nor was there error in the refusal of the request to the effect that, if the jury found that plaintiff suffered no broken bones, he could not recover.

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3. Defendant complains of certain of the instructions of the court relative to the expert opinion evidence. While the court unnecessarily extended its remarks upon this subject beyond what the character of the experts or nature of the case would seem to have justified, yet we find no sufficient reason for holding that defendant was substantially prejudiced thereby. The remarks of the court were general, and applied with equal force to the medical experts called by both parties. The case would perhaps be different had defendant produced the only experts, and upon their opinions based its defense. Plaintiff's case rested largely upon the opinions of such experts, and there was, as usually occurs in such a case, a square conflict in the opinions of those called by plaintiff and those called by defendant. And when the court said to the jury that they were not to accept the opinions of such witnesses, based upon an assumed state of facts, and not upon a direct knowledge of the facts, "unless it comports and agrees with your common sense and is consistent with the facts proven in the case, as such facts are determined by you from a fair preponderance of all the evidence in the case," the court went no further in point of substance than did the charge of the court in *Moratzky v. Wirth*, 74 Minn. 146, 76 N. W. 1032, where the instructions were held not error. Plaintiff was injured at the time the train upon which he was a passenger was wrecked, and of this there is no controversy. The nature and character of those injuries presented the principal inquiry on the trial. The physicians called to treat him after he left the hospital and the care of defendant's physician thoroughly examined him a month or six weeks thereafter, took an X-ray of his hip and back, and discovered what they declared was an impacted fracture of the femur, a dislocation of the sacroiliac joint, and a curvature of the spine. They produced the photograph at the trial and pointed out the fracture, and expressed the opinion that all the injuries resulted from the wreck. After quitting the hospital plaintiff returned to his home, and was about his place doing such work as he was able to do, but he did not recover, and there was at the trial no question but that he is now permanently crippled. The physicians called by defendant also examined plaintiff, and expressed the opinion that the injuries complained of were the result of disease, tubercular in character, and not the result of the wreck. They found no evidence of an impacted fracture of the femur, and were of opinion that, if plaintiff suffered such a fracture, he could not have gone about his work on the farm; that it would

have been impossible for him to do so. Plaintiff's experts did not agree to this, and expressed opinions to the contrary. Plaintiff had for some time prior to the accident suffered from some ailment in his left side, and an operation had been performed to locate the trouble, but the evidence tends to show that he had recovered from that operation before receiving the injury here complained of. During the time he was suffering from the trouble in his side, in walking about he favored the left leg, and to this defendant's physician attributed the difficulty with his spine now complained of, and which plaintiff's experts characterized as a curvature. The doctors were not agreed upon this question. Defendant's physician described it as a crooked spine brought about by the act of plaintiff in favoring his left leg, as just stated. But we need not pursue the subject. The testimony of the different physicians, those called by both parties, was opinion evidence in the main,

and it was for the jury to accept that which satisfied them of the true situation as disclosed by the whole evidence in the case. This was, in substance, what the court said to the jury. And though the court in some respects went beyond what the case required, we conclude that there was no substantial prejudice to the rights of defendant.

4. The other assignments do not require extended mention. There was no unreasonable delay in repudiating the settlement after discovery of the fraud, and the court properly refused to instruct as requested by defendant. If the present condition of plaintiff resulted from the injuries received at the time the train was wrecked, a question of fact, the amount awarded by the jury is within reasonable limits, and not excessive. The evidence upon this, as upon all other issues in the case, presented questions of fact, and we discover no sufficient reason for disturbing the verdict.

Order affirmed.

NORTH DAKOTA SUPREME COURT.

WALTER A. McDONALD, Resp.,
v.

M. B. FINSETH, Impleaded, etc., Appt.

(32 N. D. 400, 155 N. W. 863.)

Contract — action by third person.

1. When one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, even though the consideration does not run directly from him, and even though at the time he knew nothing of the promise to pay him.

For other cases, see Parties, I. a, 2, b, in Dig. 1-52 N. S.

Mortgage — assumption — deficiency.

2. The grantee of mortgaged premises who purchases subject to a mortgage which he assumes and agrees to pay will be held liable for a deficiency arising on a foreclosure and sale, even though his grantor is not personally liable for the payment of the mortgage.

For other cases, see Mortgage, III. in Dig. 1-52 N. S.

Same — amount in excess of advance.

3. Where A agrees to loan B \$2,000, and takes a note and mortgage therefor, and at the time fails to pay B the full sum of \$2,000 on account of a shortage of funds, and before he can pay the same the mortgagor sells the property to C, subject to

said mortgage, though no agreement to pay or assume the same is given in such deed, and A and B then agree that A shall collect the full sum of \$2,000 on the mortgage when it falls due, and shall pay the balance over what he had actually paid to B, and which is \$600, when the money is so collected, and gives to B a written obligation binding himself to pay the said sum of \$600 and to collect the same, and the land is afterwards sold by C to subsequent grantees, who specifically agree to assume and pay the said mortgage, A may, on foreclosure of the mortgage against the last grantee, collect the full sum of the said mortgage note, namely, \$2,000.

For other cases, see Mortgages, III. in Dig. 1-52 N. S.

Joint tenants — knowledge of contents of deed.

4. A cotenant will not be allowed to assert ignorance of the terms of a deed by which he, together with his cotenant, assumes and agrees to pay a mortgage debt on the land on the ground that the deed was not delivered to him, but to his cotenant, and he has had no knowledge of its terms, and his cotenant had no authority to agree to such assumption, when, with full knowledge of the fact that the same had been received and had been recorded, he remains in possession of the premises, together with his cotenant, for nearly three years without questioning the terms of the deed or the authority of his cotenant to receive the same, and himself pays interest on the indebtedness secured by the mortgage which was so assumed during such time.

For other cases, see Estoppel, III. g, 2, a, in Dig. 1-52 N. S.

Headnotes by the COURT.

Note. — As to right of mortgagee to enforce purchaser's promise to pay the mortgage where the grantor, or promisee, was not himself liable, see annotation following this case, post, 154.
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(December 14, 1915.)

APPEAL by defendant Finseth from a judgment of the District Court for Burleigh County in plaintiff's favor in an action brought to foreclose a mortgage. Affirmed.

Statement by Bruce, J.:

This is an action for the foreclosure of a mortgage and for a deficiency decree, and comes before us for a trial de novo after judgment being rendered in the trial court in favor of the plaintiff. The question at issue is whether the defendant M. B. Finseth assumed the mortgage, and, even if he did, whether the present plaintiff, Walter A. McDonald, can hold him personally liable for the deficiency decreed against him. The mortgage which the plaintiff seeks to foreclose was executed on January 31, 1910, by one Charles H. Woodburs and wife, and was given to secure a note of the face value of \$2,000. It appears, however, that the amount which was actually paid to the Woodburys was only \$1,400, the explanation for this transaction being that at the time of the loan McDonald did not have the full \$2,000, and paid the Woodburys only \$1,400; that shortly thereafter, and on March 4, 1911, and before the payment of the balance, the Woodburys transferred the property to one Ernest Engel, and that it was therefore agreed that McDonald should collect the whole \$2,000, and after he had collected the same should pay the \$600 to them, the plaintiff testifying that he had executed an obligation which bound him to pay this balance and to collect the amount. This deed from the Woodburys to Ernest Engel was for a recited consideration of \$10,525. There was in it no mention of the plaintiff's mortgage, except a covenant that "the premises are free from all encumbrances excepting a mortgage of \$2,000 to Walter A. McDonald." There was no specific agreement to pay the mortgage on the part of the grantee, and there were the usual covenants of title and of quiet possession. No parol evidence was introduced on the trial to show any oral or collateral agreement to pay this mortgage, or to show that its payment constituted part of the purchase price. Later, and on March 27, 1911, Engel and his wife executed a deed of the premises for the alleged consideration of \$10,500 to C. H. Langley and E. J. Langley. This deed contained the provision that "the premises are free from all encumbrances except a mortgage for \$2,000 which second parties (the Langleys) assume and agree to pay with accrued interest from February 1, 1911."

Later, and on June 1, 1911, the Langleys executed a warranty deed of the premises L.R.A.1916D.

for the recited consideration of \$10,500 to the defendant and appellant, M. B. Finseth, and to H. A. Hallum. This deed contained in the covenant against encumbrances the following clause: "That the premises are free from all encumbrances except a mortgage for \$2,000 which second parties (Finseth and Hallum) agree to pay with accrued interest from February 1, 1911."

It appears that this deed was delivered only to the grantee Hallum, and that appellant, Finseth, did not actually know of the assumption clause contained therein until later, when he found it upon the records of Burleigh county. The trial court found the amount due upon the indebtedness to the plaintiff, McDonald, to be the sum of \$2,350, with interest at 10 per cent from January 31, 1913, and the mortgage containing the usual deficiency clause, adjudged and decreed that "in case the property shall not bring a sum sufficient on the sale thereof to pay the entire debt, interest and taxes, that the plaintiff shall have and recover a deficiency judgment against the defendant, M. B. Finseth, if any there be."

From this judgment defendant has appealed, and asks for a trial de novo. His contention is: First, that there was no privity of contract between himself and the mortgagee, McDonald, and therefore no assumption of the mortgage by him; second, that the mortgagee, McDonald, only paid to the Woodburys, the original mortgagors, the sum of \$1,400, and that in no case can he be held liable for the difference between the sum of \$1,400 and \$2,000 which the mortgage ostensibly secured. He argues that his liability can only be founded on the assumption clause in the deed to him from the Langleys; that the covenants of the Woodburys, the original mortgagors and grantors, to Ernest Engel, only stated that the land was free from all encumbrances excepting a mortgage of \$2,000 to W. A. McDonald; that this was merely a limitation upon the covenant of title and quiet possession made by the grantor, and in no way constituted an assumption of the mortgage or an agreement to pay the same by the grantee, Engel, and that there is, in the record even, no evidence that the amount of the mortgage was deducted from the purchase price and entered into the consideration for the transfer.

Messrs. S. E. Ellsworth and F. H. Register for appellant.

Mr. M. C. Freerks, for respondent:

The assumption clause inserted in a deed is binding upon the grantee in such deed as an original, independent contract by which the grantee obligates himself to pay the assumed encumbrance as a part of the

purchase price of the property conveyed, and such grantee may be proceeded against by a mortgagee or by the grantor.

Moore v. Booker, 4 N. D. 549, 62 N. W. 607; McArthur v. Dryden, 6 N. D. 438, 71 N. W. 125; Williams v. Naftzger, 103 Cal. 438, 37 Pac. 411; Alvord v. Spring Valley Gold Co. 106 Cal. 547, 40 Pac. 27; Laderoute v. Chale, 9 N. D. 336, 83 N. W. 218; Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907; Birke v. Abbott, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485; Hare v. Murphy, 45 Neb. 809, 29 L.R.A. 851, 64 N. W. 211; Little v. Thomas, 4 Ohio Dec. Reprint, 513; McKay v. Ward, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; Cobb v. Fishel, 15 Colo. App. 384, 62 Pac. 625; Marble Sav. Bank v. Mesarvey, 101 Iowa, 285, 70 N. W. 198; Merriman v. Moore, 90 Pa. 78; Brewer v. Dyer, 7 Cush. 337; Enos v. Sanger, 96 Wis. 150, 37 L.R.A. 862, 65 Am. St. Rep. 38, 70 N. W. 1069.

A grantee who takes a conveyance subject to a mortgage, even as distinguished from an assumption, is presumed to have included the mortgage debt in the purchase price, and is not therefore permitted to dispute the validity of the mortgage. In this respect he is in the same position as one who expressly assumes the mortgage.

3 Pom. Eq. Jur. 3d ed. § 1205; Maher v. Lanfrom, 86 Ill. 513; Freeman v. Auld, 44 N. Y. 50; Hardin v. Hyde, 40 Barb. 435; Fuller v. Hunt, 48 Iowa, 163; Green v. Turner, 38 Iowa, 112; Greither v. Alexander, 15 Iowa, 470.

And such grantee, so assuming or taking subject to a mortgage, cannot be heard to dispute the amount or validity of the mortgage, nor can he set up duress, illegality of consideration, or coverture of one of the mortgagees.

Foy v. Armstrong, 113 Iowa, 629, 85 N. W. 753; Willis v. Terry, 15 Ky. L. Rep. 753, 24 S. W. 621; Johnson v. Thompson, 129 Mass. 398; McNaughton v. Burke, 63 Neb. 704, 89 N. W. 274; Arlington Mill & Elevator Co. v. Yates, 57 Neb. 286, 77 N. W. 677; Pass v. Lynch, 117 N. C. 453, 23 S. E. 357; Mott v. Maris, — Tex. Civ. App. —, 29 S. W. 825; Washington, O. & W. R. Co. v. Cazenove, 83 Va. 744, 3 S. E. 433.

Bruce, J., delivered the opinion of the court:

There is a decided conflict in the authorities upon the question which is before us, and some courts hold to the rule that the grantee of mortgaged premises who purchases subject to a mortgage which he assumes and agrees to pay will not be liable for a deficiency arising on a foreclosure and sale unless his grantor is also liable legally and equitably for the payment of

the mortgage, and that if there is a break anywhere in the chain of liability, all of the subsequent purchasers are without obligation in so far as the mortgagee is concerned, and that the promise of the last grantee only operates as an indemnity to his immediate grantor. See dissenting opinion in McKay v. Ward, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; Fry v. Ausman, 29 S. D. 30, 30 L.R.A.(N.S.) 150, 135 N. W. 710, Ann. Cas. 1914C, 842; Brown v. Stillman, 43 Minn. 126, 45 N. W. 2; Nelson v. Rogers, 47 Minn. 103, 49 N. W. 526; Vrooman v. Turner, 69 N. Y. 284, 25 Am. Rep. 195; King v. Whitely, 10 Paige, 465; Morris v. Mix, 4 Kan. App. 654, 46 Pac. 58; New England Trust Co. v. Nash, 5 Kan. App. 739, 46 Pac. 987; Skinner v. Mitchell, 5 Kan. App. 366, 48 Pac. 450; Ward v. De Oca, 120 Cal. 102, 52 Pac. 130; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Y. M. C. A. v. Croft, 34 Or. 106, 75 Am. St. Rep. 568, 55 Pac. 439; Eakin v. Shultz, 61 N. J. Eq. 156, 47 Atl. 274; Norwood v. De Hart, 30 N. J. Eq. 412; Wise v. Fuller, 29 N. J. Eq. 257; Crone v. Stinde, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907; Goodenough v. Labrie, 206 Mass. 599, 138 Am. St. Rep. 411, 92 N. E. 807; Hicks v. Hamilton, 144 Mo. 495, 66 Am. St. Rep. 431, 46 S. W. 432; Willard v. Wood, 135 U. S. 309, 34 L. ed. 210, 10 Sup. Ct. Rep. 831; Wiltsie, Mortg. Foreclosure, § 227; 9 Enc. Pl. & Pr. 469.

If we adopt this rule, it is perfectly clear that the trial court erred in rendering judgment for the plaintiff and respondent, and that such judgment should be reversed; for, although it is perfectly clear from the record that in the deed from the Langleys to Finseth, Finseth assumed and agreed to pay the mortgage, and that in the deed from Engel to the Langleys, the Langleys also agreed to pay the mortgage, it is not clear that in the deed from the Woodburys to Engel, Engel made any such agreement or assumption; that the chain was therefore broken, and according to the authorities cited there would be no privity of contract between the mortgagee, McDonald, and the defendant M. B. Finseth. We believe, however, that the cases mentioned are unsound in principle, and prefer to follow the other line of authorities which appear to us to express the better rule. The cases cited by counsel for appellant, indeed, seem to totally ignore, in their conclusions, at any rate, even if not in their reasoning, the well-established rule of law that when one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise even though the consideration does not run directly from him, and even though at the time he knew

nothing of the promise to pay him. *Hare v. Murphy*, 45 Neb. 809, 29 L.R.A. 851, 64 N. W. 211; *McKay v. Ward*, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; Rev. Codes 1895, § 3840; *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907, overruling *Hicks v. Hamilton*, 144 Mo. 495, 66 Am. St. Rep. 431, 46 S. W. 432. This is certainly the rule which has been announced by this court in construing Rev. Codes 1895, § 3840, which provides that "a contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it."

In the case of *McArthur v. Dryden*, 6 N. D. 438, 71 N. W. 125, we said: "Section 3840, above quoted, contemplates a contract resting upon a present consideration passing between the two contracting parties, and with which the third party has no connection. One of the most common instances of such a contract arises when a mortgagor of real property sells the same, and the grantee, as a part of the consideration, promises and agrees with the mortgagor that he will pay the mortgage debt. Here the conveyance of the property furnishes the consideration for the grantee's promise, and the mortgagee may maintain an action against him. He becomes the principal debtor, and, while the mortgagor is not released, yet, as to the grantee, he stands in the position of a surety. *Moore v. Booker*, 4 N. D. 543, 62 N. W. 607."

And we are not unaware of the holding in *Parlin v. Hall*, 2 N. D. 473, 52 N. W. 405, and come to our conclusion in spite of that decision. In our minds, indeed, that case is in no way parallel with the one at bar, as in it the defendant did not agree to pay any debt, or to pay anyone, or to be directly responsible to any third party, but merely "to pay to said first party all the sums which he pays on said guaranty or advances in pursuance of this agreement." This is clearly not a promise to pay any third party. In the case at bar the defendant *Finseth* expressly agreed in his deed from the *Langleys* to pay a mortgage of \$2,000, and we must assume that this amount was deducted from the purchase price of the land. 3 Pom. Eq. Jur. 3d ed. § 1205; *Maier v. Lanfrom*, 86 Ill. 513; *Freeman v. Auld*, 44 N. Y. 50; *Hardin v. Hyde*, 40 Barb. 435; *Fuller v. Hunt*, 48 Iowa, 163; *Green v. Turner*, 38 Iowa, 112; *Greither v. Alexander*, 15 Iowa, 470; *Gage v. Cameron*, 212 Ill. 146, 72 N. E. 204; *Jehle v. Brooks*, 112 Mich. 131, 70 N. W. 440; *Strong v. Converse*, 8 Allen, 557, 85 Am. Dec. 732; *Drury v. Tremont Improv. Co.* 13 Allen, 168; *Weed Sewing Mach. Co. v. Emerson*, 115 Mass. 554; *Schley v. Fryer*, 100 N. Y. 71, 2 N. E. 280; *Corning v. Bur-* L.R.A.1916D.

ton, 102 Mich. 86, 62 N. W. 1040. The case, indeed, is no different from one in which A, who is anxious to sell his land and also to give his son a present, agrees to sell it to B for \$4,000 on the consideration that \$3,000 shall be paid to him in cash and the \$1,000 balance of the purchase price shall be paid to his son. The last assumption, indeed, is an original promise on the part of the grantee, *Finseth*, to pay the plaintiff, *McDonald*, a certain sum of money, and, under what we believe to be the better line of authorities, can be and is properly supported by the consideration afforded by the transfer of land to him and by the fact that the amount of the mortgage was deducted from the purchase price, and this even though there was no direct dealing between him and the plaintiff mortgagee. *Crone v. Stinde*, 156 Mo. 262, 55 S. W. 863, 56 S. W. 907 (overruling *Hicks v. Hamilton*, 144 Mo. 495, 66 Am. St. Rep. 431, 46 S. W. 432; *Harberg v. Arnold*, 78 Mo. App. 237; and *Heim v. Vogel*, 69 Mo. 529); *Birke v. Abbott*, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485; *Hare v. Murphy*, 45 Neb. 809, 29 L.R.A. 851, 64 N. W. 211; *Little v. Thoman*, 4 Ohio Dec. Reprint, 513; *McKay v. Ward*, 20 Utah, 149, 46 L.R.A. 623, 57 Pac. 1024; *Cobb v. Fishel*, 15 Colo. App. 384, 62 Pac. 625; *Marble Sav. Bank v. Mesarvey*, 101 Iowa, 285, 70 N. W. 198; *Merriman v. Moore*, 90 Pa. 78; *Brewer v. Dyer*, 7 Cush. 337; *Enos v. Sanger*, 96 Wis. 150, 37 L.R.A. 862, 65 Am. St. Rep. 38, 70 N. W. 1069; *Dean v. Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209, 1 N. E. 340.

So, too, it is immaterial whether the original mortgagor in fact received from the plaintiff the full sum of \$2,000 or not, or whether, as claimed by the defendant, \$600 of the \$2,000 has never been paid to the original mortgagor. The evidence shows that this \$600 was not paid, but was kept back for a short time with the consent of both parties on account of the immediate lack of funds of the mortgagee, and that in the interim the original mortgagors, the *Woodburys*, deeded the property to *Ernest Engel*, such deed containing the provision that the premises were "free from all encumbrances except a mortgage of \$2,000 to *Walter A. McDonald*." It is true that under the holding of this court in the cases of *Smith v. Gaub*, 19 N. D. 337, 123 N. W. 827, and *Sommers v. Wagner*, 21 N. D. 531, 131 N. W. 797, *Ernest Engel*, the grantee of the *Woodburys*, was not himself bound to pay the mortgage debt, and that "an express exception, contained only in the covenant against encumbrances in a deed to real property, of a mortgage upon the land, in the absence of qualifying words

making the granting of the deed subject to such encumbrance, and making the restriction upon the covenant against encumbrances apply also to the covenant of warranty and generally to all the covenants in the deed, does not except such mortgage from the covenant of warranty."

The deed from the Woodburys to Engel, indeed, contained the provision that the "parties of the first part (the Woodburys) for themselves, their heirs, executors, and administrators, do covenant with the party of the second part, his heirs and assigns, that they are well seised of the land and premises aforesaid and have good right to sell and convey the same in the manner and form aforesaid; that the same are free from all encumbrances except a mortgage of \$2,000 to Walter A. McDonald, and the above bargained and granted land and premises in the quiet and peaceable possession of said party of the second part, his heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will warrant and defend."

It is also true that, though it might have been shown by parol evidence that the amount of the \$2,000 mortgage was deducted from the purchase price, there is no such proof in the record.

The fact remains, however, that the last grantee, the defendant Finseth, specifically agreed to pay the \$2,000 mortgage, and the question before us is merely whether the plaintiff, McDonald, can, in a court of equity, take advantage of the promise and assert his claim. It is perfectly clear that he could have asserted it against the original mortgagors, the Woodburys, for the testimony shows that McDonald had agreed with these parties to collect the full amount of the mortgage note, and had given back to them an obligation by which he had agreed to pay them this amount of money when so collected. His testimony is as follows: "I do not believe I ever met the defendant Finseth—may have seen him. The full amount, \$2,000, was not paid by me, only \$1,400, plus interest and an acknowledgment for \$600. Instead of giving these people \$600 in cash, to save making up a new set of papers, I gave them an acknowledgment that when the note would be paid I would give them \$600, and that acknowledgment has never been taken up. I was not to pay it until this note of \$2,000 was paid. That was the understanding on this \$600, which they have never received as a part of the \$2,000, and has been drawing interest. If the note is not paid by the makers I would say that the only consideration that secures this mortgage is \$1,400. I gave them \$1,400. I never gave

them any other money. I have not paid anything on the \$600 acknowledgment. I was not planning on paying it until the note here in question of \$2,000 was paid. All that I am out at the present time is \$1,400 and interest and some costs. I have collected the interest on the \$2,000 note up to January 31, 1913, I think. My agreement to pay the \$600 has never been surrendered and is still an outstanding obligation against me. I have collected \$600 interest up to January 31, 1913—10 per cent."

Even though the deed from the Woodburys to Engel would preclude the idea that Engel agreed to assume and pay the mortgage debt, still the fact remains that the sum would be a lien upon the premises and the title of the grantee would be subject thereto, and the presumption would be, even without proof, that that amount of money was deducted from the purchase price. Although, indeed, to quote the language in the opinion of *Smith v. Gaub*, supra, and in relation to the modification of the covenant of warranty by the statement that the premises were free from all encumbrances except the mortgage specified, "if plaintiff had wished or intended to except the mortgage from the covenant of warranty, he could easily have done so by making the restriction upon the covenant against encumbrances apply to all the covenants of the deed. In view of the case with which it may be accomplished, it is inconceivable that a careful conveyancer in a document so formal and important as a deed should fail to make the exception in some such manner."

This court must nevertheless take judicial notice of the well-established customs of business and trade, and it will not be presumed, in the absence of proof, that any person would take a deed to land which was subject to a mortgage without deducting such amount from the purchase price, nor that he would rely entirely on the covenants of warranty of his grantor to protect his purchase. The fact, indeed, that the interest on the full \$2,000 was paid up to the 31st day of January, 1913, and partly by the defendant himself, adds emphasis to this presumption. Whether or not the plaintiff had paid to his original mortgagor the full amount of the mortgage note, indeed, is a matter which lies between such original mortgagor and the plaintiff. So far as the defendant in this action is concerned, and his immediate grantor, none of such parties can be held to have paid their debts or complied with the provisions of their agreements of purchase until they have paid the \$2,000; and since in their deeds they expressly agreed to assume and pay the mortgage under all of the authori-

ties the presumption would be that the full amount was deducted from the purchase price, and that the same was retained by them for the very purpose of paying the same. They had, in short, agreed to pay this debt to the grantors in a certain manner, and this included the paying of \$2,000 and interest to the owner of the mortgage, and we can see no reason why these contracts were not valid and could not be enforced.

Nor is there any merit in the contention that the deed was not delivered to the defendant Finseth, but to his cotenant, H. A. Hallum, and that said cotenant had no authority to obligate the defendant Finseth to pay such mortgage or to accept a deed containing such clause. This point was mentioned in the oral argument, but is not suggested in the brief. If it had been, the answer to it is that the defendant Finseth himself testified that he knew the property had been deeded to himself and his cotenant; that he knew there was a mortgage on the property and paid interest on it; that his cotenant told him that he had received

the deed; that he knew that he had placed it of record—that he told him he had; that the property now stands in his name; that he paid half of the interest for two years on the full \$2,000, and that Mr. Hallum paid the other half; and that he understood it was to be sent up to Mr. McDonald. The deed was recorded on the 7th day of August, 1911. This action was not begun until June, 1914. It would hardly seem that the grantee of a recorded deed can sit quietly for three years, remain in possession of the premises, and pay the interest on a mortgage which is assumed thereon, and then claim that he did not know of or consent to the terms of the instrument.

The judgment of the District Court is affirmed.

Burke, J.:

I concur in the affirmance, but express no opinion upon paragraphs 3 and 4 of the opinion.

Petition for rehearing denied January 8, 1916.

Annotation—Right of mortgagee to enforce purchaser's promise to pay the mortgage where the grantor, or promisee, was not himself liable.

This subject has been treated in the notes to *Kramer v. Gardner*, 22 L.R.A. (N.S.) 492, and *Fry v. Ausman*, 39 L.R.A. (N.S.) 150. A further search has disclosed only two additional cases directly in point.

Casselman v. Gordon (1916) — *Va.* —, 88 S. E. 58, holds, like *McDONALD v. FINSETH*, ante, 149, that a grantee of mortgaged premises who assumes and agrees to pay the mortgage is liable to the mortgagee, although the former's immediate grantor is not personally liable for the payment of the mortgage, upon the principle, embodied in a statute, that a promise made by one person to another for the benefit of a third person may be enforced by the latter.

It is held in *Llewellyn v. Butler*

(1915) 186 Mo. App. 525, 172 S. W. 413, that, in Missouri, at least, the benefit of the grantee's promise to pay the mortgage inures to the benefit of the mortgagee without regard to the liability of the grantee's predecessor in title.

In *Baber v. Hanie* (1913) 163 N. C. 588, L.R.A.—, —, 80 S. E. 57, where it was held that a mortgagee could recover, under the doctrine of subrogation, a deficiency judgment against a grantee, where all of the successive grantees of the land mortgaged had assumed the mortgage debt, the court stated that a recovery could not be had, under such doctrine, against the grantee of a mortgagor who was not personally liable for the payment of the mortgage.

G. V. I.

RHODE ISLAND SUPREME COURT.

WILLIAM CARROLL
v.

WHAT CHEER STABLES COMPANY,
Appt.

(— R. I. —, 96 Atl. 208.)

Master and servant — workmen's compensation — injury due to seizure.

Injury received by a hack driver while in the regular performance of his duty, in fall-L.R.A.1916D.

ing from his seat through dizziness or unconsciousness induced by a disease from which he was suffering, being the first attack of the kind which he had experienced, arises out of and in the course of his employment within the operation of the workmen's compensation act, where the fall oc-

Note. — The English cases on the right to compensation under workmen's compensation acts for an injury where the employee's diseased condition was a superinducing or contributing cause of the "accident" will

curred when the hack was turned against the curbstone by the horses.

For other cases, see Master and Servant, II. a, in Dig. 1-52 N. S.

(Vincent, J., dissents.)

(January 5, 1916.)

APPEAL by respondent from a decree of the Superior Court for Providence and Bristol Counties in favor of petitioner in a proceeding under the workmen's compensation act to recover damages for personal injuries received in an accident while in respondent's employ. Affirmed.

The facts are stated in the opinion.

Messrs. **Harold W. Thatcher, Frank H. Swan, and Edwards & Angell**, for appellant:

The alleged injuries sustained by the petitioner by accident did not arise out of the employment.

Rayner v. Sligh Furniture Co. 180 Mich. 168, L.R.A.1916A, 22, 146 N. W. 665, Ann. Cas. 1916A, 386, 4 N. C. C. A. 851; **Rodger v. School Board**, 5 B. W. C. C. 547, [1912] W. C. Rep. 547, [1912] S. C. 584, 49 Scot. L. R. 413; **Sheldon v. Needham** [1914] W. C. & Ins. Rep. 274, 7 B. W. C. C. 471, 30 Times L. R. 590, 58 Sol. Jo. 652; **Butler v. Burton-on-Trent Union**, 5 B. W. C. C. 355, [1912] W. C. Rep. 222, 106 L. T. N. S. 824; **Thackway v. Connelly**, 3 B. W. C. C. 37; **Nash v. The Rangatira** [1914] 3 K. B. 978, [1914] W. C. & Ins. Rep. 490, 83 L. J. K. B. N. S. 1496, 7 B. W. C. C. 590, [1914] W. N. 291, 58 Sol. Jo. 705.

Messrs. **Mumford, Huddy, & Emerson and E. Butler Moulton**, for appellee:

The accident arose out of and in the course of the employment.

Rodger v. School Board [1912] S. C. 584, [1912] W. C. Rep. 157, 5 B. W. C. C. 547, 49 Scot. L. R. 413; **Wicks v. Dowell & Co.** [1905] 2 K. B. 225, 7 N. S. W. C. C. 14, 74 L. J. K. B. N. S. 572, 53 Week. Rep. 515, 92 L. T. N. S. 677, 21 Times L. R. 487, 2 Ann. Cas. 732; **Driscoll v. Cushman Exp. Co.** Mass W. C. C. (July 1, 1912—June 30, 1913) 125; **Sanderson v. Globe Indemnity Co.** Mass. W. C. C. (July 1, 1912—June 30, 1913) 224; **Andrew v. Falls-worth Industrial Soc.** [1904] 2 K. B. 32, 90 L. T. N. S. 611, 6 M. S. W. C. C. 11, 73 L. J. K. B. N. S. 511, 68 J. P. 409, 52 Week. Rep. 451, 20 Times L. R. 429; **Blakey v. Robson, E. & Co.** [1912] S. C.

be found at pages 33 et seq., and the American cases at pages 227 et seq., of the annotation in L.R.A.1916A, 23, on "Workmen's Compensation Acts." See also, in this connection, annotation in L.R.A.1916A, 303, on hernia as an "accident" or "personal injury" within the meaning of the compensation acts.
L.R.A.1916D.

334, 1 Scot. L. T. 81, [1912] W. C. Rep. 86, 5 B. W. C. C. 536; **Morgan v. The Zenaida**, 25 Times L. R. 446, 2 B. W. C. C. 19; **Fennah v. Midland & G. W. R. Co.** 45 Ir. Law Times, 192, 4 B. W. C. C. 440; **The Swansea Vale v. Rice** [1912] A. C. 238, 27 Times L. R. 440, 4 B. W. C. C. 298, 104 L. T. N. S. 658, 55 Sol. Jo. 497, 48 Scot. L. R. 1095, 81 L. J. K. B. N. S. 672, 12 Asp. Mar. L. Cas. 47, [1912] W. C. Rep. 242, Ann. Cas. 1912C, 899; **Martin v. J. Lovibond & Sons**, [1914] 2 K. B. 227, [1914] W. C. & Ins. Rep. 76, 83 L. J. K. B. N. S. 806, 7 B. W. C. C. 243, 110 L. T. N. S. 455, [1914] W. N. 47; **Jackson v. General Steam Fishing Co.** 25 Times L. R. 787, 2 B. W. C. C. 56.

Parkhurst, J., delivered the opinion of the court:

This cause comes before this court on respondent's appeal from a decree entered by Mr. Justice Tanner in the superior court on the 11th day of May, 1915, under the provisions of the workmen's compensation act, so called, enacted by Public Laws of 1912, chapter 831. In this decree it is recited that on the 1st day of December, 1914, the petitioner, William Carroll, was engaged at Providence, Rhode Island, in the employ of the respondent, What Cheer Stables Company, and had been engaged in this employment for the space of about five years; that said Carroll was not engaged in domestic service or agriculture at the time, but was in the employ of the respondent as a hack driver, and on the 1st day of December, 1914, while engaged in this employ, received a personal injury by accident arising out of and in the course of said employment; that at said time the company had elected to become subject to the act, and the employee had waived his right of action at common law; that the injury was not occasioned by the wilful intention of the employee to bring about the injury to himself, and did not result from his intoxication while on duty; that the cause of the injury was falling from the driver's seat of a hack which the petitioner was driving in the regular course of his employment, the fall probably being due to dizziness or unconsciousness induced by a disease from which he was suffering, the evidence showing hernia, hardening of the arteries, and Bright's disease; that the in-

As to recovery where the injured workman was intoxicated at the time of the injury, see annotation in L.R.A.1916A, 351.

As to compensation for incapacity resulting from disease, see annotation in L.R.A.1916A, 289; and later case, **Industrial Commission v. Brown**, L.R.A.1916B, 1277.

juries were a broken right clavicle, broken ribs, and shock to the nervous system, rendering the employee totally and permanently incapacitated for work, and resulted in the permanent total incapacity of said Carroll; that at the time of said injury the employee was receiving wages in the sum of \$13 per week, working seven days a week with one day off in each four weeks; that the amount of average weekly wages at the time of receiving the injury was \$10.73, and that the sum of \$28 is a reasonable charge for medical and hospital services and medicines required by the employee during the first two weeks after the injury; and that upon the above facts the What Cheer Stables Company should pay said Carroll the sum of \$28 for medical services and medicines as aforesaid, and the further sum of \$5.36 per week compensation computed from the 1st day of December, 1914, until further order of the court, but in no event for a period in excess of 500 weeks. Costs were awarded in the sum of \$12.

On the 13th day of May, 1915, the company filed with the clerk of the superior court a "claim of appeal from the final decree of the said superior court entered on the 11th day of May, A. D. 1915." On the 27th day of May said company filed with the clerk aforesaid its reasons of appeal which are in substance, and without stating them in full, that the decision of the justice and the decree appealed are against the law and the evidence, in various details.

The real question raised by this appeal arises from the contention of the respondent that the evidence does not show a "personal injury sustained by accident by an employee arising out of and in the course of his employment," under the language of the statute (Pub. Laws 1912, chap. 831, art. I), § 1 of which reads as follows: "Section 1. In an action to recover damages for personal injury sustained by accident by an employee arising out of and in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense: (a) That the employee was negligent; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee has assumed the risk of the injury."

The respondent's brief proceeds to state its contention as follows: "This is the section of the act which defines those industrial accidents which the legislature had under consideration and against which it sought to protect the employee. Hence, to entitle the workman to compensation, the following elements must appear: (1) That the workman suffered an injury; (2) that he suffered an injury by 'accident;' (3) that the injury and the accident arose 'out of' L.R.A.1916D.

the employment; and (4) that the injury and the accident arose in the course of the employment. By this language the legislature intended not simply that the 'injury,' but that both the 'injury' and the 'accident,' must arise out of and in the course of the employment. In the great majority of cases it would be impossible to separate the injury and the accident, so that one might arise out of the employment while the other would not. In the case before us, while we may admit for the sake of argument that the particular injury—the broken collar bone and ribs—were caused by the fall, and that the fall arose out of and in the course of the employment because the petitioner at that moment happened to be sitting on the seat of his cab, it by no means follows that the 'accident' arose 'out of' the employment. This, we believe, is where the authorities, which will no doubt appear on the petitioner's brief, have gone astray. That the 'accident' occurred 'in the course of' the employment is admitted. . . .

The respondent takes the position (1) that there is no evidence to support the finding of the presiding justice that either the injury or the accident arose out of and in the course of the employment, and (2) that such finding was against the law, since the legislature never intended that act to apply to accidents caused solely by a workman's previously diseased condition."

The only respect in which this decree is challenged by the appellant is as to the finding of fact that the petitioner "received a personal injury by accident arising out of . . . said employment;" and the appellant contends that the accident was solely due to the previously diseased condition of the petitioner, and not at all to the employment.

It must be obvious that the petitioner, as the driver of a hack, seated at a height of 4 or 5 feet from the ground, upon a moving vehicle, is exposed to some risk of accident which would not be incident to an occupation carried on by a person seated upon the ground or upon a stationary platform. And this would be more so in case of an employee subject to attacks of vertigo or dizziness, or of temporary unconsciousness. Now, although there is some evidence that the petitioner admitted that he had an attack of dizziness or unconsciousness just before he fell, and that caused him to fall, it is to be noted that there is no evidence that he had ever before had such an attack when he was driving; his only previous disability, so far as the evidence shows, had been a slight temporary disability due to displacement of his truss, when at work harnessing his horses, and which required him to lie down for a few minutes to readjust his

truss; and he was also unable, on account of his rupture, to lift trunks on or off his hack. There is no evidence that he had at any time before the accident had any disability with regard to driving his horses when he was seated upon the carriage. But there is direct and positive evidence from a witness who saw him fall, who said, "I thought . . . that the horses ran against the curbstone and he fell off headfirst;" that "the horses was coming down the side of the sidewalk, not running, but not coming easy, on a kind of a gallop, and the first thing I see he was pitched out headfirst on the side, that way" (illustrating); that "he was pitched up on the side, half on the sidewalk and half on the hill."

This evidence shows that the petitioner's fall was more than the mere inert fall or collapse of an unconscious man (see *Lewis v. Globe Indemnity Co.* Mass. W. C. C. 1912-1913, p. 48; *Sanderson v. Globe Indemnity Co.* Mass. W. C. C. pp. 224, 229); that it was a positive throwing or pitching of the driver from his seat by the movement of the hack turning or lurching into the gutter, toward or against the curbstone, and might have happened to a driver in full possession of his senses; and although the justice of the superior court in his rescript does not allude to this evidence, it is to be presumed that, when he came to enter his final decree and decreed that petitioner "received a personal injury by accident arising out of . . . said employment," he made his finding upon all the evidence before him. We think that the evidence above quoted, therefore, was such as to warrant the finding of fact which is here challenged, and that under the decision in *Jillson v. Ross*, 38 R. I. 145, 94 Atl. 717 (July 2, 1915), we should not be justified in setting aside the decree upon this ground, since the act provides that findings of fact, in the absence of fraud, shall be conclusive.

The evidence does not show, as claimed by the appellant, that the petitioner's fall was "caused solely by the workman's previously diseased condition," nor does the justice of the superior court so decide; the justice says in his decree, "the fall probably being due to dizziness or unconsciousness induced by a disease from which he was suffering," etc. But the decree also finds that the accident was one "arising out of . . . said employment;" there is at least as much evidence that the fall was due to an unexpected and accidental lurch of the hack into the gutter and towards or against the curbstone, as that it was due to dizziness or unconsciousness induced by disease. It seems to this court that the decision and the decree appealed from embody a conclusive finding of fact that dizziness or unconsciousness was

not the sole cause of the fall, and that there was evidence from which the justice could find as he did that the accident arose out of the employment.

Several cases have been cited on behalf of the petitioner where it appeared that the claimant had, prior to the accident, been suffering from disease, and where it appeared that the diseased condition predisposed the claimant to the accident which occurred, and where it has nevertheless been held that the claimant was entitled to recover. In a very well-considered case in the English court of appeal, decided in 1905, under the English workmen's compensation act (*Wicks v. Dowell & Co.* [1905] 2 K. B. 225, 2 Ann. Cas. 732), it appears that a workman employed in unloading coal from a ship, who was required in the course of his duty to stand by the open hatchway through which the coal was being brought up from the hold, was seized with an epileptic fit while at work, and fell into the hold and was seriously injured; it was held that regard must be had to the proximate cause of the accident resulting in the injury, which was to be found in the necessary proximity of the workman to the hatchway; that the accident therefore arose "out of" as well as "in the course of" his employment, and that he was entitled to compensation under the act. It appeared that the employee was subject to epileptic fits; that it was his duty to stand on a wooden stage close to the edge of the hatchway, the stage being so constructed as to enable him to look down into the hold, and while standing on the stage he had to regulate the descent of the bucket into, and its ascent out of, the hold by means of a long pole, and also to give the necessary signals to the man who was working the crane; while thus engaged he was seized with an epileptic fit and fell through the hatchway into the hold and sustained very serious injuries. He had had an epileptic fit on three previous occasions. The county court judge held that the accident was due to the fit, and did not arise out of the employment within the meaning of the act, and refused to award compensation. The applicant appealed. In the court of appeal it was contended, as here, that, "as the original cause of the applicant's fall was the fit with which he was seized, the cause was one which the man himself carried about with him, and that the damage which he sustained did not arise out of and in the course of his employment, but arose out of the idiopathic condition of the workman at the time."

The court fully discusses and disposes of this contention upon principle and authority, and determines that the thing which happened was an "accident" within the

meaning of the act. The court, after discussing the rules and principles laid down in accident insurance cases, speaking through Collins, M. R., says (page 229):

"But those authorities are, in my judgment, directly in point. A man is picked up at the bottom of the hold of a ship suffering from injuries; what is the cause of his condition? The proximate cause obviously is that he has fallen from a height. But it is suggested that if the occurrence is analyzed, it will be seen that the accident was caused by the idiopathic disease from which the man was suffering, and that therefore the accident did not arise out of his employment. At that point the authorities come in, to the effect that, although the cause of the fall was a fit, the cause of the injuries was the fall itself, and they are direct authorities that the injury in the present case was caused by an accident.

"Then did the accident arise out of the man's employment? When we get rid of the confusion caused by the fact that the fall was originally caused by the fit, and the confusion involved in not dissociating the injury and its actual physical cause from the more remote cause, that is to say, from the fit, the difficulty arising from the words 'out of the employment' is removed. How does it come about in the present case that the accident arose out of the employment? Because by the conditions of his employment the workman was bound to stand on the edge of what I may style a precipice, and if in that position he was seized with a fit, he would almost necessarily fall over. If that is so, the accident was caused by his necessary proximity to the precipice, for the fall was brought about by the necessity for his standing in that position. Upon the authorities I think the case is clear; an accident does not cease to be such because its remote cause was the idiopathic condition of the injured man; we must dissociate that idiopathic condition from the other facts and remember that he was obliged to run the risk by the very nature of his employment, and that the dangerous fall was brought about by the conditions of that employment. I think, therefore, that the present case comes within the purview of the workmen's compensation act, and that there is nothing in either the decision or the dicta of the learned Lords in *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, which in any way qualifies the view that I have endeavored to express. The appeal must be allowed.

"Mathew, L. J.: I am of the same opinion. The case affords an illustration of the rule that one should look to the immediate, L.R.A.1916D.

and not to the remote, cause. In this case the immediate cause of the injury was the fall. I see no reason why we should hold that there was not an accident within the meaning of this statute. The true mode of dealing with the case is shown by a reference to the insurance cases that were cited during the argument. In *Fenton v. J. Thorley & Co.* Lord Macnaghten said: 'One other remark I should like to make. It does seem to me extraordinary that anybody should suppose that when the advantage of insurance against accident at their employers' expense was being conferred on workmen, Parliament could have intended to exclude from the benefit of the act some injuries ordinarily described as "accidents" which, beyond all others, merit favorable consideration in the interest of workmen and employers alike.' If we apply that view to the particular case, and treat the claim as an action brought upon a policy of insurance against accidents arising out of the employment of the assured, there can be no question that such a policy would cover the case. In my opinion we ought not to go back along the train of circumstances and trace the accident to some remote source when it is plain that the man was in fact injured by falling from the place where he was standing, and where it was his duty to stand, in discharge of his duty to his employer.

"Cozens-Hardy, L. J.: I agree, and have little to add. It seems plain to me on the authorities that what happened here was an 'accident.' It is also plain, and indeed is not contested, that the accident happened in the course of the employment; the only difficulty is whether it arose 'out of' the employment; on the whole, I am of opinion that it did. If I could adopt the view that has been pressed upon us, that the employer is not liable for the remote consequences of a disability which the workman brings with him to his work, I should come to a different conclusion; but I think the truer view is that a man always brings some disability with him; it may be a disability arising from age; it may be of some other nature. A workman who is put in a dangerous position in order to do his work is more liable to an accident by reason of the disability which he brings with him than he would otherwise be. Again, an old man is inherently more likely to meet with an accident than a young one, but an employer could not excuse himself on the ground of the man's age. The same consideration applies to a tendency to illness or to a fit; and if a man with such a tendency is told to go to work in a dangerous position and there meets with an accident, the accident none the less arises out of his employment be-

cause its remote cause is to be found in his own physical condition.

"Appeal allowed."

The case of *Wicks v. Dowell & Co.* supra, was followed in the case of *Driscoll v. Cushman's Exp. Co.* Mass. W. C. C. (July 1, 1912—June 30, 1913) pp. 125, 130, where the driver of an express wagon, employed by the defendant, while driving his wagon, suffered a fainting fit, or an epileptiform attack," falling from his wagon and fracturing his skull, dying from the effect of the fracture. It was held by the Industrial Accident Board, in review and in confirmation of the decision of the committee of arbitration, that the employee was exposed to a substantial and increased risk owing to his occupation, that the injury arose out of and in the course of his employment, and that the dependent mother was entitled to compensation.

Wicks v. Dowell & Co. supra, was cited by the court with apparent approval in *Fennah v. Midland & G. W. R. Co.* 45 Ir. Law Times, 192, 4 B. W. C. C. 440, 442, a case decided in the court of appeal, Ireland, 1911, and has been frequently cited in argument both in the English court of appeal and in the House of Lords. No case has been cited to us in which that case has been criticized, modified, doubted, or overruled. A number of cases have been cited to us involving the same general principle that where the previous diseased condition or temporary illness of the employee is a contributing or antecedent cause of the accident, nevertheless the employee may recover. See: *The Swansea Vale v. Rice*, [1912] A. C. 238, 4 B. W. C. C. 208, 27 Times L. R. 440, 55 Sol. Jo. 497, 48 Scot. L. R. 1095, 104 L. T. N. S. 658, 81 L. J. K. B. N. S. 672, 12 Asp. Mar. L. Cas. 242, Ann. Cas. 1912C, 899, a case of temporary illness, contributing to the accident of falling overboard from a vessel. *Fennah v. Midland & G. W. R. Co.* supra, where an engine driver, at work on his engine while stopped at a station, tightening up a nut, fell to the permanent way and died from the effects of the fall, and where it appeared that he had previously had fainting fits, it was held that recovery could be had; that it was an accident arising out of his employment. *Ismay v. Williamson*, 1 B. W. C. C. 232, 42 Ir. Law Times, 213 (House of Lords), where the accident was a heat stroke from a furnace, which happened to a hand employed in the engine room, and who was shown to have been in poor physical condition, not fit to stand the heat. *Clover, C. & Co. v. Hughes* [1910] A. C. 242, 3 B. W. C. C. 275, 79 L. J. K. B. N. S. 470, 26 Times L. R. 359, [1910] W. N. 73, 102 L. T. N. S. 340 (House of Lords), a case of death of a workman who had a very serious aneurism L.R.A.1916D.

of the aorta, which ruptured while he was engaged in his ordinary occupation; disease of long standing. *M'Innes v. Dunsmuir & Jackson*, 45 Scot. L. R. 804, 1 B. W. C. C. 226 (court of session, Scotland), where a workman having hardening of the arteries, by overexertion brought on cerebral hemorrhage, which was more likely to occur in his case on account of the hardening of the arteries. *Maskery v. Lancashire Shipping Co.* [1914] W. C. & Ins. Rep. 290, 7 B. W. C. C. 428 (court of appeal, England), a case of death from heat stroke suffered by a laborer in the engine room of a steamer in the Red sea, deceased being physically unfit for the work, which involved exposure to extreme heat, citing *Ismay v. Williamson*, supra. See also *Morgan v. The Zenaida*, 25 Times L. R. 446, 2 B. W. C. C. 19, and *Aitken v. Finlayson, B. & Co.* [1914] S. C. 770, [1914] W. C. & Ins. Rep. 398.

We are of the opinion that the decree appealed from in this case is fully supported by the evidence; and, under the principles of law so clearly set forth in the above-cited cases, with which we find no reason to dissent, we find that what happened to the petitioner was an "accident" under the terms of the act, and that the accident "arose out of . . . the employment."

The appellants cite a few cases which do not seem to this court to have any weight in this connection, since the court in each case found that injury or death of the employee did not "arise out of the employment," but arose from natural causes to which anyone not so employed would have been equally subject. *Sheldon v. Needham* [1914] W. C. & Ins. Rep. 274, 7 B. W. C. C. 471, 30 Times L. R. 590, 58 Sol. Jo. 652, *Rodger v. Paisley School Board* [1912] W. C. Rep. 157, [1912] S. C. 584, 5 B. W. C. C. 547, 49 Scot. L. R. 413; *Robson v. Blakey* [1912] W. C. Rep. 86, [1912] S. C. 334, 5 B. W. C. C. 536; *Butler v. Burton-on-Trent Union* [1912] W. C. Rep. 222, 5 B. W. C. C. 355, 106 L. T. N. S. 824; *Thackway v. Connelly*, 3 B. W. C. C. 37; and *Nash v. The Rangatira* [1914] 3 K. B. 978, [1914] W. C. & Ins. Rep. 490, [1914] W. N. 291, 83 L. J. K. B. N. S. 1496, 7 B. W. C. C. 590, 58 Sol. Jo. 705. In the latter case the accident and death were found to have arisen out of intoxication, and not out of the employment. We have carefully examined all of these latter cases and find nothing therein to disturb our conclusions.

Our decision is that the decree appealed from be affirmed; that the appeal be dismissed, and the cause remanded to the Superior Court for further proceedings.

Vincent, J., dissenting:

I am unable to agree with the majority of

the court in affirming the decree of the superior court and dismissing the respondent's appeal.

The petitioner, at the time of the accident, was in the employ of the respondent company as driver of a vehicle commonly known as a hack or hackney carriage, such employment requiring him to occupy the elevated seat common thereto. On the day of the accident, while the petitioner was driving along one of the public streets, he became wholly or partially unconscious, or was seized with dizziness or vertigo, whereupon he fell from his seat to the ground, sustaining some injuries. It is not disputed that the petitioner had, for a considerable period prior to the time of his accident, been in a condition of health which might at any moment cause him to become unconscious or dizzy to an extent which would deprive him, temporarily, at least, of physical control.

The majority opinion proceeds upon the theory that there was some testimony, produced in the court below, showing that the fall of the petitioner, from his seat on the hack, was occasioned by a sudden contact of the wheel with the curbstone. The testimony referred to is that of Mrs. McKenna, who, at the time of the accident, was sitting at her window and viewed the scene across two streets. On examining the testimony, bearing in mind that the burden of proof is upon the petitioner to show that the accident arose out of the employment, I find that it amounts to nothing. She says in her direct examination: "I thought he stumbled against the curbstone; that the horses ran against the curbstone and he fell off head-first."

This in itself is not testimony tending to prove that the wheel of the hack came in contact with the curbstone. It is simply the way in which the witness, viewing the situation from a distance, imagined that the fall must have been occasioned. Later, in cross-examination, any doubt about her testimony is disposed of when she says, in answer to the question: "You didn't see anything happen to the hack or to the horses or anything except Mr. Carroll pitch off from the hack, did you?" "That is all, that is all I noticed then."

This testimony not only fails to sustain the burden of proof before mentioned, but it is not testimony from which it can be reasonably assumed or inferred that the wheel of the hack came in contact with the curbstone at all. Mrs. McKenna did not see the wheel strike the curbstone, and she does not claim to have seen anything of the kind. The petitioner does not claim that his wheel struck the curbstone or went into the gutter; in fact, he says he does not remember any jumping of the horses or hitting any

stone or ditch. Upon this state of the testimony how can it be assumed that the proximate cause of the accident was the contact of the wheel with the curbing of the street? It is also evident that the superior court did not consider this evidence sufficient when it said: "That the cause of such injury was falling from the driver's seat of the hack which the petitioner was driving in the regular course of his employment, the fall probably being due to dizziness or unconsciousness induced by a disease from which he was suffering. . . ."

Further that this the petitioner told Mr. Stockard, in speaking of the accident, that he felt a dizzy spell coming on. That he made such a statement to Mr. Stockard the petitioner nowhere denies, but in his direct testimony he says that he lost consciousness when he fell.

There is some testimony on the part of the petitioner that in his descent from the hack he came in contact with some portion of the outfit, presumably the whiffletree or cross-bar, from which it might be argued that his realization of such an occurrence tended to show that he was not wholly unconscious at the time of the accident. It is not, however, important to ascertain the exact degree of mental power or physical control which the petitioner possessed at the time of and immediately preceding his fall. Whether he was partially or wholly unconscious or simply dizzy, without being unconscious at all is not important in this consideration. It cannot be seriously or reasonably claimed that his fall was occasioned otherwise than by a sudden seizure of some kind, induced by his physical condition. The court below, in its findings of fact, reached that conclusion. Furthermore, it is not claimed that the physical condition of the petitioner was brought about or affected by his employment, or that his employment in any way operated, in connection with his diseased condition, to bring about or produce the particular attack which caused this fall.

The statute regulating the compensation of workmen provides that such compensation is only payable in cases where the injuries sustained arise out of and in the course of the employment; and it is generally conceded by the authorities that the burden is upon the petitioner to show that his injuries arose both out of and in the course of his employment. There is no question in the present case but what the accident occurred in the course of the employment, but did it arise out of the employment? It is quite clear to my mind that it did not. It seems to me to be desirable, not to say necessary, to determine, first, what is the proximate cause of the accident; and, second, whether or not there is any relation between such

proximate cause and the employment in which the petitioner was engaged.

In the old case of *Scott v. Shepherd*, decided in 1770, and reported in 2 W. Bl. 892, 3 Wils. 403, which is more popularly known as the "Squib" Case, it was held that trespass and assault will lie for originally throwing a lighted squib, which, after having been thrown about in self-defense by other persons, at last put out the plaintiff's eye. The question there was whether the action could be maintained against the person who first threw the squib, and it was held that such action could be maintained. In a recent law publication called the "Docket," under date of December, 1915, I find the following comment upon the Squib Case: "Many, many cases have been bottomed on the Squib Case, that unhappy accident seeming to have an illustrative value beyond any other instance of causal connection ever brought to the attention of court or counsel. The most recent, of note, is *Salmi v. Columbia & N. River R. Co.* 75 Or. 200, L.R.A. 1915D, 834, 146 Pac. 819, and comes from Oregon, where the complainant, a woman, lived near a railroad right of way on which the railroad company exploded a 'large and unsafe blast,' so greatly frightening complainant that she swooned, and swooning fell, and falling injured herself, sustaining a rupture. In refuting the contention that she could not recover for injuries from fright alone, Burnett, J., in an able opinion, after referring to the analogy to the noted Squib Case, says: 'Likewise in this instance the explosion of the blast naturally produced the mental state of fright, the fright the faint, the faint the fall, the fall the fracture of the abdominal wall, upon which the plaintiff rests her cause of action.'"

The law as laid down in the Squib Case has continued to be the law in England and this country down to the present time, and it determines that a defendant who exerted the original force is responsible for the injury, such force having been transmitted to the plaintiff through a series of acts which were the direct consequence of the original act. In other words, the original act was the proximate cause of the injury to the plaintiff.

In a case of this character the proximate cause is always that cause which, acting through a natural sequence of events, causes the injury. The cases furnish a multitude of definitions of proximate cause which, while they are couched in different language, are substantially the same in substance; as, for example: "The proximate cause is the dominant cause, not the one which is incidental to that cause, its mere instrument, though

the latter may be nearest in place and time to the loss."

Again: "The proximate cause is the dominant controlling one, and not those which are mere incidents."

And further: "The proximate cause of an accident is a cause without which the accident would not have occurred."

See 6 Words & Phrases, 5762, and cases cited.

Applying this principle to the case in hand the conclusion is inevitable that the unconsciousness or dizziness of the petitioner was the proximate cause of his accident. It was the one thing without which the accident would not have happened; it was the dominant cause, and the subsequent fall and contact with the ground were simply incidents or events which naturally and necessarily followed. This being so, it cannot be reasonably argued under the evidence in this case, that, as between the employment and cause of the accident, there was any relation whatsoever; and therefore it cannot be said that the injuries of the petitioner arose out of his employment.

The majority opinion in support of its conclusions cites ten cases. Two of the cases cited cannot be distinguished from the case before us, namely, *Wicks v. Dowell & Co.* [1905] 2 K. B. 225, 74 L. J. K. B. N. S. 572, 53 Week. Rep. 515, 92 L. T. N. S. 677, 21 Times L. R. 487, 2 Ann. Cas. 732, and *Driscoll v. Cushman*, Mass. W. C. C. June 30, 1913, pp. 125, 130. The remaining eight cases cited are easily and readily distinguishable.

The case of *Fennah v. Midland & G. W. R. Co.* 4 B. W. C. C. 440, 45 Ir. Law Times, 192, was that of an engine driver who was tightening up a nut upon his engine while his train was at the station. He was later found lying between the engine and platform, and died in a few minutes. There was evidence showing that on three previous occasions when the train was at a station the deceased had fainted, but a few days prior to the time of his decease he was examined by a physician of the company and found physically fit. This case is materially different from the case at bar, there being no testimony whatever that he suffered a fainting fit at the time of his death, or that the proximate cause of the accident was anything else than the fall.

The case of *Ismay v. Williamson*, 1 B. W. C. C. 232, 42 Ir. Law Times, 213, was a case in which a seaman employed as a trimmer on board ship, whilst engaged in drawing ashes from the bottom of the ship's furnace, had a heat stroke from which he died. In *M'Inness v. Dunsmuir & Jackson*, 45 Scot. L. R. 804, 1 B. W. C. C. 226, a workman, in the course of his ordinary and usual em-

ployment, overexerted himself and brought on an attack of cerebral hemorrhage. In *Clover, C. & Co. v. Hughes* [1910] A. C. 242, 3 B. W. C. C. 275, 79 L. J. K. B. N. S. 470, 26 Times L. R. 359, [1910] W. N. 73, 102 L. T. N. S. 340, a workman suffering from aneurism of the aorta was doing his work in the ordinary way by tightening a nut with a spanner. This ordinary strain caused a rupture of the aneurism, resulting in death. In *Maskery v. Lancashire Shipping Co.* [1914] W. C. & Ins. Rep. 290. 7 B. W. C. C. 428, an engineer, while working in the engine room of a steamer in the Red sea, sustained a heat stroke from the effects of which he died. In *Aitken v. Finlayson, B. & Co.* [1914] W. C. & Ins. Rep. 398, [1914] S. C. 770, a workman running to the scene of an accident, and thence to telephone for a doctor, by his exertion brought on a fit of apoplexy.

It will readily be observed that in each of the last six cases the death or injury was brought about by influences directly proceeding from the employment; as, for instance, where a man suffered a stroke from the heat of a furnace about which and in connection with which he was employed. All these last-mentioned cases are decidedly different from the case at bar, where there is no proof whatsoever that the impaired physical condition of the petitioner was due to or was even aroused by his employment.

In the case of *The Swansea Vale v. Rice*, [1912] A. C. 238, 4 B. W. C. C. 298, 27 Times L. R. 440, 104 L. T. N. S. 658, 81 L. J. K. B. N. S. 672, 12 Asp. Mar. L. Cas. 47, 55 Sol. Jo. 497, [1912] W. C. Rep. 242, the chief officer of a steam vessel fell overboard during his duty on deck. Some two or three hours prior to the accident, he had gone below, complaining of headache and giddiness, had taken a dose of castor oil and returned to his duty on deck. There was, however, no testimony nor any other circumstances from which it might be inferred that the officer was suffering from giddiness at the time of the accident, and that case is therefore materially unlike the one which I am considering here.

The case of *Driscoll v. Cushman & Co.*, Mass. W. C. C. June 30, 1913, pp. 125, 130, which follows to some extent the case of *Wicks v. Dowell & Co. supra*, also differs from it in some respects. The Board of Arbitration there held that the employed was exposed to a substantially increased risk owing to the position in which he had to work,—meaning that, as a driver of an express wagon, he occupied a more elevated position than he would have occupied in some other employment.

It is evident that the more elevated the position of the workman, the more likely he

is to be injured in case he falls, but that does not affect the principle. The same principle should govern whether the person suffering the accident stands in one place or another so far as the determination of the proximate cause of the accident is concerned. The degree to which he may be injured in one place, as compared with the possible extent of his injuries in another, does not in any way assist in the determination as to what was the proximate cause of the accident, or whether the accident arose out of the employment. All that arises out of the employment is that the consequences of the fall are more serious, but the fall itself does not arise out of it. It is wrong to disassociate the petitioner's dizziness or unconsciousness, and to say that though the one was not an accident, the other was.

This leads to the discussion of the case of *Wicks v. Dowell & Co. supra*, which, as before stated, cannot be distinguished from the case at bar. In that case a workman, employed in unloading coal from a ship, was standing in the course of his duty by an open hatchway through which the coal was being drawn up from the hold. He was seized with an epileptic fit and fell into the hold and was seriously injured. The court held that the proximate cause of the accident was to be found in the close proximity of the workman to the hatchway, and that the accident therefore arose out of his employment. As we have seen from the authorities cited, the proximate cause is that cause without which the accident would not have happened. The proximate cause is that cause which, through a natural sequence of events, results in the injury. There was no claim in that case that the epileptic attack was brought about or induced by the employment. But it was nevertheless the proximate cause of the accident because without it the accident would not have happened. It was the one thing operating through a natural sequence of events that led to the injury. Between such proximate cause and the employment there was absolutely no relation whatsoever, and it seems to me that to follow that case is to adopt and perpetuate a patent absurdity.

The case of *Wicks v. Dowell & Co. supra*, decided in 1905, has not always been followed by later decisions of the English courts. Thus, in the case of *Butler v. Burton-on-Trent Union*, 5 B. W. C. C. 355, and [1912] W. C. Rep. 222, decided by the court of appeals in 1912, it appeared a workhouse master, while on duty in the evening, was sitting smoking at the top of a flight of steps. He was suffering from tuberculosis, and while seized by a fit of

coughing became dizzy and fell down the steps, from which fall he sustained injuries. The court said:

"It has been decided that an accident 'arising out of' means some risk reasonably incidental to the employment; that the man is more exposed to the particular risk than other persons of the community. . . . There is nothing peculiar in the employment which renders the risk greater than that to which ordinary persons are exposed." "The place was not a dangerous place; the man was neither more nor less liable to fall because he was a workhouse master. These considerations are sufficient. The accident did not arise out of the employment in the sense that it was due to the nature of the employment or to anything to which the employment required him to expose himself." [5 B. W. C. C. 355.]

"The provision that the accident must be an accident arising out of the employment has the meaning that the accident must arise out of some risk reasonably incidental to the employment, in the sense that the man who meets with the accident must have been exposed in the course of his employment to some risk additional to those of other members of the public. Counsel for the respondent admitted that the accident in this case might just as well have happened when the deceased was sitting in his office at his desk; and applying the test I have stated it is clear that the accident in no sense arose out of the employment. There was nothing peculiar to his employment which rendered the risk of this accident happening greater than it would have been otherwise. It is not as if he was engaged in any task which was likely to render his coughing more dangerous or more frequent. In these circumstances I think the accident was brought on by the tubercular nodule which caused the fit of coughing. The coughing in its turn produced giddiness, and, owing to the giddiness, the man fell. I think we should be extending the principles of the act beyond reason, principle, or authority if we were to hold here that the accident arose out of the employment." [1912] W. C. Rep. 222.

While the workhouse master was not compelled to sit at the head of the stairs, still he was acting in the course of his employment, and his presence at that particular place was as much in the performance of his duty as would have been the case had he been in another part of the building. It is impossible to reconcile these two cases, or to arrive at any other conclusion than that the court in the latter case has absolutely rejected the view taken in *Wicks v. Dowell & Co.* L.R.A.1916D.

The case of *Nash v. The Rangatira* [1914] 3 K. B. 978, [1914] W. C. & Ina. Rep. 490, was, as the reference indicates, decided in 1914, and was an appeal from an award under the workmen's compensation act made in favor of the dependents of one Nash. Nash was employed as a seaman on the steamship *Rangatira*, which, at the time of the accident, was moored to a pier. Late one night, Nash, who had been ashore, returned to the ship apparently intoxicated. He walked onto the gangplank for the purpose of boarding the ship, lost his balance, fell off, and was killed. The trial judge found that the primary cause of the accident was the man's intoxicated condition, but that the accident would not have happened had he not been at the time mounting the gangplank, an incident in the performance of his duty in returning to the ship. Hence he was under a special risk, and compensation was awarded. This case was decided on the question as to whether the accident arose out of the employment, and the court said: "In one sense, whenever there is an accident to a drunken man whilst he is in the ambit of his employment it may be said that the accident arose out of the employment, because, but for his being in the place where the accident occurred, the man's drunken condition might have been immaterial. Take, for instance, the case where a man's work causes him to be close to machinery in motion, or in any other dangerous place; it may be said that his employment took him there, and that if he had been at home drunk he would, if he had fallen, have been able to lie on the floor till he was sober. In this way it may be said that this was an additional risk; but in my opinion the accident does not arise out of the employment in such circumstances. It is not sufficient that a drunken man should meet with an accident in the ambit of his employment. In the present case the accident did not arise out of the deceased man's employment."

If it is sought to distinguish the above case from the one before us on the ground that a man intoxicated is in no condition to perform the duties for which he was employed, and hence technically he is doing nothing in the performance of his employment, it may be said that the same is true of an individual who becomes unconscious through disease. So far as the employment is concerned, drunkenness and Bright's disease, as causes of a fall, are on the same footing. The sailor was required to mount the gangplank to return to the boat, and thus was in the performance of his duty. His fall, however, was caused by the drunkenness, which had no relation to his em-

ployment. This case, as well as the foregoing case of *Butler v. Burton-on-Trent Union*, not only fails to follow the case of *Wicks v. Dowell & Co.*, but is distinctly at variance with the principle and theory upon which the latter is based.

In the case of *Robson v. Blakey* [1912] W. C. Rep. 86, a plumber engaged in laying pipes in a trench on a hot day was seized with heat apoplexy. He was required to bend over his work and consequently got his back heated. The sheriff substitute found an accident arising out of the employment, and awarded compensation. This, however, was reversed on appeal, and it was finally held that the accident did not arise out of the employment. The Lord President stated in the course of his opinion: "I . . . admit that upon the decided cases there has been a fairly formidable argument presented in favor of saying that this is an accident arising out of the employment."

Certainly in that case the position of the petitioner was much stronger than in the case of *Wicks v. Dowell & Co.*, and much stronger than that of the petitioner in the case at bar. The petitioner in *Robson v. Blakey*, by the nature of his employment, being obliged to work in a trench, perhaps somewhat shielded from the normal circulation of the air, and in a stooping position, exposing his back to the direct rays of the sun, might argue with far more force than the petitioner here that his difficulty arose out of his employment.

For these reasons, and upon the authorities cited and discussed, I am unable to concur in the conclusions of the majority opinion, which seem to me to ignore the long and well-established rule for determining the proximate cause of an accident, and to hold that a petitioner is entitled to compensation where, as between the proximate cause and the employment, there is no relation.

UNITED STATES SUPREME COURT.

SEVEN CASES, Etc., *Eckman Manufacturing Company, Owner, Plff. in Err.*,
v.

UNITED STATES OF AMERICA.
(Two cases.)

(239 U. S. 510, 60 L. ed. —, 36 Sup. Ct. Rep. 190.)

Commerce — drugs — false statements as to curative effects — power of Congress.

1. Congress could lawfully make contraband of interstate commerce, as misbranded, drugs which bear or contain in or upon packages or labels false and fraudulent statements as to curative or therapeutic effect.

For other cases, see Commerce, IV. in Dig. 1-52 N. S.

Drugs — misbranding — statements in circulars.

2. Circulars contained in the package are comprehended by a statute declaring that a drug shall be deemed to be misbranded if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of the drug or any of the ingredients or substances contained therein, which is false and fraudulent.

For other cases, see Drugs and Druggists, in Dig. 1-52 N. S.

Constitutional law — due process of law — indefiniteness of penal statute.
3. There is no such uncertainty in the

Note. — As to what constitutes misbranding within pure food and drug laws, see annotation following this case, post, 169. L.R.A.1F16D.

amendment of August 23, 1912, making contraband of interstate commerce, as misbranded, drugs which bear or contain in or upon packages or labels false and fraudulent statements as to curative or therapeutic effect, as to render the amendatory act repugnant to U. S. Const. 5th Amend., as operating as a deprivation of liberty and property without due process of law, or to the 6th Amendment, as not permitting the laying of a definite charge.

For other cases, see Constitutional Law, II. b. 8, in 1-52 N. S.

Pleading — libel for misbranding — statements of therapeutic effect.

4. The false and fraudulent character of the statements and circulars contained in each package of a drug, viz., "Effective as a preventative for pneumonia," and, "We know it has cured," and that it "will cure tuberculosis," is sufficiently shown in libels for the condemnation of the drugs as misbranded, in violation of the food and drugs act as amended August 23, 1912, where it is alleged that such statements were false and fraudulent, and, with respect to tuberculosis, that the statement was that the article "has cured" and "will cure," whereas "in truth and in fact" it will "not cure," and there is no "medicinal substance nor mixture of substances known at present" which can be relied on to effect a cure.

For other cases, see Pleading, II. p. in Dig. 1-52 N. S.

(January 10, 1916.)

WRITS of Error to the District Court of the United States for the District of Nebraska to review judgments condemning drugs as misbranded. Affirmed.

The facts are stated in the opinion.

Messrs. Daniel W. Baker and Francis D. Weaver, for plaintiff in error:

The statute is a penal statute.

Hipolite Egg Co. v. United States, 220 U. S. 45-60, 55 L. ed. 364-369, 31 Sup. Ct. Rep. 364; *United States v. Johnson*, 177 Fed. 313; *Huntington v. Attrill*, 146 U. S. 667, 668, 669, 36 L. ed. 1123, 1128, 13 Sup. Ct. Rep. 224; *United States v. Chouteau*, 102 U. S. 603, 26 L. ed. 246; *Lagler v. Bye*, 42 Ind. App. 592, 85 N. E. 36; *Diversey v. Smith*, 103 Ill. 390, 42 Am. Rep. 14; *Boyd v. United States*, 116 U. S. 816, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Coffey v. United States*, 116 U. S. 436, 29 L. ed. 684, 6 Sup. Ct. Rep. 437; *Lees v. United States*, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; *Hepner v. United States*, 213 U. S. 111, 53 L. ed. 723, 27 L.R.A.(N.S.) 739, 29 Sup. Ct. Rep. 474, 16 Ann. Cas. 960; *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; *United States v. Lacher*, 134 U. S. 629, 33 L. ed. 1083, 10 Sup. Ct. Rep. 625; *Northern Securities Co. v. United States*, 193 U. S. 358, 48 L. ed. 709, 24 Sup. Ct. Rep. 436.

The act is unconstitutional.

Feller v. United States, 213 U. S. 138, 53 L. ed. 737, 29 Sup. Ct. Rep. 470, 16 Ann. Cas. 1066; *United States v. Delaware & H. Co.* 164 Fed. 229; *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39; *American School v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; *Todd v. United States*, 158 U. S. 282, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; *United States v. Lacher*, 134 U. S. 628, 33 L. ed. 1083, 10 Sup. Ct. Rep. 625; *United States v. Grimaud*, 170 Fed. 210; *State v. Mann*, 2 Or. 241; *Brown v. State*, 137 Wis. 543, 119 N. W. 338; *United States v. Capital Traction Co.* 34 App. D. C. 597, 19 Ann. Cas. 68.

No prosecution can be had under this statute unless the libel, information, or indictment specifically and directly pointed out to the party charged wherein he has violated the law.

United States v. Simmons, 96 U. S. 360, 24 L. ed. 819; *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; *Pettibone v. United States*, 148 U. S. 202, 37 L. ed. 422, 13 Sup. Ct. Rep. 542; *Blitz v. United States*, 153 U. S. 315, 38 L. ed. 727, 14 Sup. Ct. Rep. 924; *Evans v. United States*, 153 U. S. 587, 38 L. ed. 831, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *Jedbetter v. United States*, 170 U. S. 610, 42 L. ed. 1163, 18 Sup. Ct. Rep. 774.

The libels do not state, or properly state, L.R.A.1916D.

any violation of the pure food law as amended.

There is no proper statement of the contents of the circular.

McClure v. Review Pub. Co. 38 Wash. 160, 80 Pac. 303; *Edgerley v. Swain*, 32 N. H. 481; *Com. v. Wright*, 1 Cush. 62; *Schubert v. Richter*, 92 Wis. 199, 66 N. W. 107.

There is no statement, nor is it contended, that the alleged statements mentioned in the libels anywhere appear on the original packages, or on the bottles themselves.

United States v. Johnson, 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627; *United States v. American Druggists' Syndicate*, 186 Fed. 387; *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431.

There is no statement that the statements alleged to be in the circular are false.

Hatcher v. Dunn, 102 Iowa, 411, 36 L.R.A. 689, 71 N. W. 343; *Ratterman v. Ingalls*, 48 Ohio St. 468, 28 N. E. 168; *State v. Brady*, 100 Iowa, 101, 36 L.R.A. 693, 62 Am. St. Rep. 560, 69 N. W. 290; *United States v. Johnson*, supra.

Not only is there no statement of facts anywhere in the libels showing that the alleged statements contained in said circulars are fraudulent, but the statements in the libels negative that fact.

Miller v. Tobin, 9 Sawy. 401, 18 Fed. 609; *Ball v. Lively*, 4 Dana, 370; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732, 17 Atl. 946; *Byard v. Holmes*, 34 N. J. L. 296, 6 Mor. Min. Rep. 657; *People v. Wiman*, 85 Hun, 320, 32 N. Y. Supp. 1037; *Re Reiffeld*, 36 Misc. 472, 73 N. Y. Supp. 808; *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 56 Am. Rep. 31; *St. Louis & S. F. R. Co. v. Johnson*, 138 U. S. 566-578, 33 L. ed. 683-687, 10 Sup. Ct. Rep. 390; *Fogg v. Blair*, 139 U. S. 118-127, 35 L. ed. 104-107, 11 Sup. Ct. Rep. 476; *Fox v. Hale & N. Silver Min. Co.* 5 Cal. Unrep. 980, 53 Pac. 32; *Tolbert v. Caledonian N. Ins. Co.* 101 Ga. 746, 28 S. E. 991; *Anderson Transfer Co. v. Fuller*, 73 Ill. App. 52; *Ward v. Lunceen*, 25 Ill. App. 160; *Kerr v. Steman*, 72 Iowa, 241, 33 N. W. 654; *Cohn v. Goldman*, 76 N. Y. 284; 16 Cyc. 231; *Cosgrove v. Fisk*, 90 Cal. 75, 27 Pac. 56; *New Bank v. Kleiner*, 112 Wis. 287, 87 N. W. 1090; *Cade v. Head Camp*, P. J. W. W. 27 Wash. 218, 67 Pac. 603; *Crowley v. Hicks*, 98 Wis. 566, 74 N. W. 348; *Evans v. United States*, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *United States v. Louisville & N. R. Co.* 165 Fed. 936; *United States v. Post*, 113 Fed. 854; *United States v. 68 Cases of Syrup*, 172 Fed. 782; *United States v. 650 Cases of Tomato Catsup*, 166 Fed. 773; *Nave-McCord Mercantile Co. v.*

United States, 104 C. C. A. 486, 182 Fed. 46.

Mr. E. Marvin Underwood, Assistant Attorney General, for the United States:

The amendment applies to statements in a circular contained within the original unbroken package.

United States v. Johnson, 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627; Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651; United States v. Lexington Mill & Elevator Co. 232 U. S. 399, 409, 58 L. ed. 658, 661, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337; United States v. Antikamnia Chemical Co. 231 U. S. 654, 667, 58 L. ed. 419, 425, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49; United States v. Goldenberg, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 656, 663, 23 L. ed. 336, 339; Johnson v. Southern P. Co. 196 U. S. 1, 18, 49 L. ed. 363, 369, 25 Sup. Ct. Rep. 158, 17 Am. Neg. Rep. 412; United States v. Winn, 3 Sumn. 209, Fed. Cas. No. 16,740; Postmaster General v. Early, 12 Wheat. 136, 148, 6 L. ed. 577, 582; Murphy v. Utter, 186 U. S. 95, 111, 46 L. ed. 1070, 1078, 22 Sup. Ct. Rep. 776; Platt v. Union P. R. Co. 99 U. S. 48, 58, 25 L. ed. 424, 427.

It is a constitutional regulation of interstate commerce.

Davis v. Mills, 194 U. S. 451, 456, 48 L. ed. 1067, 1071, 24 Sup. Ct. Rep. 692; Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. ed. 23, 70; Lottery Case (Champion v. Ames) 188 U. S. 321, 347, 47 L. ed. 492, 497, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561; Hoke v. United States, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; Hipolite Egg Co. v. United States, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364; Flint v. Stone Tracy Co. 220 U. S. 107, 176, 55 L. ed. 389, 423, 31 Sup. Ct. Rep. 342, Ann. Cas. 1912B, 1312; Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287; United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 44 L.R.A.(N.S.) 325, 33 Sup. Ct. Rep. 141; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Cooley, Const. Lim. 7th ed. 856.

It is not a regulation of matters of opinion.

Southern Development Co. v. Silva, 125 U. S. 247, 250, 31 L. ed. 678, 680, 8 Sup. Ct. Rep. 881, 15 Mor. Min. Rep. 435; Cliquot's Champagne, 3 Wall. 114, 18 L. ed. L.R.A.1916D.

116; Stebbins v. Eddy, 4 Mason, 414, Fed. Cas. No. 13,342; McDonald v. Smith, 139 Mich. 211, 102 N. W. 668; Com. v. Pierce, 138 Mass. 165, 52 Am. Rep. 264; Smith v. Land & House Property Corp. L. R. 28 Ch. Div. 7, 51 L. T. N. S. 718, 49 J. P. 182; Hedin v. Minneapolis Medical & S. Institute, 62 Minn. 146, 35 L.R.A. 417, 54 Am. St. Rep. 628, 64 N. W. 158; State v. Jules, 85 Md. 305, 36 Atl. 1027; Reg. v. Giles, 10 Cox, C. C. 44, Leigh & C. C. 502, 34 L. J. Mag. Cas. N. S. 50, 11 Jur. N. S. 119, 11 L. T. N. S. 643, 13 Week. Rep. 327; Clerk & L. Torts, 6th ed. p. 569; 1 Street, Foundations of Legal Liability, p. 395; Foster v. Swasey, 2 Woodb. & M. 217, Fed. Cas. No. 4,984; Reg. v. Bunce, 1 Post. & F. 523; Murray v. Tolman, 162 Ill. 417, 44 N. E. 748; Scott v. Burnight, 131 Iowa, 507, 107 N. W. 422; Culley v. Jones, 164 Ind. 168, 73 N. E. 94; Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Hickey v. Morrell, 102 N. Y. 454, 55 Am. Rep. 824, 7 N. E. 321; French v. Ryan, 104 Mich. 625, 62 N. W. 1016; Montgomery Southern R. Co. v. Matthews, 77 Ala. 357, 54 Am. Rep. 60; Eibel v. Von Fell, 55 N. J. Eq. 670, 38 Atl. 201; Birdsey v. Butterfield, 34 Wis. 52; Darling v. Stuart, 63 Vt. 570, 22 Atl. 634; Cruess v. Fessler, 39 Cal. 336; Smith v. Griswold, 6 Or. 440; Kohler Mfg. Co. v. Beeshore, 8 C. C. A. 215, 17 U. S. App. 352, 59 Fed. 572; Missouri Drug Co. v. Wyman, 129 Fed. 628; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Ayres v. French, 41 Conn. 142; Pom. Eq. Jur. § 878; State ex rel. Feller v. State Medical Examiners, 34 Minn. 391, 26 N. W. 125; Durland v. United States, 161 U. S. 306, 313, 40 L. ed. 709, 711, 16 Sup. Ct. Rep. 508; Evans v. United States, 153 U. S. 584, 592, 38 L. ed. 830, 833, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; Public Clearing House v. Coyne, 194 U. S. 497, 516, 48 L. ed. 1092, 1101, 24 Sup. Ct. Rep. 739; Bowen v. State, 9 Baxt. 45, 40 Am. Rep. 71; American School v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33; United States v. American Laboratories, 222 Fed. 104.

The act is not violative of the 5th or 6th Amendment.

Hoke v. United States, 227 U. S. 308, 323, 57 L. ed. 523, 527, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905; United States v. Zuoker, 161 U. S. 475, 481, 40 L. ed. 777, 779, 16 Sup. Ct. Rep. 641; Counselman v. Hitchcock, 142 U. S. 547, 563, 35 L. ed. 1110, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; United States v. Smith, 5 Wheat. 153, 159, 160, 5 L. ed. 57-59; United States v. Kelly, 11 Wheat. 417, 6 L. ed. 508; Baker v. State, 12 Ohio St. 214; Com. v. Exler, 243 Pa. 155, 89 Atl. 968; State v. Camley, 67 Vt.

322, 31 Atl. 840; *Nash v. United States*, 229 U. S. 373, 377, 57 L. ed. 1232, 1235, 33 Sup. Ct. Rep. 780; *International Harvester Co. v. Kentucky*, 234 U. S. 216, 223, 58 L. ed. 1284, 1288, 34 Sup. Ct. Rep. 853.

The allegations of the libel were sufficient.

United States v. Simmons, 96 U. S. 360, 362, 24 L. ed. 819, 820; *Fogg v. Blair*, 139 U. S. 118, 127, 35 L. ed. 104, 107, 11 Sup. Ct. Rep. 476; *Lehigh Zinc & I. Co. v. Bamford*, 150 U. S. 665, 673, 37 L. ed. 1215, 1217, 14 Sup. Ct. Rep. 219; *Wecker v. National Enameling Co.* 204 U. S. 176, 185, 51 L. ed. 430, 435, 27 Sup. Ct. Rep. 184, 9 Ann. Cas. 757; *Evans v. United States*, 153 U. S. 584, 593, 38 L. ed. 830, 833, 14 Sup. Ct. Rep. 934, 9 Am. Crim. Rep. 668; *Morrow v. Bonebrake*, 84 Kan. 724, 34 L.R.A.(N.S.) 1147, 115 Pac. 585; *Garvin v. Harrell*, 27 Okla. 373, 35 L.R.A.(N.S.) 862, 113 Pac. 186, Ann. Cas. 1912B, 744.

Mr. Justice Hughes delivered the opinion of the court:

Libels were filed by the United States, in December, 1912, to condemn certain articles of drugs (known as "Eckman's Alternative") as misbranded in violation of § 8 of the food and drugs act. The articles had been shipped in interstate commerce, from Chicago to Omaha, and remained at the latter place unsold and in the unbroken original packages. The two cases present the same questions, the libels being identical save with respect to quantities and the persons in possession. In each case demurrers were filed by the shipper, the Eckman Manufacturing Company, which challenged both the sufficiency of the libels under the applicable provision of the statute and the constitutionality of that provision. The demurrers were overruled, and, the Eckman Company having elected to stand on the demurrers, judgments of condemnation were entered.

Section 8 of the food and drugs act, as amended by the act of August 23, 1912, chap. 352, 37 Stat. at L. 416, Comp. Stat. 1913, § 8724, provides, with respect to the misbranding of drugs, as follows:

"Section 8. That the term 'misbranded,' as used herein, shall apply to all drugs or articles of food or articles which enter into the composition of food, the package or label of which shall bear any statement, design, or device regarding such article, or the ingredients or substances contained therein which shall be false or misleading in any particular, and to any food or drug product which is falsely branded as to the state, territory, or country in which it is manufactured or produced.

"That for the purposes of this act an article shall also be deemed to be misbranded. In case of drugs:

"Third. If its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent."

The amendment of 1912 consisted in the addition of paragraph "Third," which is the provision here involved.

It is alleged in each libel that every one of the cases of drugs sought to be condemned contained twelve bottles, each of which was labeled as follows:

"Eckman's Alternative,—contains twelve per cent of alcohol by weight, or fourteen per cent by volume—used as a solvent. For all throat and lung diseases including Bronchitis, Bronchial Catarrh, Asthma, Hay Fever, Coughs and Colds, and Catarrh of the Stomach and Bowels, and Tuberculosis (Consumption). . . . Two dollars a bottle. Prepared only by Eckman Mfg. Co. Laboratory Philadelphia, Penna., U. S. A."

And in every package containing one of the bottles, there was contained a circular with this statement:

"Effective as a preventative for Pneumonia." "We know it has cured and that it has and will cure Tuberculosis."

The libel charges that the statement "effective as a preventative for pneumonia" is "false, fraudulent, and misleading in this, to wit, that it conveys the impression to purchasers that said article of drugs can be used as an effective preventative for pneumonia, whereas, in truth and in fact, said article of drugs could not be so used;" and that the statement, "we know it has cured" and that it "will cure tuberculosis" is "false, fraudulent, and misleading in this, to wit, that it conveys the impression to purchasers that said article of drugs will cure tuberculosis, or consumption, whereas, in truth and in fact, said article of drugs would not cure tuberculosis, or consumption, there being no medicinal substance nor mixture of substances known at present which can be relied upon for the effective treatment or cure of tuberculosis, or consumption."

The principal question presented on this writ of error is with respect to the validity of the amendment of 1912.

So far as it is objected that this measure, though relating to articles transported in interstate commerce, is an encroachment upon the reserved powers of the states, the objection is not to be distinguished in substance from that which was overruled in sustaining the white slave act, 36 Stat. at L. 825, chap. 395, Comp. Stat. 1913, § 8812. *Hoke v. United States*, 227 U. S. 308, 57 L. ed. 523, 43 L.R.A.(N.S.) 906, 33 Sup. Ct. Rep. 281, Ann. Cas. 1913E, 905. There,

after stating that "if the facility of interstate transportation" can be denied in the case of lotteries, obscene literature, diseased cattle and persons, and impure food and drugs, the like facility could be taken away from "the systematic enticement of and the enslavement in prostitution and debauchery of women," the court concluded with the reassertion of the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations. *Id.* pp. 322, 323. See *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 215, 29 L. ed. 158, 166, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Hipolite Egg Co. v. United States*, 220 U. S. 45, 57, 55 L. ed. 364, 368, 31 Sup. Ct. Rep. 364; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321, 13 Am. Crim. Rep. 561.

It is urged that the amendment of 1912 does not embrace circulars contained in the package, but only applies to those statements which appear on the package or on the bottles themselves; that is, it is said that the word "contain" in the amendment must have the same meaning in the case of both "package" and "label." Reference is made to the original provision in the first sentence of § 8 with respect to the statements, etc., which the package or label shall "bear." And it is insisted that if the amendment of 1912 covers statements in circulars which are contained in the package, it is unconstitutional. Such statements, it is said, are not so related to the commodity as to form part of the commerce which is within the regulating power of Congress.

But it appears from the legislative history of the act that the word "contain" was inserted in the amendment to hit precisely the case of circulars or printed matter placed inside the package, and we think that is the fair import of the provision. *Cong. Rec.* 62d Cong. 2d Sess. vol. 48, pt. 11, page 11,322. And the power of Congress manifestly does not depend upon the mere location of the statement accompanying the article, that is, upon the question whether the statement is *on* or *in* the package which is transported in interstate commerce. The further contention that Congress may not deal with the package thus transported in the sense of the immediate container of the article as it is intended for consumption is met by *McDermott v. Wisconsin*, 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, *Ann. Cas.* 1915A, 39. There the court said: "That the word 'package' or its equivalent expression, as L.R.A.1916D.

used by Congress in §§ 7 and 8 in defining what shall constitute adulteration and what shall constitute misbranding within the meaning of the act [food and drugs act] clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. . . . Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed." And, after stating that the requirements of the act, thus construed, were clearly within the power of Congress over the facilities of interstate commerce, the court added that the doctrine of original packages set forth in repeated decisions, which protected the importer in the right to sell the imported goods, was not "intended to limit the right of Congress, now asserted, to keep the channels of interstate commerce free from the carriage of injurious or fraudulently branded articles, and to choose appropriate means to that end." *Id.* pp. 130, 131, 137.

Referring to the nature of the statements which are within the purview of the amendment, it is said that a distinction should be taken between articles that are illicit, immoral, or harmful and those which are legitimate, and that the amendment goes beyond statements dealing with identity or ingredients. But the question remains as to what may be regarded as "illicit," and we find no ground for saying that Congress may not condemn the interstate transportation of swindling preparations designed to cheat credulous sufferers, and make such preparations, accompanied by false and fraudulent statements, illicit with respect to interstate commerce, as well as, for example, lottery tickets. The fact that the amendment is not limited, as was the original statute, to statements regarding identity or composition (*United States v. Johnson*, 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627), does not mark a constitutional distinction. The false and fraudulent statement which the amendment describes accompanies the article in the package, and thus gives to the article its character in interstate commerce.

Finally, the statute is attacked upon the ground that it enters the domain of speculation (*American School v. McAnnulty*, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33), and by virtue of consequent uncertainty operates as a deprivation of liberty and

property without due process of law, in violation of the 5th Amendment of the Constitution, and does not permit of the laying of a definite charge as required by the 6th Amendment. We think that this objection proceeds upon a misconstruction of the provision. Congress deliberately excluded the field where there are honest differences of opinion between schools and practitioners. Cong. Rec. 62d Cong. 2d Sess. vol. 48, pt. 12, Appx. p. 675. It was, plainly, to leave no doubt upon this point that the words "*false and fraudulent*" were used. This phrase must be taken with its accepted legal meaning, and thus it must be found that the statement contained in the package was put there to accompany the goods with actual intent to deceive,—an intent which may be derived from the facts and circumstances, but which must be established. *Id.* 676. That false and fraudulent representations may be made with respect to the curative effect of substances is obvious. It is said that the owner has the right to give his views regarding the effect of his drugs. But state of mind is itself a fact, and may be a material fact, and false and fraudulent representations may be made about it; and persons who make or deal in substances or compositions alleged to be curative are in a position to have superior knowledge, and may be held to good faith in their statements. *Russell v. Clark*, 7 Cranch, 69, 92, 3 L. ed. 271, 279; *Durland v. United States*, 161 U. S. 306, 313, 40 L. ed. 709, 711, 16 Sup. Ct. Rep. 508; *Stebbins v. Eddy*, 4 Mason, 414, 423, Fed. Cas. No. 13,342; *Kohler Mfg. Co. v. Beeshore*, 59 Fed. 572, 574; *Missouri Drug Co. v. Wyman*, 129 Fed. 623, 628; *McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668; *Hedin v. Minneapolis Medical & S. Institute*, 62 Minn. 146, 149, 35 L.R.A. 417, 54 Am. St. Rep. 628, 64 N. W. 158; *Hickey v. Morrell*, 102 N. Y. 454, 463, 55 Am. Rep. 824, 7 N. E. 321; *Reg. v. Giles*, 10 Cox, C. C. 44, *Leigh & C. C. C.* 502, 34 L. J. Mag. Cas. 50, 11 Jur. N. S. 119, 11 L. T. N. S. 643, 13 Week. Rep. 327; *Smith v. Land & House Property Corp.* L. R. 28 Ch. Div. 7, 15, 51 L. T. N. S. 718, 49 J. P. 182. It cannot be said, for example, that one who should put inert matter or a worthless composition in the channels of trade, labeled or described in an accompanying circular as a cure for disease, when he knows it is not, is beyond the reach of the lawmaking

power. Congress recognized that there was a wide field in which assertions as to curative effect are in no sense honest expressions of opinion, but constitute absolute falsehoods, and in the nature of the case can be deemed to have been made only with fraudulent purpose. The amendment of 1912 applies to this field and we have no doubt of its validity.

With respect to the sufficiency of the averments of the libels, it is enough to say that these averments should receive a sensible construction. There must be a definite charge of the statutory offense, but we are not at liberty to indulge in hypercriticism in order to escape the plain import of the words used. There is no question as to the adequacy of the description of the article, or of the shipments, or of the packages. It is said that there was no proper statement of the contents of the circular. But the libels give the words of the circular, and we think that the allegations were sufficient to show the manner in which they were used. The objection that it was not alleged that the statements in question appeared on the original packages or on the bottles themselves, as already pointed out, is based on a misconstruction of the statutory provision. The remaining and most important criticism is that the libels did not sufficiently show that the statements were false and fraudulent. But it was alleged that they were false and fraudulent, and with respect to tuberculosis it was averred that the statement was that the article "has cured" and "will cure," whereas "in truth and in fact" it would "not cure," and that there was no "medicinal substance nor mixture of substances known at present" which could be relied upon to effect a cure. We think that this was enough to apprise those interested in the goods of the charge which they must meet. It was, in substance, a charge that, contrary to the statute, the article had been made the subject of interstate transportation with a statement contained in the package that the article had cured and would cure tuberculosis, and that this statement was contrary to the fact, and was made with actual intent to deceive.

Judgments affirmed.

Mr. Justice McReynolds took no part in the consideration or decision of these cases.

Annotation—What constitutes misbranding within pure food and drugs laws.

As to what constitutes the misbranding of vinegar, see subdivision at page L.R.A.1916D.

1210 of note to *People v. William Henning Co.* in 49 L.R.A.(N.S.) 1206, upon

the constitutionality and construction, generally, of statutes in relation to vinegar.

Upon the question whether the requirements of pure food laws as to labeling apply to small retail packages taken from the original package of the manufacturer, see note to *Armour & Co. v. Bird*, 25 L.R.A.(N.S.) 616.

As to what constitutes adulteration within the food and drugs acts, see note to *United States v. Lexington Mill & Elevator Co.* L.R.A.1915B, 774.

For the validity of police regulations as to branding or labeling articles of commerce, see notes to *Ex parte Hayden*, 1 L.R.A.(N.S.) 184, and *Alcorn Cotton Oil Co. v. State*, 40 L.R.A.(N.S.) 875.

For state regulations as to misbranding as affected by the Federal pure food law, see note to *McDermott v. State*, 47 L.R.A.(N.S.) 985.

For inducing a shipment of misbranded food for the purpose of creating a basis for a criminal charge, as a defense to prosecution, see subdivision at page 953 of note to *State v. Smith*, 30 L.R.A.(N.S.) 946, upon the general subject of instigation or consent to crime for the purpose of detecting a criminal, as a defense to prosecution.

During recent years statutes have been passed in most, if not all, jurisdictions, regulating the manufacture and marketing of food products, and in many cases also of drugs, and these statutes have almost uniformly been upheld as a valid exercise of the police power for the protection of the public against unwholesome and harmful preparations, and adulterations and imitations of, and substitutes for, known articles. See note in 40 L.R.A.(N.S.) 875. One requirement of most of these statutes is that articles within their scope shall be so branded or labeled as to show truthfully certain facts regarding their identity, composition, quantity, source, etc., and it is the construction of this statutory requirement with which this annotation deals.

General rule of construction.

In construing the brands or labels on food products or drugs alleged to be misbranded, the words used should be given their ordinary and customary meaning, so far as they have one, rather than the scientific or technical meaning. (*United States v. 75 Boxes of Alleged Pepper* (1912) 198 Fed. 934; *United States v. 150 Cases of Fruit Pudding* (1914) 211 Fed. 360), or the commercial significance which they have acquired

among manufacturers and dealers (*Libby, McNeill & Libby v. United States* (1913) 127 C. C. A. 14, 210 Fed. 148), different from the ordinary and popular meaning.

As stated in *United States v. 75 Boxes of Alleged Pepper* (Fed.) supra: "It is difficult to perceive how otherwise justice could be done in any given case, or what practical efficiency the statute would have, or what protection it would afford, if the public were required to have scientific and technical knowledge as to the derivation and nomenclature of the various food and drug products. The ordinary purchaser, unless he could rely upon the common and generally understood signification of a label, could never be certain of what he was buying. A label should be reliable to the extent that it will not in any wise, or to any extent, mislead such a purchaser."

And so, a food product in which no fruit, in the common meaning of the word, is used, is misbranded if labeled "Fruit Flavored," although "the grain out of which the product is manufactured is, botanically speaking, a fruit." *United States v. 150 Cases of Fruit Pudding* (Fed.) supra.

Intent.

In proceedings under the Federal food and drugs act or insecticide act for the condemnation of misbranded articles, the intent of the claimant is immaterial, the sole question being whether the articles are so labeled or branded as to deceive and mislead the purchaser. *United States v. 36 Bottles of London Dry Gin* (1914) 127 C. C. A. 119, 210 Fed. 271, reversing (1913) 205 Fed. 111; *United States v. 2 Cases of Chloro-Naptholeum Disinfectant* (1914) 217 Fed. 477; *United States v. 267 Boxes of Macaroni* (1915) 225 Fed. 79.

Nor is intent an element of the offense of misbranding under the Federal food and drugs act. *Weeks v. United States* (1915) 139 C. C. A. 626, 224 Fed. 64.

Statements as to nature or identity of article.

Soda water contained in bottles having blown therein the words, "The contents of this bottle manufactured by the Phos-Ferrone Manufacturing Company, Phos-Ferrone," is misbranded within the Missouri food and drugs law of 1907; it appearing that soda water and phosphorane are different substances, and their names indicate a different composition, and also that the soda water in the bottles was not made by the Phos-Fer-

rone Manufacturing Company. State v. Lief (1913) 248 Mo. 722, 154 S. W. 1133.

So, under the Federal food and drugs act, cheap, ordinary, low grade carbonated white wine, which is in fact offered for sale and sold as champagne, and which is put up and labeled in close imitation of champagne, and bears the words "extra dry," which are false as applied to it,—is misbranded in that it is an imitation, and is offered for sale under the distinctive name of another article, and is so labeled as to deceive and mislead the purchaser, although the word "champagne" nowhere appears on the label. United States v. 5 Cases of Champagne (1913) 205 Fed. 817.

And ordinary Croton water drawn from a pipe in New York city and thoroughly filtered, and bottled with the addition of a little mineral salt and carbonic acid gas, is misbranded if labeled "Imperial Spring Water," as the label is misleading, although the water is pure and wholesome. United States v. Morgan (1910) 181 Fed. 587, which, however, granted a motion in arrest of judgment for want of allegation and proof of notice and a preliminary hearing; judgment granting motion in arrest reversed in (1911) 222 U. S. 274, 56 L. ed. 198, 32 Sup. Ct. Rep. 81, on the ground that such notice and hearing were not a condition precedent to the prosecution.

Likewise, an article of food made of ground cocoanut, sugar, and the white of eggs, which is labeled and shipped as "Macaroons," is misbranded, if a macaroon, as commonly understood, is made of ground almonds, sugar, and the white of eggs. Washburn v. United States (1915) 140 C. C. A. 81, 224 Fed. 395.

And a food product which is labeled merely "Condensed Skimmed Milk," while it contains 42 per cent of cane sugar, is misbranded, where it appears that unsweetened condensed skimmed milk is also produced and sold. Libby, McNeill & Libby v. United States (1913) 127 C. C. A. 14, 210 Fed. 148.

In Washburn v. United States (Fed.) supra, it was further held that, if the jury found that a "macaroon" consisted of cocoanut, sugar, and the white of eggs, then an article of food containing also glucose and branded "Macaroons" was misbranded within the meaning of § 8, subdivs. 1 and 4 (1) of the Federal act, as it was "an imitation of, or offered for sale under the distinctive name of, another article," and was labeled so as to deceive and mislead the purchaser.

In this case, however, which was a prosecution upon an information in two L.R.A.1916D.

counts, charging both adulteration and misbranding of the same article, the court, after concluding that the verdict on the first count, charging adulteration, must be set aside for other reasons, said: "Furthermore, it seems to us that the trial on the first count proceeded upon a wrong theory, and that the allegations and proofs offered would not warrant a conviction for adulteration within the meaning of the act. The evidence discloses that a macaroon is a mixed food composed of certain ingredients; that the name by which it is known is distinctive; and that the added ingredient, glucose, which the respondent used in its cakes, was not poisonous or deleterious to health. It is provided in § 8, subdiv. 4 (1), that a mixture known by a distinctive name shall not be regarded as adulterated if it does not contain any added poisonous or deleterious ingredient. The added ingredient here in question was neither poisonous nor deleterious, and, as the mixture or compound was known by a distinctive name, it was not adulterated within the meaning of the act." And as § 8, subdiv. 4 (1), referred to, provides not only that such an article shall not be regarded as adulterated, but also, in the same phrase, that it shall not be deemed to be misbranded, it is difficult to see why this reasoning does not apply also to the second count, charging misbranding. The court, however, affirmed the decree so far as it related to this count, on the ground that, as above stated, if the jury found that a macaroon consisted of cocoanut, sugar, and the white of eggs, then the defendant's article containing also glucose, and branded "Macaroons," was in "imitation of, or offered for sale under the distinctive name of, another article," which is excluded from the proviso to § 8, subdiv. 4 (1). But it is also difficult to see why this reasoning would not likewise prevent the application of the proviso to the charge under the first count of the information.

In Brina v. United States (1910) 105 C. C. A. 558, 179 Fed. 373, cottonseed oil contained in cans labeled salad oil was held to be misbranded within the meaning of the Federal act. The court said: "The trial judge held, and so charged the jury, that 'as a notorious fact salad oil prima facie means olive oil,' but allowed the defendant to show if he could that 'it means something else because of recent events which have perhaps rendered olive oil more difficult to obtain, or that other food elements have come to be known as salad oil.' No such proof was introduced, and the ruling is assigned as

error. The Century Dictionary, Worcester's, Stormont's Imperial, and the Encyclopedia all define 'salad oil' as 'olive oil.' Webster's does not give any definition. We are satisfied that the trial judge quite properly charged, in the absence of any testimony of the sort suggested, that 'salad oil prima facie imports olive oil; that is what the world has been accustomed to regard as salad oil.'

But in *Von Bremen v. United States* (1912) 113 C. C. A. 296, 192 Fed. 904, it was held that sesame oil, or (obiter) cottonseed oil, labeled "salad oil," is not misbranded in that the label is false and misleading as indicating that the article is olive oil, or deceives and misleads the purchaser into believing that it is olive oil, if it is shown that enormous quantities of edible oils made from cottonseed, from the seed of sesame, from peanuts, and from corn have been sold as "salad oil," and that olive oil is almost invariably labeled and sold as "olive oil;" that the trade does not understand "salad oil" to mean olive oil; and that purchasers of other than olive oil, as "salad oil," have not been misled or deceived.

And a liquid having a vanilla flavor, but containing no extract from the vanilla bean, which is labeled "Nectar Choice Flavor of Vanilla, sugar colored, for flavoring," etc., is not misbranded within the meaning of the Federal act, as the words "flavor" and "extract" are not synonymous. *United States v. St. Louis Coffee & Spice Mills* (1909) 189 Fed. 191.

Statement as to composition of article.

A combination of ground black pepper and ground long pepper, which is labeled "Pure Pepper," is misbranded within the meaning of the Federal act, if it is shown that "pure pepper" means, in the trade and in the market, black pepper and nothing else. *United States v. 75 Boxes of Alleged Pepper* (1912) 198 Fed. 934.

And an article which contains 65 per cent of white pepper and 35 per cent of a corn product, and is labeled "Compound White Pepper" in large and plain letters, and about an inch thereunder, in small and inconspicuous type, "Composed of ground white pepper and ground cereals," is misbranded within the meaning of the Federal act, as the term "Compound White Pepper" (not necessarily importing the same idea as "White Pepper Compound") "does not so naturally imply, to the average purchaser, a mixture of white pepper with an ingredient other than pepper as to make it a proper L.R.A.1916D.

branding, as against the fact (as alleged) that the statement of the ingredients is so placed and in such type as not to be readily noticed by the purchaser, and as to be calculated and intended to deceive and mislead the latter." *Frank v. United States* (1911) 113 C. C. A. 188, 192 Fed. 864.

Likewise, a food product consisting chiefly of imitation "wild cherry essence artificially colored," which is labeled "Fruit Wild Cherry Compound," is misbranded within the meaning of the Federal act, in that the label is misleading and deceptive to the public as conveying to the mind a representation that the dominant element in the combination is genuine fruit wild cherry, to which something else, such as an essence or extract, has been added. *United States v. Weeks* (1912) 225 Fed. 1017.

And tomato catsup to which pumpkin has been added as a filler—conceding that the result is an article which may be described as a compound—is misbranded if merely marked "Compound" on the package, without indicating the substances composing it. *William Henning & Co. v. United States* (1912) 113 C. C. A. 382, 193 Fed. 52.

But a food product consisting of an imitation wild cherry essence and fruit wild cherry, which is labeled "Fruit Wild Cherry Compound," is not misbranded within the meaning of the Federal act, although the ingredients of the compound are not stated. *United States v. Weeks* (Fed.) supra.

"Where there is no proof that the words 'Hudson's Extract' have a well-known trade meaning, an imitation of vanilla marked 'Hudson's Extract', without giving any indication of what the article is composed, shows a clear case of misbranding under the pure food law." *Hudson Mfg. Co. v. United States* (1912) 113 C. C. A. 625, 192 Fed. 920.

But an article of food consisting of a compound of lemon terpene and citral, which is labeled "Special Lemon. Lemon Terpene and Citral," is not misbranded within the meaning of the Federal act, in that the label is misleading as indicating that the article is a product derived from lemons. *Weeks v. United States* (1915) 139 C. C. A. 626, 224 Fed. 64.

And a fluid containing no measurable amount of lemon oil, which is an essential ingredient of pure lemon flavor, but containing citral, not derived from the lemon fruit, is not shown to be misbranded within the meaning of the Federal act, when labeled "Flavor of Lemon

and Citral—a Pure Flavor,” if it is not shown that the oil of lemon is an essential ingredient of a pure flavor of lemon and citral. *Nave-McCord Mercantile Co. v. United States* (1910) 104 C. C. A. 486, 82 Fed. 46.

An insecticide labeled “Sulpho-Napthol,” which contains less than four tenths of 1 per cent of sulphur, the presence of which is due to chemical or accidental impurities in the raw materials employed, and does not in any appreciable way affect the usefulness of the article, is misbranded within the meaning of the Federal insecticide act of 1910. *United States v. 2 Cases of Sulpho-Napthol* (1914) 213 Fed. 519.

And a disinfectant labeled “Chloro-Naptholeum,” which contains neither chlorin nor chlor-napthol, is misbranded within the meaning of the Federal insecticide act of 1910, in that the label is false and misleading, and the article so labeled as to deceive a purchaser of normal capacity, who uses that capacity in a common-sense way, where it appears that chlorin has long been recognized as a valuable disinfectant and is extensively used in purifying the water supplies of urban communities; that napthol is also a well-known and powerful germicide; and that the name chlor-napthol has long been given to a definite chemical compound which is also a powerful germicide,—although a large majority of the purchasers of the article in question may not know these facts, or be misled by the name applied to the article. *United States v. 2 Cases of Chloro-Naptholeum Disinfectant* (1914) 217 Fed. 477.

And under the declaration of § 8 of the Federal insecticide act of 1910, that an insecticide, other than Paris green or lead arsenate, which “consists partially or completely of an inert substance or substances which do not prevent, destroy, repel, or mitigate insects or fungi,” is misbranded unless it has “the names and percentage amounts of each and every one of such inert ingredients plainly and correctly stated on the label,” or the producer states “plainly upon the label the correct names and percentage amounts of each and every ingredient of the insecticide or fungicide having insecticidal or fungicidal properties,” and as to the inert ingredients merely states the total percentage thereof present,—“Roach Food” is misbranded, which contains wheat flour and small quantities of other substances which do not prevent, destroy, repel, or mitigate insects, without having on the label either of the alternative statements required by the act, L.R.A.1916D.

although the substances are in the nature of food or bait attractive to the insects which it is sought to kill, and are necessary to induce them to eat the poison compounded therewith, which alone would not produce the desired result. *United States v. 30 Dozen Packages of Roach Food* (1913) 202 Fed. 271.

Candy containing 15¹/₁₀₀ per cent of alcohol, which is labeled “Chocolates,” without stating the proportion of alcohol contained therein, is misbranded within the Oregon pure food law of February 28th, 1915, which provides that an article shall be deemed to be misbranded, if (among other things) it fails to bear a statement on the label of the quantity or proportion of any alcohol, etc. *Hoefler v. Mickle* (1915) — Or. —, 153 Pac. 417.

And under the provisions of § 8 of the Federal pure food and drugs act of 1906, that a drug shall be deemed to be misbranded if its label shall be false or misleading in any particular, or shall fail to state the quantity or proportion of certain enumerated substances, or any derivative or preparation of any of such substances, contained therein, a drug containing one of such derivatives is misbranded unless the label thereon, in addition to stating the quantity of such derivative, by name, also states the substance from which such derivative is produced, in order to make the warning of the label complete. *United States v. Antikamnia Chemical Co.* (1914) 231 U. S. 654, 58 L. ed. 419, 34 Sup. Ct. Rep. 222, Ann. Cas. 1915A, 49, reversing (1912) 37 App. D. C. 343.

And in *State v. Intoxicating Liquors* (1909) 106 Me. 135, 76 Atl. 268, it was held that liquor of which the alcoholic contents is less, and the residuum much more, than the standard test for whisky in the United States Pharmacopœia or National Formulary, and which is labeled as monogram whisky and marked merely “Blend,” without a statement of the standard of strength, quality, or purity, is misbranded within the provisions of the Federal food and drugs act, which prohibit interstate commerce in any article of food or drugs which is adulterated or misbranded, and define the term “drug” as including all medicines and preparations recognized in the United States Pharmacopœia or National Formulary, and declare that a drug shall be deemed to be adulterated, if, when sold under a name recognized in the United States Pharmacopœia or National Formulary, it differs from the standard of strength, quality, or purity as determined by the test laid down therein, with-

out bearing upon the container a plain statement of the standard of strength, quality, or purity.

It is not a necessary condition of a finding that a drug is misbranded within the meaning of the Federal act, that a statement on the label regarding the composition of the drug should be flatly and baldly false, but the drug is misbranded, if the jury find that the statement in question is such as to create or lead to a false impression in the mind of the reader as to what the ingredients or the composition of the drug is. *United States v. American Laboratories* (1915) 222 Fed. 104.

But an article labeled "Peroxide Cream" is not misbranded within the meaning of the Federal act by reason of the fact that it contains only an insignificant quantity of peroxide. *United States v. American Druggists' Syndicate* (1911) 186 Fed. 387.

A syrup made from cane sugar and a product of some treatment of maple wood, which bears a label consisting of the words "Ohio" above and "Maple Syrup" below, in red, with the word "Blended" between in blue, and below these words, in smaller type, the statement that "this syrup is made from the sugar maple tree and cane sugar," is misbranded within the meaning of the Federal act, in that the label is misleading as conveying the idea that the product contains at least some maple syrup, whereas, in fact, it contains none at all as the term "maple syrup" is popularly understood. *United States v. Scanlon* (1908) 180 Fed. 485.

But it has been held that a syrup consisting largely of refined cane sugar flavored with an extract of maple wood, which is labeled "blended" maple syrup, is not misbranded within the Federal food and drugs act, in that the label is misleading; the proviso to § 8, "In the case of food," subdiv. "Fourth," providing, in legal effect, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded if labeled so as to indicate plainly that it is a "blend," and the word "blend" is plainly stated on the package; and the term "blend" so used shall be construed to mean a mixture of like substances, not excluding harmless flavoring ingredients used for the purpose of flavoring only. *United States v. 68 Cases of Syrup* (1909) 172 Fed. 781.

And a syrup composed of 90 per cent of white sugar and 10 per cent maple sugar, which is labeled "Gold Leaf Syrup," composed of "maple and white sugar," with the name of the maker and a trade-L.R.A.1916D.

mark consisting of a maple leaf printed in gold, with stalks of sugar cane projecting on each side, is not misbranded within the Federal act, in that the label is misleading as representing, and tending to make a purchaser believe, that the article is composed principally of maple sugar. *Re Wilson* (1909) 168 Fed. 566.

Similarly, an article of food consisting principally of glucose and starch sugar, with some honey added, which is labeled, "Compound: Pure Comb and Strained Honey and Corn Syrup," is not misbranded, within the meaning of the Federal act of 1906, merely in that the label is misleading as holding out to the public that "pure comb honey" is the principal ingredient. *United States v. Boeckmann* (1910) 176 Fed. 382.

And molasses containing from 30 to 40 per cent of commercial glucose, which may properly be labeled and sold as "Corn Syrup," which molasses bears labels having the words "Sugar House Molasses" in large letters, but distinctly stating in three places that it is a compound of molasses and corn syrup, is not misbranded within the meaning of the Federal act, in that the labels are misleading as conveying the impression that the substance is pure sugar house molasses. *United States v. 779 Cases of Molasses* (1909) 98 C. C. A. 197, 174 Fed. 325.

Under the Michigan statute "in relation to the sale of corn syrup," which prohibits the sale, etc., of any cane syrup, beet syrup, or glucose, unless the package containing it be distinctly branded or labeled with the true and appropriate name; or of any cane syrup or beet syrup mixed with glucose, unless the package containing it be distinctly branded or labeled "Glucose Mixture" or "Corn Syrup," etc.,—a syrup composed of 90 per cent pure syrup made entirely from corn, commercially called "glucose" or "corn syrup," and 10 per cent cane syrup, which composition is labeled corn syrup, with a statement of the formula of the contents of the package, as follows, "Corn syrup, 90 per cent, cane syrup, 10 per cent," is not misbranded in that it describes the corn syrup element as "corn syrup," instead of "glucose." *People v. Harris* (1903) 135 Mich. 136, 97 N. W. 402.

But in *McDermott v. State* (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315, which was a prosecution for selling a mixture of glucose and cane syrup labeled, in one case, "Karo Corn Syrup; 10 per cent Cane Syrup, 90 per cent Corn Syrup," and, in another case, "Karo Corn

Syrup with Cane flavor; Corn Syrup 85 per cent," in violation of the Wisconsin statute prohibiting the sale of any of the specified syrups or any molasses or glucose unless it is true to name and labeled with the true name, or any syrup or molasses mixed with glucose unless it is so labeled as to show plainly the true name of each and all the ingredients, and prescribing that if the proportion of glucose in a syrup and glucose mixture exceeds 75 per cent, the mixture shall be labeled by adding the name of the syrup used as the name of a flavoring, as "Glucose flavored with Maple Syrup," or "Cane Syrup," as the case may be,—it was held that the court below was justified in finding that pure glucose was not a syrup in the sense in which the term was commonly used and applied to these articles of table foods, and that the terms "glucose" and "corn syrup" were not synonymous in their trade meaning and use as applied to articles of table food; and that the natural result of the use of the term "corn syrup" to indicate a mixture of glucose and syrup was to mislead the consumers into the belief that they were obtaining a table syrup of the variety and kind commonly known as syrup, the product of sugar producing plants, and the consequences of such practice were that the consumers were misled and deceived in respect to the actual nature, the constituents, and the value of the article as a food product. The judgment of the Wisconsin court was, however, reversed by the United States Supreme Court, in (1913) 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39, on the ground that the Wisconsin statute was invalid as conflicting with the Federal food and drugs act, and interfering with interstate commerce in forbidding all labels other than the one it prescribed.

A syrup composed of sugar, citric and tartaric acid, and the juices of certain fruits, not including pomegranates, which is labeled "Grenadine Syrup," is not misbranded in that the label is deceptive or misleading as tending to induce purchasers to believe that the syrup is composed only of sugar and the juice of pomegranates, where it is shown that, according to the accepted meaning of the words "Grenadine Syrup," they signify only a syrup having a certain color and characteristic flavor, and not a syrup actually made from pomegranates. United States v. 30 Cases (1912) 199 Fed. 932.

And a mixed food for animals, which is branded "Corno Horse and Mule Feed. Mixture of ground alfalfa, oats, corn, L.R.A.1916D.

flax bran, oat and hominy feeds," followed by the name of the manufacturer and a guaranteed analysis, is not misbranded within the meaning of the Federal act, by reason of the fact that it contains a quantity of oat hulls in excess of the amount that would have been naturally and normally present in case whole ground oats had been used in lieu of the same amount of the by-product of oatmeal or rolled oat factories contained in the mixture, as the words "oat feed" properly mean such by-product, containing a large proportion of oat hulls, and should not, especially when used in juxtaposition with the word "oats," as on this label, lead anyone to believe that the whole ground or crushed grain is meant. United States v. 1 Carload of Corno Horse & Mule Feed (1911) 188 Fed. 453.

But a food for domestic animals containing 30 per cent of corncob and but 12 per cent of protein, which is labeled "XXX Mixed Feed . . . Guaranteed Analysis. Protein 13.81 per cent . . . Made from: Wheat Middlings. Corn," is misbranded within the Kentucky pure food law which provides that "an article of food shall be deemed misbranded: (1) If the package or label shall bear . . . any statement purporting to name the substances of which such article is made, which statement shall not give fully the name or names of all substances contained in any measurable quantity." W. H. Small & Co. v. Com. (1909) 134 Ky. 272, 120 S. W. 361.

Under a statute requiring labels on foods which are mixtures or compounds to show that fact, a label for a food compounded of meat and cereal is sufficient which states that it is sausage and cereal, without stating the addition of water, although water is also an ingredient of the mixture. Armour & Co. v. State Dairy & Food Com'r. (Armour & Co. v. Bird) (1909) 159 Mich. 1, 25 L.R.A.(N.S.) 616, 123 N. W. 580.

And a label stating that "This Baking Powder contains the following ingredients and none other: Starch, Egg, Phosphate, Bicarb. Soda, Sodium Aluminium Sulphate," used on baking powder consisting of bicarbonate of soda, calcium acid phosphate, sodium aluminium sulphate, egg albumen, and corn starch, is a substantial compliance with the requirement of the Oregon food laws, that all baking powder must "have printed on the label in plain English, free from all technical or chemical phrases, . . . the names of all ingredients composing" it. Crescent Mfg. Co. v. Mickle (1914) 216 Fed. 246.

And an article of food labeled "O'Donohue's Fifth Avenue Salad Dressing" is not misbranded in violation of the New York agricultural law, in that the label does not state the ingredients of the article, as such a statement is required only when the article is an imitation or adulteration of some standard article of food; there being no proof that there is a standard merchantable salad dressing, and that the article in question is not that article, or that any ingredient of the article in question is unwholesome or foreign to true salad dressing. *People v. Henderson* (1911) 74 Misc. 577, 131 N. Y. Supp. 997.

Under § 165 of the New York agricultural law, which provides that an article of food shall be deemed to be misbranded if it be an imitation of, or offered for sale under the distinctive name of, another article, or if the package containing it, or its label, bears any false or misleading statement regarding the ingredients or the substances contained therein: Provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded, if it is a mixture or compound known by its own distinctive name, and is not an imitation of or offered for sale under the distinctive name of another article, or if it is an article so labeled as to indicate plainly that it is a mixture, compound, combination, imitation, or blend, and to show the character and constituents thereof,—“tomato catsup” labeled, “Prepared from whole ripe tomatoes, no artificial color, and contains one tenth (1/10) of soda benzoate,” but which is artificially colored and contains benzoic acid and 22/100 of 1 per cent of soda benzoate, is misbranded; the proviso in the statute having no application to the article in question. *People v. Luke* (1907) 122 App. Div. 64, 106 N. Y. Supp. 621.

And a compound composed of vanillin, cummerin, spirits, sugar, coloring, and water, which is contained in a bottle upon which is a label bearing, in large full-face type, the words “Peerless Extract of Vanilla,” is misbranded, under the same section, although the bottle also has, on the reverse side thereof, a small white strip of paper upon which is printed in small type the following: “Formula Vanilline Cummerin Spirits Sugar Coloring Water;” such article so labeled not being within the proviso. *People v. Butler* (1909) 134 App. Div. 151, 118 N. Y. Supp. 849, reversing a judgment of the municipal court in favor of the defendant, which dismissed the L.R.A.1916D.

complaint, and ordering a new trial; appeal dismissed without opinion in (1910) 200 N. Y. 556, 93 N. E. 1127; judgment of the municipal court affirmed, after a new trial, on the authority of the judgment on the first appeal, in (1912) 148 App. Div. 928, 133 N. Y. Supp. 1137, which was affirmed without opinion in (1914) 212 N. Y. 613, 106 N. E. 1037.

Under the proviso to the “Fourth” subdiv. of § 8 of the Federal food and drugs act, “In the case of food,” that an article of food which does not contain any added poisonous or deleterious ingredient shall not be deemed misbranded, if it is a mixture or compound known as an article of food under its own distinctive name, etc., an article known and sold under the distinctive name of “Coca Cola” is not misbranded by reason of any false statement or suggestion contained in the name itself, if there is no other article having this distinctive name, although the separate words of the name are indicative of distinct articles, but are not, otherwise than as applied to this article, used together to describe any combination of the two distinct articles. *United States v. 40 Barrels & 20 Kegs of Coca Cola* (1914) 132 C. C. A. 47, 215 Fed. 535, affirming (1911) 191 Fed. 431.

And the use of the words “Cream Vanilla” and “Rose Vanilla,” which have been adopted as artificial and distinctive names for certain flavors and colors of a proprietary food product known as “Pudding,” is protected by the same proviso, and does not constitute misbranding, although the products sold under such names may be flavored with synthetic vanillin, instead of the natural product in the form of the vegetable extract of vanilla. *United States v. 150 Cases of Fruit Pudding* (1914) 211 Fed. 360.

And under the second part of the proviso, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be misbranded, if it is an article labeled, branded, or tagged so as to indicate plainly that it is a compound, and the word “compound” is plainly stated on the package in which it is offered for sale, etc.,—an article of food containing no poisonous or deleterious ingredients, which is labeled “Fruit Wild Cherry Compound,” has been held not to be misbranded, although it contains no “fruit wild cherry.” *Weeks v. United States* (1915) 139 C. C. A. 626, 224 Fed. 64.

But this proviso “was only intended to protect an article sold under its distinctive name from the charge of misbranding in so far as any statement or sug-

gestion contained in the name itself is concerned, and . . . was not intended to prevent the condemnation of the article as misbranded, even though sold under its own distinctive name, if in addition to such distinctive name the label contains other misleading statements, designs, or devices." *United States v. 40 Barrels & 20 Kegs of Coca Cola* (1911) 191 Fed. 431, affirmed on other points in (1914) 132 C. C. A. 47, 215 Fed. 535.

And so, a food product known by the distinctive name "Puddine" or "Fruit Puddine," in which no fruit, in the common meaning of the word, is used, but which is labeled "Fruit Flavored," is misbranded within the meaning of the Federal act, in that the words "fruit flavored" are false and misleading, as the protection afforded by the proviso is limited to the distinctive name, and does not include other false or misleading words or statements on the label on such an article. *United States v. 150 Cases of Fruit Puddine* (Fed.) supra.

Statements as to source of article.

Under the provision of § 8 of the Federal food and drugs act, that the word "misbranded" shall apply to any food or drug product which is falsely branded as to the state, territory, or country in which it is produced, apples and blackberries grown in Arkansas and there bought and canned by a Michigan firm, which are labeled "Tepee Apples [or Blackberries]. Packed by C. H. Godfrey & Son, Benton Harbor and Watervliet, Mich.," are misbranded in that the label is misleading and false as leading purchasers to believe that the fruit was grown as well as packed in Michigan. *United States v. 100 Cases of Tepee Apples* (1908) 179 Fed. 985.

And under the further provision that "an article shall also be deemed to be misbranded: . . . In the case of food: . . . Second. If it be labeled or branded so as to deceive or mislead the purchaser, or purport to be a foreign product when not so,"—domestic white wine, artificially carbonated and labeled "Extra Dry Champagne," with words in French and other details of "dress" tending to create in the minds of purchasers the impression that it is a foreign and not a domestic product,—is misbranded. *Schraubstadter v. United States* (1912) 118 C. C. A. 42, 199 Fed. 568.

And domestic-made macaroni bearing a label which is very distinctly Italian in general appearance, which does not state the name of the manufacturer or the place where the macaroni is made, L.R.A.1916D.

which has nearly all of the wording thereon in the Italian language, and contains the name of a city in Italy where macaroni is extensively made, is misbranded in that it is so labeled as to mislead the purchaser by conveying the impression that it is of foreign manufacture, notwithstanding the label also bears, in small type, within less than an inch of space, on the very narrow white margin on the lower edge of the label, the letters "Mfg. U. S. A." *United States v. 267 Boxes of Macaroni* (1915) 225 Fed. 79.

Likewise, under the pure food regulation adopted pursuant to the pure food law, that "the use of a geographical name in connection with a food or drug product will not be deemed a misbranding when, by reason of long usage, it has come to represent a generic term, and is used to indicate a style, type, or brand; but in such cases, the state or territory where any such article is manufactured or produced shall be stated upon the principal label,"—the geographical name of "Mocha" may be used in connection with coffee grown in either Arabia or Abyssinia, but the word "Abyssinian" must be used in connection therewith to cover coffee grown in Abyssinia, and the word "Arabian," in connection therewith, to cover coffee grown in Arabia, and either coffee is misbranded if labeled merely "Mocha." *United States v. Thomson & T. Spice Co.* (1912) 198 Fed. 565.

But a domestic gin which is labeled "London Dry Gin" is not misbranded, in that it purports to be a foreign product when not so, or in that the label is deceptive and misleading, if the jury find, on proper evidence, that the term "London Dry Gin" designates a distinct and well-known kind of gin having certain characteristics that identify it wherever it may be made, rather than the place of origin. *United States v. 36 Bottles of London Dry Gin* (1913) 205 Fed. 111, reversed and a new trial granted, on another ground in (1914) 127 C. C. A. 119, 210 Fed. 271.

And in *United States v. Schurman* (1910) 177 Fed. 581, which was an application for leave to file an information for an alleged violation of the Federal pure food act in misbranding a domestic food product by labeling it "Genuine Dutch Tea Rusk, made in Holland, Mich., by the Michigan Tea Rusk Company, Holland, Mich.," and having the word "Holland," where it first occurred, in type so large and prominent as to hold the attention and thus mislead purchasers into supposing that the article was a genuine

importation from the country of Holland,—the application was denied, with leave to renew the same at any time upon a further showing that, after notice from the Department of Agriculture of a conclusion that the label was improper, or after knowledge of the disposition of this motion, the respondents should continue to use the word "genuine" upon their labels, or to give undue prominence to the word "Holland;" the court saying that "in a case like this, where the violation is doubtful, and where the respondents seem to have acted in good faith in being willing to comply with the law and the rules, if they could find out what the law and the rules were, it is extremely improbable that any jury would find, beyond a reasonable doubt, the existence of the essential misleading, and, upon the same principle which requires a grand jury not to indict unless it is reasonably probable that a conviction might follow, this information should not be filed."

Statements as to strength, quality, grade, or purity of article.

An insecticide labeled "Inert Substance. Water 7%, Insecticide 93%," which in fact contains over 10 per cent of water, is misbranded within the meaning of the insecticide act of 1910. *United States v. 2 Cases of Sulpho-Naphthol* (1914) 213 Fed. 519.

And an article of food labeled "Extract Terpeneless Lemon" is misbranded if it contains only .05 per cent of citral derived from oil of lemon, while terpeneless extract of lemon, according to established standards of purity, contains or should contain, not less than .2 per cent of citral derived from oil of lemon. *United States v. Frank* (1911) 189 Fed. 195.

But flour containing 90 per cent of the flour content of the wheat is not misbranded in being labeled "patent flour," where there is no fixed standard as to the percentage of the flour content which may properly be termed "patent flour," and that term does not connote any fixed or maximum percentage of the flour content of the wheat berry, but means merely flour containing less than the total of the flour content of the wheat. *Lexington Mill & Elevator Co. v. United States* (1913) 121 C. C. A. 23, 202 Fed. 615, affirmed on other points in (1914) 232 U. S. 399, 58 L. ed. 658, L.R.A.1915B, 774, 34 Sup. Ct. Rep. 337.

And a Missouri grain dealer who contracted to sell No 2 red wheat according to Missouri state inspection is not guilty of misbranding a carload of wheat L.R.A.1916D.

shipped to Texas under the contract, with an invoice describing it as "2 red wheat, . . . K. C. Wts. and Grades," where he never saw the load of wheat, or had anything to do with its shipment, except to order the operator of a public elevator to ship out No. 2 red wheat, and the operator loaded a car with wheat out of the bin containing that grade, which an official inspector of the state of Missouri then inspected in the car, and adjudged and certified to be No. 2 red wheat, and the elevator operator caused the carload to be forwarded to Texas, although, when the load of wheat arrived in Texas, a Texas inspector, a Federal inspector, and others inspected it and found it not to be "No. 2 red wheat." *Hall-Baker Grain Co. v. United States* (1912) 117 C. C. A. 318, 198 Fed. 614.

Statements as to curative effect of drug or medicine.

False and misleading statements on the label on a drug or medicine as to its curative or remedial effects, which do not, however, import any statement concerning identity, do not constitute misbranding within the meaning of § 8 of the Federal food and drugs act of June 30, 1906, as such statements are beyond the scope and purpose of the act, which defines the term "misbranded" as applicable to all drugs or articles of food, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular. *United States v. Johnson* (1911) 221 U. S. 488, 55 L. ed. 823, 31 Sup. Ct. Rep. 627, affirming (1910) 177 Fed. 313; *United States v. American Druggists' Syndicate* (1911) 186 Fed. 387.

But under the Sherley amendment of 1912 to the Federal food and drugs act of 1906, statements as to the curative properties of a drug or medicine constitute misbranding if they are both false in fact and fraudulently made, but not if made in good faith as an honest expression of opinion; and the question of fact as to the fraudulent character of the statement is one which must be determined by the jury. *United States v. American Laboratories* (1915) 222 Fed. 104.

Place of statements.

The word "package," or its equivalent expression, as used in the section of the Federal pure food and drugs act of June 30, 1906, defining what shall constitute misbranding within the meaning of the act, refers to the immediate container

of the article which is intended for consumption by the public, and not simply to the outside wrapping or box containing the packages made up and intended for sale to the ultimate consumer. *McDermott v. Wisconsin* (1913) 228 U. S. 115, 57 L. ed. 754, 47 L.R.A.(N.S.) 984, 33 Sup. Ct. Rep. 431, Ann. Cas. 1915A, 39, reversing (1910) 143 Wis. 18, 126 N. W. 888, 21 Ann. Cas. 1315.

And, accordingly, in a prosecution under the Federal pure food and drugs act for shipping misbranded medicines in a box containing several bottles thereof, it is not necessary to allege that the box was misbranded, if it is charged that each of the bottles was misbranded. *Dr. J. L. Stephens Co. v. United States* (1913) 122 C. C. A. 135, 203 Fed. 817.

Under the Federal act of 1906, false and misleading statements regarding an article on an advertising circular inclosed with the article inside the carton in which it was offered for sale, did not constitute misbranding, as such a circular neither induced a sale nor deceived a prospective purchaser, and was not within the purview of the act. *United States v. American Druggists' Syndicate* (1911) 186 Fed. 387.

But under the amendment of 1912, false and fraudulent statements regarding curative or therapeutic effects, on circulars contained in the package, constitute misbranding. *SEVEN CASES v. UNITED STATES*, ante, 164.

More offering for sale as another article.

Under the portion of § 8 of the Federal food and drugs act, which defines misbranding as "offering an article for sale" under the distinctive name of another article, even though no label describing it as such other article be affixed

to it, an article of food consisting of a compound of lemon terpene and citral is misbranded if offered for sale and sold as pure lemon oil. *Weeks v. United States* (1915) 139 C. C. A. 626, 224 Fed. 64.

Package containing premium or coupon as misbranded.

It is within the police power of the state to provide that a food product shall be deemed to be misbranded if there be contained in the package any gifts, premiums, or prizes. *Re Arrigo* (1915) 98 Neb. 134, L.R.A.—, 152 N. W. 319; *Re De Klotz* (1915) 98 Neb. 140, 152 N. W. 321; *Re Indovina* (1915) 98 Neb. 140, 152 N. W. 321.

But under the provision of the Nebraska pure food act, that a food product shall be deemed to be misbranded if there be contained in the package any gifts, premiums, or prizes, a food package is not misbranded by reason of the fact that it contains merely a narrow slip of thin paper or coupon, which does not in any way affect the wholesomeness of the food, and is practically unappreciable in weight, and which bears the printed statement: "This coupon will be accepted by us, with others, in full payment for the many beautiful and costly articles described in our handsomely illustrated catalogue upon conditions stated therein," etc.; such a slip or coupon not being distinguishable, in principle, for the purposes of this statute, from any other printed advertising matter, against the placing of which in food packages there is no prohibition. *Re De Klotz* (1915) 98 Neb. 861, 155 N. W. 240, setting aside, upon rehearing, the opinion reported in (1915) 98 Neb. 140, 152 N. W. 321, and affirming the judgment of the trial court. A. C. W.

ILLINOIS SUPREME COURT.

RE WILL OF MICHAEL O'CONNOR, Deceased.

HOWARD JAMES SCOTT et al., Appts.,
v.

MARY A. O'CONNOR COUCH.

(271 Ill. 395, 111 N. E. 272)

Will — corporation as executor — stockholder as witness.

1. A stockholder of a bank which is made

Note. — As to competency, as an attesting witness, of officer or stockholder of a corporation named as executor or trustee, see annotation following this case, post, 185. L.R.A.1916D.

executor of a will is not competent to witness its execution.

For other cases, see Wills, I. b, in Dig. 1-52 N. S.

Same — statutory regulations — corporation and stockholder.

2. A corporation named as executor in a will witnessed by one of its stockholders is within the operation of a statute providing that if any beneficial interest is given to a subscribing witness, such interest shall be null and void, and he shall be compelled to give testimony as to the residue of the will, and therefore the corporation is disqualified to act as executor, but the stockholder must testify as to the execution of the will.

For other cases, see Wills, I. c, 2, in Dig. 1-52 N. S.

Same — proper attestation — adverse testimony of attesting witnesses.

3. A will containing an attesting clause properly signed, and reciting that the witnesses believed testator to be of sound mind and capable of making the will, meets the requirements of the statute, although the attesting witnesses subsequently testified that testator was not of sound mind and memory.

For other cases, see Wills, I. b, in Dig. 1-52 N. E.

Evidence — capacity of testator — opinions.

4. Persons who testify to transacting business with testator and meeting him socially may give their opinions as to his soundness of mind.

For other cases, see Evidence, VII. e, in Dig. 1-52 N. E.

(Cooke, J., dissents.)

(December 22, 1915.)

APPEAL by proponents from a judgment of the Circuit Court for Knox County, affirming a judgment of the County Court, refusing probate of an instrument alleged to be the will of Michael O'Connor, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Edward Maher, R. H. C. MILLER, and Sig. B. Nelson, for appellants:

Proponents of a will and codicil are not confined, on appeal to the circuit court, when they were rejected in the county court, to the testimony of attesting witnesses, and resort may be had to any legitimate evidence which may be resorted to in order to establish a will in chancery.

Mead v. Presbyterian Church, 229 Ill. 529, 14 L.R.A.(N.S.) 255, 82 N. E. 371, 11 Ann. Cas. 426; Kaul v. Lyman, 259 Ill. 30, 102 N. E. 179; Voodry v. University of Illinois, 251 Ill. 48, 95 N. E. 1034; Craig v. Southard, 148 Ill. 37, 35 N. E. 361.

Proponents are not bound by the testimony of attesting witnesses. They may be contradicted or impeached by proof of previous declarations, as proponents are required by law to produce the attesting witnesses.

30 Am. & Eng. Enc. Law, p. 595; Thompson v. Owen, 174 Ill. 229, 45 L.R.A. 682, 51 N. E. 1046; Re Barry, 219 Ill. 391, 76 N. E. 577; Re Simon, 266 Ill. 304, 107 N. E. 613.

The testimony of the attesting witness Pankey, and of the witnesses Butt and Williamson, was competent, and it was error to exclude or strike out such testimony.

Jones v. Grieser, 238 Ill. 183, 87 N. E. 295, 15 Ann. Cas. 787; Fearn v. Postlethwaite, 240 Ill. 626, 88 N. E. 1057; Boyd v. McConnell, 209 Ill. 396, 70 N. E. 649; Standley v. Moss, 114 Ill. App. 612.

L.R.A.1916D.

The opinion of a nonexpert witness is entitled to no weight where he states no facts on which to base a reasonable belief as to the mental condition of the testator.

Brainard v. Brainard, 259 Ill. 627, 103 N. E. 45; Craig v. Southard, 148 Ill. 37, 35 N. E. 361; Baker v. Baker, 202 Ill. 609, 67 N. E. 410; Huggins v. Drury, 192 Ill. 528, 61 N. E. 652.

The valid execution of the codicil, together with testamentary capacity at the time of its execution, carries with it and proves the will, because O'Connor's codicil refers to and makes the will a part of the codicil.

Fry v. Morrison, 159 Ill. 244, 42 N. E. 774; Ellis v. Dick, 165 Ill. 637, 46 N. E. 710; Brown v. Riggan, 94 Ill. 560; Duncan v. Duncan, 23 Ill. 364, 76 Am. Dec. 699.

The law presumes that O'Connor was sane before and at the times of the execution of the will and of the codicil.

Wilbur v. Wilbur, 129 Ill. 392, 21 N. E. 1076; Holloway v. Galloway, 51 Ill. 159; Carpenter v. Calvert, 83 Ill. 62; Baker v. Baker, 202 Ill. 595, 67 N. E. 410; Craig v. Southard, 148 Ill. 37, 35 N. E. 361.

Testimony of conduct of business transactions before and after the execution of the will and codicil is properly receivable to show testamentary capacity, such evidence being confined within reasonable limits as to time.

Voodry v. University of Illinois, 251 Ill. 48, 95 N. E. 1034; Craig v. Southard, 148 Ill. 37, 35 N. E. 361; Petefish v. Becker, 176 Ill. 448, 52 N. E. 71; Shultz v. Shultz, 229 Ill. 420, 82 N. E. 312.

The testimony of a subscribing witness invalidating a will ought to be received with suspicion, because such person, by his act of attestation, solemnly testifies to the sanity of the testator, and, as a matter of law, the testimony of such subscribing witness is entitled to no more weight than that of another person of equal ability and opportunities of observation.

Craig v. Southard, 148 Ill. 37, 35 N. E. 361; Brainard v. Brainard, 259 Ill. 613, 103 N. E. 45; 25 Am. & Eng. Enc. Law, p. 1015; 40 Cyc. 1309; 1 Woerner, Am. Law of Administration, 2d ed. § 218; Lambert v. Cooper, 29 Gratt. 61; Webb v. Dye, 18 W. Va. 376; Young v. Barner, 27 Gratt. 96; Baker v. Baker, 202 Ill. 595, 67 N. E. 410.

O'Connor had mental strength before, at, and after the making of the will, and before, at, and after the making of the codicil, to make contracts and carry on and transact ordinary business. This is more than sufficient to establish testamentary capacity.

Re Weedman, 254 Ill. 505, 98 N. E. 956; Trish v. Newell, 62 Ill. 196, 14 Am. Rep.

79; *Schneider v. Manning*, 121 Ill. 376, 12 N. E. 267; *Greene v. Greene*, 145 Ill. 264, 33 N. E. 941; *Drum v. Capps*, 240 Ill. 524, 88 N. E. 1020; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Meeker v. Meeker*, 75 Ill. 260.

Mental capacity is held established by proof of facts that tend to show capacity of testator to transact his ordinary business. Facts of lacking testamentary capacity must clearly preponderate to justify a setting aside of the will.

Todd v. Todd, 221 Ill. 410, 77 N. E. 680; *Adams v. First M. E. Church*, 251 Ill. 268, 96 N. E. 253; *Wilkinson v. Service*, 249 Ill. 146, 94 N. E. 50, Ann. Cas. 1912A, 41; *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076.

Messrs. Hardy & Hardy and Chipperfield & Chipperfield, for appellee:

Competency of attesting witnesses must exist at the time the will is witnessed.

Slingloff v. Bruner, 174 Ill. 561, 51 N. E. 772; *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952; *Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255; *Fisher v. Spence*, 150 Ill. 253, 41 Am. St. Rep. 360, 37 N. E. 314; *Gump v. Gowans*, 226 Ill. 635, 117 Am. St. Rep. 275, 80 N. E. 1086; *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057; *Standley v. Moss*, 114 Ill. App. 612.

The test of competency is whether the witness will gain or lose financially, as the direct result of the suit, or whether the judgment will be evidence for or against him in another action.

Boyd v. McConnell, 209 Ill. 396, 70 N. E. 649; *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090; *Rowlett v. Moore*, 262 Ill. 436, 96 N. E. 835, Ann. Cas. 1912D, 346; *Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255; *Jones v. Grieser*, 238 Ill. 183, 87 N. E. 295, 15 Ann. Cas. 787; *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057.

An executor is not a competent witness to the execution of a will.

Ferguson v. Hunter, 7 Ill. 657; *Bardell v. Brady*, 172 Ill. 420, 50 N. E. 124; *Sloan v. Sloan*, 184 Ill. 579, 56 N. E. 952; *Re Tobin*, 196 Ill. 484, 63 N. E. 1021; *Godfrey v. Phillips*, 209 Ill. 584, 71 N. E. 19; *Jones v. Abbott*, 235 Ill. 220, 85 N. E. 279; *Jones v. Grieser*, 238 Ill. 186, 87 N. E. 295, 15 Ann. Cas. 787.

Courts of equity will disregard mere matters of form and will look to the substance, and see on which side of the controversy the real interest of a party to the suit who is interested therein lies, and determine the competency of the witness from his interest in the case, regardless of the mere question of pleadings, when the question is as to his interest in the case.

Campbell v. Campbell, 130 Ill. 466, 6 L.R.A.1916D.

L.R.A. 167, 22 N. E. 620; *Pyle v. Pyle*, 158 Ill. 289, 41 N. E. 999; *Bardell v. Brady*, 172 Ill. 424, 50 N. E. 124.

Stockholders in a corporation are not competent witnesses.

Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109; *C. H. Albers Commission Co. v. Sessel*, 193 Ill. 153, 61 N. E. 1075; *Consolidated Ice Mach. Co. v. Keifer*, 134 Ill. 481, 10 L.R.A. 696, 23 Am. St. Rep. 688, 25 N. E. 799; *First Nat. Bank v. Dunbar*, 118 Ill. 625, 9 N. E. 186; *Thrasher v. Pike County R. Co.* 25 Ill. 393; *Nichols v. Cunningham*, 181 Ill. App. 190; *National Woodenware & Cooperage Co. v. Smith*, 108 Ill. App. 477; *First Nat. Bank v. Sandmeyer*, 164 Ill. App. 141; *Christiansen v. Dunham Towing & Wrecking Co.* 75 Ill. App. 267.

The requisites of the statute must be observed.

Greene v. Hitchcock, 222 Ill. 216, 78 N. E. 614; *Crowley v. Crowley*, 80 Ill. 469; *Hill v. Kehr*, 228 Ill. 204, 119 Am. St. Rep. 425, 81 N. E. 848; *Allison v. Allison*, 46 Ill. 61, 92 Am. Dec. 237.

Witnesses must have made observation to be qualified to express an opinion.

Hobbs v. Saunders, 264 Ill. 52, 105 N. E. 737.

Cartwright, J., delivered the opinion of the court:

Application was made to the county court of Knox county to admit to probate an instrument alleged to be the will of Michael O'Connor, deceased. Probate was refused, and an appeal was taken by the legatees and devisees under the will to the circuit court. There was a hearing in the circuit court, at which the heirs at law contested the application, and probate was again refused, and a further appeal was taken to this court.

On January 4, 1913, Michael O'Connor executed an instrument as his last will and testament at the People's Trust & Savings Bank in Galesburg, where he had done considerable business, and he died on May 24, 1914. The attestation clause was in the usual form, containing all the statutory requirements, and it was signed by Nellie Stark and W. H. Pankey as witnesses. Nellie Stark was a stenographer and clerk in the bank, and she testified to the execution of the will, and that, in her opinion, the testator was at that time of sound mind and memory. W. H. Pankey was the other subscribing witness, and testified to the execution of the will and that at the time he regarded the testator as of sound mind and memory; but his testimony was stricken out by the court, because he was a director and stockholder of the bank, which was ap-

pointed executor of the will. The statute of wills provides that a will must be attested in the presence of the testator or testatrix by two or more credible witnesses, and that means witnesses who at the time were competent, in law, to testify concerning the subject-matter. *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Johnson v. Johnson*, 187 Ill. 86, 58 N. E. 237. The test of competency is whether the witness will gain or lose financially as a direct result of the establishing of the instrument as a will. *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090. Under that rule a person who is appointed executor by a will is incompetent to attest it as a witness because he will gain the commissions allowed by law if the will is established, and that is a direct financial gain to him, and another person who, by virtue of a contract, is to share in the fees earned by the executor, is equally incompetent. *Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255. The test whether a witness has an interest which disqualifies him, under the act concerning evidence and depositions, to testify against an heir, devisee, or legatee, is whether he will immediately gain or lose by the event of the suit, or whether the verdict can be given in evidence for or against him in another suit. The interest must be a legal interest in the outcome of the suit, and it must be certain, direct, and immediate. *Feitl v. Chicago City R. Co.* 211 Ill. 279, 71 N. E. 991; *Jones v. Abbott*, 235 Ill. 220, 85 N. E. 279; *Ackman v. Potter*, 239 Ill. 578, 88 N. E. 231.

Counsel for appellants contend that under these rules Pankey was a competent witness, because his interest as a stockholder in the commissions was indirect, and not immediate, but remote and incidental, and that, while there was a possibility of a direct profit to the bank, there could be only an indirect profit to Pankey. Counsel for appellee, citing and relying upon cases holding the above rule, contend that Pankey was incompetent, because he had an interest which must be direct, legal, immediate, and certain, and would gain or lose as a result of the suit. That could only be if a beneficial interest was given to him by the terms of the will itself, since he neither had nor claimed any interest in any property disposed of by the will, and had acquired no interest, by contract or otherwise, adverse to the heir at law. The question whether a stockholder of a corporation is a competent witness to testify against the representative of a deceased person, where the corporation will gain or lose as a result of a suit, must be regarded as settled in this court, and the position of counsel for appellee must be upheld. Stockholders in a corporation are owners of the income and

earnings of the corporation and directly interested therein, and as a general rule, unaffected by any special statutory provision, they are incompetent to testify for the benefit of the corporation against an heir at law, devisee, or legatee. *C. H. Albers Commission Co. v. Seasel*, 193 Ill. 153, 61 N. E. 1075; *Anthony Ittner Brick Co. v. Ashby*, 198 Ill. 562, 64 N. E. 1109; *Cronin v. Supreme Council*, R. L. 199 Ill. 228, 93 Am. St. Rep. 127, 65 N. E. 323. There is, however, a special statutory provision applicable to a witness attesting the execution of a will.

In the revision of 1872 (Laws 1871-72, p. 775), a provision of the Revised Statutes of 1845 was brought forward as § 8 of the statute of wills (Hurd's Rev. Stat. 1913, chap. 148). It removed the incompetency of a witness to the execution of a will to whom any beneficial devise, legacy, or interest was made or given by the will, and provided that such witness should be compellable to appear and give testimony on the residue of the will in like manner as if no such devise or bequest had been made; but the devise, legacy, or interest was declared to be null and void unless the will had been duly attested by a sufficient number of witnesses exclusive of such person, saving, however, to the witness, any share of the testator's estate not exceeding the value of the devise or bequest to which the witness would have been entitled if the will was not established. That section of the statute of wills was regarded by this court as remedial, and its purpose and effect were explained, in *Jones v. Grieser*, 238 Ill. 183, 87 N. E. 295, 15 Ann. Cas. 787. In that case *W. H. Armstrong* and *W. J. Sprague* were the attesting witnesses of the will of *Jeremiah Smith*, deceased, and were also named as executors of the will. Upon an application to admit the will to probate, the county court held they were not competent as witnesses; but on appeal the circuit court decided they were competent, and admitted the will to probate, and this court affirmed the judgment. As to the remedial nature of the statute, the court said that it was passed solely with the view to prevent the destruction of a will which would otherwise be a valid will, except that the will as executed contained some provision which made its establishment according to the forms of law necessary by the calling of witnesses who took some interest under the will. Concerning the application of the section to particular witnesses, and whether their incompetency was removed by the statute, the court said: "If the incompetency of the witnesses existed outside of the fact that the will gave them a beneficial interest in the testator's estate, § 8 of the

wills act does not remove the incompetency of the witnesses to the will. If, however, the incompetency of the witness arises by the act of attesting a will which gives the witness some interest in the testator's estate, the statute does apply, and under that section of the statute, while the witness cannot take under the will, nevertheless he may be called and the will established by his evidence."

The court said that a person named as executor in a will, who has signed the will as an attesting witness, clearly falls within the section, and may be required to give evidence in support of the execution of the will, with the effect, however, that he is barred from acting as executor or participating in the administration of the estate in any manner. That decision was adhered to and indorsed in *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057, where it was again said that, although one named as an executor is not a competent witness to the will, he may be compelled, if his testimony is needed, to abandon his executorship and testify to the execution of the will. That case, however, involved the question of the competency of the wife of the person named as executor, and it was held that her incompetency was not removed by § 8, since nothing was given to her by the will, and, like the wife of a devisee or legatee, she was prohibited from testifying for or against the interest of her husband on grounds of public policy.

After the decision in the *Fearn* Case the general assembly, in 1911, amended § 8 by broadening its terms so as to include the wife or husband of any witness to whom any benefit was given by the will, and declaring that, on account of the remedial character of the section, it should be construed liberally. The section, as amended, is as follows: "If any beneficial devise, legacy or interest shall be made or given in any will, testament, or codicil to any person subscribing such will, testament or codicil, as a witness to the execution thereof, or to the wife or husband of such person, such devise, legacy or interest shall, as to such beneficiary thereof, and all persons claiming under him, be null and void, unless such will, testament or codicil be otherwise duly attested by a sufficient number of witnesses, exclusive of such person, according to this act; and he or she shall be compellable to appear and give testimony on the residue of such will, testament or codicil, in like manner, as if no such devise or bequest had been made. But if such witness or beneficiary would have been entitled to any share of the testator's estate in case the will, testament or codicil was not established, then so much of such share shall be saved to such witness or beneficiary as shall L.R.A.1916D.

not exceed the value of the said devise or bequest made to him or her as aforesaid. This act being remedial in character shall be construed liberally, and shall apply to cases arising on wills of persons deceased, prior to the adoption of this act, but not finally adjudicated." Laws of 1911, p. 538.

Counsel for appellee take the position that the corporation itself, which was named as executor, was not one of the attesting witnesses, and hence could not be required to relinquish under the statute of wills. The claim is that, Pankey being disqualified under the act concerning evidence and depositions because he subscribed as a witness the will that gave him a beneficial interest, the statute of wills did not render him competent because the beneficial interest was not given to him, but to the corporation. He was an attesting witness to the execution of the will, and it gave him a beneficial interest because he was a stockholder of the corporation named as executor, so that he came precisely within the terms of the statute of wills. That statute provides that the interest given by the will to the attesting witness shall be null and void, and he shall be compellable to appear and give testimony on the residue of the will. The beneficial interest given to Pankey was only because his corporation was named as executor, and the only means by which the beneficial interest could be annulled would be by declaring the provision by which he acquired it null and void. The legislative will that the beneficial interest of an attesting witness shall be null and void can only be made effective as to the stockholder of a corporation by declaring null and void the provision which gives an interest to his corporation.

The court, in *Jones v. Grieser*, *supra*, having defined the classes of persons whose incompetency is removed by the statute, and confined it to witnesses to whom some beneficial interest in the testator's estate is given by the will, the distinction between such witnesses and those to whom nothing is given by the will must be kept in mind. A case involving the distinction is *Smith v. Goodell*, 258 Ill. 145, 101 N. E. 255, *supra*. In that case one of the witnesses to the will was Frank F. Butzow, who was a partner in the banking business with Warren S. Goodell and Nathan P. Goodell, who were named as executors and appointed as trustees. Butzow was not named as an executor, and the will gave no beneficial interest to him or to the partnership; but there was a private contract between him and his partners by which he was to share in their earnings as executors or in any trust capacity. He derived his interest, not by any of the provisions of the will, but

by reason of his relationship with those named as executors. The question of what he might receive was a question solely between him and his partners, and was entirely without the control or cognizance of the court in which the estate was being settled. He had at the time of the attestation a present, certain interest of a pecuniary nature in the subject-matter concerning which he was called to testify, and by reason of that interest was rendered incompetent to attest the execution of the will. The contract drew into the partnership and gave to Butzow a share of the earnings of executors in no sense connected with the banking business, and not given to him, directly or indirectly, by any provision of the will. His incompetency existed outside of the fact that the will gave him any beneficial interest in the estate, and therefore his incompetency was not removed by the statute. In this case the incompetency of Pankey arose from the fact that the will gave a beneficial interest to the corporation of which he was a director and a stockholder, and the beneficial interest to the stockholders was direct, immediate, and substantial. Every dollar and every piece of property that comes to a corporation comes directly to the stockholders and increases the value of their stock. In substance, the stockholders, collectively, represented by the artificial corporate entity, were executors of the will. The interest of Pankey was derived directly from the will, and not through any private contract or arrangement outside of it, and his incompetency arose directly from the beneficial interest given to him and the other stockholders as a corporation. The statute applied, and the court erred in striking out his testimony. The bank being disqualified to act as executor, and therefore having no interest, M. O. Williamson, who was rejected as a witness, was competent to testify generally in the case.

On October 24, 1913, Michael O'Connor executed a codicil to the will in a hospital in Galesburg by which he reaffirmed the will, and if the codicil was valid the will was also rendered valid. The attesting clause to the codicil was complete as in the case of the will, containing all the particulars of the statute and that the attesting witnesses believed that the testator was of sound mind and memory and fully capable of making the instrument. It was witnessed by two nurses, Mayme Cassel and Nettie Girkin. Mayme Cassel testified that she read the attesting clause hastily, without noticing its meaning, and when asked by M. O. Williamson to sign it and have another nurse sign it, she demurred and did not want to do it, but he told her it was merely a matter of form, and she signed it. She also said that

Nettie Girkin read the attesting clause, but that witness said she did not read it. Mayme Cassel testified that when the testator signed the codicil he was sitting on a chair and signed it on a chart back, while Nettie Girkin said that he was in his bed in his night robe and signed it on a bedside table. Both witnesses said he was not of sound mind and memory. Two witnesses testified that shortly before the will was offered for probate Mayme Cassel said she certainly thought the testator was of sound mind and memory, or she would not have signed the will, and a witness testified that Nettie Girkin said she thought he was of sound mind and memory. On appeal to the circuit court it was proper to establish the will by any evidence sufficient to establish a will in chancery, and a large number of witnesses, who had known the testator for many years, and had done business with him, testified that he was of sound mind and memory in 1912 and 1913. The rulings of the court in many instances unduly limited and hampered the appellants in making their proof. Witnesses who had known the testator for a great many years, had transacted business with him, met him socially, talked with him on various subjects, and visited with him in the hospital, were not permitted to give their opinion, although such opinions were admissible under the rule that witnesses who testify to facts and circumstances in their own knowledge, as coming under their observation, may give their opinion, to be received and valued according to the intelligence of the witness and his capacity to form an opinion. *Roe v. Taylor*, 45 Ill. 485; *Snell v. Weldon*, 239 Ill. 279, 87 N. E. 1022; *Graham v. Deuterman*, 244 Ill. 124, 91 N. E. 61. The testator had been extensively engaged in business for many years and with many different persons as a dealer in live stock and otherwise, and from January 5, 1912, to July 29, 1913, he gave in the course of his business 100 checks on the People's Trust & Savings Bank, which were paid by the bank and produced on the trial. The contestant introduced no evidence whatever on the subject of testamentary capacity, but was content to rest upon the proposition that W. H. Pankey was an incompetent witness and the opinion of the two nurses that the testator was not of sound mind and memory. The will and codicil were attested in the manner required by the statute, and the court erred in holding the contrary.

The judgment is reversed, and the cause remanded.

Cooke, J., dissenting.

Petition for rehearing denied February 3, 1916.

Annotation—Wills: competency, as an attesting witness, of officer or stockholder of a corporation named as executor or trustee,

The doctrine that an executor is an incompetent attesting witness to a will is established in Illinois. *Jones v. Griesser* (1909) 238 Ill. 183, 87 N. E. 295, 15 Ann. Cas. 787. Likewise, the wife of an executor is incompetent (*Fearn v. Postlethwaite* (1909) 240 Ill. 626, 88 N. E. 1057), as is also a partner of an executor, where he shares in the fees (*Smith v. Goodell* (1913) 258 Ill. 145, 101 N. E. 255). This incompetency of the executor is held to exist in the case of a stockholder in a corporation which is appointed as executor, in *Re O'Connor*, ante, 179. The view thus taken by the Illinois court is sustained in *Palethorp's Estate* (1915) 249 Pa. 389, 94 Atl. 1060, a case involving a stockholder in a corporation which was appointed trustee in a will. In this case the trustee was held disqualified because given broad powers with reference to the trusteeship; in fact, with the absolute power of control and administration, subject only to the directions of the testator as to specific bequests for charitable uses to certain named beneficiaries. After holding the corporation disqualified, the court states that if the interest of the corporation is a disqualifying one, it would seem to follow necessarily that the interest of a stockholder must be so regarded, since the stockholders own and control the corporation, and whatever benefits accrue to the corporate body inure to the stockholders in dividends; that, in determining what constitutes a disqualifying interest of an attesting witness to a will, a corporation as a legal entity cannot be differentiated from its shareholders, who are the real owners of the corporate property, who control and direct its business affairs, and are responsible for those in charge of its management.

Both the assistant trust officer and the title officer of a trust company are disinterested witnesses to a will containing a gift to the trust company in trust. *Carson's Estate* (1914) 244 Pa. 401, 90 Atl. 719. The fact that the stockholder in *Palethorp's Estate* (Pa.) supra, was an assistant to the trust officer is there stated not to render him incompetent.

It is apparent that to present a distinctive point to the question under annotation it must be assumed that an executor or trustee is an incompetent witness to a will. It is held in some cases that an executor or trustee is a competent witness to the will. After holding this in the case of a corporate ex-

ecutor or trustee, it is assumed without discussion that a stockholder is likewise a competent witness. While this point is beyond the scope of the present note, a few cases so holding have been included. *Re Letarpentier* (1914) — Del. —, 91 Atl. 204, holding that a stockholder and director of a trust company which was one of the executors and trustee of a will is a competent witness. *Jeanes's Estate* (1910) 228 Pa. 537, 77 Atl. 824, holding that a stockholder and vice president of a company which is made executor of a will is a disinterested witness within the meaning of a statute requiring disinterested witnesses to a will containing religious or charitable bequests, and this although his company would receive commissions as one of the executors.

In *Jeanes's Estate* (Pa.) supra, the corporation was also appointed trustee. The will contained a direction to the trustees to pay dividends on certain stock to a hospital provided it would accept a conditional bequest. For a subsequent breach of the condition, the stock was given directly to a named charity. It was contended that the stockholder in the trustee corporation was disqualified because of the compensation which might be paid to it. It is stated in answer to this contention that if, under the direction of the will to pay the dividends to the hospital, the company would charge and be entitled to receive compensation for paying them, it would be compensation for services rendered; that a stockholder could not be regarded as an interested witness because he might have an uncertain, remote, and contingent interest in a very small sum in the earnings of the company under the direction of the testatrix that, upon certain conditions, the company pay dividends on certain shares of stock to her appointees. Accordingly the stockholder, who was also vice president of the company, was held a disinterested witness.

A statutory provision that no person having a direct legal interest in the result of any civil action or proceeding when the adverse party is the representative of a deceased person shall be permitted to testify to any transaction or conversation had between the deceased person and the witness does not render incompetent as an attesting witness one who is a stockholder in and president of a corporation named as trustee in the

will. *Re Wiese* (1915) 98 Neb. 463, L.R.A.1915E, 832, 153 N. W. 556.

As to trustee or member of a charitable beneficiary as a witness to a will, see note to *Re Stinson*, 36 L.R.A.(N.S.) 504.

As to whether the competency of an attesting witness to a will is to be determined as of the time of attestation or of probate, see note to *Bruce v. Shuler*, 35 L.R.A.(N.S.) 687. W. A. E.

KENTUCKY COURT OF APPEALS.

W. O. ROGERS, Appt.,

v.

FANCY FARM TELEPHONE COMPANY.

(160 Ky. 841, 170 S. W. 178.)

Damages — death — loss of consortium.

A man cannot recover from a telephone company which negligently fails to furnish him service to summon a physician for his wife, who dies because of absence of medical aid, damages for loss of services and consortium, where the time elapsing between the negligence and the death was not appreciable.

For other cases, see Damages, III. i, 3, in Dig. 1-52 N. S.

(November 12, 1914.)

APPEAL by plaintiff from a judgment of the Circuit Court for Graves County in defendant's favor in an action brought to recover damages for alleged negligent failure of defendant to furnish plaintiff with telephone service. Affirmed.

The facts are stated in the opinion.

Messrs. Hester & Hester for appellant.

Messrs. Stanfield & Stanfield for appellee.

Hannah, J., delivered the opinion of the court:

W. O. Rogers instituted this action in the Graves circuit court against the Fancy Farm Telephone Company, seeking a recovery of damages in the sum of \$5,000, for alleged negligence of the defendant company in failing to afford the plaintiff telephone connection with a physician, whom plaintiff desired to call to the bedside of his wife on the occasion of her accouchement, by reason of which alleged failure the physician, although a messenger was sent for him, was unable to reach plaintiff's home, a distance of 4 miles, until it was too late to check the hemorrhages from which plaintiff's wife suffered in time to save her life.

In part, the language of the petition is as follows: "Plaintiff states that his wife was thirty-two years old, and they had four other children, all of whom were young and needed her attention to aid and assist

plaintiff in caring for and rearing them, and that he was entitled to her comfort, her counsel, her services, and her company and consortium, all of which he has been deprived of by reason of defendant's negligence in failing to have and to keep its said line in repair and working order, and by reason of all of which he has sustained damages in the sum of \$5,000."

The circuit court sustained a demurrer to the petition as amended, and the plaintiff declined to plead further, his petition was dismissed, and he appeals.

We deem it necessary to consider but one question raised by the appeal: Can the husband recover for loss of services and society of the wife, sustained by her death? as it is this loss alone which is sued for.

1. In *Eden v. Lexington & F. R. Co.* 14 B. Mon. 208, the court said: "The injury complained of in this case is the loss of the society of the wife and of her assistance in the management of the husband's domestic affairs. According to the existing law, there can be no recovery for this injury, inasmuch as the death of the wife was instantaneous, and it is only for the loss that is sustained by the husband in this respect from the moment of the injury up to the time of the death of the wife for which any recovery can be had."

And in *Louisville & N. R. Co. v. McElwain*, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385, 34 S. W. 236, the court said that it was perfectly manifest that at common law a husband could recover damages for the loss of his wife's society from the date of the injury until her death, resulting from a negligent act, although she died as a result thereof, provided any appreciable length of time elapsed after the negligent act became operative until her death, during which time the husband could have enjoyed his wife's society.

It is apparent from the language of the petition above quoted that plaintiff sues for the loss of conjugal society after the death of his wife,—i. e., caused by and resulting from the death of his wife; and under the decisions in the *Eden* and *McElwain* Cases he cannot recover therefor. There was no appreciable length of time after the alleged negligence became operative and before the

Note. — For loss of consortium as element of damage for wrongful death, see annotation following this case, post, 187. L.R.A.1916D.

death of plaintiff's wife. The trial court, therefore, properly sustained the demurrer. 2. It is unnecessary to consider whether the alleged negligence was too remote to

constitute the proximate cause of the death of plaintiff's wife.
Judgment affirmed.

Annotation—Loss of consortium as element of damage for wrongful death.

In general.

As shown in the notes appended to *Blair v. Seitner Dry Goods Co.* L.R.A. 1915D, 524, and *Marri v. Stamford Street R. Co.* 33 L.R.A.(N.S.) 1042, a husband is entitled to recover damages for loss of consortium due to the personal injury of his wife, but the right of a wife to recover for the loss of consortium due to an injury to her husband is not so clear. See note appended to *Feneff v. New York C. & H. R. R. Co.* 24 L.R.A.(N.S.) 1024.

In treating the question as to the right of one of the parties to the marital relation to recover for the loss of consortium due to the negligent killing of the other party, the term "consortium" is used in the sense of conjugal society, affection, aid, assistance, company, and companionship. There is considerable conflict and confusion among the cases as to the right to include certain of these elements of loss in the recovery by one spouse of damages for the wrongful killing of the other.

The conflict on the subject is in part due to the fact that the right to recover damages for the negligent killing of the husband or wife is statutory, the statutes giving the right are not uniform in language, and the difference is frequently substantial. Generally, however, the statutes in effect authorize the recovery of the pecuniary loss to the survivor from the death of the other party to the marital relation; but the term "pecuniary loss" is very apt to be construed with reference to the general context of the statute, and where the language indicates an intention to limit the recovery, the term "pecuniary" is more strictly construed than it is when an intention is indicated to give to the term a broad and liberal construction.

It is of interest to note that generally this difference among the courts as to the measure of damages to be awarded to one spouse for the death of the other has apparently made but little difference in the amount of the verdicts rendered, and the distinction is seldom traceable in the amount of the pecuniary loss actually assessed in concrete cases in the different jurisdictions. Indeed, the most extravagant verdicts are to be found in jurisdictions which deny the right to re-

cover compensation for loss of conjugal society and companionship. A comparison of the cases in this regard may be had by referring to the note which collects the cases on excessive and inadequate damages.*

It is intended to confine this note to those elements of damage included in the term "consortium" which are more intangible in their character, and form a more indefinite basis for estimating the pecuniary loss than does such pecuniary damage as loss of support. It may be proper to observe in this connection, however, that many of the cases sustaining the right to recover for loss of services, earnings, or support are authority for the rule that the more intangible benefits of the marital relation cannot be considered in assessing damages to one spouse for the unlawful killing of the other. These cases are not included herein, but may be found in the note to be appended to *Florida East Coast R. Co. v. Hayes*, L.R.A.—, —.

Without pointing out what was meant by the term "consortium," it has been denied that any recovery may be had under a statute embodying the principles of Lord Campbell's act, as compensation for loss of consortium.¹ And, referring specifically to Lord Campbell's act, it has been held that the framers of this act never could have meant to give compensation to a widow merely for the deprivation of her husband.² On the other hand,

* Note appended to *St. Louis, I. M. & S. R. Co. v. Craft*, L.R.A.1916C, 817.

¹ *Green v. Hudson River R. Co.* (1860) 32 Barb. (N. Y.) 25, holding that the action given by a statute substantially similar to Lord Campbell's act is not one sounding in damages in which the jury exercises a discretion and may give solatium in respect to the mental suffering of the statutory beneficiaries, or compensation for loss of consortium.

² In *Gillard v. Lancashire & Y. R. Co.* (1849) 12 L. T. (Eng.) 356, Pollock Ch. B., says that it is a pure question of pecuniary compensation and nothing more which is contemplated by the act commonly designated as Lord Campbell's act, for it is utterly impossible for a jury to estimate any sum as a compensation for the injured feelings of the survivors. All that is left that is appreciable after the death of the party killed is the pecuniary loss sustained by his family; and this act enables them to

in assessing the damage to the widow it has been asserted that there is to be considered the probability of the continuance of the domestic relations as they existed at the time of the husband's death, and the continuance of his care, protection, and support.³ Under the Connecticut statute, which differs somewhat in immaterial respects on this point from Lord Campbell's act, it has been held that the amount recoverable is influenced by the obligations, moral or legal, naturally incident to the marital relation, and the extent to which the deceased recognized these obligations.⁴

And where the question has been specifically presented and urged, it has been held that every husband has a pecuniary value to his wife beyond the amount of his earnings or vocation,⁵ and that, even as a pecuniary proposition, a man's life is worth something more to his family than the mere amount of money which he brings into it.⁶ And so as to a wife, it has been declared that the pecuniary

value of her services as wife and mother are not truly indicated by the consideration of the question as to the wages to be paid to a servant girl or housekeeper.⁷

These general statements, however, are of but little aid in determining what elements of consortium aside from loss of support, services, or earnings may be included in assessing the damages to the husband or wife for the death of the other. As already pointed out, the recovery of other elements of consortium arising out of the marital relation has been questioned because of their intangible character, the courts differing as to their own ability or the ability of the jury to assess damages for such losses by the application of any pecuniary standard.

Elements of loss of intangible character.

In many jurisdictions the rule obtains that elements of benefit or advantage inuring to the parties to the marital relation, such as conjugal society,⁸ compan-

recover that which deceased himself would have sued for had the accident not terminated fatally. The framers of the acts never could have meant to give compensation to the parent for the mere deprivation of a son, or to the widow for that of her husband.

³ *St. Louis, I. M. & S. R. Co. v. Needham* (1892) 3 C. C. A. 129, 10 U. S. App. 339, 52 Fed. 371.

⁴ *Farley v. New York, N. H. & H. R. Co.* (1913) 87 Conn. 328, 87 Atl. 990, holding, where the damages recoverable for a wrongful death are exclusively for the benefit of certain designated beneficiaries, the amount recoverable in a given case is influenced by the nature of the relation between the beneficiaries and the deceased, the obligations, moral or legal, naturally incident to such relation, the extent to which the deceased recognized that obligation, his financial ability and disposition to do so, as shown by experience, and the thousand and one circumstances calculated to throw light in some substantial way upon the reasonable expectation of benefits of which the beneficiaries were deprived by the death. This rule must differ according to the relation between the parties plaintiff and the decedent, according as the action is brought for the benefit of the husband, wife, minor child, or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.

⁵ *Southern Traction Co. v. Hulbert* (1915) — Tex. Civ. App. —, 177 S. W. 551.

⁶ *Felice v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 345, 43 N. Y. Supp. 922, 1 Am. Neg. Rep. 637; *Clancy v. New York N. H. & H. R. Co.* (1909) 133 App. L.R.A.1916D.

Div. 119, 117 N. Y. Supp. 233; Pittsburgh, C. C. & St. L. R. Co. v. Dooley (1910) 13 Ohio C. C. N. S. 225.

⁷ *Craig v. Chicago, St. P. M. & O. R. Co.* (1915) 97 Neb. 586, 150 N. W. 648, declaring that it is impossible to place a definite money value upon the services of a wife and mother. The wages of a servant girl or housekeeper are not always a true indication of the pecuniary loss to the husband and children in this regard.

⁸ *Michigan C. R. Co. v. Vreeland* (1913) 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176 N. W. American R. Co. v. Didricksen (1913) 227 U. S. 145, 57 L. ed. 456, 33 Sup. Ct. Rep. 224; *Brady v. Chicago* (1865) 4 Biss. 448, Fed. Cas. No. 1,796; *New York, C. & St. L. R. Co. v. Niebel* (1914) 131 C. C. A. 248, 214 Fed. 952; *Cain v. Southern R. Co.* (1911) 199 Fed. 211; *Swift & Co. v. Johnson* (1905) 1 L.R.A. (N.S.) 1161, 71 C. C. A. 619, 138 Fed. 867; *Helena Gas Co. v. Rogers* (1911) 98 Ark. 413, 135 S. W. 904; *Duval v. Hunt* (1894) 34 Fla. 85, 15 So. 876, 13 Am. Neg. Cas. 848; *East St. Louis Electric Street R. Co. v. Burns* (1898) 77 Ill. App. 529; *Hunt v. Conner* (1901) 26 Ind. App. 41, 59 N. E. 50; *Falender v. Blackwell* (1906) 39 Ind. App. 121, 79 N. E. 393; *Dwyer v. Chicago St. P. & O. R. Co.* (1892) 84 Iowa, 479, 35 Am. St. Rep. 322, 51 N. W. 244; *Graffam v. Saco Grange* (1914) 112 Me. 508, L.R.A. 1915C, 632, 92 Atl. 649; *McKay v. New England Dredging Co.* (1899) 92 Me. 454, 43 Atl. 29; *Bolinger v. St. Paul & D. R. Co.* (1887) 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; *Knight v. Sadler Lead & Zinc Co.* (1898) 75 Mo. App. 541; *Haines v. Pearson* (1904) 107 Mo. App. 481, 81 S. W. 645; *Boyd v. Missouri P. R. Co.* (1911) 236 Mo. 54, 139 S. W. 561; *Paulmier v. Erie R. Co.* (1870) 34 N. J. L. 151, 16 Am. Neg. Cas.

ionship,⁹ comfort,¹⁰ association,¹¹ love and affection,¹² or protection¹³ are so intangible in their character as to render it impossible to measure their value by any pecuniary standard, and that hence, in assessing the pecuniary loss to one spouse for the wrongful or negligent killing of the other, these elements are not to be considered by the jury. As to the loss of society, the great weight of authority supports this view; but, as hereafter pointed out, there is more doubt as

to the weight of authority with reference to the other elements of loss mentioned.

The doctrine that loss of society and companionship cannot be considered in assessing the damage to the survivor of the marital relation has been based upon the reasoning that the pecuniary loss or damage must be such as can be measured by some standard. That it is a term employed judicially, not only to express the character of the loss to the beneficiary which is the foundation of recovery, but

643; *Green v. Hudson River R. Co.* (1860) 32 Barb. (N. Y.) 25; *Felice v. New York C. & H. R. R. Co.* (1897) 14 App. Div. 345, 43 N. Y. Supp. 922, 1 Am. Neg. Rep. 637; *McFarland v. Oregon Electric R. Co.* (1914) 70 Or. 27, 138 Pac. 458; *Nashville & C. R. Co. v. Smith* (1882) 9 Lea (Tenn.) 470; *Illinois C. R. Co. v. Bentz* (1902) 108 Tenn. 670, 58 L.R.A. 690, 91 Am. St. Rep. 763, 69 S. W. 317; *Galveston, H. & S. A. R. Co. v. Worthy* (1894) 87 Tex. 459, 29 S. W. 376; *International & G. N. R. Co. v. McVey* (1905) 99 Tex. 28, 87 S. W. 329; *Houston & T. C. R. Co. v. Loeffler* (1899) — Tex. Civ. App. —, 51 S. W. 536; *Chicago, R. I. & G. R. Co. v. Trippett* (1908) 50 Tex. Civ. App. 279, 111 S. W. 761; *Missouri, K. & T. R. Co. v. Wallace* (1908) 53 Tex. Civ. App. 127, 115 S. W. 302; *Missouri, K. & T. R. Co. v. Williams* (1909) — Tex. Civ. App. —, 117 S. W. 1043; *International & G. N. R. Co. v. White* (1909) — Tex. Civ. App. —, 120 S. W. 958; *Missouri R. & T. R. Co. v. Henderson* (1912) — Tex. Civ. App. —, 148 S. W. 822; *Openshaw v. Utah & N. R. Co.* (1889) 6 Utah, 132; *Rudiger v. Chicago, St. P. M. & O. R. Co.* (1898) 101 Wis. 292, 77 N. W. 169; *Regan v. Chicago, M. & St. P. R. Co.* (1881) 51 Wis. 599, 8 N. W. 292 (compare with Wisconsin cases cited infra, note 19) *Gillard v. Lancashire & Y. R. Co.* (1849) 12 L. T. (Eng.) 356.

New York C. & St. L. R. Co. v. Niebel (1914) 131 C. C. A. 248, 214 Fed. 952, holds that under the Federal employers' liability act, the measure of recovery in behalf of the widow and children for the death of the husband and father is their pecuniary loss, as distinguished from the loss of companionship and association.

And *Green v. Hudson River R. Co.* (1860) 32 Barb. (N. Y.) 25, holds that no pecuniary damages can be predicated upon the loss of the society of the wife, since this is a loss which cannot be compensated for or estimated in money. But see *Cregin v. Brooklyn Crosstown R. Co.* infra, note 14a.

McFarland v. Oregon Electric R. Co. (1914) 70 Or. 27, 138 Pac. 458, holds that under the employers' liability act, there can be no recovery for the loss of comfort, society, and protection of the deceased.

See *Gillard v. Lancashire & Y. R. Co.* (1849) 12 L. T. (Eng.) 356, wherein Pollock, C. B., declared under Lord Campbell's act that a widower was not entitled to sue for compensation for loss of the society and L.R.A.1916D.

comfort of his wife, by reason of her death through the negligent act of the defendant.

⁹ *New York C. & St. L. R. Co. v. Niebel* (1914) 131 C. C. A. 248, 214 Fed. 952; *Helena Gas Co. v. Rogers* (1911) 98 Ark. 413, 135 S. W. 904; *Hunt v. Conner* (1900) 26 Ind. App. 41, 59 N. E. 50; *Graffam v. Saco Grange* (1914) 112 Me. 508, L.R.A.1915C, 632, 92 Atl. 649; *McKay v. New England Dredging Co.* (1899) 92 Me. 454, 43 Atl. 29; *Nelson v. Lake Shore & M. S. R. Co.* (1895) 104 Mich. 582, 62 N. W. 993; *Hutchins v. St. Paul, M. & M. R. Co.* (1890) 44 Minn. 5, 46 N. W. 79, 16 Am. Neg. Cas. 294; *Bennett v. Southern Railway-Carolina Div.* (1913) 98 S. C. 42, 79 S. E. 710, affirmed in (1913) 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566; *Missouri, K. & T. R. Co. v. Wallace* (1908) 53 Tex. Civ. App. 127, 115 S. W. 302.

Bennett v. Southern Railway-Carolina Div. (1913) 98 S. C. 42, 79 S. E. 710, affirmed in (1913) 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, holds that, in assessing the actual loss suffered by the statutory beneficiaries, where the deceased was the husband, father, wife, or mother, there may be included loss of services or counsel and training, but not loss of companionship.

¹⁰ *Hutchins v. St. Paul, M. & M. R. Co.* (1890) 44 Minn. 5, 46 N. W. 79, 16 Am. Neg. Cas. 294; *Gillard v. Lancashire & Y. R. Co.* (1849) 12 L. T. (Eng.) 356.

¹¹ *New York C. & St. L. R. Co. v. Niebel* (1914) 131 C. C. A. 248, 214 Fed. 952; *Openshaw v. Utah & N. R. Co.* (1889) 6 Utah, 132.

¹² *Helena Gas Co. v. Rogers* (1911) 98 Ark. 413, 135 S. W. 904; *East St. Louis Electric Street R. Co. v. Burns* (1898) 77 Ill. App. 529; *McKay v. New England Dredging Co.* (1899) 92 Me. 454, 43 Atl. 29; *Graffam v. Saco Grange* (1914) 112 Me. 508, L.R.A.1915C, 632, 92 Atl. 649; *Tilley v. Hudson River R. Co.* (1862) 24 N. Y. 471; *Missouri, K. & T. R. Co. v. Wallace* (1908) 53 Tex. Civ. App. 127, 115 S. W. 302; *Missouri, K. & T. R. Co. v. Williams* (1909) — Tex. Civ. App. —, 117 S. W. 1043.

Helena Gas Co. v. Rogers (Ark.) supra, holds that the loss of companionship and happiness found in the love and affectionate treatment by the husband of his wife is not an element of damages in her favor for his death.

¹³ *McFarland v. Oregon Electric R. Co.* (1914) 70 Or. 27, 138 Pac. 458.

also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased, upon which, in the nature of things, it is not possible to set a pecuniary valuation.¹⁴

In other jurisdictions, both those

where the statute permits the recovery of pecuniary loss to one spouse by the wrongful killing of the other, and those where, in addition, the language of the statute authorizes the jury to assess the loss at such sum as, under all the circumstances, will be just and reasonable, it has been held that loss of society,^{14a}

¹⁴ *Bennett v. Southern Railway-Carolina Div.* (1913) 98 S. C. 42, 79 S. E. 710, affirmed in (1913) 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566.

^{14a} *Northern P. R. Co. v. Freeman* (1897) 27 C. C. A. 457, 48 U. S. App. 757, 83 Fed. 82, reversed in (1899) 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763; *Grayson-Nashville Lumber Co. v. Carroll* (1912) 102 Ark. 460, 144 S. W. 519; *Green v. Southern P. Co.* (1898) 122 Cal. 563, 55 Pac. 577; *Green v. Southern California R. Co.* (1901) 6 Cal. Unrep. 843, 67 Pac. 4; *Dyas v. Southern P. Co.* (1903) 140 Cal. 296, 73 Pac. 972; *Valente v. Sierra R. Co.* (1910) 158 Cal. 412, 111 Pac. 95; *Simoneau v. Pacific Electric R. Co.* (1911) 159 Cal. 494, 115 Pac. 320, 2 N. C. C. A. 137; *Hale v. San Bernardino Valley Traction Co.* (1909) 156 Cal. 713, 106 Pac. 83; *Everts v. Santa Barbara Consol. R. Co.* (1906) 3 Cal. App. 712, 86 Pac. 830; *Kramm v. Stockton Electric R. Co.* (1913) 22 Cal. App. 737, 136 Pac. 523; *Jones v. Leonardt* (1909) 10 Cal. App. 284, 101 Pac. 811; *Florida C. & P. R. Co. v. Foxworth* (1899) 41 Fla. 70, 79 Am. St. Rep. 149, 25 So. 338; *Georgia, F. & A. R. Co. v. Sasser* (1908) 4 Ga. App. 276, 61 S. E. 505; *Dougherty v. New Orleans R. & Light Co.* (1913) 133 La. 993, 63 So. 493; *St. Louis & S. F. R. Co. v. Moore* (1911) 101 Miss. 768, 39 L.R.A.(N.S.) 978, 58 So. 471, Ann. Cas. 1914B, 597; *Haines v. Pearson* (1904) 107 Mo. App. 481, 81 S. W. 645; *Mize v. Rocky Mountain Bell Teleph. Co.* (1909) 38 Mont. 521, 129 Am. St. Rep. 659, 100 Pac. 971, 16 Ann. Cas. 1189; *Cregin v. Brooklyn Crosstown R. Co.* (1881) 83 N. Y. 595, 38 Am. Rep. 474; *Pennsylvania R. Co. v. Goodman* (1869) 62 Pa. 329; *Brickman v. Southern R. Co.* (1906) 74 S. C. 306, 54 S. E. 553; *Baltimore & O. R. Co. v. Noell* (1879) 32 Gratt. (Va.) 394; *Portsmouth Street R. Co. v. Peed* (1904) 102 Va. 662, 47 S. E. 850.

Grayson-Nashville Lumber Co. v. Carroll (1912) 102 Ark. 460, 144 S. W. 519, holds that, under the Arkansas statute, the husband is entitled to recover damages for the loss of his wife's society.

Simoneau v. Pacific Electric R. Co. (1911) 159 Cal. 494, 115 Pac. 320, 2 N. C. C. A. 137, holds that loss to a wife and children of the society, comfort, and care of the husband and father, as well as their support, may be considered in assessing their pecuniary loss through his death.

Green v. Southern California R. Co. (1901) 6 Cal. Unrep. 843, 67 Pac. 4, holds that the father and children for the death of the wife and mother are entitled to recover as damages all the pecuniary loss suffered by them from the loss of her society and protection, etc.

and protection, etc.

Dougherty v. New Orleans R. & Light Co. (1913) 133 La. 993, 63 So. 493, holds that loss of society, support, affection, and kindly offices of the deceased are elements of damages for his death.

St. Louis & S. F. R. Co. v. Moore (1911) 101 Miss. 768, 39 L.R.A.(N.S.) 978, 58 So. 471, Ann. Cas. 1914B, 597, holds that the damages recoverable by a wife and children for the death of the husband and father may include loss of his society and companionship where based upon a statute authorizing a recovery of such damages as the jury may assess, taking into consideration all the damages of every kind to any and all parties interested in the suit.

Mize v. Rocky Mountain Bell Teleph. Co. (1909) 38 Mont. 521, 129 Am. St. Rep. 659, 100 Pac. 971, 16 Ann. Cas. 1189, holds that under a statute similar to the California statute, in assessing the damages to a widow for the death of her husband, there may be taken into consideration the loss of comfort, protection, society, and companionship of the husband.

Pennsylvania R. Co. v. Goodman (1869) 62 Pa. 329, holds that for the killing of his wife, the husband may recover for the loss of her society and companionship, estimated in a pecuniary sense.

Brickman v. Southern R. Co. (1906) 74 S. C. 306, 54 S. E. 553, holds that in an action by a widow for the death of her husband, in awarding the damages, the jury may take into consideration the earning capacity of the husband, and the loss of his companionship and society, and any other injury sustained, where the statute authorizes a recovery of such damages, including exemplary damages, as the jury may think proportionate to the injury.

It has been held that a husband suing for damages for loss of services and society of his wife through personal injuries resulting eventually in her death can recover damages for loss of services and companionship only for the time she lived after the injury. *Indianapolis & M. Rapid Transit Co. v. Reeder* (1908) 42 Ind. App. 520, 85 N. E. 1042.

And see *Philippi v. Wolff* (1873) 14 Abb. Pr. N. S. (N. Y.) 196, holding that a cause of action exists in behalf of the husband, where the wife survives her injury for a time, and recovery may be had for the loss of her society and services during the period between her injury and the death, to the extent that it was due to the injury.

comfort,¹⁵ companionship,¹⁶ care and attention,¹⁷ affection and kindly offices,¹⁸ and protection,¹⁹ may be included in assessing the damages to the one spouse for the death of the other; and that, in assessing the damages to the widow for

¹⁵ *Green v. Southern P. Co.* (1898) 122 Cal. 563, 55 Pac. 577; *Dyas v. Southern P. Co.* (1903) 140 Cal. 296, 73 Pac. 972; *Valente v. Sierra R. Co.* (1910) 158 Cal. 412, 111 Pac. 95; *Simoneau v. Pacific Electric R. Co.* (1911) 159 Cal. 494, 115 Pac. 320, 2 N. C. C. A. 137; *Hale v. San Bernardino Valley Traction Co.* (1909) 156 Cal. 713, 106 Pac. 83; *Kramm v. Stockton Electric R. Co.* (1913) 22 Cal. App. 737, 136 Pac. 523; *Florida C. & P. R. Co. v. Foxworth* (1899) 41 Fla. 1, 79 Am. St. Rep. 149, 25 So. 338; *Georgia, F. & A. R. Co. v. Sasser* (1908) 4 Ga. App. 276, 61 S. E. 505; *Baltimore & O. R. Co. v. State* (1866) 24 Md. 271; *Mize v. Rocky Mountain Bell Teleph. Co.* (1909) 38 Mont. 521, 129 Am. St. Rep. 659, 100 Pac. 971, 16 Ann. Cas. 1189; *Chesapeake & O. R. Co. v. Rodgers* (1902) 100 Va. 324, 41 S. E. 734; *Portsmouth Street R. Co. v. Peed* (1904) 102 Va. 662, 47 S. E. 850.

Cregin v. Brooklyn Crosstown R. Co. (1879) 19 Hun (N. Y.) 341, holding that, in assessing the husband's damages for the death of his wife, the jury may consider the loss sustained by deprivation of regular attendance, services, and comfort of the decedent's society. On appeal this case was reversed on the ground that the right to recover for loss of society of the wife did not survive the death of the husband. (1881) 83 N. Y. 595, 38 Am. Rep. 474. In this connection attention is called to *Green v. Hudson River R. Co.* (1866) 2 Abb. App. Dec. (N. Y.) 277, which is sometimes cited as holding that a husband cannot maintain an action for damages by being deprived of the society and assistance of his wife, resulting from her death. This case, however, actually holds that a statute authorizing an action for negligent death for the benefit of the wife and next of kin does not authorize an action by the husband to recover for the negligent killing of his wife, without reference to the nature of the pecuniary loss, whether the loss of society, companionship, or the services of the wife.

¹⁶ *Mize v. Rocky Mountain Bell Teleph. Co.* (1909) 38 Mont. 521, 129 Am. St. Rep. 659, 100 Pac. 971, 16 Ann. Cas. 1189; *Pennsylvania R. Co. v. Goodman* (1869) 62 Pa. 329; *Brickman v. Southern R. Co.* (1906) 74 S. C. 306, 54 S. E. 553; *Wells v. Denver & R. G. Western R. Co.* (1891) 7 Utah, 482, 27 Pac. 688; *Spiking v. Consolidated R. & P. Co.* (1907) 33 Utah, 313, 93 Pac. 838.

Wells v. Denver & R. G. Western R. Co. (1891) 7 Utah, 482, 27 Pac. 688, holds that loss of companionship to the widow and daughter of decedent is an element of damages recoverable by or for them.

¹⁷ *Kountz v. Toledo, St. L. & W. R. Co.* (1908) 189 Fed. 494; *St. Louis, I. M. & S. R. Co. v. Sweet* (1895) 60 Ark. 550, 31 S. W. 571; *Michigan C. R. Co. v. Vreeland* (1912) 227 U. S. 59, 57 L. ed. 417, 33 Sup. L.R.A.1916D.

Ct. Rep. 192, Ann. Cas. 1914C, 176; *Green v. Southern P. Co.* (1898) 122 Cal. 563, 55 Pac. 577; *Dyas v. Southern P. Co.* (1903) 140 Cal. 296, 73 Pac. 972; *Hale v. San Bernardino Valley Traction Co.* (1909) 156 Cal. 713, 106 Pac. 83; *Simoneau v. Pacific Electric R. Co.* (1911) 159 Cal. 494, 115 Pac. 320, 2 N. C. C. A. 137; *Kramm v. Stockton Electric R. Co.* (1913) 22 Cal. App. 523, 136 Pac. 523; *Hunt v. Conner* (1901) 26 Ind. App. 41, 59 N. E. 50; *Jordan v. Cincinnati, N. O. & T. P. R. Co.* (1889) 89 Ky. 40, 11 S. W. 1013; *Bolinger v. St. Paul & D. R. Co.* (1887) 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; *Hutchins v. St. Paul, M. & M. R. Co.* (1890) 44 Minn. 5, 46 N. W. 79, 16 Am. Neg. Cas. 294; *Paris & G. N. R. Co. v. Robinson* (1910) — *Tex. Civ. App.* —, 127 S. W. 294; *Baltimore & O. R. Co. v. Wightman* (1877) 29 Gratt. (Va.) 431, 26 Am. Rep. 384; *Baltimore & O. R. Co. v. Noell* (1879) 32 Gratt. (Va.) 394; *Portsmouth Street R. Co. v. Peed*, 102 Va. 662, 47 S. E. 850.

Kountz v. Toledo, St. L. & W. R. Co. (1908) 189 Fed. 494, holds that the value of the care and attention which the wife receives from her husband is an element of damages in her favor for his death.

Bolinger v. St. Paul & D. R. Co. (1887) 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856, holds the value of services of the husband and father in a pecuniary sense cannot be limited to the amount of his daily wages earned for the support of his wife and children, but his constant daily services, attention and care in their behalf, in the relation which he sustained to them, may also be considered. Loss of society and mental suffering, however, are not to be included.

Paris & G. N. R. Co. v. Robinson (1910) — *Tex. Civ. App.* —, 127 S. W. 294, holds that the wife may recover for the loss of care and counsel of her husband.

¹⁸ *Dougherty v. New Orleans R. & Light Co.* (1913) 133 La. 993, 63 So. 493.

¹⁹ *Florida C. & P. R. Co. v. Foxworth* (1899) 41 Fla. 1, 79 Am. St. Rep. 149, 25 So. 338; *Green v. Southern California R. Co.* (1901) 6 Cal. Unrep. 843, 67 Pac. 4; *Hale v. San Bernardino Valley Traction Co.* (1909) 156 Cal. 713, 106 Pac. 83; *Jones v. Leonardt* (1909) 10 Cal. App. 284, 101 Pac. 811; *Georgia F. & A. R. Co. v. Sasser* (1908) 4 Ga. App. 276, 61 S. E. 505; *Jordan v. Cincinnati, N. O. & T. P. R. Co.* (1889) 89 Ky. 40, 11 S. W. 1013; *Mize v. Rocky Mountain Bell Teleph. Co.* (1909) 38 Mont. 521, 129 Am. St. Rep. 659, 100 Pac. 971, 16 Ann. Cas. 1189.

Keeley v. Great Northern R. Co. (1909) 139 Wis. 448, 121 N. W. 167, holding that the wife, suing as administratrix, may recover the value of her support and the protection which she would have received from her husband had he continued to live.

Bauer v. Richter (1899) 103 Wis. 412, 79

the death of her husband, there may also be included loss of his services in assisting her in the care of the family.²⁰ Also the personal attentions of the husband to secure the comfort of the wife in the many ways in which he may make himself helpful and useful to her are to be taken into consideration in assessing her loss by reason of his death, although there is no reliable standard for the measurement of such damages;²¹ and the disposition of the husband, and his deportment towards his wife and family, his counsel, advice, care and solicitude for their welfare,²² and the loss of family resources,²³ may also be considered in estimating the damages for his death.

And while denying the right to recover, at least, for loss of society, nevertheless it has been held that damages are recoverable for loss from being deprived of the comfort of the decedent's experience, knowledge, and judgment in the management of the affairs of the family;²⁴ and that the jury may take into consideration the loss of the decedent's services in the superintendence, attention to, and care of his family;²⁵ and also the father's constant, daily services to his family, his attention and care

in their behalf, in the relation which he sustained to them.²⁶ It has, however, been held that the jury are not entitled to take into consideration the loss of social relations of husband and wife, and advice and protection of the deceased as wife and mother.²⁷

While it has been asserted that a widow may recover for loss of the support and protection of her husband, in specifically applying the rule in Wisconsin the basis for assessing the damage has apparently been support based upon the earning capacity of the deceased, for it has been held that the recovery should be limited to such sum as, being put at interest, will each year, by taking part of the principal and adding to the interest, yield an amount sufficient for the support of the widow during the time the deceased would probably have lived, together with such other sum as the evidence shows there was a reasonable expectation that the widow would have received from the decedent's earnings.²⁸

Since the cases sustaining the right to recover for what may be termed the intangible elements of loss to a husband or wife from the death of the other proceed upon the ground that these ele-

N. W. 404; *Rudiger v. Chicago*, St. P. M. & O. R. Co. (1898) 101 Wis. 292, 77 N. W. 169; *Kaspari v. Marsh* (1899) 74 Wis. 562, 43 N. W. 368; *Lawson v. Chicago*, St. P. M. & O. R. Co. (1885) 64 Wis. 447, 54 Am. Rep. 634, 24 N. W. 618; *Castello v. Landwehr* (1871) 28 Wis. 522.

²⁰ *Georgia, F. & A. R. Co. v. Sasser* (1908) 4 Ga. App. 276, 61 S. E. 505.

²¹ *Haines v. Pearson* (1904) 107 Mo. App. 481, 81 S. W. 645, declaring that, aside from the support of a wife by her husband, and his society, she has other property rights in his life, for the loss of which she may recover in the event of his wrongful death. As, for example, the personal attentions of the husband to insure her comfort, and the many ways he might make himself helpful and useful to her, should be taken into consideration in measuring her loss by reason of his death, even though there is no reliable standard for the measurement of such damages; since, in such case, they must be left to the judgment of the jury.

²² *Evans v. Oregon Short Line R. Co.* (1910) 37 Utah, 431, 108 Pac. 638, Ann. Cas. 1912C, 259, holding that, in connection with the evidence of what the deceased had contributed to his family for support and maintenance of his wife and children, his disposition and deportment towards them, his counsel, advice, care, and solicitude for their welfare, may also be considered in so far as such things are disclosed by his acts.

²³ *Canadian P. R. Co. v. Lachance* (1909) L.R.A.1916D.

²⁴ *Can. S. C. 205*, holding that the damages recoverable in behalf of the widow and children for the death of the husband and father are not limited to the actual wages or earnings of the deceased, but there may be included in the computation compensation for loss of decedent's services at home, loss of the family resources, and other substantial benefits and advantages of which the beneficiaries have been deprived by the death complained of.

²⁵ *Northern P. R. Co. v. Freeman* (1897) 27 C. C. A. 457, 48 U. S. App. 757, 83 Fed. 82, reversed in (1899) 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763.

²⁶ *Bennett v. Southern Railway-Carolina Div.* (1914) 98 S. C. 42, 79 S. E. 710; *Openshaw v. Utah & N. R. Co.* (1889) 6 Utah, 132.

²⁷ *Bolinger v. St. Paul & D. R. Co.* (1887) 36 Minn. 418, 1 Am. St. Rep. 680, 31 N. W. 856; *Hutchins v. St. Paul, M. & M. R. Co.* (1890) 44 Minn. 5, 46 N. W. 79, 16 Am. Neg. Cas. 294; *Johnson v. C. A. Smith Lumber Co.* (1906) 99 Minn. 343, 109 N. W. 810.

²⁸ *Nashville & C. R. Co. v. Smith* (1882) 9 Lea (Tenn.) 470.

²⁹ *Rudinger v. Chicago*, St. P. M. & O. R. Co. 101 Wis. 292, 77 N. W. 169. In this jurisdiction it is also held that it is only for the pecuniary loss that the action is maintainable, and not for loss of society or damage by way of solatium. *Regan v. Chicago, M. & St. P. R. Co.* (1881) 51 Wis. 599, 8 N. W. 292.

ments are subject to pecuniary estimate, in principle they are opposed to the other class of cases denying, either in whole or in part, the right to recover for these different elements of loss. As pointed out, however, in some of the cases a distinction may be made between the language of the statutes authorizing the action; but this is not true as to all of the cases, and, as noted, in some jurisdictions the right to recover for loss of society is denied, yet the right is sustained to recover for other elements arising from loss of consortium which are intangible, and but little, if any, more sub-

ject to pecuniary estimate than is the loss of the society of the deceased.²⁹

It is well settled, however, that, in assessing the damages for these intangible elements of loss, the basis of the assessment is pecuniary; and it is only the pecuniary value that is to be considered.³⁰ But it is held that these elements are capable of being considered from a pecuniary standard; for example, the pecuniary loss to the wife of a kind husband, aside from loss of support, may be considerable, for she loses his advice and assistance in many matters of domestic economy.³¹

²⁹ *Bennett v. Southern Railway-Carolina Div.* (1913) 98 S. C. 42, 79 S. E. 710, affirmed in (1914) 233 U. S. 80, 58 L. ed. 860, 34 Sup. Ct. Rep. 566, holding that there may be included in the damages recoverable compensation for loss of counsel and training, but not for loss of companionship; and in *Utah*, the right to recover for loss of society has been denied. *Openshaw v. Utah & N. R. Co.* (1889) 6 *Utah*, 132. In a later *Utah* case however it is held that loss of companionship is an element of damage recoverable in behalf of the widow. *Wells v. Denver & R. G. Western R. Co.* (1891) 7 *Utah*, 482, 27 *Pac.* 688. Likewise the loss of the husband's counsel, advice, and solicitude for the welfare of his family. *Evans v. Oregon Short Line R. Co.* (1910) 37 *Utah*, 431, 108 *Pac.* 638, *Ann. Cas.* 1912C, 259. And in *Texas*, while compensation for the loss of the husband's society is not recoverable (see *Texas* cases *supra*, note 8), compensation for the loss of his care and counsel is. *Paris & G. N. R. Co. v. Robinson* (1910) — *Tex. Civ. App.*

—, 127 S. W. 294. And in *Minnesota* the loss of the decedent's society is not an element of damage (see note 8), but the loss of his attention and care is (*supra*, note 26).

³⁰ *Green v. Southern P. Co.* (1898) 122 *Cal.* 563, 55 *Pac.* 577, holding that it is the pecuniary loss that is recoverable, and not the loss of society, comfort, and care, regardless of the pecuniary loss.

Pennsylvania R. Co. v. Goodman (1869) 62 *Pa.* 329; *Morgan v. Southern P. Co.* (1892) 95 *Cal.* 510, 17 *L.R.A.* 71, 29 *Am. St. Rep.* 143, 30 *Pac.* 603.

Harrison v. Sutter Street R. Co. (1897) 116 *Cal.* 156, 47 *Pac.* 1019, 1 *Am. Neg. Rep.* 403; *Pepper v. Southern P. Co.* (1895) 105 *Cal.* 389, 38 *Pac.* 974, 11 *Am. Neg. Cas.* 200, holding that the loss of the husband's society, comfort, and care can be considered only as bearing upon the wife's pecuniary loss.

³¹ *Morgan v. Southern P. Co.* (1892) 95 *Cal.* 510, 17 *L.R.A.* 71, 29 *Am. St. Rep.* 143, 30 *Pac.* 603. A. G. S.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Resp't.,

v.

BARTLES OIL COMPANY, Appt.

(— Minn. —, 155 N. W. 1035.)

Gasolene — testing and branding.

1. The prevention of fraud and imposition upon the purchasing public in the sale of a commodity the quality of which is not readily ascertainable is a proper object of police regulation as well as the protection of public safety; and Laws 1909, chap. 502, providing for the testing of gasolene for gravity, requiring it to be branded, "unsafe for illuminating purposes," and requiring the word "gasolene" to be branded and the

gravity stenciled on every barrel or package,—is a proper police measure, and is not in contravention of the Constitution.

For other cases, see *Constitutional Law*, II. c, 4, d, in *Dig. 1-52 N. S.*

Commerce — interstate — state inspection laws.

2. Where a commodity is shipped from one state into another, its identity not preserved, mingled with other property of like character, held there for sale, and not designed for any particular purchaser, or for reshipment to any particular place, it becomes a part of the general mass of the property of the state and is not longer the subject of interstate commerce; and the statute cited operates upon it as a part of the common property of the state and was not intended to operate upon property the subject of interstate commerce.

For other cases, see *Commerce*, IV. a, in *Dig. 1-52 N. S.*

Same — police power.

3. Such a commodity, whether the subject of interstate commerce or a part of the general mass of the property of the

Headnotes by DIBELL, C.

Note. — For validity of state inspection laws as applied to commodities in interstate commerce, see annotation following this case, post. 196. L.R.A.1916D.

state, is subject to inspection under the police power; but the charges must be reasonable and intended for the purpose of covering the expenses of inspection, and not for the purpose of revenue; and it is held that the statute cited is not a revenue law clothed in the guise of an inspection law.

For other cases, see Constitutional Law, II. c, 4, d, in Dig. 1-52 N. S.

Same — import duties — constitutional prohibition.

4. United States Const. art. 1, § 10, cl. 2, prohibiting a state from laying duties on imports except such as are necessary in the execution of its inspection laws, refers to imports from foreign countries, and not to shipments from state to state.

For other cases, see Commerce, V. in Dig. 1-52 N. S.

(January 21, 1916.)

A PPEAL by defendant from an order of the District Court for Ramsey County denying a motion for a new trial of an action brought to recover inspection fees for inspecting oil and gasoline of defendant in accordance with statute. Affirmed.

The facts are stated in the opinion.

Messrs. Martin H. Albin and Frederick M. Catlin, for appellant:

The fees provided by chapter 502, Laws of 1909, for inspection of oil and gasoline, are excessive, and produce a revenue, in amount, far beyond what is necessary to execute the law, and constitute a burden upon interstate commerce, and are in conflict with the Constitution of the United States; and the law is therefore void.

D. E. Foote & Co. v. Stanley, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 63, 27 L. ed. 383, 385, 2 Sup. Ct. Rep. 87; *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273.

The fees prescribed by the law in question are "obviously and largely beyond what is needed to pay for the inspection services rendered."

Red "C" Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152; *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576; *Castle v. Mason*, 91 Ohio St. 296, 110 N. E. 463.

The oil and gasoline, fees for inspection of which this suit was brought, were, when inspected, and when subject to inspection, in the channel of interstate commerce.

D. E. Foote & Co. v. Stanley, 232 U. S. L.R.A.1916D.

494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377; *Bartels Northern Oil Co. v. Jackman*, *supra*.

Messrs. Lyndon A. Smith, Attorney General, and William J. Stevenson, Assistant Attorney General, for the State:

The statute is a valid inspection law, and is not a revenue measure.

Willis v. Standard Oil Co. 50 Minn. 290, 52 N. W. 652; *State ex rel. Hughes v. Reusswig*, 110 Minn. 475, 126 N. W. 279; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *Patapasco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 Ann. Cas. 736.

The oil and gasoline inspected were not when inspected, or when subject to inspection, then the subject of interstate commerce. They had reached their destination and had lost their character as interstate commerce.

Chicago, M. & St. P. R. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592; *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 57 L. ed. 1015, 33 Sup. Ct. Rep. 712; *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475.

The defendant cannot assert the invalidity of the law after taking all benefits thereunder.

Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; *Swain v. Seamen*, 9 Wall. 254, 274, 19 L. ed. 554, 560; 18 Cyc. 785-788; *State v. Home Ins. Co.* 59 Neb. 524, 81 N. W. 443; *Catherwood v. Collins*, 48 Pa. 480; *William Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568.

Dibell, C., filed the following opinion:

Action by the state to recover inspection fees for inspecting oil and gasoline in accordance with Laws 1909, chap. 502, now embodied in Gen. Stat. 1913, §§ 3619-3632. There were findings for the plaintiff. The defendant appeals from the order denying its motion for a new trial.

1. Particular objection is made to § 7 of the act (Gen. Stat. 1913, § 3625) upon the ground that the inspection which it provides for gasoline is not a legitimate police regulation. This section provides that gasoline shall be tested as to gravity, and branded "Unsafe for illuminating purposes;" and that every barrel or package containing gasoline shall be branded with the word "gasoline" in red letters and the gravity stenciled thereon. No test other than for gravity is provided. The objec-

tion is that this test has no legitimate reference to public safety. The prevention of fraud and imposition upon the purchasing public in the sale of a commodity the quality of which is not readily ascertainable by the general public is properly enough the subject of police regulation. In an early case the purpose of inspection laws is stated as follows: "The object of those laws is to protect community, so far as they apply to domestic sales, from frauds and impositions; and, in relation to articles designed for exportation, to preserve the character and reputation of the state in foreign markets." *Clintaman v. Northrop*, 8 Cow. 45.

In *Patapasco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862, the court, in holding that a statute providing for the inspection of commercial fertilizers was valid when enacted in the exercise of the police power, said: "No doubt can be entertained of this where the inspection is manifestly intended, and calculated in good faith, to protect the public health, the public morals, or the public safety. . . . And it has now been determined that this is so, if the object of the inspection is the prevention of imposition on the public generally."

There is a discussion of the subject in Freund, *Pol. Power*, §§ 272 et seq. We do not conceive that there is any considerable doubt of the propriety of legislation under the police power having as its object the prevention of fraud and imposition upon the purchasing public. The statute requiring inspection as to gravity as a condition of sale within the state impairs no fundamental or constitutional right of the vender. We do not say that the legislature may not, with propriety, have considered that there was an element of public safety to be guarded by the statute; but, conceding that this is not so, the statute is easily upheld as a measure intended to prevent imposition upon the purchasing public.

2. It is claimed that the oil and gasoline inspected were the subject of interstate commerce, and that the inspection was an unlawful interference with such commerce within the commerce clause of the Constitution. U. S. Const. art. 1, § 8. The defendant is a Minnesota corporation. It has its place of business in St. Paul. It has storage facilities at West St. Paul and at White Bear. It has no other place of business. Oil products are shipped to it from the oil-producing states in tank cars and are stored in its storage tanks. They are not "original package" shipments. *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715. They are on the defendant's private property, leased or owned, and the cars are

switched there and unloaded. The railroads make and the defendant accepts delivery there. The oil and gasoline have no further definite destination. They are for sale. They are incorporated into the general mass of property of the state. Most of such products are sold in Minnesota. Some are sold in other states. When shipped out of the state the inspection charges are rebated, —not because the products shipped are the subject of interstate commerce, but because the state does not impose its inspection for the protection of the public of another state. The oil and gasoline are mixed by the defendant with other oil and gasoline of like quality in the storage tanks. There are no reshipments in the tank cars. Very clearly it is the purpose of the statute to impose an inspection only upon oil products coming into the state and sold to the public. The inspection is imposed for the protection of those to whom the dealer makes sales. It is not for his protection in purchasing from the refineries. The facts in the case of *General Oil Co. v. Crain*, 209 U. S. 211, 52 L. ed. 754, 28 Sup. Ct. Rep. 475, involving a state oil inspection, where it was held that oil at rest in the state, though intended for shipment out of it, was not the subject of interstate commerce, are very much stronger in support of a claim that the property was the subject of interstate commerce than are the facts in the case at bar. Upon this general question, see *Susquehanna Coal Co. v. South Amboy*, 228 U. S. 665, 57 L. ed. 1015, 33 Sup. Ct. Rep. 712; *Bacon v. Illinois*, 227 U. S. 504, 57 L. ed. 615, 33 Sup. Ct. Rep. 299; *Chicago, M. & St. P. R. Co. v. Iowa*, 233 U. S. 334, 58 L. ed. 988, 34 Sup. Ct. Rep. 592. The defendant relies particularly upon *D. E. Foote & Co. v. Stanley*, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377, and *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576, and *Castle v. Mason*, 91 Ohio St. 296, 110 N. E. 463, which were decided in reliance upon it. The Foote Case does not overrule the Crain Case. On the contrary, the Crain Case is followed in later cases and the doctrine of it is distinctly approved. We are of the opinion that the inspection for which recovery was had was not an inspection of property the subject of interstate commerce.

3. But if we are mistaken, and if the oil products were the subject of interstate commerce, they were subject to inspection under a statute passed in the proper exercise of the police power, though such inspection incidentally affected, if it did not unduly burden, interstate commerce. *Savage v. Jones*, 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S.

38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; Patapasco Guano Co. v. Board of Agriculture, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862. And whether the subject of interstate commerce, or a part of the common property of the state, the inspection charge must be reasonable. It must have reference to the cost of service. It cannot be a revenue measure clothed in the guise of an inspection law whether it relates to a subject of interstate commerce or intrastate commerce. Within reasonable limits the amount of the inspection fee is for the legislature. *Willis v. Standard Oil Co.* 50 Minn. 299, 52 N. W. 652. The amount of the inspection charge is primarily with the legislature, and a statute will not be held unconstitutional as providing for an excessive charge unless it is so unreasonable and disproportionate to the service rendered as to attack the good faith of the law. "The law being otherwise valid, the amount of the inspection fee is not a judicial question; it rests with the legislature to fix the amount, and it can only present a valid objection when it is shown that it is so unreasonable and disproportionate to the services rendered as to attack the good faith of the law." *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1. But if it clearly appears that it is obviously and largely beyond what is necessary to pay the cost of inspection service, the law will be declared invalid. "If, therefore, it is shown that the fees are disproportionate to the service rendered, or that they include the cost of something beyond legitimate inspection to determine quality and condition, the tax must be declared void, because such costs by necessary operation obstruct the freedom of commerce among the states." *D. E. Foote & Co. v. Stanley*, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377. In the *Foote* Case the expenses for the two years shown amounted to 34 and 35 per cent of the inspection receipts. In the *North Dakota* case the expenses for five years ran from 11 to 20 per cent of the receipts, and averaged 16 per cent. In the *Ohio* case for a period of six years the expenses ran from 32 to 42 per cent of the receipts and averaged 37 per cent. In *Minnesota*, from 1903 to 1913, inclusive, a period of eleven years, the expenses fluctuating from time to time have run from 53 to 98 per cent of the

receipts, and have averaged 82 per cent. These expenses cover the actual expenses of the oil-inspection department, with no allowance for incidental services rendered by the other departments of the state. In *D. E. Foote & Co. v. Stanley*, *supra*, and in *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 393, 56 L. ed. 240, 244, 32 Sup. Ct. Rep. 152, it was said that the courts do not interfere immediately upon it being made to appear that the amount collected is beyond what is needed for inspection expenses, because of the presumption that the legislature will reduce the fees to a proper amount. The legislature, from time to time, has made a reduction in the inspection charges. It is proper to note that the last legislature (*Laws 1915*, chap. 271) reduced the inspection charges on oil and gasoline in tanks or tank cars containing more than 50 barrels, and we take it that such oil products reach the state largely in tank cars, to 7 cents per barrel, it before having been 10 cents. This reduction of 30 per cent is substantial, and, unless there is a material increase in consumption, will greatly reduce receipts.

While we are impressed with the view that in years past the inspection fees have been higher than necessary to meet the expenses of an economical inspection, we cannot say, under the rules fixed for our guidance, that the statute is invalid. The increase in consumption has been great, and it was perhaps not easy to foresee the receipts which would come from year to year. The legislature of 1915 made a good-faith endeavor by a reduction of 30 per cent to bring about a proper relation between receipts and inspection fees.

4. Counsel refer to U. S. Const. art. 1, § 10, cl. 2, providing that no state, without the consent of Congress, shall lay any duties on imports except such as are necessary for executing its inspection laws. This constitutional provision refers to imports from foreign countries, and not to property coming from another state. *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* *supra*; *Patapasco Guano Co. v. Board of Agriculture*, 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862, and cases cited.

Order affirmed.

Annotation—Validity of state inspection laws as applied to commodities in interstate commerce.

For the earlier cases involving the validity of state statutes regulating the inspection of meat, which is a subject of interstate commerce, see *Armour & Co.* L.R.A.1916D.

v. Augusta, 27 L.R.A.(N.S.) 677 and note, the subsequent cases upon that question being included in the present note.

For state legislation for protection of health of live stock as an interference with interstate commerce, see *Evans v. Chicago & N. W. R. Co.* 26 L.R.A.(N.S.) 278, and note.

For the validity of statutes or ordinances for the settlement of weights as between buyer and seller by a public weigher, see *Taylor v. Anderson*, 51 L.R.A.(N.S.) 731, and note.

As to the constitutionality and construction of statutes in relation to vinegar, see *People v. William Henning Co.* 49 L.R.A.(N.S.) 1206, and note.

As to state regulations of interstate commerce as affected by the Federal pure food law, see *McDermott v. State*, 47 L.R.A.(N.S.) 984, and note.

Validity in general.

The validity of proper state inspection laws applying to articles of interstate commerce is recognized by the Constitution of the United States, which provides: "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imports laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." Article I., § 10, subdiv. 2.

The term "imposts" as used in the above clause refers to goods from foreign countries, not those passing from one state to another. *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* (1906) 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *Pittsburg & S. Coal Co. v. Louisiana* (1894) 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459, (1889) 41 La. Ann. 465, 6 So. 220; *State v. Bartles Oil Co. ante*, 193; *State v. Bixman* (1901) 162 Mo. 1, 62 S. W. 828.

When inspection statutes provide for actual inspection, and do not impose excessive fees for the inspection service, they are uniformly upheld.

Thus in *Turner v. Maryland* (1882) 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44, a statute of Maryland providing that it shall not be lawful to carry out of the state in hogsheds any tobacco raised in the state, except in hogsheds which shall have been inspected, passed, and marked according to the provisions of the act, was held to be a proper inspection law, and not in conflict with the Federal Constitution; it appearing that the charges made were for services rendered in the inspection.

L.R.A.1916D.

A statute providing for the appointment of two gaugers of coal and coke boats is not a regulation of commerce, nor does it lay an impost or duty on imports or exports from other states. *Pittsburg & S. Coal Co. v. Louisiana* (1894) 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459.

A statutory prohibition of the receipt by common carriers for transportation beyond the limits of the territory, of hides which do not bear evidence of inspection required by the act, is a valid exercise of the police power, and does not, in the absence of congressional legislation covering the subject, violate the commerce clause of the Federal Constitution, although hides not offered for transportation are not required to be inspected, and although the incidental effect of the statute may be to levy a tax upon that class of property. *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* (1906) 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1, affirming (1904) 12 N. M. 425, 78 Pac. 74, 79 Pac. 295.

A statutory prohibition against sales by importing purchasers of concentrated commercial feeding stuffs in the original packages, unless there has been a compliance with the statute as to inspection, analysis, and disclosure of the ingredients, together with the incidental provisions for the filing of a certificate for registration and for labels and stamps, is a proper exercise of the police power of the state, and not an unconstitutional regulation of commerce. *Savage v. Jones* (1912) 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715; *Standard Stock Food Co. v. Wright* (1912) 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784.

A statute subjecting illuminating oils sold or offered for sale in a state to inspection, for the purpose of determining the safety and value of such oils for illuminating purposes, is a proper exercise of the police power, and does not violate the commerce clause of the Federal Constitution. *Red "C" Oil Mfg. Co. v. Board of Agriculture* (1912) 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152, affirming (1909) 172 Fed. 695.

A statute providing for the inspection of all cotton-seed meal, cotton-seed cake, linseed-oil meal, linseed-oil cake, and feeding stuff, by-products of starch factories, glucose, cereal, and breakfast-food factories, breweries, distilleries, meat-packing establishments and slaughter houses, sold or offered for sale in the state, and making a level charge of 25 cents per ton on all such products with-

out discrimination as to value of the product, and providing for an actual inspection of such products, is valid as an inspection law. *George H. Lee Co. v. Webster* (1911) 190 Fed. 353.

A state statute which requires inspectors to examine and inspect all hides or animals known or reported to him as sold or as leaving or going out of the county for sale or shipment, and all animals driven or sold in the district for slaughter, and requiring him to prevent the sale or removal out of the county of hides or animals upon which the brands cannot be ascertained unless identified by proof, and providing for fees for the inspection, is an inspection law within the legislative power of the state. *Neilson v. Garza* (1876) 2 Woods, 287, Fed. Cas. No. 10,091.

In *Green v. Savannah* (1832) R. M. Charl. (Ga.) 368, an inspection law providing for the gauging and inspecting of liquors, and for the payment of a small fee to the officer for the service performed, was held to be valid as applied to liquors imported from another state.

A statute passed for the protection of farmers, by requiring that a sample of all fertilizer sold within the state at a price over \$10 per ton should be submitted to the experimental station of the agricultural college for analysis and labeling, for which a fee was charged, was not a levy of an impost on interstate commerce, where the fees were used for the single purpose of supporting and maintaining the experimental station. *Vanmeter v. Spurrier* (1893) 94 Ky. 22, 21 S. W. 337.

A statute providing for the inspection of hay to protect citizens of the state from unfit products does not amount to a regulation of commerce between the states nor to an impost or duty on imports or exports. *Hay Inspectors v. Pleasants* (1871) 23 La. Ann. 349.

A statute providing for the appointment of gaugers of cargoes of coal or coke, the charges for such gauging going exclusively to the gaugers or inspectors as their fees for services rendered in the inspection, is not a regulation of commerce in any sense of the word, as all that it purports to do is to protect buyers of coal in boats and barges against fraud in weights and measures. *State v. Pittsburg & S. Coal Co.* (1889) 41 La. Ann. 465, 6 So. 220.

And a city ordinance requiring the measurement of coal by an inspector when sold within the city, and providing for a small fee for his services, is not invalid as a regulation of commerce. L.R.A.1216D.

Charleston v. Rogers (1823) 2 M'Cord, L. (S. C.) 495, 13 Am. Dec. 751.

But in *Foster v. Master & Wardens* (1876) 94 U. S. 246, 24 L. ed. 122, reversing (1874) 26 La. Ann. 105, a statute of the state of Louisiana providing for a survey by the master and wardens of the port of New Orleans of the hatches of all sea-going vessels which should arrive at the port, or for their making a survey of damaged goods coming on board such vessels, and prohibiting any other persons from making such surveys, was held to be in violation of the Constitution, it being a regulation of both foreign and interstate commerce, and not an inspection law in the sense in which that term is used in the Constitution; the purpose of the act being to furnish official evidence for the parties immediately concerned, and, where the goods are damaged, to provide for and regulate their sale.

Nature of inspection; discrimination.

To be valid as an inspection law, a statute must provide for actual inspection.

So, a requirement that a sample shall be sent in advance for inspection before intoxicating liquors are brought into the state cannot be supported as an inspection law, as such a law must at least provide for some inspection of the article imported. *Vance v. W. A. Vandercook Co.* (1898) 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; *State v. McGee* (1899) 55 S. C. 247, 74 Am. St. Rep. 741, 33 S. E. 353.

A statute forbidding any common carrier to bring into the state any intoxicating liquors from any other state or territory without first having a certificate that such liquors were consigned to a person authorized to sell the same is neither an inspection law, nor a quarantine or sanitary law, and is not a legitimate exercise of police power by the state, and is void as a regulation of commerce among the states. *Bowman v. Chicago & N. W. R. Co.* (1888) 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

A fee imposed for the registering of every brand of concentrated feeding stuff offered or held for sale or sold within the state, the registration being made, not from an examination of the goods themselves or of a sample of the goods, but from a statement as to their ingredients and from whence obtained, is not an inspection fee, but a tax on the right to engage in the business of selling such products in the state, and is therefore

unconstitutional and void. *George H. Lee Co. v. Webster* (1911) 190 Fed. 353.

A statute which prohibits the manufacture, sale, or possession of, or the paying of freight or express charges on, intoxicating liquors, except when they are bought from a state officer authorized to sell the same and have been tested by the chemists of the South Carolina College and found to be chemically pure, but which does not require the chemist to test any liquors except those purchased by state officers for sale in the state, and fixes no fee for his services, is not a proper inspection law, but rather an effort under the guise of an inspection law to impose a burden on commerce, and is in conflict with the Constitution and laws of the United States. *Donald v. Scott* (1896) 74 Fed. 859.

And an inspection law will not be upheld if it has the effect of discriminating against the products of other states.

So, a state statute compelling the inspection of all flour brought into the state and offered for sale therein and the payment of a fee for such inspection, flour made and sold in that state not being required to be inspected, is unconstitutional and void as discriminating against the products and industries of other states. *Voight v. Wright* (1891) 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855.

And a statute providing for the inspection of lime, which applies only to lime brought from a certain other state, is not a proper inspection law, because it is not uniform and violates the provision of the Federal Constitution that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." *Higgins v. Lime* (1880) 130 Mass. 1.

A municipal ordinance requiring that all live stock shall be inspected on the hoof by an officer appointed by the town authorities before being slaughtered, as a condition to the sale for food purposes of the meat of such animals, contravenes the commerce clause of the Federal Constitution in that it practically excludes all meats taken from animals slaughtered in other states. *Carter v. Green* (1910) 127 La. 490, 31 L.R.A.(N.S.) 1055, 53 So. 729. For other cases of this nature, see the last paragraph of the note to *Evans v. Chicago & N. W. R. Co.* 26 L.R.A.(N.S.) 278.

But an inspection law excluding from a territory illuminating fluids above a certain specific gravity is within the L.R.A.1916D.

police power of the territory, although some oils may be excluded which are as safe for use as those which comply with the statutory standard. *Waters-Pierce Oil Co. v. Deselms* (1909) 212 U. S. 159, 53 L. ed. 453, 29 Sup. Ct. Rep. 270, affirming (1907) 18 Okla. 107, 89 Pac. 212.

To what commodities applicable.

Interstate as well as foreign commerce is subject to state inspection laws. *Patapasco Guano Co. v. Board of Agriculture* (1898) 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862.

Inspection laws are valid when they act on a subject before it becomes an article of commerce, and also, although operating on articles brought from one state into another, when they are enacted in the exercise of that power of self-protection commonly called the police power. (U. S.) *Ibid*.

So important a matter as fixing the grade by which grain in interstate transportation can be sold, and without which it cannot be sold on any large scale, admits of one uniform system or plan of regulation, and only one, and therefore falls within the exclusive power of Congress; and statutes passed by the state of Wisconsin providing for the inspection and grading of grain intended for delivery, storage, manufacture into flour, and reshipment in the state, which system of inspection was intended to and would have the effect of overthrowing the standard of inspection by which all sales and purchases of grain in interstate commerce had for many years been made according to the inspection system of Minnesota, were a regulation of commerce between the states and invalid. *Globe Elevator Co. v. Andrew* (1906) 144 Fed. 871, interlocutory order affirmed in (1907) 84 C. C. A. 376, 156 Fed. 664.

Inspection laws cannot be made applicable to commodities merely passing through a state from one state to another.

Thus, in *Farris v. Henderson* (1893) 1 Okla. 384, 33 Pac. 380, a county inspection law which applied to cattle being driven across the county from one state to another, fees being charged for such inspection, was held to be invalid, as a regulation of interstate commerce.

And in *Georgetown v. Davidson* (1868) 6 D. C. 278, it was held that an ordinance for the inspection of flour did not apply to flour which was merely transhipped at the place of inspection on its journey from one state to another, but that if the ordinance did apply to such flour it was inoperative and void.

Inspection fees.

While, by the terms of the Constitution of the United States, the fees which a state may impose for inspection are only such as "may be absolutely necessary for executing its inspection laws," the courts apparently do not construe this language strictly, and reasonable fees, all of which are applied to inspection purposes, are sustained.

Thus, an inspection charge of 80 cents per hundred, for stamps to be affixed to packages of concentrated commercial feeding stuffs, is not on its face so unreasonably in excess of the cost of analysis, salaries of officials, and other necessary expenses, when applied to sales by importers in the original packages, as to invalidate the statute as a disguised revenue measure. *Savage v. Jones* (1912) 225 U. S. 501, 56 L. ed. 1182, 32 Sup. Ct. Rep. 715.

Nor does an inspection fee of 10 cents per ton on concentrated commercial feeding stuffs, when sold or offered for sale within the state, or the exaction in lieu thereof in the case of condimental, patented, proprietary, or trademark stock or poultry foods, of an annual license fee of \$100, render the statute invalid as applied to sales by importers in the original packages. *Standard Stock Food Co. v. Wright* (1912) 225 U. S. 540, 56 L. ed. 1197, 32 Sup. Ct. Rep. 784.

A charge of $\frac{1}{2}$ cent per gallon, made by a state oil inspection act for the avowed purpose of defraying the expense connected with the inspection, cannot be said, in advance of the experience gained from the actual operation of the act, to be so seriously in excess of what is necessary as to justify the imputation that the real purpose of the statute was to raise a revenue in violation of the commerce clause of the Federal Constitution. *Red "C" Oil Mfg. Co. v. Board of Agriculture* (1912) 222 U. S. 380, 56 L. ed. 240, 32 Sup. Ct. Rep. 152, affirming (1909) 172 Fed. 695.

The amount of fee imposed for the inspection of articles of commerce does not render the statute, if otherwise valid, repugnant to the commerce clause of the Federal Constitution where it is not so unreasonable and disproportionate to the services rendered as to challenge the good faith of the law. *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* (1906) 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1, affirming (1904) 12 N. M. 425, 78 Pac. 74, 79 Pac. 295.

An inspection charge of 25 cents per ton on commercial fertilizers is not so in excess of what is necessary to pay

cost of analysis, salaries of inspectors, cost of tags, and other charges, as to justify the imputation of bad faith and show that it is not a proper exercise of the police power. *Patapsco Guano Co. v. Board of Agriculture* (1898) 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862.

A fee imposed by a state statute in favor of the state gauger for his services in gauging casks of wine imported at San Francisco is not unconstitutional as imposing duties on imports by state authority, or as interfering with the Federal government in its regulation of commerce, as the authority of the state to pass inspection laws involves the power of enforcing such laws by adequate provisions for the remuneration of officers charged with the duty of inspecting goods. *Addison v. Saulnier* (1861) 19 Cal. 82.

Where the object of a statute providing for inspection of hay was to protect the citizens from commodities that were unfit for commerce, and the fees allowed to the inspection officers were only remuneration for their services, and were not excessive, it does not amount to a levy on imports or a tax upon the products of other states. *State v. Fosdick* (1869) 21 La. Ann. 256.

An inspection fee not being an impost or a duty on imports or exports, it is immaterial whether it is absolutely necessary for executing the inspection laws of the state. *Hay Inspectors v. Pleasants* (1871) 23 La. Ann. 349.

See also *STATE V. BARTLES OIL CO.* ante, 193.

But a revenue law may not be disguised as an inspection law, and the imposition of fees largely in excess of what is required for inspection purposes, or the application of part of the fees to other purposes, will render a statute invalid.

A statute providing for the inspection of oils, which imposes a burden on interstate commerce by way of fees largely in excess of the expenses necessary for executing the inspection law, is unconstitutional. *Castle v. Mason* (1915) 91 Ohio St. 296, 110 N. E. 463.

If a state fixes an inspection fee materially greater than the cost of the inspection, it becomes not only a police measure, but also a revenue measure, and to the extent that the fees exceed the reasonably necessary cost of inspection they are invalid because in conflict with the commerce provisions of the Federal Constitution. *Bartels Northern Oil Co. v. Jackman* (1915) 29 N. D. 236, 150 N. W. 576.

A charge of 1 cent per bushel upon oysters coming from other states, levied by the Maryland oyster law to help defray the expenses of the inspection provided for by that statute, is unconstitutional as unlawfully interfering with interstate commerce, where such tax regularly yields a revenue largely in excess of the amount required to pay the salaries of the inspectors, and the excess is devoted to noninspection purposes. *D. E. Foote & Co. v. Stanley* (1914) 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377, reversing (1912) 117 Md. 335, 82 Atl. 380.

A statute imposing a tax of 2 cents a bushel on all oysters that are sold by commission men and others selling less than a cargo cannot be upheld as an inspection law, where the act upon its face segregates one half of the charge and applies it to reselling the oyster bottoms of the state, thus enriching the resources of the state by a tax upon interstate commerce. *D. E. Foote & Co. v. Clagett* (1911) 116 Md. 228, 81 Atl. 511. R. L. S.

VERMONT SUPREME COURT.

RE ESTATE OF HOMER W. HEATON.

MONTPELIER SAVINGS BANK & TRUST COMPANY, Trustee, Exceptant.

(— Vt. —, 96 Atl. 21.)

Common law — adoption — particular decisions.

1. The statutory adoption of so much of the common law of England as is applicable to the local situation and circumstances applies only to principles, and does not include particular decisions unless the reasoning is satisfactory.

For other cases, see *Common Law in Dig.* 1-52 N. S.

Life tenant — right to stock dividends.

2. A stock dividend declared out of profits accumulated since the creation of the trust goes to the life tenant, and not to the remainderman, under a will creating a trust to pay all income by way of interest, dividends, rents, and profits to the life tenant, remainder over.

For other cases, see *Life Tenants, II. b, in Dig.* 1-52 N. S.

(November 23, 1915.)

EXCEPTIONS by the Montpelier Savings Bank & Trust Company to rulings of the Washington County Court affirming a decree of the Probate Court allowing as income, and distributing to the life tenants of a trust fund, a stock dividend declared on the stock of which they had only a life use with remainder over. Affirmed.

The facts are stated in the opinion.

Note. — For rights as between life tenant and remainderman in dividends or distributions by corporations, see annotation following this case, post, 211.

Generally as to the adoption of the common law in the United States, see note to *KcKennon v. Winn*, 22 L.R.A. 501. For later cases see L.R.A. Dig. under the title "Common Law." L.R.A.1916D.

Mr. William B. O. Stickney, for exceptant:

The testator had no purpose that by his will these beneficiaries or any one of them should receive any part of the capital stock of the Montpelier Savings Bank & Trust Company, originally owned by him, or becoming part of the trust fund by reason of the declaration of what is called a "stock dividend."

Van Allen v. Assessors (Churchill v. Utica) 3 Wall. 573, 584, 18 L. ed. 229, 234; *Delaware R. Tax*, 18 Wall. 206, 230, 21 L. ed. 888, 896; *Tennessee v. Whitworth*, 117 U. S. 129, 136, 29 L. ed. 830, 832, 6 Sup. Ct. Rep. 645; *New Orleans v. Houston*, 119 U. S. 265, 277, 30 L. ed. 411, 415, 7 Sup. Ct. Rep. 198; *Gibbons v. Mahon*, 136 U. S. 549, 557, 34 L. ed. 525, 527, 10 Sup. Ct. Rep. 1057; *Chaffee v. Rutland R. Co.* 55 Vt. 126; *Curran v. Arkansas*, 15 How. 304, 307, 14 L. ed. 705, 707; *Pouch v. Sproule*, L. R. 12 App. Cas. 393, 56 L. J. Ch. N. S. 1037, 57 L. T. N. S. 345, 36 Week. Rep. 193; *Pritchitt v. Nashville Trust Co.* 96 Tenn. 472, 33 L.R.A. 861, 36 S. W. 1064; *Boardman v. Mansfield*, 79 Conn. 637, 12 L.R.A.(N.S.) 793, 118 Am. St. Rep. 178, 66 Atl. 169; *Great Western Min. & Mfg. Co. v. Harris*, 63 C. C. A. 51, 128 Fed. 321; 2 *Woerner, Administration*, 2d ed. § 457; 2 *Perry, Trusts*, §§ 544, 545, and notes; *Re Stevens*, 46 Misc. 623, 95 N. Y. Supp. 297; *McLouth v. Hunt*, 154 N. Y. 179, 39 L.R.A. 230, 48 N. E. 548; *Re Kernochan*, 104 N. Y. 618, 11 N. E. 149; *Spooner v. Phillips*, 62 Conn. 62, 16 L.R.A. 461, 24 Atl. 524; *Beveridge v. New York Elev. R. Co.* 112 N. Y. 27, 2 L.R.A. 648, 19 N. E. 489; *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 496, 38 L. ed. 793, 797, 14 Sup. Ct. Rep. 968; *Newport Trust Co. v. Van Rensselaer*, 32 R. I. 231, 35 L.R.A.(N.S.) 564, 78 Atl. 1009; *Williams v. Western U. Teleg. Co.* 93 N. Y. 162; *Day v. Faulks*, 81 N. J. Eq. 173, 88 Atl. 384; *Chester v. Buffalo Car Mfg. Co.* 70 App. Div. 443, 75 N. Y. Supp.

428; *Lauman v. Foster*, 157 Iowa, 275, 50 L.R.A. (N.S.) 531, 135 N. W. 14; *Kalbach v. Clark*, 133 Iowa, 215, 12 L.R.A. (N.S.) 801, 110 N. W. 599, 12 Ann. Cas. 650; *Re Osborne*, 209 N. Y. 450, 50 L.R.A. (N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298.

Messrs. **Fred L. Laird and Fred B. Thomas** for the life tenants.

Taylor, J., delivered the opinion of the court:

Homer W. Heaton died testate January 28, 1899. By his will of October 5, 1895, he created the following trust, among others: "The residue and remainder of my estate I give to the aforesaid James W. Brock upon trust, and to his duly appointed successor in the trust hereby created, upon the trust that all the income of said residue and remainder of my estate by way of interest, dividends, rents, and profits be paid each and every year, or half or quarter year, if convenient, in the following manner; that is to say, one-third part thereof to my son Charles H. Heaton, for the full term and period of his natural life; and one-third part thereof to my son James S. Heaton for the full term and period of his natural life; and one-third part thereof to my grandchildren, Clifton M. Heaton and Ruby M. Heaton, in equal shares for the full term and period of the natural life of each one of them."

After making provision for the disposition of the shares of such life beneficiaries as should de cease during the term, the will further provides: "At the death of said Sarah S. Heaton (wife of Charles H. Heaton, mentioned elsewhere in the will) and my sons and grandchildren, the aforesaid trust and trusts are to be ended, and all the property and estate held upon trust is given to the lawful issue of said grandchildren and their heirs in equal shares per capita."

At the time of the testator's death he owned 105 shares of the capital stock of the Montpelier Savings Bank & Trust Company of the par value of \$100 per share which was a part of the residue of his estate, and so a part of said trust fund. The testator gave positive directions that said stock, together with certain other property mentioned in his will, should be held until the termination of the trust. James W. Brock having resigned said trust, the appellee was, on January 31, 1913, appointed his successor as trustee and is now acting as such.

On December 15, 1913, the trustees of the Montpelier Savings Bank & Trust Company declared a dividend out of the surplus earnings of said bank under the following vote: "That a dividend of \$100 per share payable L.R.A.1916D.

in new capital stock from the surplus earnings of the bank be paid to the stockholders of record at the close of business December 31, 1913, thereby increasing the capital stock to the sum of \$100,000 represented by 1,000 shares of \$100 each."

At the time such dividend was declared, said bank had no rule nor by-law touching its authority to declare dividends or increase its capital stock; so that its authority in this regard depended upon its charter and the general law.

It appears from the agreed statement of facts that at the time of the testator's death the surplus earnings of the bank were upwards of \$50,000; and that from that time to the time said dividend was declared there had been a gradual increase of its surplus earnings, so that when said dividend was declared "the surplus earnings of said bank exceeded twice the amount of said surplus earnings at the time of the decease of said Homer W. Heaton by more than the amount of this dividend." It also appears that there has been a corresponding increase in the volume of the bank's business since said dividend was declared.

Pursuant to said vote, said dividend was paid to and accepted by all of the stockholders of the bank in new capital stock, and the dividend of 105 shares on account of the original stock held as part of the trust fund is now in the hands of the bank as trustee. Said bank claims to hold the new shares as part of the trust fund, while Charles H. Heaton, Clifton M. Heaton, and Ruby Heaton-Marks, the surviving life beneficiaries, claim said stock as income of the trust fund. The question arises on an appeal from the decree of the probate court upon the allowance of the annual account of the trustee. That court ordered that the 105 shares of new stock be charged to the account of income and paid and delivered in equal shares to the life tenants, from which decree the trustee appealed. The case was heard in the county court on an agreed statement of facts, and to its judgment affirming the decree of the probate court the trustee excepted. The single question before us is whether said dividend under the will is part of the corpus of the fund which the trustee should hold for the remaindermen, or income of such fund which should pass to the life tenants.

No question is made as to the authority of the bank to declare this dividend. There was nothing in its charter nor in the general law then in force forbidding such a dividend as the one in question. See No. 150, Acts of 1915, § 3. In the absence of some statute to the contrary, there is no legal objection to a corporation's declaring a dividend payable in stock out of its net

income, leaving its ordinary capital unimpaired. Such a dividend operates to transfer distributable assets to the individual ownership of the stockholders, thus changing accumulated surplus into permanent capital, and thereby creating an additional liability of the corporation. The vote by which the dividend was declared recites that it was from the surplus earnings of the bank, and it will be presumed that it was declared from surplus earnings available for division among the stockholders. *Walker v. Walker*, 68 N. H. 407, 39 Atl. 432; *Boardman v. Boardman*, 78 Conn. 451, 12 L.R.A. (N.S.) 784, 62 Atl. 339; *Kalbach v. Clark*, 133 Iowa, 215, 12 L.R.A. (N.S.) 801, 110 N. W. 599, 12 Ann. Cas. 647.

Moreover, the transfer of surplus to capital would not impair the surplus fund that the bank was required by law to reserve, as paid-in capital is treated as part of such fund. See No. 158, Acts of 1910, § 69.

We may start our inquiry with the proposition, which will be recognized as elementary, that the income of trust funds belongs to the life tenant, while the corpus of the fund belongs to the remainderman. The difficulty lies in determining what is income and what corpus in the particular case, especially when a dividend in the form of stock is declared by the corporation. When the question is settled whether the dividend is to be regarded as income or as capital of the trust fund, the respective rights of the life tenant and remainderman are readily determined. While the case is one of first impression in this state, the question as to the conflicting rights of life beneficiaries and remaindermen to stock dividends has frequently arisen in other jurisdictions, and it has vexed the courts to formulate a rule that would invariably work out exact justice between the parties.

The early English rule, adopted in 1799, gave all extraordinary or unusual dividends declared during the life estate, whether in stock or cash, to the corpus, and not to the income. *Brander v. Brander*, 4 Ves. Jr. 800; *Irving v. Houston*, 4 Paton, 521. While this rule was recognized in England as late as 1856 (*Cuming v. Boswell*, 2 Jur. N. S. 1005, 4 Week. Rep. 752), there were frequent departures from it even among the earlier cases. See *Preston v. Melville*, 16 Sim. 163; *Price v. Anderson*, 15 Sim. 473; *Johnson v. Johnson*, 15 Jur. 714. The rule is now practically obsolete in England and of little more than historical value. The modern English rule is very much the same as the rule hereinafter referred to as the Massachusetts rule. See *Bouch v. Sproule*, L. R. 12 App. Cas. 385, 56 L. J. Ch. N. S. 1037, 57 L. T. N. S. 345, 36 Week. Rep. 193; *Re Hopkins*, L. R. 18 Eq. 696, 43 L. L.R.A. 1916D.

J. Ch. N. S. 722, 30 L. T. N. S. 627, 22 Week. Rep. 687; *Jones v. Evans* [1913] 1 Ch. 23, 107 L. T. N. S. 604, 82 L. J. Ch. N. S. 12, 57 Sol. Jo. 60, 19 Manson, 397.

An examination of the American decisions discloses three distinct lines of cases. For convenience their doctrines may be designated as the Massachusetts rule, the Pennsylvania rule, and the Kentucky rule. It is worthy of notice that the American courts view the question from a common standpoint. They all expressly or impliedly recognize that the question whether a distribution made by a corporation during the continuance of a life estate is to be regarded as income or as capital is primarily one of construction,—a question of the intention of the creator of the trust manifested by the will or other instrument by which the right to the income is, for the time being, severed from the corpus. The difficulty arises when the will or other instrument merely directs the payment of "earnings" or "income" or "dividends" to the life tenant, and is not sufficiently explicit for the guidance of the court when the distribution by the corporation is of an unusual or extraordinary nature. As we shall see, the application of this principle plays an important part in working out the several rules adopted by the courts of this country, which, though starting from a common premise, reach widely divergent conclusions.

The Massachusetts rule regards all cash dividends, however large, as income, and stock dividends, however made, as capital. This rule was first announced in *Minot v. Paine*, 99 Mass. 108, 96 Am. Dec. 705. It will be observed that under this rule it makes no difference when the dividend was earned, provided it was declared out of net earnings during the life tenancy. It makes the character of the dividend, whether in cash or stock, the criterion of the rights of the parties.

The Pennsylvania rule, declared in *Earp's Appeal*, 28 Pa. 368, is that net earnings when declared as dividends, whether in stock or cash, belong to the life tenant, provided such earnings have been made, or have accumulated, since the stock in question was held as part of the trust estate. The rule differs from the Massachusetts rule in two important particulars: (1) It makes no difference whether the dividend is declared in stock or cash; and (2) it takes into account the time when the earnings were made or accrued. It does not make the character of the dividend the criterion, but looks to its source to determine the right of the parties. It inquires as to the time covered by the accumulation of earnings from which the dividend was

declared relative to the inception of the life estate. Thus, if it is ascertained that the entire fund accumulated before the inception of the life estate, the Pennsylvania rule awards the entire dividend, whether cash or stock, to the corpus; and, if it is ascertained that the entire fund accumulated after the inception of and during the continuance of the life estate, it awards the entire dividend, whether stock or cash, to income. Further, if it is found that the fund from which the dividend was declared accumulated partly before and partly after the inception of the life estate, it apportions the dividend, whether stock or cash, between the life tenant and remainderman.

The third rule was formerly known as the New York and Kentucky rule, but since *Re Osborne*, 209 N. Y. 450, 50 L.R.A. (N.S.) 510, 103 N. E. 723, 823, Ann. Cas. 1915A, 298, is referred to as the Kentucky rule, as in that case the court of appeals of New York receded from its former position and adopted the apportionment feature of the Pennsylvania rule. The Kentucky rule is like the Pennsylvania rule, in that it makes no distinction between cash and stock dividends declared out of surplus earnings, but differs therefrom in holding that dividends, whether stock or cash, are nonapportionable and are considered as accruing in their entirety as of the date when they are declared. See *Hite v. Hite*, 93 Ky. 257, 19 L.R.A. 173, 40 Am. St. Rep. 189, 20 S. W. 778.

We are not now concerned with the point of difference between the Pennsylvania and Kentucky rules, as the question of apportionment is not involved in this case. The surplus earnings of the bank at the time the dividend was declared were more than three times what they amounted to at the time of Mr. Heaton's death; so the stock dividend did not intrench in any degree upon the capital of the trust fund created by the will, as there still remained more than twice as much surplus as there was at the time of the testator's death. The whole amount transferred by the dividend from surplus to invested capital may properly be considered as earnings of the bank during the life tenancy.

Having in mind that the intention of the testator is to control if it can be gathered from the will, we have carefully examined its provisions in the light of the surrounding circumstances, but find there no satisfactory solution of the question. The provision that all the income of the trust fund, including the bank stock in question, "by way of interest, dividends, rents and profits," should go to the life tenant, is broad enough to include by implication this stock dividend. The word "dividends" considered with its context might mean more

than ordinary cash dividends; but the will lacks certainty on this point, there not being enough in the will to make it clear that the testator contemplated such a dividend as the one in controversy, so we must look to the law to determine whether it should be regarded as income of the trust fund or as part of the fund itself.

It is impossible to reconcile the decisions of the courts that follow the Massachusetts rule with those that adopt the Pennsylvania rule either with or without its apportionment feature. It would not be profitable to attempt any extended review of the conflicting decisions, as they are readily accessible. A complete review of the cases will be found in the following notes: 118 Am. St. Rep. 162; 12 Ann. Cas. 647; Ann. Cas. 1912B, 1218; Ann. Cas. 1915A, 311; 12 L.R.A. (N.S.) 768; 35 L.R.A. (N.S.) 563; 60 L.R.A. (N.S.) 510; 7 R. C. L. 289-292. It will answer our present purpose to examine a few of the leading cases to discover the reasons advanced by the courts for their decisions. The Massachusetts rule has found favor outside that jurisdiction in Connecticut, Rhode Island, Illinois, and possibly Ohio, and has been approved by the Supreme Court of the United States. See *Smith v. Dana*, 77 Conn. 543, 69 L.R.A. 76, 107 Am. St. Rep. 51, 60 Atl. 117; *Re Brown*, 14 R. I. 371, 51 Am. Rep. 397; *De Koven v. Alsop*, 205 Ill. 309, 63 L.R.A. 587, 68 N. E. 930; *Wilberding v. Miller*, 88 Ohio St. 609, L.R.A. 1916A, 718, 106 N. E. 665; *Gibbons v. Mahon*, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057. The supreme court of Ohio quotes with apparent approval the arguments in support of this rule, but disposes of the case, as it would appear, on the express intention of the testator as gathered from the will. Among the courts that follow the Pennsylvania rule, either with or without its apportionment feature, are the courts of last resort in Maine, New Hampshire, New York, New Jersey, Delaware, Maryland, Kentucky, Tennessee, South Carolina, Mississippi, Iowa, Minnesota, and Wisconsin. See *Gilkey v. Paine*, 80 Me. 319, 14 Atl. 205; *Holbrook v. Holbrook*, 74 N. H. 201, 12 L.R.A. (N.S.) 768, 66 Atl. 124; *McLouth v. Hunt*, 154 N. Y. 179, 39 L.R.A. 230, 48 N. E. 548; *Van Doren v. Olden*, 19 N. J. Eq. 176, 97 Am. Dec. 650; *Bryan v. Aiken*, — Del. —, 45 L.R.A. (N.S.) 477, 86 Atl. 674; *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565; *Hite v. Hite*, 93 Ky. 257, 19 L.R.A. 173, 40 Am. St. Rep. 189, 20 S. W. 778; *Pritchitt v. Nashville Trust Co.* 96 Tenn. 472, 33 L.R.A. 856, 36 S. W. 1064; *Cobb v. Fant*, 36 S. C. 1, 14 S. E. 959; *Wallace v. Wallace*, 90 S. C. 61, 72 S. E. 553; *Kalbach v. Clark*, 133 Iowa,

215, 12 L.R.A.(N.S.) 801, 110 N. W. 599, 12 Ann. Cas. 647; *Goodwin v. McGaughey*, 108 Minn. 248, 122 N. W. 6; *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

The decisions in Georgia are influenced by statute, and so shed little, if any, light on the discussion.

The argument in support of the Massachusetts rule is based upon the assumption that it is within the discretion of the corporation, acting in good faith, to determine whether earnings shall be withheld or distributed, and that its action in that respect, within the limits of good faith, is binding upon the parties; and that consequently the life tenant has no right in respect of any earnings accumulated by the corporation, whether before or after the inception of the life estate, unless and until the corporation has declared a distribution of such earnings. In other words, that until such a distribution has been declared any enhancement in value of the stock by reason of the withholding of earnings inures entirely to the benefit of the corpus, and the life tenant derives no advantage therefrom. It was said in *Minot v. Paine*, supra: "The money in the hands of the directors may be income to the corporation; but it is not so to a stockholder till a dividend is made; and, where the company invest it in buildings and machinery, or in railroad tracks, depots, rolling stock, or any other permanent improvements, for enlarging or carrying on their legitimate business, it never becomes income to the shareholder. The investment becomes an accretion to the capital; and it is equally so whether they increase the number of shares, . . . or leave the shares unaltered. Or if the number of shares is increased for purposes merely speculative, it is an increase of capital stock, and not of income; and it would be practically unwise for courts to go behind the action of the company . . . to ascertain how they came by the funds out of which they declare either cash or stock dividends. As the corporation is the legal owner of the property and has power, within the limits of its charter, to give to the shareholders either an increase of income or an increase of capital, out of the money in its hands, according to the discretion of its directors, it would seem to follow that an increase of capital should be kept for the remainderman, and an increase of income should be paid to the tenant for life."

The court adopted the rule as a matter of expediency, saying: "A trustee needs some plain principle to guide him; and the cestui que trust ought not to be subjected to the expense of going behind the action of the directors, and investigating the concerns of the corporation, especially if it is out of our L.R.A.1916D.

jurisdiction. A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital."

While the rule is simple and convenient and is calculated to relieve the courts, as well as trustees, of much trouble, it does not commend itself for its justice and equity. It has been frankly admitted by the court of its origin that the rule is arbitrary and sometimes defeats the intention of the testator. See *D'Ooge v. Leeds*, 176 Mass. 558, 560, 57 N. E. 1025. And another court that follows it has stated that it was not claimed for the rule that its application would accomplish exact justice in all cases. *Boardman v. Boardman*, 78 Conn. 451, 12 L.R.A.(N.S.) 784, 62 Atl. 339. One is led to question whether in their desire to formulate a workable rule of easy application the courts that adopt the Massachusetts rule have not unconsciously preferred expediency to justice. The hardship that would result to a life tenant under this rule in case the corporation pursued the policy of declaring stock dividends is perfectly apparent. The injustice attending its application has repeatedly moved the court that announced it to follow the spirit of the Pennsylvania rule, though at the same time reaffirming *Minot v. Paine*. The courts professing to follow the rule look behind the vote declaring the dividend, thus regarding substance and not form, and do not hesitate to award a dividend in cash to the remainderman when investigation shows it to have been declared from the corpus of the fund; and in some cases have gone so far as to hold a dividend in stock to have been in substance a cash dividend. *Heard v. Eldredge*, 109 Mass. 258, 12 Am. Rep. 687; *Leland v. Hayden*, 102 Mass. 542; *Davis v. Jackson*, 152 Mass. 58, 23 Am. St. Rep. 801, 25 N. E. 21; *Lyman v. Pratt*, 183 Mass. 58, 66 N. E. 423; *Green v. Bissell*, 79 Conn. 547, 8 L.R.A.(N.S.) 1011, 118 Am. St. Rep. 156, 65 Atl. 1056, 9 Ann. Cas. 287. But for the most part they regard a dividend in stock, even from the earnings of the corporation accumulated during the life tenancy, as belonging to capital, and not income. The tendency of the supreme judicial court of Massachusetts toward a rule more liberal to the life tenant is indicated in its later decisions. See *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789; *Boston Safe Deposit & T. Co. v. Adams*, 219 Mass. 175, 106 N. E. 590. It is also significant that the courts adhering to the Massachusetts rule pretty generally hold that a dividend payable optionally in cash or stock is a cash dividend, even when stock is taken, and so belonging to the life tenant. *Hyde v. Holmes*, 198 Mass. 287, 84 N. E. 318;

Newport Trust Co. v. Van Rensselaer, 32 R. I. 231, 35 L.R.A.(N.S.) 563, 78 Atl. 1009.

Gibbons v. Mahon, 136 U. S. 549, 34 L. ed. 525, 10 Sup. Ct. Rep. 1057, decided in 1890, is much relied upon by the courts following the Massachusetts rule. The case follows and adopts the reasoning of *Minot v. Paine*. After saying that money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders unless and until it is distributed among them by the corporation, and that its undistributed earnings may be treated and dealt with by the corporation either as property or as an addition to capital, the opinion continues: "Which of these courses shall be pursued is to be determined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, unless in case of fraud or bad faith on their part, their discretion in this respect cannot be controlled by the courts."

Based upon this reasoning, the court held that reserved and accumulated earnings, so long as they are held and invested by the corporation, being a part of the corporate property, it would follow that the interest therein represented by each share is capital, and not income of that share as between the life tenant and remainderman.

In support of this decision, the court argues further that the question whether the profits of the corporation should be distributed as income to the life tenant or retained as capital, thus inuring to the benefit of the remainderman, is a question to be determined by the action of the corporation itself in the proper administration of its affairs; and cannot, without producing great embarrassment and inconvenience, be left open to be tried and determined by the courts. The decision evidently turns upon a presumption as to the intention of the testator. The court says: "In ascertaining the rights of such persons, the intention of the testator, so far as manifested by him, must of course control; but, when he has given no special direction upon the question as to what shall be considered principal and what income, he must be presumed to have had in view the lawful power of the corporation over the use and apportionment of its earnings, and to have intended that the determination of that question should depend upon the regular action of the corporation with regard to all its shares. Therefore, when a distribution of earnings is made by a corporation among its stockholders, the question whether such distribution is an apportionment of additional stock . . . or a division of profits and income depends upon the substance and intent of L.R.A.1916D.

the action of the corporation, as manifested by its vote or resolution; and ordinarily a dividend declared in stock is to be deemed capital, and a dividend in money is to be deemed income, of each share."

In support of this view, it is argued that a stock dividend really takes nothing from the property of the corporation and adds nothing to the interests of the shareholders; that the only change is in the evidence which represents the shareholders' interests, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones.

Gibbons v. Mahon has never been reviewed by the Supreme Court of the United States, and so has only the weight of a single decision, although the standing of the court entitles it to careful consideration. It is an interesting fact in this connection that Mr. Justice Gray, who wrote the opinion, was a member of the supreme judicial court of Massachusetts when *Minot v. Paine* was decided, which in a measure accounts for the similarity of reasoning in the two cases.

The supreme court of Illinois held, in *De Koven v. Alsop*, 205 Ill. 309, 63 L.R.A. 587, 68 N. E. 930, that a stock dividend which evidences the conversion by the corporation of earnings accumulated during the testator's lifetime into capital of the corporation goes to the remainderman as a part of the corpus of the estate; and reaffirmed this decision in *Blinn v. Gillett*, 208 Ill. 473, 100 Am. St. Rep. 234, 70 N. E. 104, and *Billings v. Warren*, 216 Ill. 281, 74 N. E. 1050. It does not appear that any of the stock dividends involved in these cases covered accumulations made after the death of the testator. That being so, the result is the same as it would have been had the court followed the other rule; but it appears that the court is committed to the Massachusetts rule, as it cites with approval *Minot v. Paine* and *Gibbons v. Mahon* and adopts their argument. No additional argument is advanced in support of its conclusions.

The later English rule is similar to the Massachusetts rule and is based upon much the same reasoning. *Neville, J.*, in *Jones v. Evans* [1913] 1 Ch. 23, 82 L. J. Ch. Div. N. S. 12, decided in 1912, says: "From the necessity of the case it has always been held that, as between tenant for life and remainderman, the court must decide whether a particular fund is to be treated as capital or whether it is to be divided as income by way of dividend; and one does not see very well how any other rule could apply."

The reason for the rule assigned by the English courts is tersely summed up in

Sproule v. Bouch, L. R. 29 Ch. Div. 638: "What the company says is income shall be income, and what it says is capital shall be capital."

Referring to the distinction sought to be made between stock and cash dividends, Lord Chancellor Eldon, in *Paris v. Paris*, 10 Ves. Jr. 185, used a homely but expressive phrase. He said: "As to the distinction between stock and money, that is too thin; and if the law is that, this extraordinary profit, if given in the shape of stock, shall be considered capital, it must be capital if given as money."

It seems to us that it does not follow as a necessary conclusion, assuming that the corporation or its directors have the authority claimed for them over the disposition of its surplus earnings, that the action of the corporation or its directors is conclusive of the rights of the life tenant and remainderman, and that therein lies the weakness of the argument. It fails to distinguish capital as regards the corporation and its stockholders from capital or corpus of the trust fund. Moreover, it rests upon a presumption that is altogether artificial as a rule of construction, and little less than violent when applied to the facts of this case, where the testator was making provision for his children and grandchildren, who were at the time members of his own immediate family, by way of life income with remainder to a succeeding generation as yet unborn. If any presumption is to be indulged, it seems more rational to presume that the creator of the trust intends, in the absence of anything to the contrary, that the life beneficiary shall receive all the profits of the stock earned during the life tenancy which may be released from corporate control by distribution among the stockholders during the existence of the life estate, in whatever form the distribution may be made. This recognizes the assumed right of the corporation to distribute surplus earnings at such times and in such manner as best suits the purposes of the corporation, and at the same time takes into account the evident distinction between capital of the corporation and corpus of the trust fund when the rights of the life tenant and remainderman are being considered. As said in *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739: "To say that when a stockholder conveys his stock, as in this case, he thinks otherwise than that the term owner will take all benefits, as to such stock, of dividends out of earnings made during such term, regardless of the manner of making the dividends, seems contrary to common knowledge."

Mr. Thompson, in his work on Corporations, says in criticism of this rule: "The L.R.A.1916D.

Massachusetts doctrine seems to be a rule of mere convenience, and not a rule of justice. It loses sight of the real question under consideration, which is, what is capital of the estate disposed of by will, and not, what is capital of the corporation; and it goes entirely beyond tenable ground when it allows this question to be determined, not by the judicial courts upon a view of the real substance of the case, but by a board of directors, that is, by a committee of persons entirely foreign to the will, in passing a resolution declaring a dividend." 2 *Thomp. Corp.* § 2222.

The same author expresses a clarifying truth when he says: "Instead of attempting to lay down a hard and fast rule on the subject which shall be applicable to all cases—and herein lies the chief mistake which the courts have made in dealing with it—it should be determined upon the consideration of the actual nature of the dividend in each particular case." 2 *Thomp. Corp.* § 2192.

The courts that reject the Massachusetts rule generally agree that the action of the corporation converting earnings into capital gives them that character for all corporate purposes, but they hold that the action of the corporation does not bind the life tenant and remainderman, and that either can always show the true nature and source of the dividend in spite of any act or declaration of the corporation. This is the evident trend of the later decisions, and, as we have seen, is in a measure shared by the courts that profess to follow *Minot v. Paine* and *Gibbons v. Mahon*. We shall need to examine but few of the numerous decisions following the Pennsylvania rule in order to contrast their argument with that of the cases based upon the Massachusetts rule.

Earp's Appeal, 28 Pa. 368, was decided in 1857. By his will Robert Earp created a trust for the benefit of his children, the rents, income, and interest of the trust fund to go to them during life with remainder over. The trust fund consisted in part of 540 shares of stock of a certain manufacturing corporation, of the par value of \$50 but worth \$125 per share at the time of the testator's death, owing to surplus earnings accumulated during his lifetime. The surplus of the corporation continued to increase after the testator's death until the stock dividend was declared. This was accomplished by issuing new shares of the par value of \$80 per share in lieu of the original stock. By the redistribution of stock, Robert Earp's estate received 1,350 shares of the new stock, surrendering therefor the original shares. The court argued that the testator's interest in the corporation at the time of his

death amounted to \$87,500; that it would have produced that sum if sold at that time; that the omission to sell and invest the proceeds for the purposes of the trust could not change the rights of the parties. It was held that the life beneficiary had no right to the income accumulated before the testator's death, but that the profits arising since his death were income within the meaning of the will. Speaking of the right of the corporation to deal with its surplus earnings, the court says: "The managers might withhold the distribution of it for a time, for reasons beneficial to the interests of the parties entitled. But they could not, by any form of procedure whatever, deprive the owners of it, and give it to others not entitled. The omission to distribute it semi-annually, as it accumulated, makes no change in its ownership. The distribution of it among the stockholders in the form of new certificates has no effect whatever upon the equitable right to it. It makes no kind of difference whether this fund is secured by 540 or 1,350 certificates. Its character cannot be changed by the evidences given to secure it. Part of it is principal,—the rest is 'income,' within the meaning of the will. The principal must remain unimpaired during the lives of the appellants, and the 'income' arising since the death of the testator is to be distributed among them."

Pritchitt v. Nashville Trust Co. 96 Tenn. 472, 33 L.R.A. 856, 36 S. W. 1064, one of the later cases on the subject, is especially instructive. It involved stock dividends on account of surplus accumulated after the death of the creator of the trust. The court points out that present enjoyment is the very essence of a life estate; that without it the gift would be meaningless and worthless. The case contains an exhaustive review of *Gibbons v. Mahon*; and, though concurring in all that the Federal Supreme Court said concerning the authority of the corporation over dividends, the court dissents vigorously from the conclusion as to the effect of corporate action upon life tenants and remaindermen. To quote from the opinion: "There can be no doubt that reserved and accumulated earnings . . . are corporate property; nevertheless, we are unable to see how that fact determines or affects the question of interest therein as between life tenant and remainderman of shares. Those persons acquire their interests under the will or deed, and not through any action of the corporation."

Further, in commenting upon what is said in *Gibbons v. Mahon* to the effect that the only change produced by a stock dividend is in the evidence which represents the stockholders' interest, the court says: "Ob-

viously, this change 'in the evidence' of the shareholder's interest separates his income on the investment from his capital invested, the new shares representing his income and the old ones his capital; and it would seem that a separation of the combined interests of life tenant and remainderman is wrought by the same process, the new shares standing for income of the trust estate and the old ones for its capital, at least to the extent that the new capitalization includes net earnings made since the trust took effect. The trustee has made no new investment. He has only received new shares representing profits of the investment made by the founder of the trust. How can the facts that net earnings are made capital to the company, and that the issuance of stock dividends thereon do not diminish corporate property, prevent such dividends from being income to the holder of old shares, whether that holder be absolute owner or only tenant for life?"

Bryan v. Aiken, — Del. —, 45 L.R.A. (N.S.) 477, 86 Atl. 674, decided by the supreme court of Delaware in 1913, gives an exhaustive review of the authorities. With reference to the effect of the action of the corporation upon the rights of the life tenant and remainderman of corporate stock, the court says: "Although a corporation has the right to set apart or reserve a portion of its net earnings for a period of years, and treat them as capital, . . . yet if it subsequently divides such net earnings . . . by declaring a dividend in cash, in stock, or in both, based upon such earnings, it is a distribution of profits. When the necessity for the reservation ceases, and the reserve fund is divided among the shareholders, the question whether it was income or capital depends upon its origin, for their source is not changed by the delay in distribution. If it was originally taken from the net earnings, it belongs to the tenant for life, if distributed in his lifetime."

The discussion of the question by the supreme court of Kentucky in *Hite v. Hite*, 93 Ky. 257, 19 L.R.A. 173, 40 Am. St. Rep. 189, 20 S. W. 778, is worthy of special notice. The court grants that, as between the company and the shareholder, the action of the directors in determining whether earnings shall be capitalized or paid out in cash is conclusive; but holds that, when a dividend is once declared, although in stock, it is the province of the law to determine their ownership,—whether they belong to the corpus of the estate and are to benefit the remainderman, or whether they shall go to the life tenant as income. Speaking of a stock dividend based upon the earnings of the company, the court said: "It is in

reality, whether called by one name or another, the income of the capital invested in it. It is but a mode of distributing the profit. If it be not income, what is it? If it is, then it is rightfully and equitably the property of the life tenant. If it be really profit, then he should have it, whether paid in stock or money. A stock dividend proper is the issue of new shares, paid for by the transfer of a sum equal to their par value from the profit and loss account to that representing capital stock; and really a corporation has no right to declare a dividend, . . . except from its earnings; and a singular state of case—it seems to us an unreasonable one—is presented, if the company, although it rests with it whether it will declare a dividend, can bind the courts as to the proper ownership of it, and by the mode of payment substitute its will for that of the testator, and favor the life tenant or the remainderman, as it may desire. It cannot in reason be considered that the testator contemplated such a result. The law regards substance, and not form, and such a rule might result not only in a violation of the testator's intention, but it would give the power to the corporation to beggar the life tenants, who, in this case, are the wife and children of the testator, for the benefit of the remaindermen, who may perhaps be unknown to the testator, being unborn when the will was executed. We are unwilling to adopt a rule which, to us, seems so arbitrary and devoid of reason and justice."

To much the same effect is *McLouth v. Hunt*, 154 N. Y. 179, 39 L.R.A. 230, 48 N. E. 548, and *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739. In *Thomas v. Gregg*, 78 Md. 545, 44 Am. St. Rep. 310, 28 Atl. 565, the supreme court of Maryland, after a careful review of the authorities, reaches the conclusion that there are but few cases, if any, that can properly be construed to mean that, although the stock dividends only include net earnings, and they were intended to be distributed as income, and not as capital, yet the life tenants must be deprived of them simply because they were stock dividends. It was held: "When it is possible for the court to ascertain to any certainty whether the distribution in the stock dividend includes net earnings, and, if so, what proportion, and also whether such earnings were intended to be made a part of the capital or merely to be used temporarily with the intention on the part of the directors of refunding them to the shareholders as income, we think it is the duty of the court to make such investigations and dispose of the stock in an equitable way between the tenants for life and the remaindermen."

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If we regard the intention of the trustees of the bank in declaring the dividend of any importance, it is clear from the vote declaring it that the dividend in the case at bar was intended as a distribution of surplus among the stockholders, which had been accumulated at the expense of regular cash dividends. Though payable in stock, it was as much compensation to the stockholders for loss of income as it would have been if paid in cash.

The Pennsylvania rule has been recently restated by the court of appeals in *Re Osborne*, 209 N. Y. 450, 50 L.R.A.(N.S.) 510, 103 N. E. 723, Ann. Cas. 1915A, 298: "Extraordinary dividends, payable from the accumulated earnings of the company, whether payable in cash or stock, belong to the life beneficiary, unless they entrench, in whole or in part, upon the capital of the trust fund as received from the testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund or apportioned between the trust fund and the life beneficiary in such a way as to preserve . . . the trust fund."

This is in effect what the supreme court of Pennsylvania has held since the time of *Earp's Appeal*. See *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 320; *Stokes's Estate*, 240 Pa. 277, 87 Atl. 971.

Most of the authorities in this country, including the Federal Supreme Court, recognize that the owner of corporate stock may convey the beneficial interest therein for a time to one and the whole ownership in remainder to another, unhampered by any power lodged in the corporation to disturb the purpose of the conveyance. It follows that the controlling factor is the intention of the creator of the trust, expressed in the will or other instrument creating the trust or presumed by the law, in the absence of anything therein from which it can be ascertained. Whenever a distribution of earnings is made, whatever its form, the distributive share, so far as the owner of the stock is concerned, is income, and for that reason an incident of the ownership of the stock during the period of accumulation, although inchoate until distributed by the corporation. If the testator had been living at the time the dividend in question was declared, unquestionably the new shares would have represented to him income on his original investment. He could have disposed of them without diminution of the investment represented by the value of the original shares as of the date of his death. With his estate they stand the same, only that now two classes are interested,—the life tenants entitled to the income and the remaindermen entitled to the corpus of the

fund. In construing his will it is only reasonable to presume that the testator used the word "income" in the sense it would have when applied to the stock while he was living; so that what would have been income to him, if living, should be regarded as income to his estate after his death. This is the doctrine of the Pennsylvania rule, and accords with what we regard as the decided weight of authority.

Appellant's counsel refer to the animadversions of Stevens, V. C., on the Pennsylvania rule found in *Ballantine v. Young*, 79 N. J. Eq. 71, 81 Atl. 119, as indicating a disposition on the part of the New Jersey courts to follow the English rule. The views expressed were the personal views of the vice chancellor, and cannot be taken as showing that the court of errors is inclined to depart from its former holdings.

It is claimed that the English rule is binding upon us by virtue of P. S. 1221, by which so much of the common law of England as is applicable to the local situation and circumstances is adopted as the law of this state. The question as to the binding effect of the decisions of the courts of England in cases arising here requiring the application of common-law principles is for the first time presented to this court. The question has arisen in some of the other states, most of which have statutes adopting the common law that are similar to ours. Some courts hold to the view that the common law thus adopted is identical with the decisions of the courts; or, in other words, they regard the common law of England as what the English courts make it. The predominant view, however, is that precedents do not constitute the common law, but only serve to illustrate its principles; that statutes adopting it do not require adherence to the decisions of the court of England even prior to the separation of the colonies, in case the court considers subsequent decisions, either in England or America, better expositions of the general principles of the common law. This view accepts what Sir Frederick Pollock has called "the immemorial and yet freshly growing fabric of the common law" as the guide, and not the decision of any particular court at any particular time. Whether our statute makes the decisions of the English courts controlling, or leaves the courts at liberty to decide for themselves, the principle of law applicable to the particular case depends upon the intention of the legislature to be gathered from the statute of adoption read in the light of surrounding circumstances.

Followed to its logical conclusion, the view that the common law is what the English courts make it compels one of two results,—either we must abide the time that

the courts of England see fit to modify their rules of law to meet changing conditions and circumstances, or we must regard the common law as inflexible, depending upon the rule of decision prevailing in England at the time of its adoption here. It is clear that our legislature did not intend either result, as both are inconsistent with the due administration of justice. The founders of the state were not unmindful of the necessity for a system of laws that would readily adapt themselves to the changing conditions of society; while the effect of the statute claimed by the appellant would either petrify the common law as embodied in the decisions of the English courts at the time of the separation, or would require the courts to administer the common law blindly in accordance with decisions of the courts of the country of which they had recently declared their independence. The construction we give to the statute is supported by the original statute of adoption enacted in 1779, by which it was provided that: "The common law as generally practised and understood in the New England states be, and is hereby established as the common law of this state."

We are confirmed in this view by what Judge Nathaniel Chipman says in his dissertation on the act. He says: "By the common law of England, exclusive of positive laws enacted by statute, are understood those rules and maxims by which decisions are made in their courts of law, whether in relation to the mode of prosecuting a right or to the right itself,—rules and maxims which have been there adopted, 'time whereof the memory of man runneth not to the contrary.'"

He makes it clear that the act did not adopt the English precedents expositive of the common law, but rather its principles, when he says, quoting Lord Mansfield: "The law of England . . . would be an absurd science indeed, were it decided upon precedents only. Precedents serve to illustrate principles and to give them a fixed certainty, but the law of England, . . . exclusive of positive law enacted by statute, depends upon principles."

He continues: "We may . . . lay it down that this statute gives the citizens of this state the rules, maxims, and precedents of the common law so far as they serve to illustrate principles,—principles only which, from the situation of society with us, exist in this state." N. Chip. 117-139.

In *State v. Parker*, 1 D. Chip. (Vt.) 298, 6 Am. Dec. 735, Judge Chipman says, by way of caution: "I would not have it understood, by anything which I have said, that this court is limited by the precedents of decided cases at common law, or the re-

search of the numerous and profound commentators. The common law, exclusive of positive law enacted by statute, depends on principles. Precedents and maxims serve to embody and illustrate principles to give them a fixed certainty."

We have no doubt that the statute in question leaves the court free to inquire whether the reasoning of a particular case is satisfactory, and to accept or reject the rule it announces. The responsibility of discovering and applying to the case in hand the proper principles of the common law as it prevails in this state rests upon the courts of the state to which have been committed the administration of the law. In discharging this duty it has always been their practice to give heed to the decisions of the English court, whether rendered before or since the separation, giving them such weight as they are entitled to as evidence of what the law is; but we cannot agree that they are entitled to any such binding force as the appellant claims for them. See 5 R. C. L. 818; notes in Ann. Cas. 1913E, 1222, 1232; *Williams v. Miles*, 68 Neb. 463, 62 L.R.A. 383, 110 Am. St. Rep. 431, 94 N. W. 705, 96 N. W. 151, 4 Ann. Cas. 306; *Rensselaer Glass Factory v. Reid*, 5 Cow. 587; *Forbes v. Scannell*, 13 Cal. 242; *Robert v. West*, 15 Ga. 122; *Cox v. Morrow*, 14 Ark. 603; *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373; *Kallenbach v. Dickinson*, 100 Ill. 427, 39 Am. Rep. 47; *Morgan v. King*, 30 Barb. 13; *Marks v. Morris*, 4 Hen. & M. 463. Much light is shed upon this question in an article by Herbert Pope on English Common Law in the United States, 24 Harvard L. Rev. 6; also, in an essay by Paul Samuel Reinsch on English Common Law in the American Colonies. 1 Anglo-American Legal History, 367.

It is also said that the life tenants are not entitled to the enhanced value of the corpus of the fund, instancing the increase in value of the real property that forms part of this trust estate; but there is a clear distinction between accretions to the fund derived from earnings accumulated during the term, and the enhanced value of the

trust property due to other causes. The one is properly income, while the other is not.

We do not regard the question of convenience, of which so much is said by the courts that follow the Massachusetts rule, as a serious objection. The latter rule, as applied in practice, is somewhat less simple and easy of application than the statement of it would seem to imply; for the reason that, as applied, it is always necessary to ascertain whether the distribution by the corporation is from earnings or income, or whether it represents a reduction or change in form of the capital, or an enhancement of the value of the capital assets by means other than the accumulation of earnings. But, despite the difficulties attending it, the court should endeavor in every case to do justice between the parties and at the same time effectuate the intention of the creator of the trust. We believe that this result is most closely approximated by classifying a dividend according to what it really represents, and not according to the form in which it is declared. By the rule we adopt, the life tenant receives all the profits of the corporation accumulated during the life of the trust which are released from corporate control and distributed among the stockholders during the life tenancy, regardless of the form of the distribution; and the remainderman receives at the end of the term the corpus of the trust fund undiminished in value from what it was at the inception of the trust, which is all that he can justly claim, unless the creator of the trust has evidenced an intention that he shall receive more. It works out exact justice between the parties, and, we believe, will more often give effect to the unexpressed intention of the testator.

We therefore hold that the stock issued to the trustee was income of the trust fund belonging to the life tenants. The court below did not err in affirming the decree of the probate court.

Judgment affirmed, to be certified to the Probate Court.

Annotation—Rights as between life tenant and remainderman in dividends or distributions by corporations.

This note is supplementary to notes on the same subject appended to *Holbrook v. Holbrook*, 12 L.R.A.(N.S.) 768; *Newport Trust Co. v. Van Rensselaer*, 35 L.R.A.(N.S.) 563; and *Re Osborne*, 50 L.R.A.(N.S.) 510.

These notes are not concerned with cases like *Re Bates* [1907] 1 Ch. (Eng.) L.R.A.1916D.

22, 76 L. J. Ch. N. S. 29, 95 L. T. N. S. 753, 23 Times L. R. 15, in which the claim of the remainderman in a dividend declared during the life estate is based upon the principles applicable to wasting securities, and is in effect a corollary of the contention that it is the duty of the trustees to realize on the stock and

place the proceeds in a proper investment.

These notes do not in general assume to deal with the responsibility of trustee who, through a mistake of law or otherwise, turns over to the life tenant dividends he should have retained for the corpus, or vice versa. Reference, however, is made in this connection to a modification by the surrogate in *Re Tod* (1914) 86 Misc. 616, 148 N. Y. Supp. 618, of its earlier decision (1914) 85 Misc. 298, 147 N. Y. Supp. 161, cited in the note in 50 L.R.A.(N.S.) 515, surcharging trustees with stock received upon a stock dividend which belonged to the corpus, but which, in reliance upon earlier New York decisions, and under a mistake of law as it was subsequently declared in the *Osborne Case*, they turned over to the life tenants as part of the income. As the result of the modification the trustees were surcharged only with the capital value of the dividend shares which they had turned over to the life tenants as of the date of the distribution, at which time they also, in the exercise of the discretion vested in them by the will, disposed of the original shares, notwithstanding the contention, in behalf of the remainderman, that they should be surcharged with the specific shares, and the life tenants compelled to transfer such shares to the trust fund for the benefit of the remainderman, their market value having increased. The court said in effect that all the parties acted in good faith, and that while such a disposition of the matter enabled the life tenants to profit by the mistake of the trustees, the remaindermen suffered no loss on account of it, as the assumption was that the trustees would have disposed of the dividend shares with the original shares if they had regarded them as belonging to the corpus.

Intention of testator or creator of the trust.

Supplementing notes in 12 L.R.A.(N.S.) 769; 35 L.R.A.(N.S.) 564; and 50 L.R.A.(N.S.) 510.

The importance of ascertaining the intention of the testator as manifested by the will in determining the respective rights of life tenant and remainderman in dividends or distributions declared by the corporations receives additional recognition in *Wilberding v. Miller* (1914) 88 Ohio St. 609, L.R.A. 1916A, 718, 106 N. E. 665, and *RE HEATON*, ante, 201, although, as is true of most of the cases, the wills in these cases did not yield any specific intention on the point. L.R.A.1916D.

Opposing rules, generally; apportionment with respect to time.

Supplementing notes in 12 L.R.A.(N.S.) 771-777; 35 L.R.A.(N.S.) 566; and 50 L.R.A.(N.S.) 510.

The Massachusetts rule, which makes the character of the dividend, i. e., whether it is essentially a cash dividend or a stock dividend, the criterion of the rights of the parties, and refuses to make any apportionment, assuming that the dividend really represents earnings, and not capital, is reaffirmed in *Talbot v. Milliken* (1915) 221 Mass. 367, 108 N. E. 1060. The circumstances of the case illustrate the rigidity, if not the injustice, of the Massachusetts rule. The cash dividend of \$50 per share which, by the application of the Massachusetts rule, was awarded in that case to the income, represented earnings of the corporation that had accumulated before the death of the testator, and the declaration of the dividend was the result of a modification of an arrangement, made after the testator's death, for a sale of the control of the corporation. It appeared that an offer of \$225 per share had been received, and some of the directors suggested that instead of a sale at that price, the prospective purchasers should offer \$175 per share after a special dividend of \$50 per share had been declared, in addition to the regular dividend, to be paid from the accumulated surplus or profits; and that arrangement was carried out. It thus appears that by the application of the Massachusetts rule, and simply because the dividend was declared in cash, earnings which had accumulated before the inception of the trust were, to the extent of \$50 per share, diverted to the life beneficiaries, notwithstanding that, if the original proposition for the sale of the stock had been carried out, the \$50 per share would have inured to the benefit of the corpus rather than of the income.

The Massachusetts rule is adopted in *Humphrey v. Lang* (1915) 169 N. C. 601, L.R.A. 1916B, 626, 86 S. E. 526. The court said in support of this rule: "A stock dividend differs materially from a cash dividend. The former takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased; whereas, a cash dividend declared on the then existing capital stock subtracts so much from the treasury of the corporation and transfers it to the pockets of the stockholders." As shown by the earlier notes, this is the line of

reasoning generally employed in support of the Massachusetts rule.

But the Vermont supreme court in *RE HEATON*, *supra*, rejected the Massachusetts doctrine. The court did not decide whether or not the principle of apportionment should be adopted, as the stock dividend in question was declared from earnings which accumulated wholly after the inception of the life estate; and was, accordingly, in harmony with the Pennsylvania rule in that event, awarded in its entirety to the income.

In *Poole v. Union Trust Co.* (1916) — *Mich.* —, 157 N. W. 430, also, the court was not called upon to pass upon the question as to apportionment relatively to the time of the accumulation of earnings, since it reached the conclusion that the profits which had been put into the plant had been offset by the depreciation of the plant, and that the "stock dividend" represented not earnings, but an enhancement of the value of the corporate assets from causes other than accumulation of earnings.

In *Wilberding v. Miller* (*Ohio*.) *supra*, the court said that in spite of the irreconcilable differences in the conclusions arrived at on the subject there are a few general propositions as to which there is substantial agreement—among them, that there should be no arbitrary, rigid rule which would prevent the court from looking into the facts and circumstances of each case to determine the rights of the parties according to justice and equity; that the earnings of a corporation are and remain its property until it distributes them among the stockholders; and that, when acting in good faith and for the best interests of all concerned, the corporation may reserve the earnings of a prosperous year to make up for a possible lack of profits in future years, or it may retain possession of its earnings and invest them from time to time in the improvement of its plant and in general betterments.

In *Northern Central Dividend Cases* (1915) 126 *Md.* 16, 94 *Atl.* 338 (disposing of eight appeals involving questions between life tenants and remaindermen over certain extraordinary dividends declared by the Northern Central Railroad Company), it was held as to stock dividends of 12½ and 40 per cent respectively, that it should be determined by agreement or by testimony what part of the accumulations of earnings from which these dividends were declared accrued in the lifetime of any particular testator, and that such part would constitute the corpus going severally to the

remaindermen, and the balance should be distributed to the life tenants as income.

In *Miller v. Safe Deposit & T. Co.* (1916) — *Md.* —, 96 *Atl.* 766, pursuant to the suggestion in the last case, an agreement was reached and reported in the court below, from which it appeared that the proportion of the earnings which accrued to the company prior to the death of the testator on November 11, 1908, was 77 and a fraction per cent of the whole amount, leaving 22 and a fraction per cent as the proportion which accumulated during the remainder of the ten-year period expiring December 21, 1909; and accordingly it was held that the stock dividend of 40 per cent should be distributed between the corpus and income of the trust in these proportions. It may be observed that this basis of apportionment is not necessarily in conflict with that adopted in the *Osborne Case*, 50 *L.R.A.* (N.S.) 510, on the motion to amend the remittitur, since apparently the 40 per cent dividend was treated as though it exhausted the entire accumulation of earnings for the ten-year period, leaving no balance unexhausted as in the *Osborne Case*.

In the *Miller Case* the will directed that if the testator's death should occur prior to January 1, 1911 (the testator died November 11, 1908), the income from the estate until that date should be distributed to an amount not exceeding \$8,000 annually to the life beneficiaries, in the proportions specified in the will, and any surplus of income over that amount should be added to the corpus, and that after the date mentioned the whole income should be paid to the tenants for life. It was contended that in view of this provision, the apportionment of the stock dividend should be made, not with reference to the date of the testator's death, but as of the 1st of January, 1911. This contention, however, was rejected. The court said that if the dividend had been declared prior to January 1, 1911, it would have been added to the corpus for the remaindermen in pursuance of the provision of the will requiring such application; but that it was not until three years after 1911 that the resolution for the payment of the dividend was adopted, and that at that time the life tenants were entitled to the whole income from the estate.

In (1915) 166 *App. Div.* 547, 152 *N. Y. Supp.* 48 (a later phase of the litigation before the court in *Re Osborne*, 50 *L.R.A.* (N.S.) 510), the court, in adjusting the respective rights of the life tenant and remainderman in the stock dividend, re-

jected the contention of the trustees that the amount of a cash dividend, declared after the stock dividend was authorized but at the same meeting, should be deducted from the surplus as the basis of the declaration of the stock dividend. The court said that the stock dividend was authorized by the stockholders at a prior special meeting, and in declaring that dividend the directors but carried out the authorization of the stockholders, and when that dividend was declared the transaction was consummated and the rights were vested; that the subsequent declaration of the cash dividend was not to be transferred from its actual order so as to give it an effect qualifying the declaration of the stock dividend. It appears from information furnished by counsel in the case that the reduction of the number of shares going to the life tenant from 999.1 shares awarded by the court of appeals on the amendment of the remittitur to 652.7 shares, as indicated by this report, was not due to any change in the basis or method of apportionment, but to newly discovered evidence, reducing the amount of the surplus accumulated by the corporation after the inception of the life estate.

It was contended in *Northern Central Dividend Cases* (1915) 126 Md. 16, 94 Atl. 338, that the trustees in the adjustment of the rights between the life tenants and remaindermen should credit to the corpus the excess capital value of the stock over the par value at the date on which the dividend was declared, but the court rejected this view, saying that stock dividends were not based upon the capital value of the stock, but upon the accumulated earnings of the company; that in the declaration of such dividends the capital value is not considered; and that such proportion of the earnings represented by the dividend as accrued during the life tenancy belong to the life tenant.

Regular cash dividends.

Supplementing notes in 12 L.R.A. (N.S.) 780 and 50 L.R.A. (N.S.) 514.

The prevailing rule, as shown in the earlier notes, is that, in the absence of statute, regular cash dividends from current earnings are not apportionable.

And so dividends declared after the death of the first life beneficiary from earnings for the year of his death were, in *Re Barron* (1916) — Wis. —, 155 N. W. 1087, awarded in their entirety to the next life beneficiary, it being expressly held that they were not apportionable. L.R.A.1916D.

In this case the division of a cash dividend, declared from earnings for the year during which the testator died, between the income and corpus in proportion of the amounts of the earnings before and after his death, was upheld, but the division had been agreed upon by the parties in interest.

Current dividends earned and declared before, but not payable until after, a purchase of stock made by the trustees at the instance of the life tenant, do not go to the life tenant. *Re Peel* [1910] 1 Ch. (Eng.) 389, 79 L. J. Ch. N. S. 233, 102 L. T. N. S. 67, 26 Times L. R. 227, 54 Sol. Jo. 214.

Extraordinary cash dividend.

Supplementing notes in 12 L.R.A. (N.S.) 785; 35 L.R.A. (N.S.) 566; and 50 L.R.A. (N.S.) 510.

As to the character of a dividend, so-called, as a cash dividend so far as it depends upon the question whether it represents accumulated earnings or capital, see *infra*, "Capital or earnings." As to principles and basis of apportionment relatively to the periods covered by the earnings on which the dividend is based, see *supra*, "Opposing rules, generally; apportionment with respect to time."

The character of an extra dividend as a cash dividend is not affected by the fact that it is payable, at the option of the stockholder, in new stock or in cash. *Humphrey v. Lang* (1915) 169 N. C. 601 L.R.A.1916B, 626, 86 S. E. 526. It will be observed that this is in harmony with most of the decisions cited in the earlier notes on this point.

In *Mitchell v. Hart* (1914) 19 Austr. C. L. 33, the majority of the High Court of Australia (the chief justice dissenting), recognizing the rule established by *Bouch v. Sproule* (1887) L. R. 12 App. Cas. (Eng.) 385, 56 L. J. Ch. N. S. 1037, 57 L. T. N. S. 345, 36 Week. Rep. 193 (see note in 12 L.R.A. (N.S.) 772), which is substantially the same as the Massachusetts rule, held in effect that new shares received by the trustees represented income going to the life tenant rather than capital belonging to the corpus. The corporations in question increased their capital stock and at the same time declared extra dividends of the same amount, and gave shareholders the right to apply the dividend upon the purchase of new shares, there being an additional provision that any premiums received by the corporation upon the sale of new shares should be divided between the shareholders who had not exercised

their right of application, pro rata to the number of shares to which they would have been entitled had they made application for the same. The court, however, said that if a disposition is made in such terms and in such surrounding circumstances that the ordinary promptings of human nature would inevitably lead the stockholder to apply his dividend to the purchase of new shares, the distribution would be regarded as capital rather than income; but that the provision in question giving the stockholders the benefit of the premium received by the corporation upon a sale of the stock left a full and free option even from a business standpoint; and that, as neither law nor self-interest could be said to compel the repayment of the profits distributed, they had not been capitalized, and remained income. But for the provision giving the shareholders, who did not apply for new stock, the benefit of premiums realized by the corporation on the sale of that stock, the majority would evidently have agreed with the dissenter that the dividends should be treated as a stock dividend, since the new stock commanded a premium (see in this connection *Jones v. Evans* [1913] 1 Ch. (Eng.) 23, 107 L. T. N. S. 606, 82 L. J. Ch. N. S. 12, 57 Sol. Jo. 60, 19 *Manson*, 397, which is set out in the note in 50 L.R.A.(N.S.) 516).

In *Re Hume* (1911) 27 *Times L. R. (Eng.)* 461, 55 Sol. Jo. 536, a corporation having passed an extraordinary resolution for the division of a special bonus from earnings amounting to 33½ per cent of paid-up capital, and sent to the trustees a conditional allotment letter which conferred upon them the right to receive the dividend in cash or to apply it on shares of £10 each fully paid, and the trustees having elected to take the shares, which were worth about £20 each, it was held that the life tenant was entitled to a charge on the shares for the amount of the par value, the balance to be treated as capital.

In *Re Despard* (1901) 17 *Times L. R. (Eng.)* 478, a special dividend received in cash by executors was held to go to the tenant for life as income, notwithstanding that at the same time the special dividend was declared, the company increased its capital by the creation of preference shares and provided that the dividend might be applied to the purchase of such shares, but that any shareholder desiring the special dividend in cash should be so paid, and the preference shares which would have been allotted to him would be disposed of by L.R.A.1916D.

the company as it might think fit. The case was distinguished from *Bouch v. Sproule* (Eng.) supra, upon the ground that there was no need of any further capital for the operation as was the fact in that case, and that it was open to shareholders to take the dividend in cash, not merely because they had the legal right, but also because the option was deliberately offered to them.

In *Re Barron* (1916) — *Wis.* —, 155 N. W. 1087, an extraordinary dividend of 20 per cent was awarded to the income, the court stating that the item was clearly a cash dividend and belonged to the income, notwithstanding that the trustees added a certain amount to it and applied it on the purchase of additional shares of stock in the same bank. It appeared in this case that the earnings between the time the original stock was acquired by the trust and the time the dividend was declared greatly exceeded the amount of the dividend, and there was, therefore, no occasion for apportionment.

In *Northern Central Dividend Cases* (1915) 126 Md. 16, 94 Atl. 338, extra cash dividends, respectively, of 8 and 10 per cent, declared by the Northern Pacific Railroad Company, were held to belong in their entirety to the life tenants irrespective of the time of the accumulation of the earnings from which they were declared. The court quoted from *Quinn v. Safe Deposit & T. Co.* (1901) 93 Md. 285, 53 L. R. A. 169, 48 Atl. 835, to the effect that "as between successive owners of a share, the dividend belongs to him who is the owner at the time it is declared; and this is true although there is a future day of payment. Such is the rule also when there are successive interests in the same share, as in the case of life tenant and remainderman; there will be no apportionment when the life tenancy expires between dividend days."

The court in *Humphrey v. Lang* (N. C.) supra, having, as already shown, adopted the Massachusetts rule, awarded an entire cash dividend of 100 per cent to the income, without inquiring as to the time of the accumulation of earnings relatively to the death of the testator.

See also *Talbot v. Milliken* (1915) 221 *Mass.* 367, 108 N. E. 1060, supra.

Stock dividends.

Supplementing notes in 12 L.R.A. (N.S.) 794; 35 L.R.A.(N.S.) 568; and 50 L.R.A.(N.S.) 515.

As to principle and basis of apportion-

ment relatively to the periods covered by the earnings upon which the dividend is based, see *supra*, "Opposing rules, generally; apportionment with respect to time."

As previously shown, the entire amount of a stock dividend declared from earnings which accumulated wholly after the inception of the life estate was awarded to the income in *RE HEATON*, ante, 201; that court having rejected the Massachusetts rule. And in *Northern Central Dividend Cases*, *supra*, the doctrine of apportionment in the event that the earnings from which the stock dividend was declared accumulated partly before and partly after the inception of the life estate is recognized; and is applied in *Miller v. Safe Deposit & T. Co.* (1916) — Md. —, 96 Atl. 766.

In *Re Megrue* (1915) 170 App. Div. 653, 155 N. Y. Supp. 1059, it was held that the proportion of stock dividends declared by subsidiaries of the Standard Oil Company of New Jersey after the division of the shares owned by that company, which represented earnings since the death of the testator, should be considered as capital.

In *Re Bishop* (1915) 89 Misc. 355, 151 N. Y. Supp. 768, it was held that extraordinary dividends declared by subsidiary Standard Oil companies should be apportioned between corpus and income in accordance with the principles laid down in the *Osborne Case*, 50 L.R.A. (N.S.) 510, notwithstanding an agreement signed by the trustees, by all the life tenants, and by the remaindermen who were of full age,—most of the remaindermen, however, being infants and therefore not joining in the execution of the instrument,—by which it was claimed that the life tenants had surrendered all right to any part of the dividends in question. The agreement in question purported to be a waiver and release by the life tenants of all such dividends that might be declared, and requested that they be deemed a part of the principal of the trust. The purported consideration was the agreement of the trustees, in compliance with the request of the parties, not to sell any of the stock in question until, in the exercise of their discretion, they deemed a sale to be for the benefit of the principal of the trust fund. The court said that the agreement could not be enforced as a contract between remaindermen and life tenants, because that, of the seventeen persons interested as remaindermen, only five signed it, and the instrument,

being under seal, could not be enforced by those who were not parties to it; that the agreement of the trustees not to sell the stock until they deemed it for the benefit of the principal of the trust fund to do so furnished no consideration, since it was merely a promise to perform a duty imposed upon them by law; and the want of consideration for the promise of the life tenants rendered the agreement unilateral and unenforceable; that if the instrument were to be construed as an assignment or transfer by the life tenants of their right to a part of the income of the trust fund which had not accrued at the date of the instrument, it would be invalid under § 15 of the Personal Property Law (Consol. Laws, chap. 41), but there were no words of assignment or transfer, the words being merely of release and waiver, and insufficient to constitute a transfer; that the agreement could not be construed as making a valid gift to the remaindermen of that part of the extraordinary dividends which, under the decision of the *Osborne Case*, would belong to the life tenants, since there were no words of direct gift, and there had been no delivery to the donees of the subject-matter of the gift; and the life tenant could not make a gift of the income which had not accrued at the time of the execution of the instrument, because it would be an attempt to make a gift to take effect in possession in futuro, and such a gift is void.

Stock rights.

Supplementing notes in 12 L.R.A. (N.S.) 810; 35 L.R.A. (N.S.) 572; and 50 L.R.A. (N.S.) 517.

As shown in the earlier notes by the weight of authority, a right given by a corporation, whether sold or exercised by taking new stock, belongs to the corpus, and not to the income. That rule is also supported by *Lamb v. Lamb* (1909) Rap. Jud. Quebec 19 B. R. 49, affirming (1908) Rap. Jud. Quebec 34 S. C. 355.

These notes, however, reveal some authority in support of the view that the stock right belongs to the income, and not to the corpus, where its value depends upon earnings since the inception of the trust, and that it should be apportioned between the corpus and income, where its value depends in part upon earnings that had accumulated before, and in part upon earnings that had accumulated after, that event.

So, in *Re Barron* (1916) — Wis. —, 155 N. W. 1087, the court said that ordi-

narily the amount realized by the trustees upon the sale of a stock right should be divided between the corpus and the income in the proportion of the amounts of the surplus and undivided profits at the time the stock was acquired, and at the time of the increase of the stock (citing *Holbrook v. Holbrook* (1907) 74 N. H. 201, 12 L.R.A.(N.S.) 768, 66 Atl. 124, see comment in note in 12 L.R.A.(N.S.) 811); but there being no showing as to the amount of the increase of the capital stock, or whether it took in all the surplus and undivided profits which existed at the time it was declared, including the surplus and profits existing at the time the trustees purchased their original shares, it was held that there were no sufficient data upon which to make the division, and so the amount realized on the sale of the stock right was treated as an ordinary profit on investment by the trustees, and awarded to the corpus.

In this same case an item realized by trustees on the sale of rights in a bank in which the trustees held stock was awarded to the corpus upon the presumption that it represented good will or other increment to the original capital of the bank, increasing the value of its assets; there being no showing as to whether the bank had any surplus or undivided profits, or as to the amount of its original stock or increase.

Capital or earnings.

Supplementing notes in 12 L.R.A.(N.S.) 803; 35 L.R.A.(N.S.) 570; and 50 L.R.A.(N.S.) 517.

As shown in the earlier notes, it may be necessary under any of the opposing rules—even the Massachusetts rule—to determine whether the dividend so-called represents accumulated earnings or capital.

Where the surplus or undivided profits already have been employed in the enlargement of the capital investment of the corporation, and become devoted to its physical plant, then a device to enable the transformation of the assets into stock, obviously for the benefit of the existing stockholders, commonly will be treated as a stock, and not a cash, dividend. *Talbot v. Milliken* (1915) 221 Mass. 367, 108 N. E. 1060. The court in this case, however, held that the facts (see *supra*) indicated no liquidation of the corporation; that undoubtedly the dividend was paid in fact out of the accumulated surplus of earnings which had not been used in addition to the perma-

nent investment by the corporation in buildings or other estate to which capital usually is devoted; and added that doubtless if the special dividend had not been declared before the purchase of the stock by the bankers they could have declared a like dividend after securing control of the management; if that had been done, any of the petitioners who had kept their stock could have been under no misapprehension as to the character of the dividend; the time of its declaration cannot make a difference in its nature; the dividend was actually paid in cash; it did not represent any part of the permanent capital of the corporation.

The question whether a cash dividend goes to the income or corpus depends fundamentally upon the question whether it was paid from accumulated surplus or earnings, or out of the capital of the corporation. If it is a payment of earnings, it must be considered as income for the purposes of the trust, although the amount distributed is unusually large and consists partly of shares in another company. *Gray v. Hemenway* (1916) — Mass. —, 111 N. E. 713.

The court, in determining whether a dividend is a stock or a cash dividend, always looks at the substance of the transaction rather than its form, and does not suffer itself to be trammelled by the names used. If, in its essence, the payment is one out of capital, then it is treated as such, no matter how it may be denominated. But if in truth it is a payment of earnings, then it is deemed income. *Talbot v. Milliken* (Mass.) *supra*.

The circumstance that in the vote declaring a special dividend, the payment is referred to as a distribution, and not as a dividend, is of slight consequence, and does not characterize the dividend as a stock dividend rather than a cash dividend. (Mass.) *Ibid*.

In *Gray v. Hemenway* (Mass.) *supra*, a dividend upon common stock, declared by the Union Pacific Railroad Company, on January 8, 1914, of \$3 in cash, \$12 in preferred stock of the Baltimore & Ohio Railroad Company, charged to profit and loss at the rate of \$80 per share, and \$22.50 in common stock of the Baltimore & Ohio Railroad Company, charged to profit and loss at \$92 per share,—was held to be a cash dividend going, under the Massachusetts rule, to the income. The court expressly overruled the contention of the remaindermen that the portion of the dividend which consisted of Baltimore & Ohio Railroad Company

stock was a capital asset of the Union Pacific Railroad Company, and that the distribution of that stock was a dividend of capital and should be regarded as a part of the corpus of the trust fund. In this connection the court said in effect that the facts indicated that the amount and character of the extra dividend was determined with a view to compensate the stockholders for the contemplated reduction of the regular dividend rate from 10 to 8 per cent, but that it was not a dividend of liquidation or partial liquidation of the capital stock of the corporation, or of capitalized profits used in its business. Dividends declared by one corporation in the stock of another corporation are to be treated as cash dividends for the purposes of the Massachusetts rule.

Dividends, declared by lumber companies whose charter empowered them to acquire and sell timber and timber rights, out of money derived from the conversion of standing timber—in which the capital of the companies had been invested—into lumber and the sale of the manufactured lumber, were held in *Washington County Hospital Asso. v. Hagerstown Trust Co.* 124 Md. 1, L.R.A. 1915A, 738, 91 Atl. 787, to represent earnings, and not capital. The court said in effect that the dividends in question did not fall within the general principle (formulated in the note in 12 L.R.A. (N.S.) 803), that a dividend, so-called, which is not declared from earnings past or present, but which represents a reduction or change of form of capital, or a mere enhancement of the value of assets representing capital from sources other than the accumulation of earnings, belongs to the corpus, and not to the income, but rather that they fell within the exception to that rule as formulated in that note, in respect of corporations whose business is such that it necessarily involves the consumption or change of form of capital.

In *Northern Central Dividend Cases* (1915) 126 Md. 16, 94 Atl. 338, it was contended upon the one side that the extra dividend declared by the Northern Central Railroad Company represented capital or corpus of the income, and upon the other hand, that the accumulated earnings shown by the company's books and which were represented by the dividends should be augmented by items and additions improperly excluded as income. In the circumstances the court held that it was not required to enter upon an examination and revision of the

accounts of the railroad company, but would follow the precedent established by *Quinn v. Safe Deposit & T. Co.* (1901) 93 Md. 285, 53 L.R.A. 169, 48 Atl. 835, and *Atlantic Coast Line Dividend Cases* (1905) 102 Md. 73, 61 Atl. 295, 297, 296, and hold the declaration of the company and its stockholders that the dividend represented earnings or income binding upon all parties to the appeals.

In *Poole v. Union Trust Co.* (1916) — Mich. —, 157 N. W. 430, additional shares of stock received by trustees upon reorganization of corporations in the stock of which funds of the trust were invested, were found to represent merely an enhancement of the value of the corporate assets from causes other than the accumulation of earnings,—apparently due to good management and the growth of trade,—and were accordingly, in harmony with the rule as formulated in the note in 12 L.R.A. (N.S.) 803, awarded to the corpus; it appearing that the assets were practically the same at the end of the fiscal year when the testatrix died as they were just prior to the reorganization. It was so held notwithstanding that the directors put the "profits" into buildings and machinery, but subsequently depreciated the same so that the increases disappeared. The court said in effect that the principle applied and the decision reached did not conflict with those decisions which give to the life tenant stock dividends which are the accumulation of earnings invested in improvements or extensions.

Liquidation; merger.

In *Wilberding v. Miller* (1914) 88 Ohio St. 609, L.R.A. 1916A, 718, 106 N. E. 665, a corporation whose stock had been bequeathed to trustees to hold in trust, with power to sell and reinvest the proceeds, a number of years after the death of the testator, with the consent of all its stockholders, transferred to a new company all its assets, including a surplus which it had accumulated in its business,—a large portion after the death of the testator,—and had invested in its plant, machinery, and other assets used in the business; and each stockholder received two shares in the new company for one in the old company. The court, without expressly adopting the Massachusetts rule, the Pennsylvania rule, or the Kentucky rule, held that the entire stock received by the trustees in the new company belonged to the corpus of the trust fund.

The new company having subsequent-

ly gone into liquidation, the court in the same case, upon the authority of *Bulkeley v. Worthington Ecclesiastical Soc.* (1906) 78 Conn. 526, 12 L.R.A.(N.S.) 785, 63 Atl. 351, and other cases cited in note in 12 L.R.A.(N.S.) 768, awarded the entire distributive share of the assets received by the trustees on the liquidation to the corpus without attempting any analysis of the distribution in respect to its source as between capital or earnings, or as between earnings before and after the death of the testator. The court apparently takes the broad ground that the principles applicable to a dividend declared by a going concern do not apply to a distribution in liquidation; commenting upon the practical impossibility of tracing back all the physical assets to their source, and determining supposed equities between life tenant and remainderman.

Distributions in form of certificates, or bonds of declaring corporation, or stock of another corporation.

Supplementing notes in 12 L.R.A.(N.S.) 812; 35 L.R.A.(N.S.) 571; and 50 L.R.A.(N.S.) 520.

A dividend payable in the notes of the declaring corporation rather than in actual money is to be treated as a cash rather than a stock dividend for the purposes of the Massachusetts rule. *Boston Safe Deposit & T. Co. v. Adams* (1914) 219 Mass. 175, 106 N. E. 590.

So that the character as a cash dividend of an extra dividend declared by a bank is not affected by the fact that it is payable in a certificate of deposit in the bank in question. *Humphrey v. Lang* (1915) 169 N. C. 601, L.R.A.1916B, 626, 86 S. E. 526.

A dividend declared by one corporation payable in the stock of another, assuming that the stock represents earnings and not capital, of the declaring corporation, is a cash, and not a stock, dividend. *Gray v. Hemenway* (1916) — Mass. —, 111 N. E. 713.

Preferred stock.

A cash dividend declared on preferred stock was, in *Boston Safe Deposit & T. Co. v. Adams* (Mass.) supra, awarded in its entirety to the income without any inquiry as to the time of accumulation of the earnings relatively to the death of the testator, notwithstanding that the dividend included the total amount of past accumulated dividends that might have been declared on the stock. The court said that it was manifest that the

right to receive the dividends which had accrued but had not been declared on testator's shares of preferred stock could not have been regarded as constituting a separate part of his estate, or have been made subject to the succession tax; that a purchaser of the stock before the declaration of the dividend would have taken the dividend as the product,—the earnings of the stock; in other words, the right to the dividend did not come into existence until its declaration; that the preferred stockholders, though having the rights of creditors against the common stockholders, are yet not creditors of the corporation.

Where no dividends are paid during the life estate upon stock carrying cumulative preferential dividends, the executors of the life tenant are not entitled to have the arrears made good out of future dividends that may be declared on the stock. *Re Sale* [1913] 2 Ch. (Eng.) 697, 83 L. J. Ch. N. S. 180, 109 L. T. N. S. 707, 58 Sol. Jo. 220.

In *Re Piercy* [1907] 1 Ch. (Eng.) 289, 76 L. J. Ch. N. S. 116, 95 L. T. N. S. 868, 14 Manson, 23, a company in each year from 1894 to 1904 returned to the holders of preferred shares, out of profits available for dividends, various sums, expressed to be paid on account, and in reduction of share capital of the company, in accordance with a resolution passed at a preceding meeting of the company, but without the passage of any further special resolutions until 1905, at which time a special resolution was passed in accordance with the English companies act of 1880 (43 Vict. chap. 19), declaring a return of a specified amount out of accumulated, undivided profits, in reduction of the paid-up capital of the company, and purporting to confirm the returns previously made. It was held that the original resolution had no prospective operation, and that the resolution of 1905 was only valid for that year and invalid so far as it purported to operate retrospectively. Accordingly all the returns except for the year 1905 were held payable as income to the tenants for life, under the doctrine of *Bouch v. Sproule* (1887) L. R. 12 App. Cas. (Eng.) 385, 56 L. J. Ch. N. S. 1037, 57 L. T. N. S. 345, 36 Week. Rep. 193 (cited in the note in 12 L.R.A.(N.S.) 762), and other cases, that a tenant for life is entitled to all dividends made out of profits, except such as have been validly capitalized by the company.

G. H. P.

**WEST VIRGINIA SUPREME COURT
OF APPEALS.**

D. M. BROWN

v.

L. B. COOK, Impleaded, etc., Plff. in Err.,

(— W. Va. —, 87 S. E. 454.)

Pleading — amendment — new process.

1. When an action of assumpsit has been remanded to rules with leave to file an amended declaration, and summons issues requiring the defendant to appear and answer a declaration, and an amended declaration is filed, the court may permit the plaintiff to amend the writ at the bar of the court by inserting "amended declaration" in place of the word "declaration," without new process.

For other cases, see Writ and Process, I. in Dig. 1-52 N. S.

Bills and notes — non-negotiable note — indorsement — effect.

2. Where a person signs his name in blank on the back of a non-negotiable note before delivery, he may be held as maker or guarantor, at the election of the holder, in the absence of a special agreement. And when the payee seeks to charge such indorser of a non-negotiable note, indorsed before delivery, he must allege that the defendant indorsed the same with intent to become liable as guarantor or maker, according to the fact.

For other cases, see Bills and notes, III. b, 2, in Dig. 1-52 N. S.

Pleading — declaration on note — charging indorser.

3. In a declaration by a payee on a non-negotiable note, the note is set out in *hæc verba*, and it is alleged that the note was signed on the back thereof by L. B. C., "whereby the said W. G. C. [the maker] and L. B. C. jointly and as co-obligors agreed to pay," "and being so liable the said W. G. C. and L. B. C., in consideration thereof, on the said 8th day of August, 1907 [the date of said note], undertook and promised the said plaintiff that they would pay him the said sum of \$600 [the sum named in the note]." This is a sufficient allegation to charge L. B. C. as joint maker of such note.

For other cases, see Pleading, II. h, in Dig. 1-52 N. S.

Same — amendment.

4. Allegations in a declaration may be changed and others added, provided the identity of the cause of action be preserved; but amendments are not allowable which are

inconsistent with the nature of the pleadings, or change the cause of action.

For other cases, see Pleading, I. n, in Dig. 1-52 N. S.

Trial — former judgment — court.

5. A plea of former judgment on the same cause of action in bar of plaintiff's suit should be tried by the court by an examination and inspection of the record.

For other cases, see Trial, II. c, 1, in Dig. 1-52 N. S.

Evidence — judgment — effect.

6. A judgment between the same parties upon the same point, which, if pleaded, would have been a perfect bar, is, when used as evidence under the general issue, not conclusive on the jury, but only evidence to be weighed by them.

For other cases, see Evidence, XII. h, in Dig. 1-52 N. S.

Election — use of former judgment.

7. A defendant has the right to elect whether he will present his defense of former adjudication to plaintiff's suit by way of a special plea of *res judicata*, or rely upon the defense as evidence on the trial under a plea of the general issue.

For other cases, see Pleading, III. a, in Dig. 1-52 N. S.

Appeal — record — rejected plea.

8. Where a plea is tendered, and objection thereto is sustained, and an exception is taken, and the record shows the ruling and exception and identifies the plea, such plea is a part of the record.

For other cases, see Appeal and Error, IV. in Dig. 1-52 N. S.

(December 14, 1915.)

ERROR to the Circuit Court for Wyoming County to review a judgment in plaintiff's favor in an action brought to hold defendants liable on a certain promissory note. Reversed.

The facts are stated in the opinion.

Messrs. James H. Gilmore, Donald O. Blagg, and M. T. Bowman, for plaintiff in error:

It was error to allow the plaintiff to amend his declaration by substituting a different ground of liability against one of the defendants, electing to hold him as joint maker instead of indorser or guarantor, as alleged in the original declaration.

7 Enc. Pl. & Pr. 361-363; 3 Enc. Pl. & Pr. 707, note.

The declaration was bad for failure to state a consideration, and for failure to aver that the defendant indorsed with intent to become liable as maker.

Young v. Sehon, 53 W. Va. 127, 62 L.R.A. 499, 97 Am. St. Rep. 970, 44 S. E. 136; Edwards, Bills & Notes, 391.

Defendant should have been allowed to file his special plea, and to have the same tried by the court, setting up a perfect

Headnotes by MASON, J.

Note. — As to character of liability of third party who indorses his name in blank on non-negotiable paper before delivery, see annotation following this case, post, 223. L.R.A.1916D.

bar to the plaintiff's action, instead of merely introducing it before the jury as evidence to be weighed by them.

23 Cyc. 1525; Hogg, Pl. & Forms § 239; Davis v. Trump, 43 W. Va. 191, 64 Am. St. Rep. 849, 27 S. E. 397.

It was error to allow the process to be amended by inserting "upon amended declaration," and leaving the sheriff's return to stand without amendment, and untrue.

Laidley v. Bright, 17 W. Va. 779.

Messrs. Toler & Bailey and Howard & Worrell, for defendant in error:

It is optional with the holder of commercial paper which is signed on the face as maker and on the back as indorser, where the holder of said note is the original payee, in the absence of an agreement to the contrary, to hold the person so signing said note as joint maker or co-obligor.

Burton v. Hansford, 10 W. Va. 470, 27 Am. Rep. 571; Young v. Sehon, 53 W. Va. 127, 97 Am. St. Rep. 970, 44 S. E. 136; Long v. Campbell, 37 W. Va. 665, 17 S. E. 197; Orrick v. Colston, 7 Gratt. 189.

Where an amended declaration, not presenting a new cause of action, is filed by leave of the court, and remanded to rules, process thereon is unnecessary.

Smith v. Nelson Bros. 69 W. Va. 550, 72 S. E. 646, Ann. Cas. 1913B, 829; Couch v. Fretwell, 10 Leigh, 578; Norfolk & W. R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465; New River Mineral Co. v. Painter, 100 Va. 507, 42 S. E. 300.

Upon the filing of the plea in abatement, the court may permit the plaintiff to amend his writ or declaration so as to correct the variance, and permit the return to be amended upon such terms as to it shall seem just. Had the defendant taken advantage of the variance, it would have been the duty of the court to permit the amendment to be made, and as to such amendments the courts are liberal.

Kittle, Rule Days, pp. 14, 15; Ryan v. Piney Coal & Coke Co. 69 W. Va. 692, 73 S. E. 330, 72 W. Va. 630, 78 S. E. 789; Barnes v. Grafton, 61 W. Va. 408, 56 S. E. 608.

Every presumption is in favor of the regularity and the upholding of the judgment of a court of competent jurisdiction.

Scott v. Newell, 69 W. Va. 118, 70 S. E. 1092.

Mason, J., delivered the opinion of the court:

D. M. Brown instituted an action of assumpsit against W. G. Cook and L. B. Cook, in the circuit court of Wyoming county. In addition to the common counts, one special count was added. The special count was on a promissory note for \$600, executed L.R.A.1916D.

by W. G. Cook to the plaintiff. The name of L. B. Cook was written on the back of the note.

The original declaration alleges: "The said defendant W. G. Cook made and signed his certain note in writing commonly called a promissory note, . . . which promissory note was indorsed by the said L. B. Cook, and by the said W. G. Cook and L. B. Cook delivered to this plaintiff."

The defendant L. B. Cook demurred to this declaration, and leave was given the plaintiff to file an amended declaration at rules or at the bar of the court. The next rule day the plaintiff filed another declaration, with common and special counts. In the special count the note referred to in the first declaration is set out in *hœc verba*, with the following allegation: "Which said note was signed on the back thereof by said L. B. Cook," etc., "whereby the said W. G. Cook and L. B. Cook jointly and as co-obligors agreed to pay the said plaintiff the further sum of \$600," etc.

At the next term of court defendant L. B. Cook appeared and demurred to this amended declaration, for the reason that no process was issued thereon. The demurrer was sustained, and the case was remanded to rules for process. At the next rules, November, 1913, process seems to have been returned; and at the April term, 1914, plaintiff moved to amend process by inserting the words "on amended declaration" after the word "assumpsit" and before the words "damages, \$1,000," which motion was sustained, and process accordingly amended, to which defendant L. B. Cook excepted. The defendant W. G. Cook did not appear or contest the plaintiff's demand.

Thereupon defendant L. B. Cook pleaded non assumpsit, and tendered two special pleas,—the first alleging failure of "consideration for the indorsement and execution of said note by this defendant;" the second a plea of *res judicata*. The plaintiff objected to the filing of these special pleas. The court permitted the filing of the first special plea, and refused the second. Defendant excepted to the ruling of the court in rejecting the second plea. Issue was joined on the plea of non assumpsit and the special plea No. 1. The case was submitted to a jury, and a verdict for the plaintiff for \$704.58 was returned. L. B. Cook moved to set aside the verdict and grant him a new trial; also to arrest the judgment. These motions were overruled, and judgment was entered against said W. G. Cook and L. B. Cook, to which defendant L. B. Cook excepted.

The evidence is not certified, and this

court can consider only such matters as appear upon the face of the record.

The court did not err in permitting the plaintiff to amend the process. The parties all being before the court, there was no necessity for sending the case back to rules for new process.

The original declaration alleged that the note was "indorsed" by defendant L. B. Cook, that is, that he was liable as an indorser; while the amended declaration alleged that his liability was as "co-obligor." The appellant insists that by this amendment the plaintiff "introduced a different cause of action from that originally sued on."

"Amendments are not allowed which are inconsistent with the nature of the pleadings, or change the cause of action. . . . Allegations may be changed, and others added, provided the identity of the cause of action is preserved." *Kuhn v. Brownfield*, 34 W. Va. 252, 11 L.R.A. 700, 12 S. E. 519; *Clarke v. Ohio River R. Co.*, 39 W. Va. 732, 20 S. E. 696.

The amendment in this case is not of such nature as to change the cause of action.

Defendant claims that the declaration is defective in not showing the intent of L. B. Cook in writing his name on the back of the note. It is conceded that he might be held either as maker or guarantor according to the fact, but it is insisted that the declaration must show in what capacity the defendant is liable,—whether as maker or guarantor. No doubt, this view is correct as to liability on a non-negotiable note.

"Where a person puts his name in blank on the back of a promissory note, he may be held liable as maker or guarantor, when there is an agreement to that effect, and when he cannot be charged as an indorser, as in the case of a non-negotiable note. But where the payee seeks to charge the indorser of a non-negotiable note, who indorsed the same before delivery, with the payment thereof, he must allege that the defendant indorsed with intent to become liable as guarantor or maker. This is allowed in order to prevent an entire failure of the contract, on the principle, '*Ut res magis valeat quam pereat.*'" *Edwards, Bills & Notes*, § 391, quoted in *Young v. Sehon*, 53 W. Va. 127, 62 L.R.A. 499, 97 Am. St. Rep. 970, 44 S. E. 136.

We think this rule has been complied with in the case at bar. The declaration avers that the note was signed on the back thereof by L. B. Cook, "whereby the said W. G. Cook and L. B. Cook, jointly and as co-obligors, agreed to pay," etc. "And being so liable the said W. G. Cook and L. B. Cook, in consideration thereof, on the 8th day of August, 1907 [the date of L.R.A.1916D.

the said note], undertook and promised the said plaintiff that they would pay him the said sum of \$600," etc. Clearly this is an averment charging L. B. Cook as an obligor.

The defendant L. B. Cook tendered and asked leave to file a special plea of *res judicata*. Counsel for defendant in error objects to the consideration of this plea for the reason that the same was not made part of the record. It is true that the order of the court simply shows that it was tendered. There was no order filing, or formally making it a part of the record by bill of exceptions or order of the court. Pleas tendered by a defendant in an action at law and rejected by the court are not parts of the record, unless made so by bill of exceptions or some appropriate order of the court. This court said in the case of *Sweeney v. Baker*, 13 W. Va. 158, 31 Am. Rep. 757: "If a rejected plea is by order of the court made a part of the record, and the order book shows that its rejection was excepted to, the supreme court of appeals will review the action of the court in rejecting such plea, though no formal bill of exceptions was taken to the rejection of such plea."

Judge Green, in delivering the opinion of the court in *Sweeney v. Baker*, said: "When the court makes the order that the pleas are rejected, and the rejection of them is excepted to by the defendants, such entry could be made by the court only to give to the defendants the power to have reviewed the decision of the court in rejecting the pleas. Of course, this purpose of the court would be idle unless the plea was thereby intended to be made a part of the record. For, of course, no exception could be taken to what constituted no part of the record. And it does seem to me we would be too technical if an entry which the court who made it considered, and must have considered, as the equivalent of an order directing the rejected plea to be made a part of the record, should be disregarded simply because it did not say in express words the rejected plea is ordered to be made a part of the record."

This question is fully discussed in *National Valley Bank v. Houston*, 66 W. Va. 336, 66 S. E. 465, and this court decided in that case: "Though an exception of defendant to a ruling on a special plea tendered be not contained in any order entered in the court below, yet, if it be shown in the certificate of evidence, or in any other part of the record, the defendant may avail himself here of any error in rejecting such plea."

In the case at bar the defendant asked leave to file the special plea, and had it

marked for identification "special plea No. 2," and the order of the court shows the objection by the plaintiff to the filing of the same, the rejection of the plea tendered, and that the defendant at the time excepted to the ruling of the court refusing the filing of the plea. This is equivalent to a formal order making the rejection of the plea a part of the record. The ruling of the court below is subject to review by the appellate court.

The refusal of the court to permit the defendant to file the plea of *res judicata* is error for which the case will have to be reversed. True, the defendant had pleaded non assumpsit, and under this plea might have shown a former judgment, but there is a very clear distinction between the two methods of presenting the defense. The advantage of a special plea of *res judicata* is that it is a perfect bar to plaintiff's case where the judgment pleaded is between the

same parties and upon the same point, but when used as evidence under the general issue, it would not be conclusive. It would only be evidence to be weighed by the jury; "the doctrine being that, though the party is estopped if the matter be pleaded, yet the jury, upon the general issue, are not estopped, but must find their verdict upon the whole evidence in the case, and may find against the former judgment." *Cleaton v. Chambliss*, 6 Rand. (Va.) 95. The plea of *res judicata* must be tried by the court upon an examination and inspection of the record. *Davis v. Trump*, 43 W. Va. 191, 64 Am. St. Rep. 849, 27 S. E. 397. The defendant had the right to elect whether he would make defense under the special plea or submit the case on the general issue.

For reasons stated above, we reverse the judgment, set aside the verdict, overrule the objection to special plea No. 2, and remand the case.

Annotation—Character of liability of third party who indorses his name in blank on non-negotiable paper before delivery.

I. Introductory, 223.

II. What irregular indorsement of non-negotiable paper imports:

a. In general, 224.

b. Special statutes, 225.

c. No contract implied, 227.

III. What such indorsement before delivery to give credit imports, 228.

IV. Liability according to intention, 231.

V. Sealed notes, 236.

VI. Miscellaneous, 237.

I. Introductory.

Such a writing by a third party whether the paper be negotiable or non-negotiable is called an "irregular indorsement."

The examination of this subject, like most others in bills and notes, is attended with great difficulty on account of the inveterate reluctance of the reporters to give us a copy of the note. Many cases have been disregarded in this note which may be of actual authority because it was impossible to say whether the note was negotiable or non-negotiable. Nor has it been considered worth while in general to mention cases excluded on this account.

It is the general rule that the actual intent of the parties may be shown, and if shown it will be carried out. If the evidence shows, however, merely an indorsement before delivery to give credit to the paper, this, by the weight of authority, imports an engagement as original promisor or guarantor. If there is no evidence, there is considerable difference of opinion, some of the courts holding in such case that no contract at all is imported. In some cases the matter is governed by special statute.

L.R.A.1916D.

Some of the technical expressions used by the courts in relation to this subject have various meanings in different jurisdictions; this is particularly so of "guarantor." In fact, it is often difficult to see just what meaning the court in a particular case is giving to "surety," "guarantor," "warrantor," or even "indorser," and in general the cases are not of much value outside the jurisdiction where they were decided unless it is clear just what the court does mean by the use of these expressions.

For liability of a stranger who indorses commercial paper in general before delivery, see the note to *Fullerton v. Hill*, 18 L.R.A. 33.

For the question as to the law of what place covers the case of irregular indorsement, see the notes to *Spies v. National City Bank*, 61 L.R.A. 200, and to *Sykes v. Citizens' Nat. Bank*, 19 L.R.A.(N.S.) 668.

For character under uniform negotiable instruments law, of one who places his name on the back of a note prior to or at the time of delivery, see the note to *Rockfield v. First Nat. Bank* 14 L.R.A.(N.S.) 842.

For conditional execution of contract under a parol agreement that it shall not take effect until others have signed it, see the note to *Benton County Sav. Bank v. Boddicker*, 45 L.R.A. 321.

II. What irregular indorsement of non-negotiable paper imports.

a. In general.

The import of the irregular indorsement of non-negotiable paper varies much in different jurisdictions.

Alabama.

Here the irregular indorsement of non-negotiable paper imports the same contract as to the indorsee as in the case of negotiable notes, except that the indorsee must aver and prove the exercise of the diligence required by the statute as to non-negotiable notes, to first endeavor to collect from the maker, and a failure to do so or an excuse for not doing so. *Bank of Luverne v. Sharp* (1907) 152 Ala. 589, 126 Am. St. Rep. 58, 44 So. 871, holding that the indorser could not complain of failure of consideration in a suit against him by a purchaser from the payee. The court said: "We are disposed to follow the line of decisions holding that the indorser of a note not negotiable is liable to the indorsee to the same extent as the indorser of a negotiable note (*Byles, Bills*, 146, and note; *Jones v. Fales* (1808) 4 Mass. 245; *Sanger v. Stimpson* (1811) 8 Mass. 260), the only distinction being, not as to extent of liability, but as to the action of the indorsee to fasten the liability after default by the maker. In case of negotiable notes, there must be protest and notice, if not waived, and in case of non-negotiable notes, when the indorsee seeks to recover against the indorser, he must aver and prove the exercise of the diligence required by the statute to first collect from the maker, and a failure to do so or an excuse for not doing so. . . . In fact, our statutes upon this subject seem to have been enacted upon the theory that the extent of the liability of the indorser of a non-negotiable note is the same as that of the indorser of one that is negotiable, and prescribe the steps to be taken in order to fasten the liability as to the former, because not subject to protest and notice, in case of default by the maker. . . . We do not understand that the effect of the indorsement, which was made before maturity, merely rendered the indorser liable to a purchaser for value in the event the maker had no defense to the note. The in-

dorsement was, in effect, a guaranty to a purchaser for value before maturity of the payment of the note if not made out of the maker, and was in no sense subject to all defenses that could be made by the maker against the collection of same. The note purported to be for a valuable consideration, and the indorsement cannot be held to be without consideration and of no effect, because of a subsequent failure of the payee to deliver the thing, the price for which the note was given." It does not appear whether the indorsement was made before delivery.

California.

The irregular indorsement of non-negotiable paper imports an absolute undertaking to pay the paper as a "guarantor" as defined in the California statute (see *First Nat. Bank v. Babcock*, 94 Cal. 96, 29 Am. St. Rep. 94, 29 Pac. 415, *infra*, III.) *Rogers v. Schulenburg* (1896) 111 Cal. 281, 43 Pac. 899, holding that where a third party wrote his name on the back of a non-negotiable note, whether before or after delivery, he became a guarantor, and that it was not necessary that the consideration be expressed in writing; that therefore as against him it was sufficient to plead his indorsement. It did not appear whether the indorsement was made before or after delivery.

Connecticut (prior to the statute of 1884).

The irregular indorsement of non-negotiable paper imports a contract by the indorser that the note is due and payable according to its tenor; that the maker shall be of ability to pay it on maturity, and that it shall be collectable by the use of due diligence. *Huntington v. Harvey* (1821) 4 Conn. 124; *Perkins v. Catlin* (1836) 11 Conn. 213, 29 Am. Dec. 282 (obiter); *Ranson v. Sherwood* (1857) 26 Conn. 437; *Spencer v. Allerton* (1891) 60 Conn. 410, 13 L.R.A. 806, 22 Atl. 778 (obiter).

But where a note read, We, A and B, as principal, and C and D surety, promise to pay P. or order, etc., and was signed A and B and indorsed C and D, it was held that the writing imported one original entire transaction, and the indorsers were considered as makers, that is, as joint promisors with the principal. *Palmer v. Grant* (1822) 4 Conn. 389. This case was construed in *Perkins v. Catlin* (1836) 11 Conn. 213, 29 Am. Dec. 282, *infra*, III., as not altering the general Connecticut rule.

Indiana.

The irregular indorsement of non-negotiable paper imports a contract of suretyship if indorsed before delivery.

In *Wells v. Jackson* (1841) 6 Blackf. (Ind.) 40, the court had under consideration an assignable bond, and stated that by the local statute it was of the character of mercantile paper. The court there, after referring to cases in Massachusetts, New York, and England, said: "The deduction which we draw from these authorities is that the blank indorsement of unnegotiable paper, made at the date of the contract and unexplained by extrinsic testimony, confers upon the payee the authority to hold the indorser liable on the original contract, as a surety; and that a similar unexplained indorsement of negotiable paper renders the indorser liable only as indorser, with the ordinary rights and privileges incident to that character. But that in either case the liability designed to be assumed, and the authority intended to be given by the indorsement, may be explained by the attendant circumstances, and the *prima facie* responsibility be changed into one of another kind. And this appears to us to be also the common-sense view of the subject."

The placing of one's signature on the back of a non-negotiable note, by a person not the payee, at or prior to the time of its inception, without making an express contract defining the nature and extent of his undertaking, renders such person liable as a surety or joint promisor, and a stipulation in such note waiving notice of nonpayment is immaterial. *Pool v. Anderson* (1888) 116 Ind. 88, 1 L.R.A. 712, 18 N. E. 445.

Missouri.

The irregular indorsement of non-negotiable paper imports a contract as original promisor. *Powell v. Thomas*, 7 Mo. 440, 38 Am. Dec. 465; *Kuntz v. Tempel* (1871) 48 Mo. 71 (obiter).

In *Powell v. Thomas* (Mo.) supra, a non-negotiable note was indorsed by the defendants, it not appearing when the indorsement was made, and it was held that they were liable as original promisors, the court saying *inter alia*: "The case of *Baker v. Briggs*, 8 Pick. (Mass.) 122, 19 Am. Dec. 311, is an authority to show that where the contrary does not appear, it will be presumed that the execution of the note and the making the indorsement were contemporaneous acts. The party making the indorsement is regarded as being privy to the consideration; and it will be presumed that it was taken on the faith of the indorse-

ment, and he will not be heard in objecting the want of consideration for his indorsement. This we hold is the light in which a blank indorsement made by a party who is not the payee of a note is to be regarded, if nothing to the contrary appears. The real contract of the parties may be shown; but in the absence of all proof, the foregoing are the principles by which we think courts should be governed in determining the liability of a party who, when not a payee or indorsee, will make a blank indorsement on a promissory note." In the *Briggs* case the note seems to have been negotiable.

In *Kuntz v. Tempel* (Mo.) supra, where we are perhaps to suppose that the note was negotiable, the court said: "The settled law in regard to this matter is that, if the note be negotiable in form, and made so in fact by the indorsement of the payee, then all other indorsers, unless the contrary be stipulated, are held as such; but if the note be non-negotiable, or be not indorsed by the payee, then, in the absence of an express agreement, the original indorsers are to be treated as makers."

Ohio.

There is an obiter statement that the irregular indorsement of non-negotiable paper imports a contract of "guaranty" in *Champion v. Griffith* (1844) 13 Ohio, 228, where the payee of a negotiable note sued the maker and a third party who indorsed it as joint and several makers, and the court, in refusing to set aside a nonsuit, said that they held "that the mere indorsement upon a note, of a stranger's name in blank, is *prima facie* evidence of guaranty. To charge such person as a maker, there must be proof that his indorsement was made at the time of the execution by the other party, or, if afterwards, that it was in pursuance of an agreement or intention that he should become responsible from the date of the execution. Such agreement or intention may be proved by parol. The rule is the same whether the instrument be negotiable or not."

b. Special statutes.

Some of the cases have been decided under special statutes.

Thus, in *Picket v. Hawes* (1862) 14 Iowa, 460, where it did not appear whether or not the indorser of a non-negotiable note had indorsed it before delivery, it was held that under the Iowa Code the blank indorsement of an instrument for the payment of money by a person not a payee, indorsee, or assignee thereof, shall

be deemed a guaranty of the performance of the contract, and that to charge him notice of nonpayment by the principal must be given within a reasonable time; but the guarantor is chargeable without notice if the holder shows affirmatively that the guarantor had received no detriment from want of notice, and in the case, as he showed no want of detriment he could not be held, this being a demand note.

In *Krachts v. Obst* (1878) 14 Bush (Ky.) 34, where the indorsers had indorsed before delivery, the court held that the statute of Kentucky, as herein-after quoted, was applicable, but it does not otherwise appear whether the note was or was not negotiable. The statute provided that "every person who shall sign his name upon the back of a promissory note shall be deemed and treated as an assignor as to the party holding it, unless in writing a different purpose be expressed; or the note can be legally placed on the footing of a bill of exchange."

In *Williams v. Obst* (1876) 12 Bush. (Ky.) 266, where it does not appear when the indorsement was made with respect to delivery, the court stated: "The fact that the note might have been negotiated at one of the chartered banks of this commonwealth or at a national bank located in this state, and thereby placed on the footing of a bill of exchange, does not take it out of the operations of the statute. The holder of the note did not negotiate it, and at the time of the institution of this action it could not have been placed on the footing of a bill of exchange."

In *Dotson v. Owsley* (1911) 141 Ky. 452, 132 S. W. 1037, A made a promissory note to B and before its delivery to B, C and D indorsed it. It was held that the indorsers were liable simply as assignors under the foregoing statute, the note being executed before the negotiable instruments law was in force. The court said: "As the note in question was not payable at any bank in this commonwealth, and actually discounted by that bank or some other bank in this commonwealth, it was not placed upon the footing of a bill of exchange; therefore under the express terms of the section of the statute referred to, Dotson and Stanley were liable merely as assignors."

The statutes of Connecticut of 1884 were before the court in the case of a negotiable note in *Spencer v. Allerton* (1891) 60 Conn. 410, 13 L.R.A. 806, 22 Atl. 778, where the court said: "In the year 1884 the legislature passed the fol-

lowing act: 'The blank indorsement of a negotiable or a non-negotiable note, by a person who is neither its maker nor its payee, before or after the indorsement of such note by the payee, shall import the contract of an ordinary indorsement of negotiable paper as between such indorser and the payee or subsequent holders of such paper.' Gen. Stat. § 1860. Before the passage of this act, . . . the blank indorsement of either a negotiable or a non-negotiable note by a stranger to the note implied, *prima facie*, a contract on the part of the indorser that the note was due and payable according to its tenor; that the maker should be of ability to pay it when it came to maturity; and that it was collectable by the use of due diligence.

. . . The statute was doubtless intended to deliver our law from its anomalous position, and bring it into harmony with the law merchant as it is interpreted in the great commercial centers of our country with which we are connected in business transactions involving the daily exchange of notes, bills, and all manner of negotiable securities. . . . Under it, it is at once apparent that the blank indorsement of a negotiable or non-negotiable note by a person who is neither its maker nor payee, whether before or after its indorsement by the payee, no longer imports a contract that the indorser will pay the note if, on the use of due diligence, it is not collected of the maker. It is no longer a contract of guaranty. But it imports, as between such indorser and the payee, or subsequent holders thereof, a contract of an ordinary indorsement of negotiable paper, which is, by the law merchant, a contract for payment conditioned on due presentment to the maker for payment and due notice of dishonor."

In *Smith v. Myers* (1904) 207 Ill. 126, 69 N. E. 858, the court held that the Connecticut statute as to the blank indorsement of a negotiable or non-negotiable note by a person not its maker or its payee did not apply to an instrument which was not a promissory note and which was delivered in Connecticut.

In this connection it may be noted that in *Cook v. Googins* (1879) 126 Mass. 410, which related to a negotiable note, it was held that notes made before it were not subject to the Massachusetts statute of 1874, chap. 404, providing that "all persons becoming parties to promissory notes payable on time, by a signature in blank on the back thereof, shall be entitled to notice of the nonpayment thereof, the same as indorsers."

c. No contract implied.

Some of the cases hold that the indorsement imports no contract.

No contract is implied by the irregular indorsement of a non-negotiable note without explanation. *Lang v. Fegenbush* (1856) 2 Phila. (Pa.) 20, *infra*, IV.

In *Jackson v. Slipper* (1869) 19 L. T. N. S. (Eng.) 640, it was claimed that a declaration on a non-negotiable note of which the plaintiff was the payee and the defendant an indorser was one by payee against maker, there being no evidence except that of the defendant's signature. It was held that a nonsuit was right as, the paper not being negotiable, defendant could not be charged as "indorsee," and in the absence of proof he was not to be held as maker.

In *Absecom Bldg. & L. Soc. v. Leeds* (1888) 50 N. J. L. 399, 5 L.R.A. 353, 18 Atl. 82, it was held that where a non-negotiable note was indorsed by third parties before delivery to the payee, an action would not lie against such indorsers simply upon the production of the note, on the ground that it had already been held in New Jersey in the case of negotiable notes that it must be shown by other testimony what the purpose of the indorsement was, and the court did not consider that there should be any distinction made between the two classes of notes. In the absence of evidence the action must fail. Four judges dissented.

In *Smith v. Myers* (1904) 107 Ill. App. 410, where two third parties had indorsed a non-negotiable instrument (apparently before delivery), one of them sued the other and a verdict was directed for defendant. On appeal it was held that, as the instrument was not a promissory note, no contract was implied from the signing by the defendant of his name upon the back of the paper. The court said: "No consideration for the indorsement of this paper by appellee was shown, nor did appellant prove or offer to prove any state of facts from which would arise an undertaking by appellee to indemnify appellant in whole or in part for the payment made by him to the holder of said paper. . . . The condition which appellant offered and was not permitted to show appears to have been that he, appellant, refused to indorse the paper until someone else had indorsed it. The instrument under consideration not being a promissory note, had appellant shown all that he offered to, he would not have established any valid contract upon the part of appellee to indemnify him for the payment he

made upon the instrument." On appeal, in (1903) 207 Ill. 126, 69 N. E. 858, the court in affirming the judgment said: "Upon a mere contract for the payment of money or the performance of any other covenant, where the instrument is not such as comes within the definition of a negotiable instrument, one by merely signing his name upon the back thereof does not become either a guarantor or an indorser, within the law merchant. There are many instruments that may be transferred by assignment of the holder or payee, and which are sometimes called negotiable instruments, such as bills of lading, warehouse receipts, and other assignable contracts, for the performance of the terms or covenants of which one may become a guarantor; but the contract of guaranty on such instrument will not arise by the mere signing of the name of a person not a party thereto on the back thereof."

In *Johnston v. McDonald* (1894) 41 S. C. 81, 19 S. E. 65, it was held that there must be proof that indorsement was before delivery. Thus, where a note was made by A, payable to B, and C had written his name across the back of it, the payee's assignee could not recover of C without showing that C's indorsement was made at or before the delivery of the note to the payee, that is, that it was a part of the original transaction. The court said: "There can be no doubt that the authorities cited by the counsel for appellant conclusively show that a third person may, under certain circumstances, make himself liable, as one of the original makers, on a note signed by one person, payable to another, by simply writing his name across the back of a note, whether it be negotiable in form, or unnegotiable, as the note here in question is, inasmuch as it is not payable to order or to bearer."

In this connection reference may be made to the two following Canadian cases:

In *West v. Bown* (1847) 3 U. C. Q. B. 290, the plaintiff declared in assumpsit on a note as made by a third party payable to the plaintiff, and that the defendant indorsed the same to the plaintiff. It was demurred that the plaintiff did not show in his declaration any right of action against the defendant, the note being payable to plaintiff, and not to his order, and consequently not a negotiable instrument. The chief justice said that it was impossible to hold that any right of action was stated in the declaration, unless they could hold that anyone, by indorsing a note not negotiable made pay-

able to another, renders himself liable to that other, and may be sued as indorser. He also said that the action was not against the defendant as a new maker of the note, independently of any rights to be derived through the payee, but an action by the payee against the defendant as indorser upon a note not negotiable, yet treating the defendant as indorser. Macaulay, J., seems to intimate in his opinion that the defendant would not have been liable as maker. (In *McMurray v. Talbot* (U. C.) *infra*, it is stated that the note in the West Case "was apparently a negotiable promissory note," the court in the *McMurray* Case apparently having not looked carefully at the report of the West Case.)

In *McMurray v. Talbot* (1856) 5 U. C. C. P. 157, where B sued C on a promissory non-negotiable note made by A to B and indorsed by C, it is stated that the fact was that the note was at the same time indorsed in blank by the defendant as a surety for the maker, it being intended that he should be bound to the parties of such note. The plaintiff contended that he was liable as maker and a verdict was found for plaintiff subject to that point, and it was ordered that there must be a nonsuit. In this case, Macaulay, Ch. J., said that "*West v. Bown* (U. C.) *supra*, was apparently a negotiable promissory note, in which the defendant was sued by the payee as indorser, and on demurrer judgment was given for the defendant. In this case I said I could not find whether *Thew v. Adams* decided that a party indorsing his name on the back of a promissory note, or if so, not indorsed by the payee, could be made responsible to the payee as a maker or indorser or guarantor." From the earlier reference of this judge in the opinion to the unreported case of *Thew v. Adams*, it seems that there the note was negotiable, but the reference to it in the West Case is somewhat ambiguous.

III. What such indorsement before delivery to give credit imports.

In some jurisdictions it has been held that an indorsement of non-negotiable paper before delivery to give credit or security imports the liability of an original promisor. *Wetherwax v. Paine* (1853) 2 Mich. 555; *Rothschild v. Grix* (1875) 31 Mich. 150, 18 Am. Rep. 171 (obiter); *Powell v. Thomas* (1842) 7 Mo. 440, 38 Am. Dec. 465; *Kuntz v. Tempel* (1871) 48 Mo. 71 (obiter); *Barr v. Mitchell* (1879) 7 Or. 346; *D. M. Osborne & Co. v. Hubbard* (1891) 20 Or. L.R.A.1916D.

318, 11 L.R.A. 833, 25 Pac. 1021; *Lumberman's Nat. Bank v. Campbell* (1912) 61 Or. 123, 121 Pac. 427 (not necessary to decision); *Cockrell v. Milling* (1847) 1 Strobh. L. (S. C.) 444; *Sylvester Bleckley Co. v. Alewine* (1897) 48 S. C. 308, 37 L.R.A. 86, 26 S. E. 609; *Houghton v. Ely* (1870) 26 Wis. 181, 7 Am. Rep. 52; *Gorman v. Ketchum* (1873) 33 Wis. 427; *Piers v. Hall* (1878) 18 N. B. 34. See also *Roe v. Hallett* (1884) 34 Hun (N. Y.) 128, and *Paine v. Noelke* (1877) 54 How. Pr. (N. Y.) 333, 11 Jones & S. 176, *infra*.

In *Sylvester Bleckley Co. v. Alewine* (1897) 48 S. C. 308, 37 L.R.A. 86, 26 S. E. 609, where a non-negotiable note was made payable to the order of blank, and was indorsed by two third parties before delivery, for the purpose of credit for the maker with the person to whom the note was delivered, it was held that his assignee could recover of the indorsers as joint makers with the maker of the note.

In *Houghton v. Ely* (1870) 26 Wis. 181, 7 Am. Rep. 52, the payee sued the indorser of a non-negotiable instrument, alleging that the indorsement was made before delivery, and in effect that the purpose of the indorsement was to give the maker credit with the plaintiff, whereby the plaintiff conveyed to the maker certain property, it being a condition of this conveyance or delivery that the defendant should be holden for the price. The point particularly discussed was the question of the statute of frauds, and it was held that the indorser was liable as maker.

Where A made a non-negotiable note to the plaintiff, and B indorsed it before delivery, and the complaint averred that the defendant in question indorsed the note at the time it was made and the plaintiff paid the consideration for the note on the credit of such indorsement, and that he so indorsed it for the purpose of procuring for the maker a credit with the plaintiff was sufficient to hold such indorser as an original promisor. *Gorman v. Ketchum* (1878) 33 Wis. 427. The court stated that, the note not being negotiable, the indorser "cannot be held liable on the note as an indorser, but only (if at all) as an original promisor."

In *Kidd v. Beckley* (1908) 64 W. Va. 80, 60 S. E. 1089, where A made a non-negotiable note to the order of the plaintiff, which was indorsed by the defendant, and the plaintiff sued the maker and the indorser as joint makers, it was held that it was not necessary for the complaint to set up the fact of indorsements before

delivery, as that was an evidential fact which might be proven under a declaration charging such indorser as maker. It was also held in the same case that an agreement between the indorser and the maker, that the note should not be delivered until other indorsers had been secured, was of no avail against the payee unless he was shown to have known of it at the time. The case, however, was reversed on other grounds.

It does not seem clear that there is any direct authority on the question in Massachusetts prior to the statute of 1874 (see *Cook v. Googins* (1879) 126 Mass. 410, *supra*, II. b), unless it be *Cherry v. Sprague* (Mass.) *infra*.

In *Moies v. Bird* (1814) 11 Mass. 436, 6 Am. Dec. 179, however, while the note appears to be negotiable, the defendant is represented as having stated to a witness that it was not a negotiable note, and it was stated by counsel in the case of *Sumner v. Gay* (1826) 4 Pick. (Mass.) 311, that the note in *Moies v. Bird* "was erroneously described in the report as being payable to order."

In *Moies v. Bird* (Mass.) *supra*, the plaintiff brought an action on a note made to him or his order signed by B., the defendant's name being signed in blank upon the back of said note. It was admitted that the defendant's name was not signed on the note until after its delivery, but it was claimed to have been done under an agreement or in furtherance of an arrangement that had been made before the delivery, as to which the court said: "If it was a fact that his signature was in consequence of the purchase made by his brother, upon representations made that he would sign the note, although his signing was not until after the delivery of the deed, his act ought to be referred to the date of the transactions, and he must be presumed, when he signed in blank, to have assented to such a reference; so that he would be considered, in law, as well as justice, as having placed his name on the note at the time it bears date, if that be necessary to give effect to his engagement;" and it was held that the effect of the indorsement was to make the defendant absolutely liable to pay the note.

In *Re Wrentham Mfg. Co.* (1872) 2 Low. Dec. 119, Fed. Cas. No. 18,063, where it was not essential to the result, the court, referring to the indorsement by a third party of a non-negotiable receipt, said: "The doctrine is firmly established in Massachusetts, that an indorsement of this sort, made by one who is not the payee of a note, and made

before the note is negotiated, binds the indorser as an original promisor. The cases are reviewed in *Union Bank v. Willis* (1844) 8 Met. (Mass.) 504, 41 Am. Dec. 541. . . . Most of the cases are of negotiable notes; but I do not see why the rule is not equally applicable to notes which are not negotiable, because it is on the very ground that the signature on the back of a note, by one who is not payee or indorsee, is not a strict indorsement; that they give it effect as a promise." But it was held in the case that the payee had no right to assume that the agent of a corporation had authority thus by indorsement to pledge the credit of the corporation for a matter of this kind.

In *Cherry v. Sprague* (1904) 187 Mass. 113, 67 L.R.A. 33, 106 Am. St. Rep. 381, 72 N. E. 456, the court expressly declined to pass upon the question whether the note was negotiable or not; it was made to the order of C, and indorsed by A, B, and C, A being the defendant, and it was held that "by the law of this state, aside from statutory enactments, a third person placing his name on the back of a promissory note before delivery to the payee is an original promisor or maker, not entitled to have demand or notice of nonpayment, and that as to him no consideration need be proved." It would appear from this decision that the court makes no distinction between negotiable and non-negotiable instruments.

In New York it is usual to say that the indorser under such circumstances may be held liable as "maker or guarantor," but it is not entirely clear just what the courts have here intended by "guarantor," and it would seem doubtful, from the leading case of *Richards v. Warring* (1864) 4 Abb. App. Dec. (N. Y.) 47, 1 Keyes, 576, *infra*, IV., whether the court means anything more by "maker or guarantor" than "maker" or an original promisor.

In *Griswold v. Slocum* (1851) 10 Barb. (N. Y.) 402, the defendant indorsed before delivery a non-negotiable note to the plaintiffs, who alleged a demand and refusal of payment and notice to the defendant, who was held liable as maker or grantor. The court said: "It is now held that when the paper is negotiable, the party indorsing it as security before delivery to the payee can be held liable only as indorser, and is entitled to notice of protest, after demand made of the maker. The reason why this is not the law in regard to paper not negotiable is to prevent an entire failure of justice. Ut res magis valeat quam pereat. Not

being liable as indorser, if he cannot be held responsible as maker or guarantor, the party escapes all accountability on his contract. The distinction in this respect between paper negotiable and not negotiable has been plainly recognized, and is now well established. All the conflict of authority has been in regard to negotiable paper. There has been none in regard to paper not negotiable."

In *McMullen v. Rafferty* (1882) 89 N. Y. 456, the plaintiff sued the defendant on a demand note made by a third party to the plaintiff without negotiable words, and indorsed by the defendant, the action being commenced more than six years after the date of it, and it was held that it was barred by the statute of limitations; that as the note was a non-negotiable note, the defendant did not in a commercial sense become an indorser of it with the rights and liabilities of a simple indorser, but he could be held as maker of the note or guarantor of its payment, and that in the case of a note payable on demand the statute of limitations begins to run in favor of the maker from its date, and as the defendant could at all times be treated as the maker of the note, the cause of action must be deemed to have accrued against him at the date of the note, and that this was so although the plaintiff had the option also to treat him as a guarantor, as the same result would follow in that case.

But in *Cawley v. Costello* (1878) 15 Hun (N. Y.) 303, where the plaintiff sued the maker of a non-negotiable note to the plaintiff, and also the indorser of such note, alleging demand and notice, it was held that the complaint was demurrable; that the writing by the defendant of his name on the back of the note was not an indorsement, the note being non-negotiable, and that such defendant could be held liable only as maker or guarantor; that to hold him as such it must be averred that he wrote his name on the back of the note with intent to become liable thereon in such character. This case is criticized in *New York Security & T. Co. v. Storm* (1894) 81 Hun 33, 30 N. Y. Supp. 605,—*infra*, IV., where the court states that it was probably not intended in the *Cawley* Case to assert in effect that the so-called indorser understood the legal relation which he wanted to assume toward the other parties to the note, and therefore signed it with intent to become liable thereon as comaker or surety to the maker, as the case might be, for if such a meaning was intended it was error.

It has also been held in *New York L.R.A. 1916D.*

that such indorsement imports the liability of a maker. *Paine v. Noelke* (1877) 54 How. Pr. (N. Y.) 273, 11 Jones & S. 176.

In *Roe v. Hallett* (1884) 34 Hun (N. Y.) 128, where a third party indorsed a non-negotiable promissory note before delivery, it was held that the complaint properly charged him as the maker.

Probably in *Brown v. Cook*, ante, 220, the court uses the expression "maker or guarantor" in the same general way as it is used in the New York cases.

In California the import is that of guaranty as defined in the statute. Thus, where a third party before delivery wrote his name on the back of a non-negotiable note to give it security, he was held to be liable as a guarantor. *First Nat. Bank v. Babcock* (1892) 94 Cal. 96, 29 Am. St. Rep. 94, 29 Pac. 415, where the court said: "What is now the liability, in this state, of a guarantor? As we have seen, a guaranty is a promise to answer for the debt of another person, and it may be enforced, upon default of the principal, without any previous demand or notice. It is an absolute undertaking to pay the whole debt if the principal does not, and no mere delay of the creditor to proceed against the principal, or to enforce any other remedy, can be availed of as a defense. And such a liability is assumed *prima facie*, when, as in this case, the guarantor writes his name on the back of a non-negotiable note to give it credit."

In Connecticut, prior to the statute of 1884 (see II. b, *supra*), a peculiar doctrine prevailed.

In *Bradly v. Phelps* (1796) 2 Root (Conn.) 325, where a third party indorsed on the refusal of the payee to lend without an indorser, it was held that this was an engagement that the payee should be able to obtain the money from the maker on maturity, and not one that the note should be paid at all events.

In *Huntington v. Harvey* (1821) 4 Conn. 124, an action by the payee of a non-negotiable note against a third party who had indorsed the same in blank before delivery, the jury were instructed that the defendant's undertaking was collateral, and not direct. In declining to set aside the verdict for misdirection the court said: "By uniform and long-continued usage in this state, as well as by repeated determinations, a blank indorsement on a note not negotiable contains a warranty that the note is due; that the maker shall be of ability to pay it when it reaches maturity; and that it shall be collectable by the use of due diligence.

Bradly v. Phelps (Conn.) supra; *Swift, Ev. 342*; *Williams v. Granger* (1810) 4 Day (Conn.) 444. The holder may not write over the indorser's name a direct and absolute promise, nor insert any special contract repugnant to the nature of a blank indorsement as it has always been understood; for it is not to be presumed that the assignor, by an indorsement in blank, intended anything more than a power of attorney with warranty, accompanied by a transfer of the money when collected. . . . The diligence before mentioned requires that the contents of the note shall be demanded of the maker so soon as it falls due, and if it be not paid, that it shall immediately be put in suit against him by attachment. On failure of this, the indorser is released from his responsibility." It should be noted that it is stated in *Palmer v. Grant* (1822) 4 Conn. 389, that in *Huntington v. Harvey* (Conn.) supra, the indorser placed his name in blank on the note long after it was made, which is certainly contrary to the statement of the court in the *Huntington Case*, for the court there says: "Augustus Bushnell made his promissory note to the plaintiff, the same not being negotiable, and procured the defendant to indorse it in blank. In this condition it was delivered to the plaintiff."

In *Perkins v. Catlin* (1836) 11 Conn. 213, 29 Am. Dec. 282, the note was a negotiable note, and it does not very clearly appear, but perhaps it is intended to appear, that the indorsement was made before the delivery. In that case the court observed: "By the common law of Connecticut, a blank indorsement of a note not negotiable *prima facie* implies a contract on the part of the indorser that the note is due and payable according to its tenor; that the maker shall be of ability to pay it when it comes to maturity, and that it is collectable by the use of due diligence."

. . . Does our law regard such an indorsement as subject to the same legal construction, and as imposing upon the payee the same legal diligence, as if the note were not negotiable? We think it does so regard it; and that in Connecticut the indorsement in blank of a negotiable note, by a third person, for the better security of the payee, *prima facie* imports the same contract as the blank indorsement of a note not negotiable. Until the year 1811, promissory notes were not negotiable in this state according to the custom of merchants."

In *Castle v. Candee* (1844) 16 Conn. 223, where the case is not free from ob-

scurity, it seems to be reasonably clear that the indorsement of the third party was made before delivery, it being a blank indorsement, and was of a non-negotiable note due on demand. The court said: "The fifth count in this declaration alleges the contract to be that the defendant, by his indorsement on the back of said note, undertook and faithfully promised the plaintiff that the note should be good and collectable by the use of due diligence for a reasonable time. If this note had been made payable at some future day, as in the common cases, there could be no doubt but it would, with the indorsement, have been admissible in evidence to prove that promise, under this count. But, as we have said, the law implies the same contract in the case of a note payable on demand, and therefore it follows that this note and indorsement were admissible under this count."

There are two cases in Texas which apparently hold that the import is one of suretyship, but while the notes appear to be non-negotiable, the decisions do not point out whether they were so considered by the court.

In *Cook v. Southwick* (1853) 9 Tex. 615, 60 Am. Dec. 181, on a note by A to B, indorsed by C, A and C were sued by the assignee of B, and it was held that, as it appeared from the note and the evidence that the consideration passed to the maker of the note, the indorser was liable as a surety. The court does not comment on the fact that the note is not to order, but simply to the person of the payee.

In *Carr v. Rowland* (1855) 14 Tex. 275, A made a note to B and C, which was indorsed by B and D, and E brought an action upon it alleging that C had transferred to him all his interest in said note for a valuable consideration by delivery without indorsement, and it was held that D was a surety. The note had no negotiable words in it.

IV. Liability according to intention.

It is the general rule that the intention may be shown and the liability be fixed accordingly. *Saussy v. Weeks* (1905) 122 Ga. 70, 49 S. E. 809; *Fear v. Dunlap* (1848) 1 G. Greene (Iowa) 331 (obiter); *Third Nat. Bank v. Lange* (1878) 51 Md. 138, 34 Am. Rep. 304; *Lewis v. Harvey* (1853) 18 Mo. 74, 59 Am. Dec. 286; *Richards v. Warring* (1864) 4 Abb. App. Dec. (N. Y.) 47, 1 Keyes, 576; *New York Security & T. Co. v. Storm* (1894) 81 Hun, 33, 30 N. Y. Supp. 605; *Lang v. Fegenbush* (1865)

2 Phila. (Pa.) 20, affirmed in (1857) 28 Pa. 193; *Comparree v. Brockway* (1850) 11 Humph. (Tenn.) 355 (obiter); *Orrick v. Colston* (1850) 7 Gratt. (Va.) 189; *Kearnes v. Montgomery* (1870) 4 W. Va. 29; *Long v. Campbell* (1893) 37 W. Va. 665, 17 S. E. 197; *Young v. Sehon* (1903) 53 W. Va. 127, 62 L.R.A. 499, 97 Am. St. Rep. 970, 44 S. E. 136 (obiter).

Compare Connecticut Cases, *supra*, III.

In *Saussy v. Weeks* (1905) 122 Ga. 70, 49 S. E. 809, the court said: "Where one who is neither maker nor payee of a non-negotiable promissory note writes his name on the back of the note, either before or after delivery to the payee, he becomes liable as indorser, guarantor, maker, or surety, according to the intention and agreement of the parties at the time he signs the paper. See 7 Cyc. 673, 674. The decisions are by no means uniform, and some draw a distinction between cases where the signature is placed on the note before and after delivery, but we think the rule above stated the correct one."

Where the payee of a non-negotiable note sued together the maker as maker, and a third party who had indorsed it "as indorser," and the indorser demurred, claiming that he was a guarantor and as such not suable in the same action with the maker in the county of the latter's residence, he residing elsewhere, the court overruled the demurrer, stating that the indorser might plead and prove his true relation if it was not that of indorser. *Saussy v. Weeks* (Ga.) *supra*, where it did not appear whether the indorsement was before or after delivery.

In *Third Nat. Bank v. Lange* (1878) 51 Md. 138, 34 Am. Rep. 304, where before delivery a non-negotiable promissory note was indorsed by a third party as security for the drawers of the note, and the payee of the note, who was named therein as trustee, afterward indorsed his name above the other and then sold the paper in breach of his trust, it was held that the obligation of the third party was that of an original maker, and that, having placed his name upon the note as security, he could not be held to a contract of guaranty of the right of the indorser to assign, into which he had not entered, and that he was entitled to show the facts as to the time when the indorsement was made.

In *Lewis v. Harvey* (1853) 18 Mo. 74, 59 Am. Dec. 286, the promissory notes in question wanted the words "negotiable and payable," which under the Missouri statute were necessary to make

them negotiable with a like effect as inland bills of exchange, and they had been indorsed by the defendants before delivery to the payee. The defendants answered that they had supposed that the plaintiffs would indorse them so that the defendants would be subsequent indorsers, but this answer was stricken out, and judgment rendered for the plaintiffs. On appeal the court, in reversing the judgment, said: "In this country there has been a very great diversity of opinion in relation to the contract which the law implies from the fact that an individual writes his name on the back of a negotiable note which is already complete in having a maker and payee. But there does not appear to be the same difference in relation to notes which are not negotiable. The decisions in most of the states in which the liability of such party to a note not negotiable has been considered appear to agree that he is liable as an original promisor, and in this state the question was decided in *Powell v. Thomas* (1842) 7 Me. 440, 38 Am. Dec. 465, and such was held to be the meaning and effect of his contract."

In *Richards v. Warring* (1864) 4 Abb. App. Dec. (N. Y.) 47, 1 Keyes, 576, a note was made by A and B to C having no negotiable words, and indorsed by D, and C's executor recovered upon it against D, without showing any notice of demand or of protest, and this judgment was affirmed. It was shown that the indorsement was made before delivery. The court stated that the defendant signed the note before it was negotiated, at the request and for the benefit of the makers, to enable them to raise money on it; "he signed it as the referee has found, 'with the intent to become liable to pay the same to the payee.'" The court said: "If the note had been negotiable, it is clearly settled that he could not have been held without a regular demand and protest of the note, and this upon the principle that as the paper admitted of the contract of indorsement, and the name was written in the place and in the manner in which the names of indorsers usually appear, he must be presumed to have intended to adopt that character, and no other. But in the present case the defendant is not indorser in the commercial sense, and the paper does not on its face import the contract of indorsement. We cannot therefore presume an intention to assume only the restricted liability of an indorser. The defendant must therefore be held in some other character, or

must be absolutely discharged as not having contracted any effectual legal liability whatever. . . . He is, in effect, the maker of the note, an original party to the instrument, whose name, equally with that of the other makers, was intended to give currency and credit to it in the hands of the payee, and on the faith of whose signature, either as principal or as surety for the other makers, the paper was discounted. The signature on the back of the instrument is not inconsistent with his liability as a maker, if he, in fact, intended to assume that character. Perhaps also he may be held as guarantor. A contract of that description does not appear to me irreconcilable with the liability he intended to assume; and if he meant to be liable in that character, a contract of that description might be written over his name, and I think a consideration 'for value received' therein stated, inasmuch as the facts developed on the trial to show a sufficient consideration to bind him. It is enough, however, in my opinion, to declare that he is liable, on the facts proved, to pay the note, and it is not important whether he be called by one name or another." The court cited as in point *Griswold v. Slocum* (1851) 10 Barb. (N. Y.) 402, *supra*, III.

In *New York Security & T. Co. v. Storm* (1894) 81 Hun, 33, 30 N. Y. Supp. 605, a complaint was held sufficient which set up a non-negotiable (sealed) promissory note to the plaintiff, and which alleged that prior to the delivery of the note, the defendant Storm and ten other individuals, "for valuable consideration, and for the purpose of inducing plaintiff to make said advance and accept said note, placed their names upon and delivered to plaintiff said note so indorsed in order to secure payment thereof to the plaintiff, and for the purpose of becoming liable to the plaintiff for such payment; and said defendants thereby became liable to the plaintiff for the payment thereof; that plaintiff relied upon the obligations of the defendants and was thereby induced to, and therefore did, make said advance and accept said note;" that thereafter the note was delivered to the plaintiff, which has ever since been the legal holder and owner thereof for value.

In *Lang v. Fegenbush* (1856) 2 Phila. (Pa.) 20, where the payee sued the indorser of a non-negotiable note, it was held that full justice was done to the defendant by instructing the jury that his indorsement alone would not make him

answerable to the plaintiff, and that his liability depended on whether his intention was to enable the maker to obtain credit from the payee, and whether the latter gave credit on the face of the indorsement, the court considering that the indorsement of the note had no definite or legal import, and depended for its effect on the circumstances under and the consideration for which it is given; hence it raised no presumption either for or against the indorser, and made the question of his liability one of mere fact to be decided upon all the evidence of the cause as in an ordinary case of guaranty. This case was affirmed in (1857) 28 Pa. 193, where it was said: "The evidence is clear and uncontradicted, tending to show that the indorsement, although made before the note was delivered to or indorsed by the payee, was made for the purpose of procuring a loan of money from him to the maker of the note, and that Lang, the indorser, was to be security for the repayment of it. Under these circumstances it was not error to instruct the jury that, 'if the note was indorsed by the defendant with the view of obtaining a loan, and a loan was made on the faith of the indorsement, the plaintiff is entitled to recover, otherwise not.' Applying these instructions to the evidence, they must have been understood by the jury as submitting to them to decide whether the defendant contracted with the plaintiff to become security to him for the money advanced to the maker; and they have responded in the affirmative."

In *Orrick v. Colston* (1850) 7 Gratt. (Va.) 189, A wrote B a letter inclosing what he said was a blank note at eight months, which he wished him to fill up with as much as he could spare him, and which was a paper signed in blank by A and C and indorsed in blank by D; whereupon B advanced the makers \$1,000 and filled out over their signatures a promissory note payable to B, his heirs or assigns, and after the action was brought he wrote over the blank signature of the indorser these words: "In consideration of the loan of \$1,000 by Cromwell Orrick, I hereby guarantee the payment of the within sum of money." The trial court gave judgment for the defendant in an action by B against the indorser, but on appeal this was reversed. The court held that the plaintiff had a right at the trial to fill out above the indorser's name any contract that was within the intention of the parties, and that if the manner in which he had filled it out was not in conformity

with his counts, he had a right to change it to make it in due form, and that he had a right to charge the indorser either as a collateral promisor or as a direct and absolute surety.

In *Long v. Campbell* (1893) 37 W. Va. 665, 17 S. E. 197, where a non-negotiable note was made with the name of the payee left blank, and it was indorsed in this condition with the intent that money be raised upon it, and it was then delivered to the payee at the time when his name was filled in, it was held that he had a right to hold makers and indorsers as original promisors. The court in the opinion refers to the decision in *Kearnes v. Montgomery* (1870) 4 W. Va. 29, as disapproved in *Burton v. Hansford* (1877) 10 W. Va. 471, 27 Am. Rep. 571, and as against the current of authority, and not sound; but the court in the *Long* Case probably intends to criticize not the decision, but the reasoning of Judge Maxwell in that case.

In *Burton v. Hansford* (W. Va.) supra, the court said of the *Montgomery* Case: "In the case of *Kearnes v. Montgomery* (W. Va.) supra, the defendant, owing the plaintiff, proposed to him to take for his debt the bond of third parties, which the defendant had drawn payable directly to the plaintiff. The plaintiff refused to accept this bond, as it was payable to the plaintiff instead of to the defendant, unless the defendant would indorse it. The defendant wrote his name on the back of it, and the plaintiff accepted it, surrendering to the defendant his bond which plaintiff held for the debt. The bond not being paid, the plaintiff brought an action of assumpsit against the defendant, and before the trial wrote over the defendant's indorsement, 'For value received, I hereby become the security of the obligors in the within bond.' The court held that the plaintiff could not hold the defendant bound as original promisor or security, but only as guarantor. This decision is in consonance with the principles laid down above, and with the case of *Orrick v. Colston* (Va.) supra. The evidence showed that 'the defendant was to assume the same situation as to liability that he would have occupied had the paper been executed to him as payee and transferred by him to the plaintiff.' And such liability would not have been direct, but only collateral. The prima facie responsibility of the defendant as original promisor at the election of the payee was therefore in that case overthrown by the proof showing that he was only to be bound collaterally." And the L.R.A.1916D.

court goes on to say that the reasoning of Judge Maxwell in the *Montgomery* Case was inconsistent with the opinion in *Orrick v. Colston* (Va.) supra, and not concurred in by one of the other judges; and the court in the *Burton* Case continues: "If we are to infer that he thought there was a difference in such case between the liability of a stranger who indorses a note not negotiable and one who indorses a negotiable note, I think both reason and authority show that such distinction is not well founded. The review of the cases before cited satisfies my mind that no such distinction can properly be drawn. And if there is no such distinction, then, as I have endeavored to show above, the responsibility of a stranger so indorsing would not be that of a guarantor only, but, at the option of the payee, it would prima facie be either that of an original promisor or that of a guarantor. . . . In this case it is only necessary to decide that a stranger who indorses negotiable paper at the time it was made is prima facie liable to the payee as original promisor if he chooses to so regard him."

McPhee v. MCPhee (1890) 19 Ont. Rep. 603, was a case where a firm, as evidence of its indebtedness to the wife of one of the members, gave her a non-negotiable note made by one member of the firm and indorsed by the other (it seems to be taken for granted in the case that we are to suppose that the wife was the payee of the note, but this is nowhere stated). The court permitted her to amend and allege that by such indorsement the indorser had rendered himself liable to the plaintiff as a maker or as a guarantor or as a surety for the maker or on an account stated; it seems to consider that he was a guarantor and held that he was liable.

This case is referred to in *Robertson v. Lonsdale* (1891) 21 Ont. Rep. 600, which concerned an indorsement made long after the maturity of the note, the court saying: "The case of *McPhee v. MCPhee* (Ont.) supra, was cited by Mr. Middleton. But that was a case where, a partnership having borrowed money from the plaintiff for partnership purposes, one member of the firm gave to the plaintiff a non-negotiable promissory note, upon the back of which the other member of the firm signed his name. The proper legal interpretation to have put upon the transaction in that case was that the party putting his name on the back of the note, being liable on the consideration for which the note was given, might be treated as a joint maker; or it

could be regarded as evidence of an account stated between the plaintiff, to whom the amount represented by the note was due, and the defendant, who had put his name on the back thereof. *Gould v. Coombs* (1845) 1 C. B. (Eng.) 543, 14 L. J. C. P. N. S. 175, 9 Jur. 494. Under some of the American authorities a person writing his name on the back of a non-negotiable note, without more, would be regarded as a guarantor; but I was in error in holding that under the English or Canadian authorities he could be so considered." The court apparently means that the statute of frauds would prevent such a holding.

In *Young v. Sehon* (1903) 53 W. Va. 127, 62 L.R.A. 499, 97 Am. St. Rep. 970, 44 S. E. 136, cited in *Brown v. Cook*, ante, 220, A made a non-negotiable note payable to B, which was indorsed by B and C and then delivered to a person from whom money was borrowed for the benefit of the maker, and it was held that such person had a right to hold the indorsers as original promisors or as guarantors. The court, having quoted from some of the text-books on the subject, went on to say: "These authorities clearly show that the rule against the admission of parol evidence to show the consideration, the relation of the parties, and the circumstances attending the execution of the paper, to the end that the true intent may be ascertained and effectuated, has no application in the case of non-negotiable paper. This being true, the rule of liability pronounced by the law must be the same in this case as it is in the cases of irregular indorsements decided by this court, and to which reference has been made. In those cases it has been decided that the holder of the paper may treat the parties thereto either as makers or as guarantors, according to his own election, however their names may stand upon the paper."

In *Comparree v. Brockway* (1850) 11 Humph. (Tenn.) 355, a case of a negotiable note, the court observed: "It is not necessary that we should enter into any discussion of the well-settled distinction between the effect of an indorsement in blank on a negotiable note, and a note not negotiable. In respect to paper not negotiable by the law merchant, it is held that if a third person place his name on the back of a note, at the time it was made, he may be held liable as an original maker or guarantor, according to the circumstances of the case and the understanding of the parties. Story, *Promissory Notes*, §§ 473-475, and L.R.A. 1916D.

notes. The reason appears to be that, as such note is not negotiable according to mercantile usage, the person so indorsing in blank cannot be regarded as an indorser, or charged as such; but having put his name on the paper to give it credit or add to its security, he will be held responsible in a different form, and treated as an original promisor or guarantor. Thus far, most of the American cases concur; but as regards negotiable mercantile paper, there is not the same concurrence of judicial opinion. There are cases which decide that the principle just stated as applicable to paper not negotiable applies equally to regular negotiable paper; such at least is the conclusion which they tend to establish. We think the law is otherwise clearly settled."

A note to the order of B, marked "non-negotiable or transferable," was signed, A, "principal," C, D, "indorser," and was indorsed by A, "This note is not transferable, nor to be used as collateral without the written consent of principal and indorsers;" and underneath this was indorsed by D, "And if so used shall be absolutely void, D, indorser." It was held that the note was not a negotiable note, but that it was transferable, and that D, having named himself at the foot of the note as an indorser, had a right to show in what character he had actually signed; he could not be a regular indorser, and could not be entitled to notice of nonpayment, as the paper was not negotiable, but "he may show that he signed in any of several characters (if there be several) which the nature of his obligation will permit. We have shown that his obligation was either that of a maker or a guarantor. Whether it was one or the other might be shown by him by evidence aliunde." *Herrick v. Edwards* (1904) 106 Mo. App. 633, 81 S. W. 466.

Vermont.

In Vermont the matter seems in some doubt. In the *Barrows Case* (Vt.) infra, we are not informed whether the court considered the note negotiable or not, nor does it appear in the *Sanford Case* (Vt.) infra, whether the court meant in its opinion to refer both to notes non-negotiable and negotiable.

In *Barrows v. Lane* (1832) 5 Vt. 161, 26 Am. Dec. 293, the plaintiff brought an action on a promissory note payable to him in good neat cattle or in grain, signed by one defendant and indorsed in blank by the other. It was admitted that the indorsement was before the de-

livery of the note, but there was dispute as to the contract, and it was held by the court that the defendant indorser had a right to explain the circumstances of his indorsement, he claiming that his contract was that he was not to be holden until the maker had first been prosecuted. The court does not comment on the form of the note, but one of the counsel observed that, since this court had decided that instruments of this description are to be treated as promissory notes, the fact that the note is payable in specific articles can make no difference. The decision of the court below, which was reversed, rejected the indorser's testimony and held that he was liable as a joint promisor.

In *Sanford v. Norton* (1842) 14 Vt. 228, in the case of a negotiable note, the court said: "Although a person other than the payee, putting his name upon the back of a promissory note in blank, may always, in this state, be prima facie holden as a joint promisor, if this is done before the delivery of the note, or, what is equivalent, is done in consummation of a contract made at the time of delivery, still this presumption may always be repelled by proof. In such case it may always be shown by parol what was the precise nature of the contract assumed by making such blank indorsement. *Barrows v. Lane* (Vt.) supra; *Knapp v. Parker* (1834) 6 Vt. 642; *Flint v. Day* (1837) 9 Vt. 345."

V. Sealed notes.

In general, that the instrument irregularly indorsed before delivery is under seal does not alter the case. *New York Security & T. Co. v. Storm* (1894) 81 Hun, 33, 30 N. Y. Supp. 605, supra, IV.; *D. M. Osborne & Co. v. Hubbard* (1891) 20 Or. 318, 11 L.R.A. 833, 25 Pac. 1021, supra, III.; *Kearnes v. Montgomery* (1870) 4 W. Va. 29, supra, IV. See also South Carolina cases referred to infra, subsequently to *Tucker v. English*.

Compare Maryland cases, infra.

In *Tucker v. English* (1844) 2 Speers, L. (S. C.) 673, the court affirmed the decision of the trial court nonsuiting the plaintiff, who attempted to charge the defendant as maker of a promissory note, where a third person made a single bond or bill under seal payable to plaintiff or order, and the defendant wrote his name upon the back of it. "The presiding judge was of opinion that this did not make the defendant the maker of a note on hand. For the paper on which he wrote his name was not a note. It was a bond without condition, and is there-

fore called a single bill, and if the defendant's name on the back of it had any legal effect, it could only be as the drawer of a bill of exchange, by appointing the bond to be paid to another. But he could not be considered as promising to pay the contents, according to the tenor and effect. For in law the instrument was not regarded as a promise, but as an obligation to pay."

The later South Carolina cases have taken a different view.

In *Cockrell v. Milling* (1847) 1 Strobb. L. (S. C.) 444, A made a sealed note to the order of B, which was indorsed by C before delivery to give the maker credit with the payee for furniture; it was held that the court properly instructed the jury that they might find the indorser liable as the drawer of the note, which they did. The court seemed to think, on the whole, that it made no difference that the document was a sealed document, and that in every other particular the case was the same as *Stoney v. Beaubien* (1842) 2 McMull. L. (S. C.) 313, 39 Am. Dec. 128, where the note was negotiable. The court said of the case of *Tucker v. English* (S. C.) supra: "In the very short report of that case, it is said, 'A third person made a single bill under seal payable to the plaintiff or order; the defendant wrote his name on the back.' If this was all the evidence, then the opinion of the presiding judge, which was affirmed in this court, that it did not make the defendant a drawer of a note of hand, was unquestionably correct. If a stranger to the contract wrote his name on the back of a single bill, without any consideration which might charge him as a guarantor, he would incur no liability. He could not be charged as drawer, for he was no party to the original contract. But the case of *Tucker v. English* is very different from this case. Here *Milling* was a party to the original contract. His name was on the note before it was delivered. It was put there as the security which the plaintiff required as a condition precedent to the delivery of the furniture. I do not think, therefore, there is anything in *Tucker v. English* which is inconsistent with the direction given to the jury on the circuit."

Watson v. Barr (1892) 37 S. C. 463, 16 S. E. 188, was an action on a sealed note by B to A or bearer, C and D signing across the back of the note. It was held that a complaint by the payee alleging that the three defendants, the maker and the two indorsers, delivered the note to him, which when delivered was payable

to him, and that the defendants owed the debt, was not demurrable. The court said: "Of course, the only difficulty suggested is that the note being unnegotiable, being a sealed note of the principal obligor, W. F. Barr, that, as to the two Browns, not being under seal as to them, and their names being written across the back of the note, the plaintiff could not recover against them as makers. Now, the complaint alleges that the three defendants delivered the note to him; when delivered, it was payable to the plaintiff, and that the defendants owe the debt. This is not the case of the payee or obligee of a sealed note merely signing his name on the back when he transferred the note, as was the case of Tryon v. De Hay (1853) 7 Rich. L. (S. C.) 12; nor such indorser after maturity of sealed note, as was the case of Garrett v. Butler (1847) 2 Strobb. L. (S. C.) 193. But it belongs to that class of cases that hold that, where a third person writes his name anywhere on the note to evidence that he holds himself out as responsible to the payee or bearer for the payment of the note, he is, and should be, treated as a maker of the note."

In Maryland the matter is obscure or doubtful.

Gist v. Drakely (1844) 2 Gill (Md.) 330, 41 Am. Dec. 426, arose upon two sealed notes of a corporation signed by the president to the order of the president's individual name, and indorsed by him and the defendant before delivery, and the defendant had actually received value for them from the corporation in the shape of a large credit upon claims which it had against him. Before offering the same in evidence plaintiff filled out over the indorsements these words: "For value received, we jointly and severally promise Thomas Drakely to pay him the amount of the within bill obligatory, should the Eutaw Company, the obligee therein named, make default in the payment thereof, when the same shall become due." It was held that the defendant was made absolutely liable to pay the note, and that the indorsement was filled as the plaintiff was entitled to fill it, and that the intention of the parties must be looked to.

In Culbertson v. Smith (1879) 52 Md. 628, 36 Am. Rep. 384, where there was an indorsement of a single bill made long after delivery, the court, in holding that the effort to hold the indorser was against the statute of frauds, stated that in the Gist Case the indorsements were made under special arrangements before delivery.

L.R.A. 1916D.

In Seigman v. Hoffacker (1881) 57 Md. 321, a third person indorsed a single bill under seal before delivery, and the pleadings in the suit against such indorser did not contain any allegation as to his entering upon any particular undertaking by reason of such indorsement, and it may be that the omission of such an allegation, or evidence to such effect, cost the plaintiff his case. The court stated that the action could not be maintained as a suit on the single bill, for, whatever might have been the effect of the defendant's indorsement, it did not make him a drawer because his engagement was not under seal. "In such case the right of action is confined to the distinct and collateral contract which the indorsement creates." And after referring to the doctrine that the indorser of a promissory note before delivery makes himself liable as a drawer, the court continued: "In the interest of trade, and to protect bona fide holders of such promissory notes, the law makes the 'conclusive presumption' against such indorser that he intended to be held as a drawer, and so holds him. Where the instrument indorsed is a sealed bill, a different rule applies, and the party so indorsing is presumed to enter into a different kind of engagement. Gist v. Drakely (Md.) supra."

VI. Miscellaneous.

In Oyler v. McMurray (1893) 7 Ind. App. 645, 34 N. E. 1004, where a third party indorsed the note, it was held that while the last clause of the note made it non-negotiable, more than one extension without notice to the indorser would discharge him. The last clause of the note read: "The drawers and indorsers severally waive presentment for payment, protest and notice of protest, and non-payment of this note, and all defenses on the ground of any extension of the time of its payment that may be given by the holder or holders to them or either of them."

In Quesenberry v. Woods (1908) 64 W. Va. 5, 60 S. E. 881, where it is not stated whether the note was negotiable or not, it was held that an allegation that A made his note to the order of B, and at the time of its delivery to B it was indorsed by C and D, was not sufficient to charge the indorsers as makers, but the fact that the maker and the irregular indorsers were sued jointly in an action of debt was enough to show that the plaintiff had elected to hold such indorsers as promisors.

In Robertson v. Davis (1897) 27 Can.

S. C. 571, A made a promissory note to B and C, which had across its face the words, "Not negotiable and given as security," and which was indorsed by D, and the payee sued the maker and indorser jointly and severally for the full amount. It was proved that the indorsement was made to give the maker of the note credit with the payee, who was to make sales of certain property and credit the amount to the maker, and no statement of their transactions, of which there had been several, had been made to the indorser, and it was held that the cause of action proved was different from that declared on, and that the plaintiff could not recover.

In *Nelson v. Dubois* (1816) 13 Johns. (N. Y.) 175, the plaintiff sued the defendant on a note made by a third party

to the plaintiff or bearer and indorsed by the defendant, and offered to show that the indorsement was made before delivery upon an agreement on the part of the defendant that he would become security for the maker of the note, and it was held that it was error to refuse to admit this testimony, that the case was not within the statute of frauds, and that the plaintiff had a right to fill in above the indorsement the actual agreement that had been made. It was claimed by the plaintiff's counsel that it made no difference whether the note was negotiable or not. The headnote puts the case of a promissory note payable to bearer, or not negotiable, but the opinion does not seem to rest the case particularly on any non-negotiability of the note.

B. B. B.

ARKANSAS SUPREME COURT.

NATIONAL UNION FIRE INSURANCE COMPANY, Appt.,

v.

SCHOOL DISTRICT NO. 55.

(— Ark. —, 182 S. W. 547.)

Insurance — failure to forward application — liability.

An insurance company is not liable for the negligence of its agent in failing to forward an application accompanied by payment of premium, so that the property is destroyed without insurance, where he had authority only to solicit applications, deliver policies, and receipt for initial premiums, and the application stipulated that there should be no contract until the issuance and delivery of the policy.

For other cases, see Insurance, I. d., in Dig. 1-52 N. S.

(January 31, 1916.)

APPEAL by defendant from a judgment of the Circuit Court for Clay County in plaintiff's favor in an action brought to recover for loss sustained by fire, upon an alleged contract for a fire insurance policy. Reversed.

Note.—The court in *NATIONAL UNION F. Ins. Co. v. SCHOOL DIST.* denied the plaintiff's right to recover either upon the theory that a contract of insurance had been consummated, or upon the theory of an action of tort for negligent delay in acting on the application. The question of effect of delay in passing upon an application is covered in the annotation to *Northwestern Mut. L. Ins. Co. v. Neafus*, 36 L.R.A.(N.S.) 1211, and *Dorman v. Connecticut F. Ins. Co.* 51 L.R.A.(N.S.) 873, which deal specifically with the question whether the mere delay in passing upon an application can be construed as an acceptance, and bring a contract of insurance into existence.

Statement by Wood, J.:

On the 17th of February, 1913, R. H. McDermott, acting for the directors of school district No. 55 of Clay County, made a written application to the National Union Fire Insurance Company for a policy of insurance, covering the school building and its contents. The application, together with \$20 in payment of the premium, was delivered to T. A. Wynne, soliciting agent of the company. The policy of insurance applied for was never delivered, and on the 6th of January, 1914, the building and contents were totally destroyed by fire. This suit was instituted on the 8th of October by the appellee against appellant to recover damages on account of the loss. The undisputed facts are as follows:

T. A. Wynne was a soliciting agent of the appellant, having authority to take applications, receive premiums, and to forward applications for policies to the company or its general agent for acceptance or rejection. On February 17, 1913, appellee made application to Wynne for a policy of insurance on its school building and contents, to take effect April 2, 1913. Wynne received the first premium, but did not transmit the application to the insurance company, and the policy was never issued.

fically with the question whether the mere delay in passing upon an application can be construed as an acceptance, and bring a contract of insurance into existence.

For the cases dealing with the liability of an insurer on the ground of tort for negligent delay in passing upon or issuing a policy until after loss, see annotation to *Boyer v. State Farmers' Mut. Hail Ins. Co.* 40 L.R.A.(N.S.) 164, and the later case of *Duffy v. Bankers' Life Asso.* 46 L.R.A.(N.S.) 25.

The insurance company was, at the time, writing insurance on property of the character mentioned, and Wynne had taken applications and the company had accepted same and issued policies on risks of the same character. The application which the appellee signed contains information concerning the ownership, the value of the property, its occupancy, and such matters. It contained also this stipulation: "It is understood and agreed that this application shall not be construed as a contract of insurance against said company until the same shall be approved by the officers of said company, which approval shall be evidenced by the issue and delivery of its policy."

The court, in effect, told the jury in its instructions, over appellant's objection, that if Wynne was the agent of the appellant, and had authority as such to receive applications for insurance, and to forward same to the company, and receive the payment of premiums thereon, that if he neglected for an unreasonable length of time to forward the application to the company, and if the company would have issued its policy if the application had been forwarded, and if they found that, by reason of such neglect on the part of the appellant's agent, the appellee suffered the loss complained of, they should find in its favor.

The appellant asked the court to instruct the jury to return a verdict in its favor, which the court refused, to which ruling of the court the appellant dully excepted. The appellant also asked the court, in effect, to tell the jury that the taking of the application for the insurance and the receipt of the insurance premium would not constitute a contract of insurance between the school district and the company, that Wynne, being a mere soliciting agent, had no power to bind the company to the issuance of an insurance policy, and that it was the duty of the appellee to ascertain the scope of his authority before paying the premium; and if it failed to do so, the loss was at its peril.

The jury returned a verdict in favor of the appellee for the amount claimed, to wit, \$500. A judgment was entered against the appellant in favor of the appellee, and this appeal has been duly prosecuted.

Messrs. Spence & Dudley, for appellant:

Even though the premium paid may still be in the hands of the soliciting agent at the time the loss against which the insurance proposed to protect occurred, the insurer is not liable unless he has actually accepted the application.

Vance, Ins. p. 161; 19 Cyc. 600; Alabama Gold L. Ins. Co. v. Mayes, 61 Ala. 163; L.R.A.1916D.

Atkinson v. Hawkeye Ins. Co. 71 Iowa, 340, 32 N. W. 371.

Mere delay in passing upon an application for insurance cannot be construed into acceptance thereof by the insurer.

Kohen v. Mutual Reserve Fund Life Asso. 28 Fed. 708; Misselhorn v. Mutual Reserve Fund Life Asso. 30 Fed. 545; Alabama Gold L. Ins. Co. v. Mayes, 61 Ala. 163; New York L. Ins. Co. v. Babcock, 104 Ga. 67, 42 L.R.A. 88, 60 Am. St. Rep. 134, 30 S. E. 273; Home Forum Benefit Order v. Jones, 5 Okla. 598, 50 Pac. 165; St. Paul. F. & M. Ins. Co. v. Kelley, 2 Neb. (Unof.) 720, 89 N. W. 997; Mutual L. Ins. Co. v. Young, 23 Wall. 85, 23 L. ed. 152.

Had the application, signed by the directors of appellee, been transmitted to appellant and accepted, it would not have been bound until the policy was issued.

People's Mut. L. Acci. & Health Ins. Co. v. Powell, 98 Ark. 166, 135 S. W. 823; American Ins. Co. v. Hornbarger, 85 Ark. 337, 108 S. W. 213.

One dealing with an agent apparently having limited authority is bound to inquire as to and take notice of the limitations imposed by the company on his authority to act for it.

22 Cyc. 1434; United States Bedding Co. v. Andre, 105 Ark. 111, 41 L.R.A.(N.S.) 1019, 150 S. W. 413, Ann. Cas. 1914D, 800; Jonesboro, L. C. & E. R. Co. v. McClelland, 104 Ark. 150, 148 S. W. 523.

Wynne, the soliciting agent who took the application, alone, under the proof, is liable to appellee for the premium which he collected.

Mutual L. Ins. Co. v. Reynolds, 81 Ark. 202, 98 S. W. 963.

Wood, J., delivered the opinion of the court:

The court correctly instructed the jury that "there was no contract of insurance in this case." The only issue presented by this appeal is whether or not an insurance company is liable for the negligence of its agent in failing to send to the company an application for insurance, where the only authority of the agent is to solicit applications for insurance, to deliver policies when issued, and to receive and receipt for initial premiums.

When an agent acts within the scope of his authority, the principal is bound. St. Louis & S. F. R. Co. v. Ryan, 56 Ark. 247, 19 S. W. 839. Now in the written application of appellee for a policy of insurance it is stated: "It is understood and agreed that this application shall not be construed as a contract of insurance against said company until same shall be approved by the officers of said company, which ap-

proval shall be evidenced by the issuance and delivery of its policy."

Under the express terms of this proposal on the part of appellee for insurance it is stipulated that there shall be no contract of insurance until the company shall approve the application, and evidence its approval by the issuance of a policy. Under this stipulation of appellee, even if the soliciting agent had promptly forwarded the application to the company, the latter was under no legal obligation to issue the policy to appellee. The authority of the soliciting agent to receive and forward the application, if strictly followed, did not impose upon the appellant any legal duty.

If the application had been promptly transmitted and received, appellant would not have been liable until the policy was actually issued. *Cooksey v. Mutual L. Ins. Co.* 73 Ark. 117, 108 Am. St. Rep. 26, 83 S. W. 317; *People's Mut. L. Acci. & Health Ins. Co. v. Powell*, 98 Ark. 166, 135 S. W. 823. Negligence and liability therefor cannot be predicated upon a state of facts that do not impose any legal duty.

The better reason and the decided weight of authority supports the doctrine that

mere delay is passing upon an application for insurance cannot be construed as accepting such application and consenting to be bound for the insurance sought by it, nor can a cause of action for negligence be grounded upon such delay. *Alabama Gold L. Ins. Co. v. Mayes*, 61 Ala. 163, and other cases cited in appellant's brief.

The soliciting agent, with only the limited authority shown by the undisputed evidence, could not bind the company by stating that a policy would be issued. *American Ins. Co. v. Hornbarger*, 85 Ark. 337, 108 S. W. 213. Appellee could not assume or presume that the special agent, with only limited authority, could bind his principal by any statements he made concerning his own authority. Appellee must be held, under the undisputed evidence, to have known the extent and nature of the authority of appellant's special agent. *United States Bedding Co. v. Andre*, 105 Ark. 111, 41 L.R.A. (N.S.) 1019, 150 S. W. 413, Ann. Cas. 1914D, 800.

It follows that appellee, under the undisputed evidence, had no cause of action, and the trial court erred in not so declaring.

The judgment is therefore reversed, and the cause is dismissed.

FLORIDA SUPREME COURT.

AGNES R. SPELLMAN, Impleaded, etc.,
Appt.,
v.
H. L. BEEMAN.

(— Fla. —, 70 So. 589.)

Mortgage — failure to record — right of junior mortgagee.

1. Under § 2496 of the General Statutes of 1906, a subsequent mortgagee of personal property occupies the same position with reference to a prior unrecorded mortgage upon the chattel as a subsequent purchaser. *For other cases, see Chattel Mortgage, III. in Dig. 1-52 N. S.*

Same — possession by mortgagee.

2. Section 2496, Gen. Stat. 1906, makes possession by the mortgagee of mortgaged personal property essential to the validity of the mortgage as to creditors and subsequent purchasers for a valuable consideration and without notice unless it be recorded.

For other cases, see Chattel Mortgage, II. d, in Dig. 1-52 N. S.

Headnotes by ELLIS, J.

Note. — As to effect of filing chattel mortgage after giving of subsequent mortgage, but before filing of the same, see annotation following this case, post, 244. L.R.A.1916D.

Same — priority of record.

3. A chattel mortgage once void as to a subsequent mortgagee for a valuable consideration and without notice of the prior unrecorded mortgage is not restored to validity, as against the second mortgage, in the absence of fraud on the second mortgagee's part, by filing it for record before the second mortgage is filed for record.

For other cases, see Chattel Mortgage, III. in Dig. 1-52 N. S.

(December 21, 1915.)

APPEAL by defendant Spellman from a decree of the Circuit Court for Orange County in complainant's favor in an action brought to foreclose a mortgage. Affirmed.

The facts are stated in the opinion.

Messrs. Dickinson & Dickinson, for appellant:

It is the duty of the person seeking to bring himself within the recording acts to see that his paper is recorded in the right place.

Grand Rapids Nat. Bank v. Ford, 143 Mich. 402, 114 Am. St. Rep. 668, 107 N. W. 76, 8 Ann. Cas. 102; *Parsons v. Lent*, 34 N. J. Eq. 67; *Thompson v. Mack*, Harr. Ch. (Mich.) 150; *Snow v. Lake*, 20 Fla. 656, 51 Am. Rep. 625.

If plaintiff's mortgage was never recorded,

the recording could not relate back to the time of filing.

Sawyer v. Adams, 8 Vt. 172, 30 Am. Dec. 459.

In order for plaintiff, whose mortgage was subsequent to the mortgage of defendant, to have a priority over her, his mortgage should have been recorded according to law.

1 Jones, Mortg. § 607.

The return of plaintiff's mortgage to him after being transcribed in Miscellaneous Book was equivalent to withdrawing the mortgage from the files.

2 Devlin, Deeds, 706; *Turman v. Bell*, 54 Ark. 273, 28 Am. St. Rep. 35, 15 S. W. 886; *Johnson v. Burden*, 40 Vt. 567, 94 Am. Dec. 436.

A recording in the wrong book is not constructive notice, and does not entitle the holder of a second mortgage to priority, and it is the duty of the holder of a mortgage to see that it is recorded in the proper book.

Grand Rapids Nat. Bank v. Ford, 143 Mich. 402, 114 Am. St. Rep. 668, 107 N. W. 76, 8 Ann. Cas. 102; *Parsons v. Lent*, 34 N. J. Eq. 67; *Thompson v. Mack*, Harr. Ch. (Mich.) 150; *Snow v. Lake*, 20 Fla. 656, 51 Am. Rep. 625.

To record a paper is to transcribe it into the public records, in a book kept for that purpose, by or under the superintendency of the officer appointed for that purpose.

Sawyer v. Adams, supra.

Mortgages on real and personal property are required to be recorded in mortgage books.

Ivey v. Dawley, 50 Fla. 537, 39 So. 498, 7 Ann. Cas. 354; *Parsons v. Lent*, 34 N. J. Eq. 67; *Thompson v. Mack*, Harr. Ch. (Mich.) 150.

Messrs. Davis & Giles, for appellee:

Immediately upon the delivery of the Beeman mortgage to the clerk, with instructions to record the same in accordance with the statute, the same was deemed recorded, and notice was immediately given all those concerned of the existence of the mortgage, and failure of the clerk to properly perform his duty can in no wise affect the notice that was given upon the filing of the instrument for record.

27 Cyc. 1159; *Davis v. Whitaker*, 114 N. C. 279, 41 Am. St. Rep. 793, 19 S. E. 699; *Jones, Mortg.* § 553; *Parker v. Scott*, 64 N. C. 118; *Deming v. Miles*, 35 Neb. 739, 37 Am. St. Rep. 464, 53 N. W. 665; *Mims v. Mims*, 35 Ala. 23; *Heflin v. Slay*, 78 Ala. 180; *Leslie v. Hinson*, 83 Ala. 268, 3 So. 443; *Oats v. Walls*, 28 Ark. 244; *Case v. Hargadine*, 43 Ark. 144; *Hine v. Robbins*, 8 Conn. 347; *Booth v. Barnum*, 9 Conn. 289, 23 Am. Dec. 339; *Merrick v. Wallace*, 19 Ill. 496; *Poplin v. Mundell*, 27 Kan. 159; *Lee v. Birmingham*, 30 Kan. 316, 1 L.R.A.1916D.

Pac. 73; *Payne v. Pavey*, 29 La. Ann. 116; *Gillespie v. Rogers*, 146 Mass. 612, 16 N. E. 711; *Mutual L. Ins. Co. v. Dake*, 87 N. Y. 264; *Shebel v. Bryden*, 114 Pa. 147, 6 Atl. 905; *Swepton v. Exchange & D. Bank*, 9 Lea, 823; *Bigelow v. Topliff*, 25 Vt. 282, 60 Am. Dec. 264.

When plaintiff filed his mortgage for record with the clerk, with instructions to record the same, he had done all that was necessary to be done; and whatever the clerk might do thereafter in regard to the instrument could not affect the lien of his mortgage, acquired by the filing of same for record.

6 Cyc. 1086; *Hook v. Fenner*, 36 Am. St. Rep. 277, and note, 18 Colo. 283, 32 Pac. 614; *Beebe v. Morrell*, 15 Am. St. Rep. 288, and note, 76 Mich. 114, 42 N. W. 1119; *Mangold v. Barlow*, 61 Miss. 596, 48 Am. Rep. 84; *Wood's Appeal*, 82 Pa. 116; *Throckmorton v. Price*, 28 Tex. 609, 91 Am. Dec. 334.

Ellis, J., delivered the opinion of the court:

This is an appeal from a decree of foreclosure of a chattel mortgage. W. M. Brittain, on July 7, 1913, was indebted to H. L. Beeman in the sum of \$616.53, and, being so indebted, executed and delivered to Beeman his three promissory notes for amounts aggregating that sum. In order to secure the payment of the notes Brittain executed and delivered to Beeman, on July 26, 1913, a mortgage on a certain automobile. The mortgage was filed for record in the office of the clerk of the circuit court for Orange county on September 26, 1913, and the mortgage was recorded in Miscellaneous Book 23, page 236, of the public records of Orange county. The record of the mortgage was indexed in the index of mortgages kept by the clerk in his office for that purpose, "being the same book in which all mortgages filed in his office for record are indexed." After recording the mortgage the clerk returned it to Beeman, who kept it in his possession until he turned it over to his attorney for foreclosure. It was never recorded in any other book in the office of the clerk of the circuit court for Orange county.

On the 14th day of May, 1913, Brittain was indebted to Agnes R. Spellman in the sum of \$800, evidenced by his promissory note to her of that date. To secure the payment of that note he executed and delivered to Agnes R. Spellman a mortgage on the same automobile above mentioned. The mortgage was filed for record in the office of the clerk of the circuit court for Orange county on the 5th day of June, 1914, and was recorded in Miscellaneous Book 23,

page 637, of the public records of Orange county. After it was recorded it was returned to Agnes R. Spellman by the clerk, and she again filed it for record on the 21st day of September, 1914, and it was by the clerk recorded in Mortgage Book No. 27, page 554, of the public records of Orange county. When the mortgage was first filed and recorded, it was "duly indexed in the index of mortgages," and when filed the second time and recorded in the mortgage book, it was "indexed in the index of mortgages of Orange county." "Neither H. L. Beeman nor Agnes R. Spellman knew of the other's mortgage at the time of making and executing the respective mortgages, nor had any knowledge thereof, or any knowledge that the other had such mortgage." Nor was the automobile delivered to either Agnes R. Spellman or H. L. Beeman, or any one for them, nor had either of them had possession of it under their respective mortgages.

The foregoing facts were by stipulation between the solicitors for Agnes R. Spellman and H. L. Beeman agreed upon and submitted to the court upon the final hearing.

On the 8th day of October, 1914, H. L. Beeman filed his bill in chancery to foreclose his mortgage against W. M. Brittain, making Agnes R. Spellman party defendant. Copies of the notes and the original mortgage were attached to the bill as exhibits.

Agnes R. Spellman answered the bill, admitting the execution of the mortgage from Brittain to Beeman and its record on the 26th day of September, 1913, in Miscellaneous Book 23, page 236, and setting up her mortgage from Brittain, dated the 15th day of May, 1913, to secure a debt which he owed to her of \$800, as evidenced by his promissory note to her for that amount, and the record of the mortgage as above recited. The answer denied that the complainant's mortgage from Brittain had ever been properly recorded. That after being recorded in Miscellaneous Book as stated, it was returned to Beeman and never refiled or "recorded in any proper book, namely, Book of Mortgages," and denied that her mortgage was a secondary lien to that of the complainant.

Brittain filed no plea, answer, or demurrer, and an order taking the bill as confessed was duly entered against him. The complainant filed a replication to the answer of Agnes R. Spellman, and the cause was heard upon the bill of complaint, answer of Agnes R. Spellman, replication, and the stipulation as to the facts above mentioned.

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The chancellor rendered his decree against the defendants, ordering them to pay to the complainant the sum of \$695.86 with legal interest from the date of the decree, together with \$75 solicitors' fees and costs within three days, and, in default thereof, that the automobile be sold at public sale to the highest bidder for cash after notice, appointing a master to conduct the sale, and directing him to pay the complainant from the proceeds of the sale the amount decreed to be due, with solicitors' fees and costs, and to bring the surplus money, if any, into court to abide its further order, and that the defendants be barred and foreclosed from all equity of redemption in and to the mortgaged property. From this decree Agnes R. Spellman appealed to this court, and assigned eight errors.

The first and second assignments of error present the question of the superiority of the Beeman mortgage lien over that held by Agnes R. Spellman.

W. M. Brittain's debt to Agnes R. Spellman antedated his debt to H. L. Beeman by nearly two months. Brittain's mortgage to Agnes R. Spellman was executed two months and eleven days prior to the execution of his mortgage to Beeman. Beeman filed his mortgage for record eight months before Agnes R. Spellman filed hers for record. In the meantime neither had actual knowledge of the other's mortgage upon the automobile. Both mortgages were recorded in Miscellaneous Book 23 of the public records of Orange County; Beeman's mortgage being recorded on page 236, and Agnes R. Spellman's on page 637. They were both indexed in the index of mortgages kept in the clerk's office for that purpose, and being the same book in which all mortgages that were filed in that office for record were indexed.

Beeman's mortgage was returned to him after being recorded in the Miscellaneous Book, and he never had it refiled for another record. Agnes R. Spellman, however, had her mortgage refiled on September 21, 1914, and recorded in Mortgage Book No. 27, on page 554, and it was again indexed.

Section 2496, General Statutes of 1906, provides that "no chattel mortgage shall be valid or effectual against creditors or subsequent purchasers for a valuable consideration and without notice unless it be recorded, or unless the property included in it be delivered to the mortgagee and continue to remain truly and bona fide in his possession."

Section 2488, General Statutes of 1906, provides that "all instruments relating to real and personal property which are authorized or required to be recorded shall

be deemed to be recorded from the time the same are filed with the officer whose duty it is to record the same."

The statute relating to the duties of the clerk of the circuit court as recorder of deeds provides, among other things, that "he shall be, in the county in which he is clerk, the recorder of deeds, and of all other papers not pertaining to the circuit court which he may be required by law to record. For the purpose of such recording, he shall keep: . . . A record of mortgages, in which he shall record all mortgages on real or personal property and powers of attorney embracing a power to execute mortgages which may be in form entitled to record. . . . Indexes, alphabetical, direct and inverse, to all the foregoing books." Gen. Stat. 1906, § 1832.

Prior to the adoption of the Revised Statutes in 1892, there was no statute of this state requiring the clerk to record chattel mortgages in any specifically designated book in order to give constructive notice of their existence. So that the record of a chattel mortgage in Miscellaneous Record Book was a valid record of it, and gave constructive notice of its existence, assuming that its execution had been properly acknowledged to entitle it to record. See *Ivey v. Dawley*, 50 Fla. 537, 39 So. 498, 7 Ann. Cas. 354. In that case, however, § 2488 of the General Statutes, which was § 1977 of the Revised Statutes, was not construed and its effect was not considered.

This mortgage from Brittain to Beeman, which was attached to the bill of complaint as Exhibit D, and made a part of the bill, bore the following indorsement, omitting the names of the parties, character and date of the instrument: "Filed for record this 26th day of Sept. 1913, and recorded in Misc. Book 23, page 236, of the Public Records of Orange County, Florida, Record verified. B. M. Robinson, Clerk, by C. A. Vivian, D. C."

It is clear that at the time Beeman obtained his mortgage from Brittain, the mortgage held by Agnes R. Spellman from Brittain was not valid or effectual against Beeman, because the Spellman mortgage had not been recorded nor filed for record. Gen. Stat. 1906, §§ 2496, 2488. A subsequent mortgagee is on the same footing as a subsequent purchaser under § 2496 of the General Statutes. See *Manny v. Woods*, 33 Iowa, 265; *Plaisted v. Holmes*, 58 N. H. 619; 5 Am. & Eng. Enc. Law, 2d ed. 1014; *Van Winkle v. Crowell*, 146 U. S. 42, 36 L. ed. 880, 13 Sup. Ct. Rep. 18; *Sheets v. Poff*, 123 Iowa, 714, 99 N. W. 573; *Jones, Chat. Mortg.* 5th ed. § 493.

A chattel mortgage is only a specific lien upon the property described in the L.R.A.1916D.

mortgage, and is not a conveyance to the legal title or right of possession, yet § 2496 of the General Statutes makes possession by the mortgagee of the mortgaged property essential to the validity of the mortgage as against creditors and subsequent purchasers for a valuable consideration and without notice unless it be recorded.

The record of the mortgage, therefore, is a substitute for the possession of the property by the mortgagee. 6 Cyc. 1097; 5 R. C. L. "Chattel Mortgages," § 35; *Cardenas v. Miller*, 108 Cal. 250, 49 Am. St. Rep. 84, 39 Pac. 783, 41 Pac. 472; *Second Nat. Bank v. Gilbert*, 174 Ill. 485, 66 Am. St. Rep. 306, 51 N. E. 584; *Moors v. Reading*, 167 Mass. 322, 57 Am. St. Rep. 460, 45 N. E. 760; *Jones, Chat. Mortg.* 5th ed. §§ 176-178; *Cook v. Mann*, 6 Colo. 21.

Under the common law, possession of property by the mortgagee under a chattel mortgage was necessary to its validity. The mortgagee acquired title to the property, subject to a defeasance. While, under our statute, it is a mere lien, yet the recording laws require possession by the mortgagee, or record of the instrument, as essential to good faith and protection of creditors and subsequent purchasers against fraud. In some states failure to take possession of the property by the mortgagee, or failure to record the instrument, is made evidence of fraud as to creditors or subsequent purchasers, subject to rebuttal by evidence of good faith; but in this state our statute renders such failure by the mortgagee to take possession of the property or to record the instrument conclusive of its invalidity as to creditors and subsequent purchasers for a valuable consideration and without notice. If it were not so, the statute requiring the record of the mortgage or possession of the property by the mortgagee could be utilized to bring about successfully the fraud which it was designed to prevent,—the setting up of secret mortgages against persons dealing with the mortgagor on the faith that his property was not encumbered. "This statute was designed to require publicity to be given to chattel mortgages for the protection of persons mentioned therein."

The Spellman mortgage, being void as to Beeman, continued to be void as to him, and the subsequent taking of possession by Agnes R. Spellman of the mortgaged property, or the record of her mortgage after Beeman had, for a valuable consideration and without notice of her mortgage, acquired his, would not restore the validity of her mortgage as against him. See *Karat v. Gane*, 136 N. Y. 316, 32 N. E. 1073; *Stephens v. Perrine*, 143 N. Y. 476, 39 N. E. 11; *Keet & R. Dry Goods Co. v. Brown*,

73 Mo. App. 245; *Williams v. Kirk*, 68 Mo. App. 457; *Landis v. McDonald*, 88 Mo. App. 335; *Sidener v. Bible*, 43 Ind. 230; *Williamson v. New Jersey Southern R. Co.* 28 N. J. Eq. 277; *Brown v. Harris*, 67 N. J. L. 207, 50 Atl. 689; *Cutler v. Steele*, 85 Mich. 627, 48 N. W. 631.

In the case of *Karst v. Gane*, 136 N. Y. 324, 32 N. E. 1073, Chief Justice Andrews, in speaking for the court upon the construction of a statute similar to ours, said: "The filing stands as a substitute for immediate delivery and an actual and continued change of possession of the property, and avoids the conclusive presumption of fraud which would otherwise attach to the instrument under the act of 1833 in the absence of delivery and a change of possession of the mortgaged property. Some time will necessarily elapse between the execution and filing of the mortgage. Where it appears that due diligence was exercised in filing the mortgage, and there was no unnecessary delay and no actual intervening lien has been acquired, there would seem to be no ground upon which subsequent lien holders could question the validity of the mortgage under the statute of 1833. The filing under these circumstances would be immediate, and make the mortgage valid as against liens subsequently acquired. But a delay of six weeks in filing the mortgage is not a compliance with the act. There were no circumstances rendering so long a delay necessary. There can be no doubt that if, during the delay in filing, a lien had been acquired by a creditor, the mortgage as to such lien, would be void. The mortgage was, however, filed before the plaintiff's judgments and executions were obtained. This did not restore the validity of the mortgage as against creditors whose debts were in existence during the default

in filing the mortgage, although judgments or executions were not obtained until after the mortgage was in fact filed."

It is unnecessary to consider the effect of the record of Beeman's mortgage in the Miscellaneous Record Book, nor the subsequent record of the Spellman mortgage in the mortgage record, because in the view we have of the case the failure of Beeman to record his mortgage did not restore to validity the mortgage of Agnes R. Spellman, who, by her conduct in failing to record her mortgage, misled and deceived Beeman and induced credit to be extended to Britain. The purpose and policy of the act was to protect one thus misled to his injury just as if the first mortgagee and his mortgagor had contrived by a system of fraudulently concealing the security or lien to induce others to extend to the mortgagor credit upon the faith of his apparently unencumbered property.

It is not necessary under the statute that there be a fraudulent intent or purpose in keeping the mortgage off the record. The statute does not require such a condition. The statute conclusively presumes that the effect of keeping the mortgage off the record, and the failure of the mortgagee to take possession of the property, is to deceive and mislead the creditors and subsequent purchasers without notice and for a valuable consideration, and declares such mortgage to be invalid as against such creditors and subsequent purchasers.

In the view we have of the case, it is unnecessary to discuss the remaining assignments of error.

The decree of the chancellor is affirmed

Taylor, Ch. J., and Shackelford, Cockrell and Whitfield, JJ., concur.

Annotation—Effect of filing chattel mortgage after giving of subsequent mortgage, but before filing of the same.

As to effect of chattel mortgagee taking possession before any specific right or lien of creditors has attached, to cure original defect in mortgage, including failure to record, as against creditors, see note to *Martin v. Holloway*, 25 L.R.A. (N.S.) 110. And generally as to retroactive effect of filing chattel mortgages for record as against lien acquired on the same property after the execution of the mortgage, see the note to *Baker v. Smelser*, 33 L.R.A. 163.

The rule laid down in *SPELLMAN v. BREMAN*, ante, 240, namely, that a chattel mortgage once void as to a subsequent mortgagee because of failure to record L.R.A.1916D.

same prior to the giving of the second mortgage is not restored to validity as against such second mortgage by filing it for record before the second mortgage is recorded, is fully supported by the few additional cases which have passed upon that question.

Thus, in *Dickson v. Tyree* (1914) 92 Kan. 137, 139 Pac. 1026, where the statute provided that chattel mortgages unaccompanied by continued possession were absolutely void as against subsequent mortgagees in good faith, unless recorded, it was held that the fact that the holder of a chattel mortgage had same recorded after the giving of a sub-

sequent mortgage, but before same was recorded, did not validate the prior mortgage so as to give it priority. This decision was upon the theory that since the first mortgage had not been recorded and the mortgagee had not taken possession at the time the second mortgage was given, the former was, by the terms of the statute, rendered absolutely void, the second mortgagee having no knowledge of the existence of the prior mortgage, and the fact that the prior mortgage was recorded after the giving of the subsequent mortgage, but prior to the recording thereof, even though in ignorance of the existence of the second mortgage, was of no avail, as the mortgagee did so not as a creditor, and not as a purchaser or mortgagee who had become such subsequent to the date of the second mortgage, but merely as the holder of an unrecorded mortgage which, on such date, became of no legal effect as against the mortgage then given.

And under a similar statute a like conclusion was reached in *McCarthy v. North Texas Loan Co.* (1907) — *Tex. Civ. App.* —, 101 S. W. 835, the court saying that as the first mortgage had not been filed in accordance with the requirements of the statute at the time of the execution of the subsequent mortgage, the mortgagees therein became subsequent mortgagees in good faith, within the meaning of the statute; and that the fact that the prior mortgagee had placed his mortgage upon record before the second mortgagees filed their mortgage did not alter the case. And the same is true of *Tips v. Gay* (1912) — *Tex. Civ. App.* —, 146 S. W. 306, it being again said that it was immaterial that the prior mortgage was recorded prior to the recording of the second mortgage, as the rights of the mortgagees under the latter mortgage were fixed at the time the same was executed.

And a similar line of reasoning was employed in *De Courcey v. Collins* (1869) 21 N. J. Eq. 357, wherein it was held that a chattel mortgage filed after the giving of a subsequent mortgage, but before a valid filing thereof, was void as against same, under a statute providing that unrecorded mortgages shall be absolutely void as against subsequent mortgagees in good faith. In this case the first mortgagees contended that the priority of record should determine the priority of lien, but the court refuted this, saying: "But the infirmity of the case of the appellants [first mortgagees] is that they are not creditors obtaining a subsequent lien. They are prior mortgagees

who have failed to put their mortgage on record until the lien of the second mortgage attached. These rights, consequently, are specifically regulated by the statute. The clear direction of the act is that a prior mortgage, unregistered, shall be 'absolutely void as against' subsequent mortgagees in good faith. We are asked to say that this result shall not follow unless such subsequent mortgagee shall obtain a priority in the registration of his mortgage. But we cannot say this, because the statute says just the reverse. The statute prescribes but a single condition to give a second mortgage priority over the first unregistered mortgage; viz., bona fides in the party taking it; it is not, therefore, in the competence of the court to require the performance of a second condition, viz., that such second instrument must be put first upon the record. I altogether agree in the conclusion of the chancellor that, by the true construction of the act in question, the first mortgage was entirely void as against the second one, and that consequently the omission to record the latter according to law cannot affect the result of this controversy."

And in *Bank of Farmington v. Ellis* (1883) 30 Minn. 270, 15 N. W. 243, where the statute declared chattel mortgages void as against subsequent bona fide mortgages unless executed in good faith and filed as provided, it was held that a chattel mortgage first executed and first filed, but not filed until after the execution of a second mortgage, was postponed to the second mortgage, it being declared that in such case it is the same as if neither mortgage had been filed.

So, in *Williams v. White* (1910) 165 Ala. 336, 51 So. 559, it was expressly held, under a statutory provision that conveyances of personalty to secure debts are inoperative as against creditors and purchasers without notice until recorded, that a chattel mortgage taken after a prior mortgage, but before registration thereof, was entitled to priority over such prior mortgage, although recorded subsequent to the recording of the first mortgage, the court saying that notice dates from the filing for record, and that the subsequent recording of the mortgage first given had no effect upon the title previously acquired by the subsequent mortgage, although the latter was filed subsequently to the filing of the prior mortgage.

And a similar opinion is intimated in *Patrick v. Paulson* (1892) 34 Neb. 416, 51 N. W. 1029, in which a subsequent mortgage was denied priority upon the

ground that the mortgagees therein were not bona fide mortgagees, as required by statute.

But where, in addition to filing a first mortgage, possession has been delivered previous to the filing of a second mortgage executed prior to the filing of the first mortgage, it has been held that the first mortgage is entitled to priority. This conclusion was reached in *Garrison v. Street & H. Furniture & C. Co.* (1908) 21 Okla. 643, 129 Am. St. Rep. 799, 97 Pac. 978, the court expressly distinguishing the cases of *Bank of Farmington v. Ellis* (Minn.) and *De Courcey v. Collins* (N. J.) *supra*, upon the ground that the element of delivery of possession was not involved in those cases. In the Gar-

rison Case the first mortgage, which was held entitled to priority, was executed on November 29, 1904, and filed on December 31, 1904, and the subsequent mortgage was given on December 15, 1904, and filed on January 3, 1905, about four hours after possession had been delivered to the first mortgagee.

And where the statutes merely provide that a chattel mortgage shall only take effect from the date of registration, it has been held that a mortgage first given and first filed is entitled to priority over a subsequent mortgage given previous to the filing of the first mortgage, but filed subsequent to the filing of such mortgage. *Copeland v. Bennet* (1837) 10 Yerg. (Tenn.) 355. G. J. C.

KANSAS SUPREME COURT.

PAUL A. DESSER et al., Appts.,

v.

CITY OF WICHITA et al.

(96 Kan. 820, 153 Pac. 1194.)

Jitney bus — license fee — prohibition.

1. The provision of the ordinance in question, requiring those operating any self-propelled vehicles carrying passengers for hire to pay additional licenses of \$300 to \$400 before being permitted to solicit or receive passengers on the paved portions of certain designated streets, although practically prohibitive as to such designated places, is a valid exercise of municipal control.

For other cases, see License, II. c, in Dig. 1-52 N. S.

Municipal corporation — regulation of jitney buses — aiding street railways.

2. That the effect of such ordinance, if enforced, would involve a benefit to the street railway company, is no reason why the city may not prescribe such regulation. *For other cases, see Jitney Buses, in Dig. 1-52 N. S.*

Headnotes by WEST, J.

Note. — As to regulation of jitney buses, see notes to *Dickey v. Davis*, L.R.A.1915F, 840, and *Memphis v. State*, L.R.A.1916B, 1156.

Generally as to validity of excise or license tax upon automobiles, see notes to *Christy v. Elliott*, 1 L.R.A.(N.S.) 215; *Mark v. District of Columbia*, 37 L.R.A.(N.S.) 440; and *Re Hoffert*, 52 L.R.A.(N.S.) 949. The notes just referred to include some cases as to the validity of a license tax on automobiles as affected by its amount or prohibitory character. Other concrete phases of that general question are presented in the notes to *People ex rel. L.R.A.1916D*.

Courts — interference with jitney regulation.

3. Before the courts can interfere with the exercise of legislative power granted to the city to license and regulate such conveyances, it must appear that the attempted exercise of such power is flagrantly unjust, unreasonable, or oppressive.

For other cases, see Courts, I. c, 3, in Dig. 1-52 N. S.

(Johnston, Ch. J., and Porter, J., dissent.)

(December 11, 1915.)

A PPEAL by plaintiffs from a judgment of the District Court for Sedgwick County in defendants' favor in an action brought to enjoin the enforcement of an ordinance regulating motor vehicles. Affirmed.

The facts are stated in the opinion.

Messrs. Fred Stanley, Claude C. Stanley, and Benjamin F. Hegler for appellants.

Messrs. James A. Conly, K. Harris, V. Harris, L. S. Ferry, T. F. Doran, and J. S. Dean, for appellees:

The ordinance was not void.

Newton v. Atchison, 31 Kan. 153, 47 Am.

State Bd. of Health v. Wilson, 35 L.R.A.(N.S.) 1074, on "Validity of license tax on peddlers so high as to be prohibitory in effect;" *Louisville v. Pooley*, 25 L.R.A.(N.S.) 583, on "Validity of license upon business of lending money as affected by excessive amount of the license fee;" *Troy v. Western U. Teleg. Co.* 27 L.R.A.(N.S.) 627, on "Validity of license fees exacted of telegraph and telephone companies as affected by amount;" and *Minnesota v. Martin*, 51 L.R.A.(N.S.) 40, on "Validity of license fee exacted of auctioneer as affected by amount."

Rep. 486, 1 Pac. 288; *Re Martin*, 62 Kan. 640, 64 Pac. 43; *Kansas City v. Overton*, 68 Kan. 560, 75 Pac. 549; *Tulloss v. Sedan*, 31 Kan. 165, 1 Pac. 285.

The city of Wichita had authority to pass the ordinance in question.

Atchison Street R. Co. v. Missouri P. R. Co. 31 Kan. 660, 3 Pac. 284; *Atchison Street R. Co. v. Nave*, 38 Kan. 744, 5 Am. St. Rep. 800, 17 Pac. 587; *Blair v. Chicago*, 201 U. S. 400, 457, 50 L. ed. 801, 825, 26 Sup. Ct. Rep. 427; *State ex rel. Kansas v. Corrigan Consol. Street R. Co.* 85 Mo. 263, 55 Am. Rep. 361.

The business of a common carrier is a privilege, and not a right, and before the privilege can be exercised by any individual, firm, or corporation, authority to do so must be obtained either from the state directly, or from a duly authorized agency of the state.

California v. Central P. R. Co. 127 U. S. 1, 40, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Street R. Co. v. Nave*, 38 Kan. 744, 5 Am. St. Rep. 800, 17 Pac. 587; *Atchison Street R. Co. v. Missouri P. R. Co.* 31 Kan. 660, 3 Pac. 284; 3 Dill. Mun. Corp. 5th ed. p. 1977, § 1237.

West, J., delivered the opinion of the court:

This suit was brought to enjoin the enforcement of an ordinance enacted by the city of Wichita, prescribing certain regulations and requiring certain licenses from persons operating jitneys and other motor vehicles. The ordinance is attacked as void because prohibitive and unreasonable.

Without going into unnecessary detail it is sufficient to say that numerous regulations are laid down for the control of the vehicles in question, and a license of \$25 to \$35 is required, according to their capacity. Section 4, however, requires that before the owners of such vehicles shall be permitted to solicit or receive passengers on or along the paved portions of certain designated streets, they shall pay an additional license of \$300 to \$400, according to the capacity of the vehicle. It is asserted, and we are convinced, that as to these specifically designated places the requirement is, and doubtless was intended to be, practically prohibitive. We find no other feature of the ordinance about which serious question could arise as to reasonableness, and it is convincingly apparent that, regardless of this requirement of §4, the ordinance would have been enacted and would be valid. So the validity of this one provision is the sole question for determination.

It is not only suggested, and to some extent proved, as shown by the record, but it is well known, that the street car sys-

tem in the city of Wichita is one long established; that the company is required to pay taxes, to keep up and maintain its tracks, and to submit to such reasonable regulations as may be prescribed for its operation. Its maintenance and continuance involve not only the investment and profit or loss upon a large sum of money, but to a great extent the convenience and necessity of the city and its inhabitants. Jitneys and similar vehicles run, not upon tracks laid at their owners' expense, but upon the public streets, with no burden of providing depots or waiting stations, or outlay, except the mere cost of vehicles and their operation. No doubt persons thus operating these conveyances for hire must be classed as and are common carriers. Being such, they are, of legal necessity, subject to regulation and control as are other common carriers of passengers for hire.

The presumption of good intention must be accorded the city in passing the ordinance. The same rules of construction apply as to a statute, and, unless clearly void, the enactment must be upheld. *Swift v. Topeka*, 43 Kan. 671, 8 L.R.A. 772, 23 Pac. 1075; *Denning v. Yount*, 9 Kan. App. 708, 59 Pac. 1092.

That the effect of § 4 is incidentally or necessarily to benefit the street railway company is not the last word to be said. It is of interest quite vital to the municipality that a street car system not only exist there, but that it be able to subsist and furnish proper and needed service. It is not a misuse of power so to legislate that this result can be accomplished merely because it involves an advantage to the utility in question as well as to the municipality.

There is no attempt to exclude from all the streets. On the contrary, all streets and parts thereof except those thus specially reserved are expressly permitted to be traversed at will.

The Constitution vests in the legislature authority to make provision by general law for the organization of cities, towns, and villages. Article 12, § 5. This has been held to add nothing to the general grant of legislative power expressed in § 1 of article 2. *Wulf v. Kansas City*, 77 Kan. 358, 94 Pac. 207. The legislature may rightfully prescribe the powers of a city, "subject only to constitutional restrictions." *Roby v. Shunganunga Drainage Dist.* 77 Kan. 754, 759, 95 Pac. 399. It can act directly or through some other body. *State ex rel. Dawson v. Parsons Street R. & Electrical Co.* 81 Kan. 430, 28 L.R.A. (N.S.) 1082, 105 Pac. 704; *State ex rel. Foote v. Hutchinson*, 93 Kan. 405, 410, 144 Pac. 241. In pursuance of this power the legislature has conferred on cities authority to do a variety

of things. "To . . . do all other acts in relation to the . . . concerns of the city necessary to the exercise of its corporate or administrative powers." Gen. Stat. 1909, § 1214, subdiv. 4.

To adopt all necessary measures for the protection of the traveling public. Section 1254. To fix the rate of carriage of persons. Section 1255. To vacate and close any street or alley or portion thereof. Section 1286. To require the construction of viaducts or tunnels over and under streets or tracks. Section 1289. To levy and collect a license tax upon and regulate all occupations conducted in the city, "including . . . hackney or livery carriages . . . and all wagons and other vehicles transporting . . . passengers for pay." Section 998; see also § 1334. To issue bonds for the purpose of purchasing, constructing, or extending utilities, including a street railway. Laws 1913, chap. 123; Senate J. R. No. 15, Laws 1913, p. 199. To construct viaducts and assess the cost to a street railway company. Laws 1913, chap. 106. To acquire title by purchase, gift, or condemnation of lands for public feed lots, and to have supervision and control thereover. Laws 1915, chap. 127.

In *Kansas City v. Overton*, 68 Kan. 560, 75 Pac. 549, an ordinance was upheld requiring hucksters or hawkers to pay a license of \$35 a month and a helper or assistant to pay a license of \$15, and exempting from its operation those who personally sold the produce of their own or leased lands. In *Schaake v. Dolley*, 85 Kan. 598, 37 L.R.A.(N.S.) 877, 118 Pac. 80, Ann. Cas. 1913A, 254, upholding the validity of the statute authorizing the charter board to refuse a bank charter where it deems that no public necessity therefor exists, it was pointed out that the alleged common-law right to engage in the banking business must be governed by the wants and conditions of the people, and that it is one of the functions of the legislature to provide such new rules subversive of the common law as it may deem proper for the welfare of society in the changing conditions incident to progress. It was said that to decide the act in question void would be merely to substitute the court's opinion for that of the deliberate judgment of the legislature; further, that the act does not prohibit persons from engaging in the banking business, but from needlessly duplicating an established business, regardless of the public necessity. The same doctrine applies here. Modern requirements for municipal transportation render it essential that the power to regulate by the governing body be broad. In *Baxter Teleph. Co. v. Cherokee County Mut. Teleph. Assn.* 94 Kan. 159, 165, L.R.A.1916D.

L.R.A.1916B, 1083, 146 Pac. 324, involving the establishment of a competitive telephone service in a field already occupied, it was suggested in the opinion (p. 165) that a mere rival can have no such interest as will permit it to maintain an action to prevent competition; that such matters are to be controlled by those acting for the public, in that case the Utilities Commission, the statute having provided as a matter of public policy that a telephone company, unless a mutual one, will not be authorized to do business until it has obtained a certificate or a license of authority "as a public convenience and necessity within the community where it seeks to do business." (p. 166.) More closely analogous, perhaps, is *O'Neal v. Harrison*, 96 Kan. 339, L.R.A. 1915F, 1069, 150 Pac. 551, to the effect that under a statute giving power to make regulations to secure the general health, to prevent and remove nuisances, and to compel and regulate the removal of garbage beyond the corporate limits, a city may grant an exclusive right to the highest bidder to remove all the garbage. It was vigorously contended that citizens have a natural or inherent right to remove the garbage from their own premises if they so desire, and that discrimination and favoritism were not in contemplation when the power referred to was vested in the municipality. But the court declared that "the decided weight of authority supports the right of a municipality either itself to take over the conduct of a business the manner of operating which may affect the public welfare, or to put it entirely in the hands of a single individual or company." Page 340.

It was also said (p. 342) that while monopolies are against public policy, this is a rule of the common law not binding upon the legislature.

Underlying all this authority is the substratum of reasonableness, for arbitrary, unreasonable, or capricious enactments are not a use, but an abuse, of legislative power. Nevertheless, those who pass ordinances for a city, like those who enact statutes for a state, are primarily the judges of what reasonable requirements are, and it is not for the courts to interfere unless and until it appears beyond question that the thing done was not a use, but a misuse, of power. "Before, however, the courts will interfere and declare a license tax to be unjust or unreasonable, a flagrant case of excessive and oppressive abuse of power by the city authorities in the levying of the license tax must be established." *Lyons v. Cooper*, 39 Kan. 324, syl. 1, 18 Pac. 296. See also *Lebanon v. Zanditon*, 75 Kan. 273, 275, 89 Pac. 10; *Stark v. Geiser*, 90 Kan. 504, 506, 135 Pac. 666.

Whatever natural right a citizen may have to traverse the streets of his city with a motor vehicle for the conveyance of his family or his friends, no inherent right exists to devote his vehicle to the public use of carrying passengers for hire, and to appropriate to himself the use of all the streets for purposes of profit.

Beyond question, the city could vacate one or more of the streets over which he might desire to operate. It cannot only require him to pay a license tax, but it may also regulate the manner of his carrying on his enterprise. Why may it not classify motor vehicles by themselves, and refuse to permit them to crowd congested portions of the business streets where patrons of another class of vehicles—street cars—must alight and take passage? Suppose, indeed, a company or corporation owning motor vehicles had the facilities and the desire to occupy all the streets to the utter destruction of the street car business. Would the city have nothing to say? Is the municipality a mere automaton, helpless in the presence of crowding and conflicting enterprises and scrambles for business which involve the comfort, the convenience, and the safety of the traveling public? Not so.

The power to regulate livery and sales stables has been held to include the right to designate their location and to prohibit their erection at other places. *St. Louis v. Russell*, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470. In licensing the use of vehicles on streets it has been held that the city is exercising its police, and not its taxing, power. *Tomlinson v. Indianapolis*, 144 Ind. 142, 43 N. E. 9, 36 L.R.A. 413, and note as to authority of municipalities. It was held by the Texas court of criminal appeals in *Ex parte Savage*, 63 Tex. Crim. Rep. 285, 141 S. W. 244, Ann. Cas. 1913D, 951, that an ordinance, providing for an official bill poster, who shall have the sole power to post bills and advertisements, does not violate the Texas statute against monopolies. While denying the validity of the particular ordinance in question, for other reasons, it was declared that the city might regulate the erection and maintenance of billboards and prevent the maintenance of others, except as authorized substantially by the ordinance, and require persons, before pursuing such business, to procure proper license therefor. In *McFall v. St. Louis*, 232 Mo. 716, 33 L.R.A.(N.S.) 471, 135 S. W. 51, an ordinance was upheld which licensed hack drivers who could procure the consent of abutting property owners, and denied the same privilege to those who could not obtain such consent. As to the power of the city to establish exclusive hack stands, see L.R.A.1916D.

note in 33 L.R.A.(N.S.) 471. Many exclusive franchises are held not to be unlawful, although creating legal monopolies. 27 Cyc. 896. In the case of *Re William Hoffert*, 34 S. D. 271, 52 L.R.A.(N.S.) 949, 148 N. W. 20, the statute under consideration imposed a registration fee of \$6 on all motor vehicles used upon the public highways of the state, 12½ per cent thereof to be forwarded to the secretary of state, the remainder to be placed in the county motor vehicle road fund and expended only for the repair and maintenance of public highways beyond the limits of cities and towns. The power of the legislature to impose this license in addition to an ad valorem tax was upheld. The road tax of 87½ per cent was held to be a proper charge for the privilege of using such vehicles upon the public highway; also that the placing of self-driven vehicles in a class by themselves is not an unlawful discrimination. The footnote—page 949 of 52 L.R.A.(N.S.)—has numerous recent decisions touching the control and classification of motor vehicles upon public highways. The city of San Antonio passed an ordinance regulating the operation of street cars, jitneys, motor omnibuses, and other vehicles using its streets for local street transportation. The court exhaustively discussed the power of cities to control such transportation. It seems that the particular provision complained of was one requiring a bond for the protection of citizens, and in an opinion denying a rehearing it was said: "Appellant desired to use the streets for private purposes of gain, and the city has the absolute right to prohibit the use of the streets for his private business, and, in case it gave permission for such use, had the right to compel the payment of a license fee." *Greene v. San Antonio*, — Tex. Civ. App. —, 178 S. W. 6, 11.

Certified copies of opinions of the supreme court of Tennessee in *Memphis Street R. Co. v. Rapid Transit Co.* — Tenn. —, L.R.A. 1916B, 1143, P.U.R.1916A, 834, 179 S. W. 635, and *Memphis v. State*, — Tenn. —, L.R.A.1916B, 1151, P.U.R.1916A, 825, 179 S. W. 631, have been furnished. These decisions, recently rendered, validate the statute of Tennessee, declaring those operating jitneys to be common carriers, and that their operation should be unlawful within incorporated cities or towns without first obtaining a permanent license under ordinances from such city or town, and that no such license should be issued unless the owner should file with the clerk of the county court a bond of not less than \$5,000 to cover loss of life or injury to person or property inflicted by such carrier or caused by his negligence, and that such license

should embody such rights, terms, and conditions as the city or town might elect to impose. Complaint was made because the city of Memphis had passed an ordinance pursuant to this statute, but the court said it was very clear then that the defendant had no right whatever to do business on the streets of Memphis. In the first of the cases mentioned, it was held that the street railway company could enjoin the jitney owners from operating upon the streets without license. In the other, the city prosecuted for violation of the statute, and the defendant sought release by writ of habeas corpus. The same conclusion was reached as to the validity of the enactment, and the opinion contains a thorough discussion of the recent development of jitney transportation and the propriety of separate classification. In *Ex parte Dickey*, — W. Va. —, L.R.A.1915F, 840, P.U.R.1915E, 93, 85 S. E. 781, the city of Huntington, through its commissioners, passed an ordinance for the regulation and licensing of "jitney buses," the licenses being graded somewhat on the capacity of the vehicles, requiring a bond of \$5,000 to pay all lawful claims for damages, the commission reserving to itself the right to refuse or grant such license as applied for, or to change the route or hours set forth in the application, and then granting the license upon such changed route or hours or both. It was held that one who makes the highway his place of business and uses the streets for his private gain in running a stagecoach or omnibus may be utterly denied such right, or that it may be permitted to some and denied to others. In the opinion it was said: "Conveyances on the streets, for the use of the general public, are of the same character, and, in addition to this, cabs, hackney coaches, omnibuses, taxicabs, and hacks, when unnecessarily numerous, interfere with ordinary traffic and travel and obstruct them. Prescription of routes or places of business for them is a fair, reasonable, and efficacious means of preventing such results. . . . They are engaged in a public service which the legislature may always regulate." p. 849 of L.R.A.1915F.

The foregoing serve to demonstrate the principle which must control.

In view of all the facts and circumstances, it would be difficult to find an expression more apt than the following from the decision in the case of *Re Martin*, 62 Kan. 638, 640, 64 Pac. 43, 44: "There is unquestioned power in the legislature to impose a license tax on occupations, whether it be laid for regulation or purposes of revenue. . . . Being a license tax, the express constitutional restrictions as to equality and uniformity of rate do not apply, and the L.R.A.1916D.

amount of the tax, as well as the method of imposing it, is left to legislative judgment and discretion. . . . If the license tax imposed were flagrantly unreasonable, unjust, and oppressive, courts might properly interfere; but we have no such case before us." p. 640.

The trial court denied the injunction sought by the plaintiff. The requirement of § 4 is within the power of the municipality, and the judgment is affirmed.

Porter, J., dissenting:

Believing that the judgment in this case is wrong, I am compelled to dissent; and, because the decision is far-reaching in its results and of more than ordinary importance to the public, I feel it my duty to state the grounds upon which I dissent.

Most that is said in the majority opinion respecting the power of the city to regulate the operation of jitneys and their use of the streets, and to impose a reasonable occupation tax, is, I think, beside the mark. This is obvious from the fact that no contention to the contrary is made by the plaintiffs. In their briefs plaintiffs concede that the city may even forbid the operation of jitneys upon certain streets in case the safety of the public requires it. Moreover, at the oral presentation, counsel for the street railway company, who argued the case for the city, frankly stated their contention to be that the city possessed the power to enact the ordinance for the express purpose of preventing competition in the business of the street railway, if such competition would, in the opinion of the city commissioners, result in the destruction of its business, or deprive it of sufficient revenue to enable it to furnish adequate service to the public. Although the majority opinion starts out with the concession that § 4 of the ordinance was enacted for the purpose of prohibiting jitneys from operating on certain streets in the city, decisions are cited to the effect that the presumption is that the city acted with a good intent. Since the intent is known and conceded on all sides to have been to prevent jitneys from competing with the street railway, we do not need the aid of any presumption as to its character.

The sole question we have to determine is this: Has the city the power to enact an ordinance forbidding jitneys to operate upon any street occupied by the tracks of a street railway? It is even narrower than I have stated it. The real question is, Has the city the power to enact such an ordinance for the sole purpose of preventing competition in the business of the street railway? If it has, then it follows that the city may prohibit the owners of hacks, omnibuses, taxicabs, and carriages of any

kind from using any street to transport persons from one part of the city to another for hire on the ground that the best interests of the city are subserved by giving to the street railway company an exclusive right to transport passengers.

The majority opinion cites authorities to the effect that many exclusive franchises are held not to be unlawful, though creating monopolies. None of the authorities cited goes so far as to intimate that a city, under the guise of attempting to regulate one business, could add anything to the rights and privileges of another business which a utility corporation carries on under an existing franchise. The city of Wichita is under the commission form of government, and the statute governing such cities prohibits the amendment of any existing grant, right, privilege, or franchise except by an ordinance, which, under certain conditions, must be submitted to the electors of the city. Gen. Stat. 1909, § 1330. Moreover, it must be obvious that even where a city grants an exclusive right to a street railway, it could not, if it would, give to the company the exclusive right to the use of the entire streets, nor forbid the public to use the portion of the streets not occupied by the railway. Suppose a company carrying on the transfer business in a city should complain that its investment was being ruined by competition of private persons who used motor cars and offered the public quicker service at cheaper prices. Could the city, under the guise of "regulation," but solely to protect the business of the corporation, enact an ordinance prohibiting the individuals from using the portions of the streets adjacent to railway stations to solicit business? Would the fact that the corporation was operating under a franchise giving it special privileges and requiring it to pay to the city a share of its receipts make any difference? These questions are easily answered when it is remembered for what purpose the streets and highways are established.

The question is asked in the majority opinion: "Why may it [the city] not classify motor vehicles by themselves and refuse to permit them to crowd congested portions of the business streets where patrons of another class of vehicles—street cars—must alight and take passage?"

The difficulty is that that is not the question. Plaintiffs, who sought to enjoin the enforcement of the ordinance, frankly concede the power of the city to regulate the business and to classify motor-driven vehicles by themselves. The question whether the city has the power to enact reasonable provisions designed to prevent the crowding of congested portions of the business

streets is not involved directly or indirectly in the case.

There is no analogy applicable to this case which can be drawn from the principle decided in *Schaaake v. Dolley*, 85 Kan. 598, 37 L.R.A.(N.S.) 877, 118 Pac. 80, Ann. Cas. 1913A, 254. There the court upheld the power of the state bank commissioner to refuse a charter for a new bank in a community where, in his judgment, the banks already in existence were amply able to care for all the business. The streets of a city are highways for the use of all the public. The city cannot, except for the purpose of reasonable regulation, prohibit the public from the use of the streets. While it may, by ordinance, prohibit heavy traffic on particular streets, its ordinance must be reasonable; and where an ordinance, otherwise reasonable in this respect, denies to an abutting lot owner reasonable access to his property, it has been held void. *Brown v. Nichols*, 93 Kan. 737, L.R.A.1915D, 327, 145 Pac. 561. In the opinion Mr. Chief Justice Johnston said: "The streets are provided for the public in general for purposes of travel and transportation" (p. 739),—and cited the case of *Bogue v. Bennett*, 156 Ind. 478, 83 Am. St. Rep. 212, 60 N. E. 143, holding void a city ordinance which prohibited traction engines and vehicles not propelled by animal power from using the streets. The Indiana court used this language: "But vehicles, whether moved by animal, steam, or other power, which do not require a specially constructed track, may be run upon the streets and alleys of a municipal corporation without first obtaining the consent of the governing body thereof." Page 486 of 156 Ind.

Another question asked in the majority opinion is this: "Would the city have nothing to say" if "a company or corporation owning motor vehicles had the facilities and the desire to occupy all the streets to the utter destruction of the street car business?"

The obvious answer is, Nothing whatever beyond the right to provide reasonable regulations of the new business. The city has not been made in any sense the guardian of the interests of the owners and stockholders of the street railway company, nor charged with the duty of protecting the company from competition, even though new and improved methods of transporting passengers in cities may, and possibly will in the near future, result in "the utter destruction" of the business of street railways. In the language of Judge Cooley: "When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it cannot be assumed that these will be the same from

age to age, or that new means of making the way useful must be excluded merely because their introduction may tend to the inconvenience, or even to the injury, of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and, if the law should preclude the adaptation of the use to the new methods, it would defeat, in greater or less degree, the purpose for which highways are established." *Macomber v. Nichols*, 34 Mich. 212, 22 Am. Rep. 522.

Twenty-five years ago, when electricity was first demonstrated to be practical and economical for operating street cars, millions had been already invested in cable car systems, with miles of expensive tunnels in the center of the streets. Competing companies on nearby streets installed trolley lines. No one supposed it was the duty of the municipalities to place obstacles in the way of the public getting immediate benefit of the new and improved method of transportation, although the competition resulted in sending most of the machinery of the cable companies to the junk pile. To quote again from Judge Cooley: "Improved methods of locomotion are perfectly admissible, if any shall be discovered, and they cannot be excluded from the existing public roads, providing their use is consistent with the present methods. A highway is a public way for the use of the public in general, for passage and traffic, without distinction. *Starr v. Camden & A. R. Co.* 24 N. J. L. 592. The restrictions upon its use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under *impartial regulations*." *Macomber v. Nichols*, supra. (Italics ours.)

It is said that in 1845, after the introduction of steam to transportation and machinery, a clerk in the Patent Office asked to be transferred to some other department because the field of discovery and invention had been exhausted. The other day Edison, speaking of electrical inventions, said, "The surface of things has only been scratched over," and he predicted wonderful developments in the uses of electricity within the next ten years.

On the 29th of last month the supreme court of Louisiana, in the case of *New Orleans v. Le Blanc*, 71 So. 248,¹ held an ordinance purporting to regulate the jitney business void for the reason that its provi-

¹ Rehearing pending.
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sions were found to be arbitrary and prohibitive. In the opinion it was said: "The jitneys are automobiles, and therefore are entitled to use the streets as matter of right, but they are automobiles used in a peculiar way, which sets them apart in a class by themselves, a fact well recognized the country over. And if, owing to this special use, special regulation is necessary for the safety and convenience of the other users of the street, such special regulation is justified, and the question of what it shall consist of is a matter within the discretion of the municipal authorities, with which the courts have no right to interfere in the absence of clear abuse. *Prohibition, however, is not regulation, and if, under the guise of a regulation, a measure be in fact a prohibition, it transcends the municipal power.*" (Italics ours.)

Most of the cases cited in the briefs of defendants go no further than to hold that a city may pass ordinances regulating the jitney business. Many of them expressly deny the power to prohibit the business altogether. I do not cite them, since they are not the decisions of courts of last resort. The recent decision of the supreme court of Tennessee, referred to in the majority opinion, in no manner involves the question whether a city, under its general grant of power over streets, or in the exercise of its police power, or under what is termed a "general welfare clause," may enact an ordinance prohibiting jitneys from using the public streets. That decision is based solely upon a recent statute enacted by the legislature, requiring jitneys, before being permitted to operate on the streets of any city, to furnish surety company bonds in the sum of \$5,000 to indemnify persons who might be injured by the operation of the jitneys.

The court should take judicial notice of the fact that the operation of jitneys, though of very recent origin, is by no means confined to cities. On the contrary, in the more densely populated places of the country jitneys are operated between cities and in rural districts. If a city, solely in the interest of a street railway company, may prohibit jitneys from using the streets to compete with the business of the company, I can see no reason why the legislature, if it see fit, may not protect the capital invested in interurban trolley lines, and, solely for that purpose, prohibit jitneys from using the public highways to carry passengers from town to town. That the legislature has not authorized a city to do this is sufficient reason why the recent Tennessee decision should not be followed; and until the cold day comes when the legislature of Kansas passes an act attempting to pro-

fect investment in street railways by giving them the exclusive right to carry passengers on public highways, or authorizing cities to give them such a monopoly of the streets, I think the courts should declare such an ordinance unreasonable, oppressive, and therefore void.

I am authorized to say that Mr. Chief Justice Johnston concurs in this dissent.

Petition for rehearing denied January 17, 1916.

MISSISSIPPI SUPREME COURT.
(Division B.)

GULF & SHIP ISLAND RAILROAD COMPANY et al., Appts.,
v.

R. J. BUDDENDORFF.

(— Miss. —, 70 So. 704.)

Commerce — jurisdiction — exclusive privilege on wharf.

1. The question of unjust discrimination on the part of an interstate carrier in giving exclusive privileges on its wharf to one ship broker may be determined by state courts in the first instance without submission to the Interstate Commerce Commission; especially where conspiracy to violate the anti-trust laws of the state is charged in the declaration.

For other cases, see Interstate Commerce Commission, in Dig. 1-52 N. S.

Railroad — exclusive privileges on wharf — validity.

2. A railroad company may give one ship broker the exclusive right to storage space on its export wharf, to enable him to accumulate partial shipments for the formation of a cargo, if equal facilities are afforded all shippers.

For other cases, see Carriers, IV. c, 4, in Dig. 1-52 N. S.

(February 21, 1916.)

APPEAL by defendants from a judgment of the Circuit Court for Harrison County in plaintiff's favor in an action brought to recover damages for alleged discrimination in shipping facilities on a wharf. Reversed.

The facts are stated in the opinion.

Mr. B. E. Eaton, for appellants:

The subject-matter of the controversy, to wit: the wharves of the railroad company and its practices relating thereto, for the reason that they are facilities used in connection with the movement of interstate and foreign commerce, are embraced in the

Note. — For right of railroad to discriminate as to wharf privileges, see note to *Cœur d'Alene & St. J. Transp. Co. v. Ferrell*, 43 L.R.A.(N.S.) 965.

Generally as to right of carrier to discriminate in respect to special or unusual service, see note to *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 12 L.R.A.(N.S.) 508.

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act to regulate commerce, and are subject to the supervision and jurisdiction exclusively of the Interstate Commerce Commission.

Southern P. Terminal Co. v. Interstate Commerce Commission, 219 U. S. 498, 55 L. ed. 310, 31 Sup. Ct. Rep. 279; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Baltimore & O. R. Co. v. United States*, 215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; *Southern R. Co. v. Reid*, 222 U. S. 424, 56 L. ed. 257, 32 Sup. Ct. Rep. 140.

Defendant had a right to limit the use of its wharves not only to any steamship company that it desired, but to any shipper.

Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745.

Defendant had the right to choose its own agencies and grant to them the exclusive privilege of access to its own wharf, which it built only for the purpose of continuing the transportation of goods which it had transported to the end of its line.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 407; *Little Rock & M. R. Co. v. St. Louis Southwestern R. Co.* 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775, affirming 4 Inters. Com. Rep. 537, 59 Fed. 400; *Central Stock Yards Co. v. Louisville & N. R. Co.* 192 U. S. 568-571, 48 L. ed. 565-569, 24 Sup. Ct. Rep. 339; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465; *Ilwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co.* 5 Inters. Com. Rep. 627, 6 C. C. A. 495, 15 U. S. App. 173, 57 Fed. 673; *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628.

It is not every discrimination that serves as a basis of recovery.

A. G. Russell Co. v. Miller, 98 Miss. 185, 53 So. 495.

Mr. J. L. Heiss for appellee.

Potter, J., delivered the opinion of the court:

This is an appeal from the circuit court of Harrison county, from a judgment in the sum of \$750 in favor of appellee, who was plaintiff in the trial court against the defendants, appellants here.

The plaintiff filed his original declaration, to which the defendants demurred, and the demurrer was overruled, whereupon the plaintiff filed an amended declaration and the defendants interposed the same demurrer, which was likewise overruled. The defendants then filed a special plea, to which the plaintiff interposed a general demurrer, which demurrer was sustained. The defendants thereupon declined to plead further, and a writ of inquiry was awarded, and damages in the sum of \$750 assessed in favor of the plaintiff and against the defendants.

The plaintiff in his amended declaration alleged that the defendant Gulf & Ship Island Railroad company was a common carrier, and operated a railroad extending from Jackson, Mississippi, in a southerly direction to the south end of its pier, or wharf, located in the harbor of Gulfport; that the southern end of said pier or wharf was the southern terminus of the said railroad and a part of its common carrier system, and had always been so held out to the public, and that the public had a right to ship commodities over its track extending to the end of the pier, and from thence to be transported for further carriage by such vessels as the shipper might engage for such service. The Gulfport Shipping Company, one of the defendants, according to the allegations in the declarations, was a partnership concern, domiciled at Gulfport, and professed to be engaged in the general business of engaging freight, but was "in fact and truth the Gulf & Ship Island Railroad Company, operating under the above-styled name for the purposes hereinafter named."

The declaration alleged that J. W. Corry & Company, also a defendant, was a corporation domiciled at Gulfport, and engaged in the general business of ship brokers, which business consists of making freight engagements and contracts of every kind for transportation by water at said port. The plaintiff then alleged "that prior to his undertaking, hereinafter mentioned," he had been, for some forty years, engaged in the business of general ship broker and ship agent in the city of New Orleans, during which time he had built up an "extensive and valuable acquaintance and connection for said business in this and in foreign lands, and was extensively known and trusted as being thoroughly qualified for the business." L.R.A.1916D.

The plaintiff then charged that when he first established himself in the business of ship broker and agent at Gulfport, he was given assurances by the railroad company, through its vice president and its general freight and passenger agent, that the railroad company would welcome him and afford every facility and accommodation necessary to the establishment of the business, and would furnish him rates therefor at his request, and that, relying thereon, he began the establishment of his business by soliciting business from various points in this state and beyond for the shipment of cotton, cotton seed meal, cotton seed cake, staves, and other merchandise, and did secure offers of cargoes for shipment by water from Gulfport, and did secure offers of steamship and sailing vessel rates for the transportation of same from said pier and wharf at acceptable rates. The plaintiff then charged that about the time he had completed his arrangements, the defendants "did conspire, confederate, and agree among themselves to perfect a monopoly of all the export and import business from the harbor of Gulfport, on merchandise other than lumber and naval stores, in this, that the defendant railroad company had heretofore, to wit, during the year of 1909, made a formal and pretended lease of the greater portion of the available free space on said wharf to the said J. W. Corry & Company for the erection of said warehouses or sheds thereon in the name of the said J. W. Corry & Company, while in fact said sheds were erected for or by said railroad company with the distinct agreement and understanding that said lease should, within a short time agreed upon, be transferred back to the said railroad company, which was thereafter done; that thereafter, to wit, during the early part of 1910, as a part of said agreed plan, the said railroad company, through its president and other officials, organized the said Gulfport Shipping Company, and owned and controlled same, having for its officers the said certain officials of said railroad and its confidential men, and that the said arrangement as thus completed was for the purpose of effecting a monopoly upon all said business at said pier, and thereby to exclude all competition as to rates and vessels, so as to fix said rates free from competition and to preserve to themselves all the profits therefrom; that as a part of said preconceived scheme, plan, and agreement, the Gulfport Shipping Company, upon its organization, made the said J. W. Corry & Company its exclusive agent and its control in all business of said character at said port.

Plaintiff further alleged that thereafter he endeavored to secure rates from the de-

defendants on merchandise for export, and endeavored to procure facilities upon the wharf for handling the same similar to facilities afforded Corry & Company; that these facilities were denied on the ground that the exclusive rights to same belonged to Corry & Company, and that they would not be shared with plaintiff, who was a competitor of Corry & Company, that in May, 1910, plaintiff sought business from A. Le More & Company, of New Orleans, but that an agent of the defendant railroad company wrote said firm that the Gulfport Shipping Company was a proper party to handle the shipment, and that the refusal of the wharf facilities to the plaintiff prevented him from securing this business; that a similar situation prevented plaintiff from making a shipment of 2,000 tons of cotton seed cakes from Gulfport in 1910; that the denial of facilities aforesaid prevented plaintiff from engaging in the business of ship broker; and that the defendants had conspired and confederated against him, and had violated the statutes of Mississippi prohibiting trusts and combines; and damages were asked for, actual and punitive, in the sum of \$10,000.

To this declaration the defendant filed a demurrer setting up the following grounds: (a) The commerce shown by the declaration in which the plaintiff was to be engaged was interstate. (b) It was necessary for all complaints with reference to discrimination in the movement of interstate commerce to be first presented to the Interstate Commerce Commission. (c) No suit of any kind can be maintained for an alleged discrimination with reference to the movement of interstate commerce until the question of discrimination has been submitted to and passed upon by the Interstate Commerce Commission. (d) In no event has this court the jurisdiction to try and determine the issues here involved.

This demurrer was also overruled, and defendants filed a special plea, in substance, as follows:

That the defendant railroad company had adequate terminal facilities in the city of Gulfport for the receipt and delivery of merchandise committed to it for transportation and delivery to the city of Gulfport, and that, while there is a physical connection by rail between its depots and yards and wharves referred to in the declaration, and while the railroad company is authorized and empowered by its charter to locate, construct, and thereafter to own and maintain and use suitable wharves, piers, breakwaters, bases, and depots and other appurtenances thereon for loading and unloading, receiving and discharging, freight and passengers from or to sea-go-

ing, lightering, and coasting vessels, neither the provisions of the charter nor any statutory law compels or requires, or did compel or require, the railroad to construct and maintain the wharf mentioned in plaintiff's declaration; that the wharf so referred to was constructed by the railroad company at an expense of several hundred thousand dollars, and was maintained at an enormous expense; and that the wharf was constructed for the purpose of procuring the transportation of goods beyond its own line in connection with such ocean carriers as it might select with which jointly to issue through export bills of lading from interior points to foreign destinations, but that no other business was ever done at the wharf except the transportation by the railroad company in cars on its railroad of articles of commerce to and from vessels lying at the said wharf, and of commerce brought to or to be transported by such vessels, and the loading and unloading of same into and from said vessels.

Defendants further allege in the special plea that after the construction of the wharf in question, the railroad company promulgated its rules and regulations, by which it was expressly provided that the wharf was the private property of the Gulf & Ship Island Railroad Company, and that vessels would be permitted to come and lie at said wharf only upon the consent of the railroad company, according to its rules and regulations promulgated from time to time. It was further set up that the wharf was ready for use in the year 1902, and that the rules and regulations above mentioned had been in force and effect continuously from that time up to and including the time mentioned in plaintiff's declaration, and to the present day; that in its rules, the railroad company expressly reserved the right to give preference at its wharf to ships engaged in the transportation of parcel shipments from said port, and that no boats or vessels, for the purpose of taking on or unloading cargoes, had ever been permitted to occupy a berth at said wharves except upon compliance with the rules and regulations prescribed by the railroad company, with the stipulation that the wharves were and are the private property of the railroad company, and that the vessels might tie up to or remain at the wharf only in strict compliance with such rules and regulations; that the recognition of the rules and regulations above mentioned had, at all times, been required before boats were permitted to berth at the wharf, and that the purpose of reserving such preference was the desire and effort of the railroad company to build up the exportation of general cargoes from the

port of Gulfport, and to build up this business it was necessary for the railroad company to issue, or have issued, in connection with some ocean carriers, through bills of lading from points of origin to foreign points of destination; that the railroad company, upon issuing the bills of lading mentioned, was liable both to the shippers and consignees for the safe, proper, and prompt transportation of such shipments to foreign destinations; and, because of the responsibility it had assumed, that it was necessary for the railroad company to secure an ocean-carrying agent of such financial strength and with facilities as would be adequate to the successful carrying on of the aforesaid enterprise. It was then alleged that the facilities offered by J. W. Corry & Company appeared to the railroad to be the best, and that Corry & Company was an established carrier of ocean freights, and was financially responsible, and therefore Corry & Company were authorized by the railroad company to occupy the space on the wharf mentioned in plaintiff's declaration, for the purpose of aiding the railroad company in the building up of general cargo shipments for export, and for affording necessary financial protection to the railroad against loss and damage because of the issuance by it of through bills of lading for the movement of such commodities in connection with Corry & Company; that the Gulfport Shipping Company was financially solvent, and was a responsible shipping company, organized for the purpose of enlarging the export movement from Gulfport, and that with the permission of the railroad company it acquired from Corry & Company the rights and privileges as to space and warehouses and berths for vessels that had previously been granted Corry & Company; and that the shipping company carried out the business arrangement theretofore existing between Corry & Company and the railroad company for export movements of commerce. The plea then sets out that the plaintiff was engaged in the business of ocean freight carrying, but that he was not satisfactory to the defendant for the issuance of through export bills of lading in connection with the movement of foreign commerce, but that, through the agency of Corry & Company and the Gulfport Shipping Company, the railroad company was enabled to and did receive all commodities for export desiring an outlet through the harbor of Gulfport, and that the movement of same was in no wise hindered, obstructed, or delayed because of any arrangement existing between the defendants for the movement of commodities by water from the port of Gulfport.

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According to the allegations of the special plea, the space allotted Corry & Company occupied approximately 500 feet at the south end of the pier, and that there remained outside of this 500 feet an additional space of approximately 2,200 feet, to which, under the rules and regulations of the railroad company, vessels other than general cargo vessels were permitted to occupy berths and take on cargoes; that there were at the times alleged in the plaintiff's declaration, and still are, many shippers in connection with whom no through export bills of lading are issued by the defendant, exporting through the port of Gulfport, who charter and own vessels and procure ocean transportation for their export products; that in such instances the shippers load directly from the cars upon which the export commodities were placed alongside the various ships, and that shipments so made are designated "full cargo shipments;" that the "full cargo shipments" constituted a large part of the export movement from Gulfport, and that vessels carrying "full cargo shipments," upon being chartered, and the rules and regulations promulgated by the railroad company subscribed to, were and now are assigned berths at said wharf, each vessel in its regular turn, and that the plaintiff was given the opportunity, so far as "full cargo shipments" were concerned, upon subscribing to the rules and regulations, of having vessels occupy berths at the wharf in the same manner and to the same extent that were offered other shippers of "full cargo shipments."

It was further alleged that there was no other space or room to apportion to the plaintiff, or anyone else, for the purpose of storage, except at an inconvenience and loss to merchants engaged in "full cargo shipments," or the lessening of the space allotted Corry & Company and the Gulfport Shipping Company for parcel shipments, and that as to parcel shipments moving through the port of Gulfport, the facilities and advantages of the space and wharves occupied by Corry & Company and the Gulfport Shipping Company were offered alike and without discrimination to all shippers and to all available points, and that Corry & Company and the Gulfport Shipping Company received and transmitted on equal terms all shipments of commodities moving through Gulfport, destined to foreign ports. The defendant then denied that it was under any legal obligation to furnish plaintiff the facilities alleged in his declaration to have been denied.

The plaintiff then filed a general demurrer to the above plea, and the demurrer was sustained. The defendant declined to

plead further, and judgment was entered accordingly.

The questions we have to determine are: First, whether this court has jurisdiction, or whether this is a matter within the exclusive control of the Interstate Commerce Commission; and, secondly, whether the special plea set out above constituted a good defense to plaintiff's declaration. It is strongly urged by the defendant railroad company that this is a matter over which the state courts have no jurisdiction, and that the determination as to whether the matters complained of in the plaintiff's declaration were or were not an unjust discrimination is for the Interstate Commerce Commission, and not the courts; that the commerce in question comes within the classification of commerce which is subject by the act to regulate commerce, passed by Congress, to the control and direction of the Interstate Commerce Commission, and, likewise, the subject-matter of the controversy, the wharves of the railroad company and its practices relating thereto, for the reason that they are facilities used in connection with the movement of interstate and foreign commerce, are likewise embraced in the act to regulate commerce, and subject to the supervision and jurisdiction exclusively of the Interstate Commerce Commission. In our opinion, this contention is not well founded. As stated in the able brief of counsel for appellee in this case: "It has been repeatedly held by the United States Supreme Court that only those matters must first come before the Interstate Commerce Commission which involve administrative functions, such as rates, switching facilities, the rate of distribution of cars, and similar questions of practice; that the Commission did not first have to pass upon those questions which constituted a violation or denial of unquestioned legal duties of giving service as a common carrier per se. The Commission was given exclusive jurisdiction of administrative matters for the reason that therein they were not deciding questions of law, or judicial questions, but questions of the reasonableness of rules, procedure, and business supervision on which opinions might well differ; and therefore, to prevent contrary holdings on similar questions and to insure uniformity, the court holds the Commission's jurisdiction on such matters to be exclusive. To permit different courts or bodies to pass upon such questions might result in what one would hold reasonable on questions of rates, facilities, switching charges, or car service, etc., another might hold unreasonable, thereby creating the discrimination that the act sought to avoid."

See *Texas & P. R. Co. v. Abilene Cotton* L.R.A.1916D.

Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; *Louisville & N. R. Co. v. F. W. Cook Brewing Co.* 223 U. S. 70, 56 L. ed. 355, 32 Sup. Ct. Rep. 189; *Pennsylvania R. Co. v. Puritan Coal Min. Co.* 237 U. S. 121, 59 L. ed. 867, 35 Sup. Ct. Rep. 484; *Eastern R. Co. v. Littlefield*, 237 U. S. 140, 59 L. ed. 878, 35 Sup. Ct. Rep. 489.

Not only does the declaration in this case charge a discrimination in favor of Corry & Company and the Gulfport Shipping Company, but it also charges a conspiracy to monopolize the business in which plaintiff was engaged, contrary to the anti-trust laws of this state. As to whether or not a violation of the anti-trust statutes is presented is clearly a matter within the province of this court to inquire into; and, for that purpose, it undoubtedly has jurisdiction.

We now come to the question of whether or not the special plea of defendant was a sufficient defense at law to plaintiff's declaration, and this resolves itself into the question of whether or not the defendant was justifiable in refusing facilities to the appellee for the purpose of storing freight on its wharf that it afforded to Corry & Company; for there is no question in this case with reference to any refusal on the part of the railroad company to receive any freight offered it for transportation, and there is no complaint that any discrimination between shippers has been made. The special plea sets up that all persons desiring to make shipments were afforded the same services and the same rates by the railroad company, which owned and controlled the wharf. The special plea sets up that adequate depots and yards were furnished by the railroad in the city of Gulfport for the receipt and delivery of merchandise committed to it for transportation; that the wharves in question were its private property and constructed and maintained by it at great cost; that the wharves were constructed for the purpose of more conveniently transporting commerce beyond its own line in connection with such ocean carriers as it might select with which to issue through bills of lading, and that no other business had been done at that wharf except transportation in connection therewith; that at no time had the use of the wharf been permitted except upon the distinct understanding of the shippers and owners that the wharf was a private wharf, and that in accordance with the rules regularly adopted by the railroad company that certain kinds of vessels and certain kinds of cargoes were to have preferred space and facilities; that the commerce carried on in connection with Corry & Company was of the kind for which a prefer-

ence was intended and made. In the case of Louisville & N. R. Co. v. West Coast Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745, the Supreme Court of the United States says:

"We do not see that the fact that the wharf was erected under authority from the city, at the foot of a public street of the city, makes any material difference in the character of the wharf, or that the right of plaintiff to select its own vessels to continue from that wharf the transportation of its goods is, on that ground, enhanced, or the right of defendant to control the wharf for its own use when erected is thereby diminished. The right to erect the wharf was granted by the proper authorities, and, so far as the record shows, it was granted without imposing any conditions as to its use by the public. We think the plaintiff had no right of access to the wharf founded simply upon the fact that it was erected under proper authority, in the harbor of Pensacola, and at the foot of one of the public streets of that city. The question of the rights of plaintiff must really turn upon the character of the use of the wharf, whether it is public or private.

"The argument upon the part of plaintiff is, in substance, this: True, defendant has erected a wharf which is not in fact intended or used as the terminus of its road at Pensacola, adequate yards and depots having been furnished by the defendant for all goods and passengers destined to Pensacola only; but the wharf has been erected to enable defendant to more conveniently carry out contracts for transportation beyond its own line, which it was not compelled to make, and which it could carry out by such agencies as it chose; but the plaintiff, having goods destined for points outside of Florida, insists upon its right to use the road of defendant, not to carry these goods to Pensacola, but to defendant's wharf, so that plaintiff may there transfer them into vessels which it has arranged to take them: in order to do this it is necessary that defendant be compelled to share its possession of its own wharf with the managers of these other vessels; for this possession plaintiff is prepared to make reasonable compensation. This right on the part of the plaintiff is urged as the result of the action of defendant in permitting the use of the wharf as stated in the plea. By such use it is contended that the defendant in effect dedicated the wharf to the public, or at least has granted to the public an interest in the use of the wharf. We are of opinion that the wharf was not a public one, but that it was a mere facility, erected by and belonging to L.R.A.1916D.

defendant, and used by it, in connection with that part of its road forming an extension from its regular depot and yards in Pensacola, to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line; and that defendant need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation. Neither the public nor the plaintiff had such an interest in the wharf as would give to either the right to demand its use on payment of reasonable hire. Nor was the wharf a depot or place of storage of the defendant for goods to be delivered at or taken from the city of Pensacola for transportation by rail. The defendant had adequate depots and yards in that city for the proper storage of all merchandise committed to it for delivery at Pensacola, or there received, to be transported therefrom by defendant. All consignees of goods at Pensacola had equal facilities for obtaining them there."

The principle was laid down, in what are known as the Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628, that railroad companies have the right to contract with particular express companies for the transportation of traffic over their railroads, and that the railroad company was not bound to transport the traffic of an independent express company over its lines in the same manner in which it transported the traffic of the particular company contracted with; in other words, that the railroad company was not bound to furnish, in the absence of statutes, to all independent express companies, equal facilities for doing an express business upon its passenger trains.

The case of Yazoo & M. Valley R. Co. v. Crawford, 107 Miss. 355, L.R.A.1915C, 250, 65 So. 462, decides the principle of law involved in this case. In that case it was decided that a railroad company, having made a contract with one log-loading company to the exclusion of other companies engaged in a like business, to load its cars, did not violate the anti-trust statutes. and that this contract did not constitute an illegal monopoly. The court in that case said: "We are of opinion that the contract made with the Valley Log Loading Company under the circumstances was not an illegal contract. The arrangement which the railroad company had made with reference to the loading of logs and furnishing to parties its cars, engines, and crews was not in any sense a function or duty required of the company in its capacity as a common carrier. There was no legal obligation resting upon the railroad company to furnish its cars, engines, and crews to in-

dividuals carrying on a log-loading business, or to receive logs to be loaded on its cars along the right of way between stations. The railroad company could itself have undertaken this to the exclusion of everybody else. This is not controverted. It would then monopolize the business in a sense, but not illegally. In the case of *Houck v. Wright*, 77 Miss. 483, 27 So. 617, this court says: 'The legislature, by the chapter on Trusts and Combines, did not intend to debar a person from conducting his own private business according to his own judgment.' It was not the purpose to limit either the term used in the Constitution or in the statute by any narrow definition, but leave it to the courts to look beneath the surface, and from the methods employed in the conduct of his business to determine whether the association or combine in question, no matter what its particular form should chance to be, or what might be its constituent elements, is taking advantage of the public in an unlawful way. This case and this extract from it were cited with approval of this court in the case of the Cumberland Teleph. & Teleg. Co. v. State, 100 Miss. 116, 39 L.R.A. (N.S.) 277, 54 So. 670."

There is no complaint in this case that every shipper did not enjoy the same rights and privileges that were extended to every

other shipper. The plea shows that the shipping public enjoyed the entire rights upon the wharf, and the small shippers not having enough cargo for an entire ship, by means of concentrations upon the pier, or by pooling freight, could make parcel shipments, and in so doing avail themselves of the benefits of the market; and the railroad company allotted on the wharf the space in question for this purpose. No discrimination of any kind is charged with reference to any shipments of freight offered to the railroad company at the wharf.

In our opinion, the railroad company had the right, to the exclusion of everyone else, to have undertaken to store the parcels received at its wharf at Gulfport for shipment; and it could have made the contracts of shipment of same with vessels of its own choosing, to the exclusion of everyone else. In view of the fact that the railroad company had the right to carry on this business in the manner in which it was carried on through its own servants, it is clear to us that it would have the right likewise to carry on the same business in the same way through the agency of Corry & Company and the Gulfport Shipping Company. The special plea sets up a sufficient defense to plaintiff's declaration. This cause is therefore reversed and remanded.

TENNESSEE SUPREME COURT.

MARTHA S. TILLMAN, by Next Friend,
v.

LEWISBURG & NORTHERN RAILROAD
COMPANY.

(133 Tenn. 554, 182 S. W. 597.)

Eminent domain — adjoining tracts held in different interests — incidental injuries — damages.

One owning individually a parcel of real estate adjoining and used with another parcel in which he has an interest by entirety is not entitled to damages for incidental injuries to the former in case of the con-

Note.—The effect upon the question whether several parcels may be treated as one tract for the purposes of condemnation, of the fact that they are held by different tenures, is discussed in the note to *Sharpe v. United States*, 57 L.R.A. 932.

The only case passing upon the question since the date of that note is *Glendinning v. Stahley* (1910) 173 Ind. 674, 91 N. E. 234, which is sufficiently set out in the opinion in *TILLMAN v. LEWISBURG & N. R. Co.*

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demnation of a railroad right of way through the latter.

For other cases, see *Eminent Domain*, III, c, in *Dig. 1-52 N. S.*

(February 1, 1916.)

PETITION for a writ of certiorari to review a judgment of the Court of Civil Appeals affirming a judgment of the Circuit Court for Davidson County sustaining a demurrer to a declaration filed to recover damages to a certain tract of land, a portion of which was alleged to have been taken by defendant as a right of way for its railroad. Writ denied.

The facts are stated in the opinion.

Messrs. J. M. Anderson and Lewis Tillman, for petitioner:

Plaintiff, who is a married woman, had the right to maintain this suit by and through her husband as next friend, and not in conjunction with him as plaintiff.

Bein v. Heath, 6 How. 240, 12 L. ed. 421; *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Donahue v. Hubbard*, 154 Mass. 537, 14 L.R.A. 123, 26 Am. St. Rep. 271, 28 N. E. 909.

Plaintiff was entitled to damages for incidental injuries to the tract of land individually owned by her.

10 Am. & Eng. Enc. Law, 2d ed. pp. 1165-1167; 2 Lewis, Em. Dom. 3d ed. § 698; Illinois, I. & M. R. Co. v. Freeman, 210 Ill. 270, 71 N. E. 444; Kansas City, E. & S. R. Co. v. Merrill, 25 Kan. 421; State ex rel. Biddle v. Superior Ct. 44 Wash. 108, 87 Pac. 40; Lincoln v. Com. 164 Mass. 368, 41 N. E. 489; Re Boston, H. T. & W. R. Co. 31 Hun, 461; Cook v. Boone Suburban Electric R. Co. 122 Iowa, 437, 98 N. W. 293; Cameron v. Pittsburgh & L. E. R. Co. 157 Pa. 617, 22 L.R.A. 443, 27 Atl. 668; Potts v. Pennsylvania Schuylkill Valley R. Co. 119 Pa. 278, 4 Am. St. Rep. 646, 13 Atl. 291; Union Terminal R. Co. v. Peet Bros. Mfg. Co. 58 Kan. 197, 48 Pac. 860; Westbrook v. Muscatine, N. & S. R. Co. 115 Iowa, 106, 88 N. W. 202; Peck v. Superior Short Line R. Co. 36 Minn. 343, 31 N. W. 217; Cameron v. Chicago, M. & St. P. R. Co. 42 Minn. 75, 43 N. W. 785; Seattle & M. R. Co. v. Roeder, 30 Wash. 244, 94 Am. St. Rep. 864, 36 Pac. 408; Colvill v. St. Paul & C. R. Co. 19 Minn. 283, Gil. 240; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; St. Paul & S. C. R. Co. v. Murphy, 19 Minn. 500, Gil. 433; Welch v. Milwaukee & St. P. R. Co. 27 Wis. 108; New York, W. S. & B. R. Co. v. Le Fevre, 27 Hun, 537; Ham v. Wisconsin, I. & M. R. Co. 61 Iowa, 716, 17 N. W. 157; Atchison & N. R. Co. v. Gough, 29 Kan. 94; Hoyt v. Chicago, M. & St. P. R. Co. 117 Iowa, 296, 90 N. W. 724; H. C. Frick Coke Co. v. Painter, 198 Pa. 468, 48 Atl. 302; Sharpe v. United States, 57 L.R.A. 932, 50 C. C. A. 597, 112 Fed. 893.

Messrs. F. M. Bass, John B. Keeble, and Ed. T. Seay, for respondent:

The two tracts cannot be considered as an entire tract for the purpose of having damages assessed.

2 Lewis, Em. Dom. 3d ed. § 698; Shipman, Common-Law Pl. p. 138; 17 Am. & Eng. Enc. Law, 601; Sandes v. Wildsmith [1893] 1 Q. B. 771, 62 L. J. Q. B. N. S. 404, 67 L. T. N. S. 387; McKenzie v. Hatton, 9 Misc. 16, 29 N. Y. Supp. 18; 1 Chitty, Pl. 16th Am. ed. *84; 15 Enc. Pl. & Pr. 541; Sutherland, Damages, Last ed. § 134; Louisville & N. R. Co. v. Atkins, 2 Lea, 248; Leavenworth & N. S. R. Co. v. Wilkins, 45 Kan. 674, 26 Pac. 16; Glendenning v. Stahley, 173 Ind. 674, 91 N. E. 234; Conness v. Indiana, I. & I. R. Co. 193 Ill. 464, 62 N. E. 221.

The tracts did not constitute an entire tract, for the reason that it is not shown that they are contiguous, and were not used L.R.A.1916D.

together for a common purpose, or put to a common permanent use.

2 Lewis, Em. Dom. 3d ed. § 698, p. 1208; Cameron v. Chicago, M. & St. P. R. Co. 42 Minn. 75, 43 N. W. 785; Kansas City, M. & O. R. Co. v. Littler, 70 Kan. 556, 79 Pac. 114; Haines v. St. Louis, D. M. & N. R. Co. 65 Iowa, 216, 21 N. W. 573.

No recoverable damages are alleged in the declaration.

Iron Mountain R. Co. v. Bingham, 87 Tenn. 522, 4 L.R.A. 622, 11 S. W. 705; Louisville & N. Terminal Co. v. Lellyett, 114 Tenn. 368, 1 L.R.A. (N.S.) 49, 85 S. W. 881; Richards v. Washington Terminal Co. 233 U. S. 546, 58 L. ed. 1088, L.R.A. 1915A, 887, 34 Sup. Ct. Rep. 654; Bennett v. Long Island R. Co. 181 N. Y. 431, 74 N. E. 418; Cleveland & P. R. Co. v. Speer, 56 Pa. 325, 94 Am. Dec. 84; Lamm v. Chicago, St. P. M. & O. R. Co. 45 Minn. 71, 10 L.R.A. 268, 47 N. W. 457; Austin v. Augusta Terminal R. Co. 108 Ga. 671, 47 L.R.A. 755, 34 S. E. 852; Cooley, Const. Lim. 7th ed. pp. 820, 821; Woodfolk v. Nashville & C. R. Co. 2 Swan, 422; Wray v. Knoxville, L. F. & J. R. Co. 113 Tenn. 544, 82 S. W. 471; Vaulx v. Tennessee C. R. Co. 120 Tenn. 316, 108 S. W. 1142; Paducah & M. R. Co. v. Stovall, 12 Heisk. 1; Shenandoah Valley R. Co. v. Shepherd, 26 W. Va. 681; Taber v. New York, P. & B. R. Co. 28 R. I. 269, 67 Atl. 9; Bangor & P. R. Co. v. McComb, 60 Me. 298; Walker v. Old Colony & N. R. Co. 103 Mass. 10, 4 Am. Rep. 509.

Plaintiff cannot maintain the suit in her own name, by her husband as next friend.

East Tennessee & V. R. Co. v. Love, 3 Head, 63; Douglas v. Butler, 6 Fed. 228; Johnson v. Vail, 14 N. J. Eq. 426; Taylor v. Holmes, 14 Fed. 498; Knoxville R. & Light Co. v. Vangilder, 132 Tenn. 487, L.R.A. 1916A, 1111, 178 S. W. 1117.

Williams, J., delivered the opinion of the court:

In this cause a demurrer to the declaration was sustained by the circuit judge, and the court of civil appeals on appeal affirmed the ruling.

In the declaration it was averred that in March, 1896, plaintiff and her husband became the owners as tenants by the entirety of a tract of 105 acres; that in June, 1887, plaintiff became the owner, to her sole and separate use, of a tract of 25 acres lying opposite the 105-acre tract and separated from it only by a public turnpike; that the plaintiff's residence is located on the smaller tract; that the two tracts were and had been continuously used and operated together, or as one farm; and that the

residence, barn, and servants' houses situated on the one are supplied with water by means of a reservoir located on the other tract.

It was further averred that the railway company had instituted a proceeding to condemn a strip through the larger tract as a right of way, and that for the value of that strip and for incidental damages to the remainder of that 105-acre tract plaintiff and her husband, tenants by the entirety, had received payment; but that, under the terms of an agreement in that proceeding, the right was reserved to plaintiff to claim in a future suit incidental damages to the smaller tract, so individually owned by plaintiff. The present action was thereupon brought for this purpose.

The demurrer set forth two grounds: (1) That plaintiff's land was not shown to be a part of the tract, a portion of which was taken for the right of way; and (2) that the title to land as to which damages are now claimed was in plaintiff, and the title to the 105-acre tract subjected to the easement was vested in her and her husband, and that, the ownership being thus variant, the claim of damages could not be supported.

In our opinion a decision on the last point will be determinative of the question of liability, and we shall not discuss the first.

As we consider, the case of plaintiff must be viewed as if her claim to damages to the smaller tract were being urged in the condemnation proceeding that affected the larger tract. The damages of the character claimed can only be such as are incident to the taking of a part of the latter tract for a railway right of way.

The authorities are surprisingly few that deal with the question of an allowance of incidental damages to the owner of an adjoining tract where the title-holding of the same is not identical with that of the lands affected by the actual condemnation-taking, both of which tracts are claimed to be actually used as one.

In *Indiana, I. & I. R. Co. v. Conness*, 184 Ill. 178, 56 N. E. 402, it was held, where a strip of land was condemned wholly within a quarter section owned by a person in fee, that the owner might also recover for injury to his interest as a tenant in common of a remainder estate in an adjoining quarter section. On a second appeal of the case, the interference with the operation of the two sections as one farm was urged as a ground of relief (*Conness v. Indiana, I. & I. L.R.A.1916D.*

R. Co. 193 Ill. 464, 62 N. E. 221), and it was further held that the jury could not take into consideration the fact that the right of way would divide the two sections so as to render difficult of access to the owners of the quarter held in fee to wells and buildings located on the quarter in which his interest was one as tenant in common in remainder. It was said that the jury must not take into account the fact that the right of way divided the two interests, but must consider each as if they were standing alone, or "as if the other of the two interests belonged to an entire stranger." Yet a judgment for some damage to the untouched quarter section was allowed to stand, but that appears to have been based on a provision of the Constitution of Illinois, and this particular ruling makes the case an inapplicable precedent in this state.

In *Chicago & E. R. Co. v. Dresel*, 110 Ill. 89, it appeared: Dresel was in the possession of lots 2 to 15, inclusive, cultivated by him as a whole as a flower garden. Lots 2 to 9 were held under a lease. Lots 10 to 15 were owned by him in fee. The strip sought to be condemned was off of the leased lots, and it was attempted to be subjected as a part of a leasehold interest. His residence and barn were upon lots 14 and 15.

Instructions of the trial judge to the jury were approved which went on the theory that if the lots had a special capacity, as an entirety, for the purpose of flower gardening, and were so used, Dresel could recover for depreciation of the value of the whole for the residue of the lease term. The court said: "Appellant proposed to take a portion of the lots held by the lease. If by so doing the market value of the whole tract was lessened during the two years which appellee had the right to hold and use the same, to that extent he was damaged, and while no part of the lots he owned in fee was taken, still, by the taking, as his property held in fee and by lease was damaged, he, in justice, ought to be entitled to recover so far as the market value of his property was depreciated."

See also in the same connection, *Smith County v. Labore*, 37 Kan. 480, 15 Pac. 577. *Glendenning v. Stahley*, 173 Ind. 674, 91 N. E. 234, dealt with a claim of damages incident to the laying out of a public highway. Glendenning owned an 80-acre tract lying immediately north of the highway, and he and his wife as tenants by entirety owned a 20-acre tract lying directly south of the road. It was sought to show the market

value of the 20 acres, considered in connection with, because used along with, the 80-acre tract, as at the time farmed. The trial court excluded the offered testimony, saying: "It is settled that, in determining the amount of special benefits or damages sustained by any one proprietor, all land belonging to him lying in a contiguous body, and used together for a common purpose, will be considered as one tract or farm. . . . This principle cannot be extended to cover lands owned by different proprietors, although contiguous and used under one management and for a common purpose."

In *Potts v. Pennsylvania Schuylkill Valley R. Co.* 119 Pa. 278, 4 Am. St. Rep. 646, 13 Atl. 291, the land condemned was the individual property of Potts, while the second tract was the property of Potts and another as tenants in common. Held that, notwithstanding a claim of a common use, the assessment of damages should be confined to the lot a portion of which was taken for the railroad's use; "the fee was held and owned by different persons; neither of them could be considered as appurtenant to, or part and parcel of, the other."

Where a leasehold estate was condemned, a claim for damages by the lessee in respect of property owned by him individually, separated from the condemned property by an alley, but used by him in connection with that property in the conduct of his business, was denied. *United States v. Inlota*, Fed. Cas. No. 15,441a.

The case of *Leavenworth, N. & S. R. Co. v. Wilkins*, 45 Kan. 674, 26 Pac. 16, relied on by appellee railway company, went off on a question of pleading without the court reaching the particular question of substantive law now under consideration. The case of *Smith County v. Labore*, supra, was cited, but its ruling on the immediate question was not disapproved.

We think the better rule is that announced in the *Indiana* and *Pennsylvania* cases.

In the case at bar we think it quite manifest that plaintiff's claim cannot be supported on principle. The two tracts are held by different titles vested in different persons. Separate condemnation proceedings would be required to condemn a right of way over them, and separate suits would have to be brought for damages by the distinct owners against an appropriator for injuries done the tracts. When we look upon a condemnation as a compulsory sale, made for the parties by the law (*Southern R. Co. v. Jennings*, 130 Tenn. 450, 171 S. W. 82), L.R.A.1916D.

the law thus would bring the railway in confrontation with two distinct ownerships.

Assume that the plaintiff, Mrs. Tillman, were the owner, as tenant in common, of a one-tenth undivided interest in the larger tract. May it be held that a condemnation affecting that small interest would support the claim here urged for damages done to the entire tract solely owned by her? If so, other such tenants in common owning contiguous tracts individually could do so in like manner, and it is conceivable that if the right of way were taken out of a small boundary so owned in common, surrounded by large tracts severally owned by the tenants in common, enormous damages could be collected from the condemnor under the rule contended for by the appellant.

Let the attitude of the case be reversed, by supposing that plaintiff's individually owned tract had been specially benefited by the construction of the railway over the adjoining tract, but that the balance of the larger tract was incidentally damaged. Would it be either fair or sound to hold that this incidental damage should be offset by the benefits accruing to the smaller tract? Would it not be an abundant reply that mutuality of parties or ownership was lacking to justify such a set-off? We think so.

We think the case has been properly disposed of. Writ of certiorari denied.

Neil, Ch. J., being incompetent, took no part in the decision of this case.

ARIZONA SUPREME COURT.

I. E. TROUTNER, Appt.,
v.
STATE OF ARIZONA.

(— Ariz. —, 154 Pac. 1048.)

Intoxicating liquor — sale — ignorance of character — effect.

Ignorance of the character of the liquid, and honest belief in its nonintoxicating character, are no defense to a prosecution for selling intoxicating liquor contrary to a constitutional provision making it a misdemeanor to sell intoxicating liquor of any

Note. — For mistake in beverage as defense to charge of illegal sale of liquor, see annotation following this case, post, 266.

kind, notwithstanding the statute provides that persons are not guilty of crime who commit an act under ignorance or mistake of fact which disproves any criminal intent.

For other cases, see *Criminal Law*, I. a, in Dig. 1-52 N. S.

(February 10, 1916.)

A PPEAL by defendant from a judgment of the Superior Court for Maricopa County convicting him of selling and disposing of certain intoxicating liquors. Affirmed.

The facts are stated in the opinion.

Messrs. J. J. Cox and James E. Nelson, for appellant:

Defendant was entitled, under the statute, to the instruction requested by him at the trial.

Patrick v. State, 45 Tex. Crim. Rep. 587, 76 S. W. 947; Walker v. State, 50 Tex. Crim. Rep. 405, 98 S. W. 843; McRoberts v. State, 49 Tex. Crim. Rep. 288, 92 S. W. 804; Mayne v. State, 48 Tex. Crim. Rep. 93, 86 S. W. 329; Uloth v. State, 48 Tex. Crim. Rep. 295, 87 S. W. 822; State v. Powell, 141 N. C. 780, 6 L.R.A.(N.S.) 477, 53 S. E. 515.

Messrs. Wiley E. Jones, Attorney General, Leslie C. Hardy and George W. Harben, Assistant Attorney General, for the State:

The courts have held that the sale of a beverage under a mistake or in ignorance of its intoxicating propensities is a defense to a charge of selling intoxicating liquors contrary to law, while some of the courts have announced a different rule.

See State v. Powell, 141 N. C. 780, 6 L.R.A.(N.S.) 477, 53 S. E. 515; Haynes v. State, 118 Tenn. 709, 13 L.R.A.(N.S.) 559, 121 Am. St. Rep. 1055, 105 S. W. 251, 12 Ann. Cas. 470.

Ross, Ch. J., delivered the opinion of the court:

Appellant was tried and convicted upon an information charging him with the crime of selling, exchanging, giving, bartering, and disposing of certain intoxicating liquors. He was tried by a jury and found guilty. From the judgment of conviction he appeals.

The appellant asked the court to instruct the jury as follows: "If you believe from the evidence in this case, beyond a reasonable doubt, that the drink sold in this case was intoxicating as alleged in the information, but still further believe that at the time defendant sold the same he sold it honestly believing it was not intoxicating, then, in such event, the defendant would

not be guilty, and it will become your duty to acquit him."

This requested instruction was refused by the court, and the jury was told by the court: "That the law of this state does not permit one to sell intoxicating liquor and then be heard to say that he did not know that the liquor was intoxicating. He is bound under the law to know. The law presumes that when he sells liquor he knows what he is selling; that is, whether it is intoxicating or not. The prohibition amendment is intended to prevent any traffic in intoxicating liquors. No excuses are recognized or permitted. If one sells intoxicating liquor, he is liable. It is his duty to know what he sells, and he cannot guess at it or rely upon someone else's statement."

The appellant complains of the court's refusal to give the requested instruction, and of the submission to the jury, as the law of this state, of the converse of the proposition contained in his request.

The prohibition amendment (article 23, § 1) reads: "Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquor of any kind, to any person in the state of Arizona, . . . shall be guilty of a misdemeanor. . . ."

In crimes involving moral turpitude, criminal intent or guilty knowledge is, of course, generally recognized as an essential element. This is true whether the offense be one at common law or by statute. Society has so developed and extended that it has become necessary, in order to protect it, to pass many laws forbidding things to be done or commanding things to be done, the neglect to do or the doing whereof had theretofore been regarded as innocent and permissible. Most crimes falling under this head are designated as *malum prohibitum* in contradistinction to those crimes that are bad in themselves and in which criminal intent or guilty knowledge is essential.

That the legislature may make the doing of an act or the neglect to do something a crime in the absence of criminal intent is well settled. The intent of the legislature therefore, in any given piece of legislation, is the controlling factor. It is said in 8 R. C. L. 62: "Whether a criminal intent or guilty knowledge is a necessary element of a statutory offense is a matter of construction to be determined from the language of the statute, in view of its manifest purpose and design. They are many instances in recent times where the legislature in the exercise of the police power has prohibited, under penalty, the performance of a specific act. The doing of the inhibited act constitutes the crime, and the moral turpitude or purity of the motive by which it was

prompted, and knowledge or ignorance of its criminal character, are immaterial circumstances on the question of guilt. The only fact to be determined in these cases is whether the defendant did the act. In the interest of the public the burden is placed upon the actor of ascertaining at his peril whether his deed is within the prohibition of any criminal statute."

In *Com. ex rel. Allegheny County v. Weiss*, 139 Pa. 247, 11 L.R.A. 530, 23 Am. St. Rep. 182, 21 Atl. 10, the defendant was charged with violating a law forbidding the sale of oleomargarin, and he defended on the ground of ignorance of the nature and quality of the article sold. The court stated the rule we are now considering so well that we quote at some length: "Whether a criminal intent or a guilty knowledge is a necessary ingredient of a statutory offense, therefore, is a matter of construction. It is for the legislature to determine whether the public injury threatened in any particular matter is such and so great as to justify an absolute and indiscriminate prohibition. Even if, in the honest prosecution of any particular trade or business conducted for the manufacture of articles of food, the product is healthful and nutritious, yet, if the opportunities for fraud and adulteration are such as threaten the public health, it is undoubtedly in the power of the legislature either to punish those who knowingly traffic in the fraudulent article, or, by a sweeping provision to that effect, to prohibit the manufacture and sale altogether. The question for us to decide, therefore, is whether or not, from the language of the statute, and in view of the manifest purpose and design of the same, the legislature intended that the legality or illegality of the sale should depend upon the ignorance or knowledge of the party charged. The statute in question was an exercise of the police power, and the act was sustained upon this ground, not only in this court, but also in the Supreme Court of the United States. *Powell v. Com.* 114 Pa. 265, 60 Am. Rep. 350, 7 Atl. 913, 7 Am. Crim. Rep. 32; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257. The prohibition is absolute and general; it could not be expressed in terms more explicit and comprehensive. The statutory definition of the offense embraces no word implying that the forbidden act shall be done knowingly or wilfully, and, if it did, the design and purpose of the act would be practically defeated. The intention of the legislature is plain, that persons engaged in the traffic shall engage in it at their peril, and that they cannot set up their ignorance of the nature and qualities of the commodities they sell as a defense."

The language in our prohibition amendment L.R.A.1916D.

ment is "absolute and general." "Every person" who (not he who knowingly or with guilty knowledge) sells intoxicating liquor "shall be guilty." It is all comprehensive,—it excludes none. It makes the act of sale of the forbidden article a crime. He who would avoid any violation of its terms must not sell intoxicating liquor, and, having done the thing forbidden, he may not excuse his act upon ignorance of the fact of its intoxicating quality. He is irrebuttably presumed to know the quality of the article sold, and if it turns out to be intoxicating he may not escape upon the plea of ignorance. To construe the prohibition amendment otherwise we would have to insert words not found therein.

In ascertaining the intent of the lawmaking body in the enactment of this prohibition law, sight of its purpose should not be overlooked. Unquestionably, the purpose was to place a ban upon the traffic in intoxicating liquors, and this purpose would be frustrated, if not entirely destroyed, if ignorance of the intoxicating quality of the article sold could be interposed as a defense. Ignorance of the law never excuses, and the rule is as absolute that ignorance of the fact never excuses if that be the declaration of the lawmaking body.

The rule announced has been almost universally the one adopted by the courts of the country in the construction of similar statutes. The courts that have adopted a different rule have either been influenced by special statutes, or have, in our opinion, pursued an erroneous course of reasoning. Where ignorance of the fact has been held a good defense, we think too much stress has been given to the rights of the defendant and too little consideration of the rights of society. While it may seem a serious hardship to inflict punishment upon one who has acted innocently, yet the fact remains that the act was of his own volition, generally fruitful of benefits to him and inimical to the rights of the general public. He, then, in our opinion, should suffer, and the general policy of the law prevail. This can be only when the rule is unbending.

The courts holding that the maxim of the criminal law, "*Ignorantia facti excusat*," applies, seem to be limited to Ohio, North Carolina, and Texas. *Farrell v. State*, 32 Ohio St. 456, 30 Am. Rep. 614; *State v. Powell*, 141 N. C. 780, 6 L.R.A.(N.S.) 477, 53 S. E. 515; *Walker v. State*, 50 Tex. Crim. Rep. 495, 98 S. W. 843.

Texas has a general statute providing that "if a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense." *Vernon's Anno. Penal Code* 1916, art. 46.

And it was held in *Patrick v. State*, 45 Tex. Crim. Rep. 587, 78 S. W. 947, that this statute was applicable to all offenses, unless specially excepted. We find no fault with that holding; the language of the statute is broad enough to apply to crimes both *malum prohibitum* and *malum in se*. The Texas decisions, however, are relied upon by appellant for a reversal, because he says subdivision 4 of § 24, Penal Code 1913, is like the Texas statute just quoted. Section 24 provides that "all persons are capable of committing crimes except those belonging to the following classes: . . . (4) Persons who committed the act or made the omission charged under an ignorance or mistake of fact which disproves any criminal intent."

This clearly has reference to crimes in which "criminal intent" or guilty knowledge is an essential ingredient. It is manifest by the language itself as also by the whole context of § 24. The other "persons" mentioned in § 24 as incapable of committing crimes are children under fourteen years of age, not knowing the wrongfulness of their acts, and idiots, lunatics, and insane persons, etc.,—persons incapable of having or entertaining a criminal intent. Persons of sound mind and unquestioned mental competency, and therefore capable of committing crimes, may, in those cases in which a criminal intent is essential, plead as a defense ignorance or mistake of fact, for the purpose of disproving any criminal intent. They are, for the purposes of their defense, placed in the same category with persons mentally incompetent to form a criminal intent, but, in that class of acts the mere doing of which is made by law the crime, regardless of the purpose or intent, persons of sound mind are not entitled to immunity because of ignorance or mistake of fact. Therefore subdivision 4 can only have reference to those crimes in which a "criminal intent" is necessary. 12 Cyc. 147.

In *United States v. Stofello*, 8 Ariz. 461, 76 Pac. 611, the defendant was charged with selling intoxicating liquor to an Indian in violation of the laws of Congress. The court held the ignorance of the defendant that the person to whom the sale was made was an Indian was no defense, in this language: "It will be noted that the statute, in plain terms, makes the selling, giving, or disposing of intoxicating liquor to an Indian, a ward of the government, under the charge of an Indian superintendent or agent, a crime. The word 'knowingly' is not used in the act, nor is any word of similar import found therein. An examination of the

authorities has satisfied us that the offense created by the statute is of that class of crimes in which knowledge or guilty intent is not an essential ingredient, and need not be proven. The doing of the prohibited thing is made an offense, without regard to the purpose or intent. Such crimes are in the nature of police regulations, imposing criminal penalties for their violation, without regard to purpose or intent. The object of such statutes is to require such diligence as will render their violation impossible; the end sought being the protection of the public,"—citing cases.

We have in our statutes many laws for the protection of children; thus it is a crime to sell or give to any minor intoxicating liquor, or to permit a minor under sixteen years of age to enter any saloon or place of entertainment where intoxicating liquors are sold, or to sell, give, or furnish to any minor under eighteen years of age cigars, cigarettes, cigarette paper, smoking or chewing tobacco of any kind or character, or to use vulgar or obscene language in the presence of any child, and, if it be required that guilty knowledge or criminal intent is essential to a conviction under these statutes, it would result in few convictions, and would largely nullify and defeat the purpose of the laws.

Haynes v. State, 118 Tenn. 709, 13 L.R.A. (N.S.) 559, 121 Am. St. Rep. 1055, 105 S. W. 251, 12 Ann. Cas. 470, is a leading case in which the court discusses both views here contended for, but sustains the proposition that ignorance of fact is no defense in cases of this character. In that case the court said: "It is the sale of intoxicating liquors without license which the statute prohibits, and it is unlawful to sell intoxicating liquor of any character without license. This being so, the seller must find out at his peril whether the liquor he proposes to sell is intoxicating or not. Guilty knowledge is not by the statute made an ingredient of the offense."

In the case and the note thereto (12 Ann. Cas. 471, 472) the cases bearing upon the point show that the great weight of authority sustains the proposition quoted in the decision. We are well satisfied that the court did not err in its refusal to give the instruction requested by appellant, and that it correctly stated the law in the instruction given.

Judgment is accordingly affirmed.

Franklin and Cunningham, JJ., concur.

Annotation—Mistake in beverage as defense to charge of illegal sale of liquor.

The earlier cases on this subject are collected in notes to *State v. Powell*, 6 L.R.A.(N.S.) 477, and *Bacot v. State*, 21 L.R.A.(N.S.) 525.

As to seller's ignorance of minority of purchaser as defense to prosecution for sale of intoxicating liquor to minor, see note to *Harper v. State*, 25 L.R.A.(N.S.) 669.

And as to effect on liability under liquor dealer's bond, of his ignorance of purchaser's intoxication or minority, see note to *State v. Dubruiel*, 25 L.R.A.(N.S.) 801.

Other notes dealing with the effect of mistake upon criminal responsibility may be found by consulting the Index to L.R.A. Notes, under the title, "Criminal Law," subtitle, "Effect of ignorance, mistake, or belief."

The general rule stated in the earlier notes, to the effect that mistake of fact as to whether liquor sold is intoxicating is no defense to a prosecution for illegal liquor selling, is sustained by the majority of the subsequent cases, including *TROUTNER v. STATE*, ante, 262.

In *Beiser v. State* (1913) 9 Ala. App. 72, 63 So. 685, it was decided that it is the fact of a sale of the prohibited articles, and not the intent with which the sale is made, that is denounced by the prohibition law, so that the fact that defendant had bought the liquor which he sold as cider, under a guaranty that it did not have any alcohol in it, would not relieve him of responsibility for the sale if in fact it was whisky; and hence that evidence of this guaranty was properly excluded.

And in *Gourley v. Com.* (1910) 140 Ky. 221, 48 L.R.A.(N.S.) 315, 131 S. W. 34, it was said: "In prosecutions for a violation of the antiliquor laws, no question of good faith or good or bad intent is involved. It is the act alone that the law looks at and takes notice of, and by the act the guilt or innocence of the accused is to be judged. If the liquor or beverage is one that will intoxicate, it is wholly immaterial that the accused believed that it would not, or that in good faith he bought it as a nonintoxicant, or that he was ignorant of its quality or ingredients."

Likewise, in *People v. Hatinger* (1913) 174 Mich. 333, 140 N. W. 648, the court said: "Section 1 of the act prohibits in positive terms the sale of intoxicating liquors, and no language is used which

indicates that the element of intent is to be read into it. Had the legislature intended to make the intent to violate the law an essential element, it would have doubtless used some appropriate language indicating its purpose. If it were necessary to prove intent to violate the law before a conviction could be had, the act would fall far short of doing what the legislature obviously intended it should do; and presumably in this can be found the chief reason why it did not incorporate into the act the element of intent. Laws forbidding the sale of intoxicating liquor and impure foods would be of little use if convictions for their violations were to depend on showing guilty knowledge. The fact, then, being that respondent had no knowledge that the cider contained alcohol, and that he purchased it and sold it in good faith, with no intent to violate the law, the law will not avail him in the face of his admission that he sold it and that it contained alcohol." And in connection with this case see *People v. Emmons* (1913) 178 Mich. 126, 144 N. W. 479, Ann. Cas. 1915D, 425.

But in *State v. Coverdale* (1910) 1 Boyce (Del.) 555, 77 Atl. 754, a divided court of two, in a prosecution for the illegal sale of vinous liquors, not for medicinal or sacramental purposes, under the local option law (24 Del. Laws, chap. 65), was of the opinion that accused might show in defense any effort made by him to ascertain whether the liquor sold by him was vinous liquor prohibited by law, and that if he had reasonable grounds to believe, and in fact did believe, that such liquor was not vinous, it would be a good defense; but that the burden was upon him to show clearly and satisfactorily that a reasonable and careful man, anxious to obey the law, would have believed under the circumstances that the liquor sold was not vinous, and that defendant did in fact entertain such belief.

In *Lightle v. State* (1911) 5 Okla. Crim. Rep. 259, 114 Pac. 275, it was held that where one is being prosecuted for having in his possession a substitute for or imitation of beer, with the intention of selling the same, it is no defense that the defendant honestly believed that the substitute contained less than one half of 1 per cent of alcohol.

Where one sells or unlawfully handles any prohibited liquors, in Oklahoma, he

does so at his peril, and cannot escape punishment by proving that he was informed and believes that the sale of such

liquor is not prohibited in the laws of Oklahoma. (*Okla.*) *Ibid.* W. W. A.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH OF KENTUCKY,
Appt.,

v.
BOB JOHNSON.

(167 Ky. 727, 181 S. W. 368.)

False pretenses — representations to stranger.

An employee who, having assigned his wages, procures them to be paid to himself by representing to his employer that he has not assigned them, and thereby defrauds the assignee, is guilty of obtaining money by false pretenses.

For other cases, see *False Pretenses*, in Dig. 1-52 N. S.

(January 13, 1916.)

APPEAL by the Commonwealth from a judgment of the Circuit Court for Bell County sustaining a demurrer to an indictment charging defendant with unlawfully obtaining money from one person by false pretenses with intent to defraud a third person. Reversed.

The facts are stated in the opinion.

Messrs. James Garnett, Attorney General, D. O. Myatt, Assistant Attorney General, and J. G. Forester for the Commonwealth.

Mr. Jackson Morris for appellee.

Miller, Ch. J., delivered the opinion of the court:

The grand jury of Bell county returned an indictment charging the appellee with the crime of unlawfully obtaining money from one person by false pretenses, with the intent to perpetrate a fraud upon a third person. Omitting the formal parts, the indictment reads as follows: "The said Bob Johnson, on the 8th day of October, 1914, and before the finding of this indictment, and in the county and state aforesaid, did unlawfully, wilfully, and with the felonious intent to perpetrate a fraud on Bascom Saylor, state, pretend, and represent to Knabb & Shank Company that he had not given an order or transferred to another person the amount said company owed him for work, and did collect from said company \$10 and other sums of money, when at the time he knew he had sold said time and the

money due therefor to Bascom Saylor, and received from said Saylor the pay therefor, and said statements were false, and said Knabb & Shank Company relied on said statements and paid him said money, which it would not have done otherwise. Said statements were made with the intent to defraud said Bascom Saylor, which was done by said false statements."

This indictment was found under § 1208 of the Kentucky Statutes, which provides, in part, as follows: "If any person by any false pretense, statement, or token, with intention to commit a fraud, obtain from another money, property, or other thing which may be the subject of larceny, . . . he shall be confined in the penitentiary not less than one nor more than five years."

The circuit court sustained a demurrer to the indictment, and the commonwealth appeals.

It will be observed that the indictment charges appellee with having made the false statement to his employer, the Knabb & Shank Company, with the intent to defraud Bascom Saylor, to whom appellee had assigned his wages, and that the Knabb & Shank Company relied on said false statement and paid Johnson his wages, which operated as a fraud upon Saylor.

The appellee contends that the indictment is defective because it fails to charge that he made a false statement to Saylor, the prosecutor in this case, and that it is insufficient to charge appellee with the crime denounced by the statute, by alleging that the false representation was made to the Knabb & Shank Company, which has not been defrauded in any way. In other words, appellee insists that the false representation must be made to the party defrauded, and that he must have relied upon it to his injury; that it is no offense if the representation is made to one person and the money is obtained from a different person. The Knabb & Shank Company having paid the money to Johnson without notice of the assignment to Saylor, that company has in no way been prejudiced. The payment was a valid one so far as the company was concerned. So the case reduces itself to this proposition: Is it a crime under the statute when a false representation is made to one, and money or property is thereby obtained from another? An examination of the question shows it has often been decided.

Note. — As to necessity of making false pretenses to defrauded party, or of intending to defraud any particular person. see annotation following this case, post, 270. L.R.A.1916D.

In *Com v. Call*, 21 Pick. 515, 32 Am. Dec. 284, decided in 1839, the defendant was

indicted under the Massachusetts statute for obtaining money on false pretenses, under the following circumstances: Parker owed White and Sargent \$11.63, and Call falsely pretended and represented himself to Parker as being the authorized collector of White and Sargent, and that they had sent him to collect and receive the money due them from Parker, and that Parker, believing the false representation, paid Call the \$11.63 which he owed to White and Sargent. The indictment charged Call with having defrauded White and Sargent of their money by means of the fraudulent representation to Parker. The Massachusetts statute under which the indictment was found provided, like ours, that if any person should designedly, by any false pretense, and with intent to defraud, obtain from another person any money, goods, wares, merchandise, or other property, he should be punished, etc. In affirming a conviction the supreme judicial court of Massachusetts said: "The objection to the indictment is that it alleges an intent to defraud one person, and that false pretenses were practised upon another; that one man was deceived and his money obtained, and another defrauded. The facts reported clearly show that these allegations are the only ones which would meet the proof, and that, if this indictment cannot be sustained, a gross fraud may be practised within the words of the statute, and yet not be liable to punishment under it. A combination of facts has here occurred, and may occur again, where a deception has been practised upon one person and his property obtained, and the loss has fallen upon another, the intention being to defraud him. This is clearly within the mischief intended to be guarded against, and we have no doubt within the effective prohibition of the statute."

Again, in *State v. Scott*, 48 Mo. 422, decided in 1871, Scott was indicted under the statute for falsely pretending to Conn that Scott's check on a New York bank for \$150 was a good, genuine, and available order for the payment of \$150, and that Scott kept an account with said bank and he had money therein for the payment of the check; that Conn thereupon indorsed the check, and that said indorsement was procured by Scott with the intent to cheat and defraud. The Missouri statute upon the subject provided that "every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretense, obtain the signature of any person to any written instrument, . . . shall, upon conviction thereof, be punished in the same manner and to the same extent as for feloniously stealing the

money, property, or thing so obtained." *Wagner Stat. chap. 42, art. 3 § 47.*

In sustaining the conviction the supreme court of Missouri said: "It was not necessary to allege in the indictment that the defendant used the false pretenses or obtained the signature of Conn with the specific intention of cheating or defrauding any particular person or body. The statute has enacted a rule at war with any such assumption. It declares that it shall be sufficient, in any indictment for an offense, where an intent to injure, cheat, or defraud shall be necessary to constitute the offense, to allege that the defendant did the act with such intent without alleging the intent of the defendant to be to injure, cheat, or defraud any particular person, and on the trial of such offense it shall not be necessary to prove an intent on the part of the defendant to injure, cheat, or defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with an intent to injure, cheat, and defraud."

In *Mack v. State*, 63 Ala. 138, decided in 1879, John Mack was indicted under § 4370 of the Alabama Code of 1876, which declared that "any person who, by any false pretense or token, and with the intent to injure or defraud, obtains from another any money or other personal property, must, on conviction, be punished as if he had stolen it."

The pretense charged against John Mack was that he falsely pretended to Smith that he had been sent by Ella Mack for certain musical instruments then in the possession of Smith, but held by him for said Ella, and that under this pretense John Mack obtained possession of the instruments, thereby defrauding Ella Mack. It will be noticed that the false representation was made to Smith, but to the prejudice of Ella Mack. In sustaining the conviction under these facts, the supreme court of Alabama said: "To constitute this statutory crime, there must be a pretense, by declaration or otherwise, that some fact or facts exist tending to induce another to part with something valuable, and upon the strength of which pretense or representation the possession of the valuable thing is parted with. The accomplished fraud must have reasonable connection with the pretense (*Bishop Statutory Crimes*, § 452), and the pretense must be shown to be false, and made with intent to injure or defraud. Defraud whom? The statute does not in terms inform us. Usually the intent is to defraud the owner of the thing obtained; but it is sufficient if the intent be to defraud anyone connected with the ownership, possession, or custody of the chattel."

In *State v. Hargrave*, 103 N. C. 328, 9 S. E. 46, decided in 1889, Hargrave assigned

his claim for witness fees against the county to Clodfelter in exchange for goods. Clodfelter filed the assignment with Kinney, the county officer authorized to pay the claim; but, the assignment having been mislaid, Hargrave collected his witness-fees, thereby defrauding Clodfelter. The indictment charged Hargrave with having defrauded Clodfelter by falsely pretending to Kinney that he was the owner and entitled to the money due upon his witness claim, and that he thereby obtained the money from Kinney and defrauded Clodfelter. The trial court instructed the jury that if it believed beyond a reasonable doubt that Hargrave fraudulently, designedly, knowingly, and falsely represented to Kinney that he had not assigned his claim to Clodfelter, and that he was the owner of the order, when in truth and in fact, he was not, and that by reason thereof he obtained the money from Kinney, he was guilty. Upon appeal the supreme court of North Carolina approved this instruction, holding that the making of a false representation to one person so as to defraud another constituted an indictable offense, under the statute. To the same effect, see Bishop's New Crim. Proc. 2d Ed. vol. 3, § 174.

In *Schayer v. People*, 5 Colo. App. 75, 37 Pac. 43, decided in 1894, the Colorado statute provided that "if any person shall cause or procure others to report falsely of his honesty, wealth, or mercantile character, and by thus imposing on any person or persons, obtain credit, and thereby fraudulently get into possession of goods, wares, merchandise, or any valuable thing, every such offender shall be deemed a swindler, and on conviction" shall be punished, etc. Gen. Stat. 1883, § 884.

Under this statute Schayer was convicted of fraudulently obtaining possession of goods of Bockfinger by means of a false report of his wealth and mercantile character which he caused to be made to Bockfinger by the mercantile agency of R. G. Dun & Company. The court reversed a judgment convicting Schayer because of variance between the allegations of the indictment and the proof, but in doing so it construed the statute as follows: "To constitute the offense defined by the statute, it is not necessary that an intention to defraud any particular person or persons should exist. If the false report which has been procured results in defrauding any person of his property, the offense is complete whether the offender had such person in his mind or not; and an indictment setting forth that the person charged caused others to report falsely of his honesty, wealth, or mercantile character, and that by means of the report some person or persons, naming them, were imposed upon so that they extended credit to L.R.A.1916D.

the offender, and he thereby fraudulently obtained possession of their property, would contain substantially all the facts necessary to constitute the offense under the statute."

And in *State v. Bourne*, 86 Minn. 432, 90 S. W. 1108, decided in 1902, it was held that, where an indictment for larceny for obtaining money through false pretenses charged that the intent was to defraud a particular person, it was not a variance if the proof showed that some other person than the one specified in the indictment was defrauded.

In 19 Cyc. 415, the rule deduced from the authorities is stated as follows: "The intent to defraud need not be directed against the legal owner; it is sufficient if it be directed against anyone in lawful possession of the goods, or who parts with property in reliance thereon. Nor need the intent be to cause ultimate loss to prosecutor, since prosecutor is defrauded by the mere obtaining of his property by a false pretense; although he may suffer an ultimate loss, an intent to cause actual loss is not necessary."

We have not overlooked the case of *Moulton v. State*, 5 Lea, 577, which seems to be at variance with the otherwise uniform line of authorities above cited. The opinion in the *Moulton* Case, however, is not more than two pages in length, and does not attempt to argue the question, and does not refer to any of the cases above cited.

It will be observed that our statute is very broad in its terms; it does not require that the false statement or representation must be made to the party defrauded. On the contrary, it says, if any person by any false pretense or statement, with the intention to commit a fraud, obtain money, he is guilty. The statute does not require that the false statement should be made to any particular person or that it should be with the intention of committing a fraud upon the person to whom the false statement was made. The offense is committed when the false statement is made with the intention to commit a fraud, and money or property is thereby obtained.

The indictment need not charge that the person to whom the false pretense was made sustained any loss. *Com. v. Ferguson*, 135 Ky. 34, 24 L.R.A. (N.S.) 1101, 121 S. W. 967, 21 Ann. Cas. 434.

The purpose of the statute is to punish the perpetrators of fraud committed through any false pretense. The gist of the offense is the successful misrepresentation, regardless of the person to whom it was made. 19 Cyc. 404. The indictment satisfies this construction of the statute.

Judgment reversed, with instructions to overrule the demurrer to the indictment, and for further proceedings.

Annotation—False pretenses: necessity of making the false pretenses to the defrauded party or of intending to defraud a particular person.

The question whether actual deception of the person from whom money or property is obtained is essential to the offense of obtaining the same by false pretenses, where such person is not the owner, but an agent or officer of the owner, of the property, is discussed in the note to *State v. Talley*, 11 L.R.A.(N.S.) 938.

As to whether an indictment or information for obtaining money under false pretenses may lay ownership in one who was in possession of the property as agent, bailee, etc., see the note to *Martins v. State* (1908) 22 L.R.A.(N.S.) 645.

The cases generally in this note under the statutes, involved support *Com. v. JOHNSON*, ante, 267, in holding that it is not necessary that the false representations be made to the person defrauded in order to convict one of obtaining money or property by false pretenses.

It was held in *State v. Hargrave* (1889) 103 N. C. 328, 9 S. E. 406, that a charge that defendant obtained something of value from one person by making a false representation to him with intent to defraud a third person not connected as agent was clearly within the mischief intended to be remedied by the statute.

So, in *Com. v. Call* (1839) 21 Pick. (Mass.) 515, 32 Am. Dec. 284, discussed in *Com. v. JOHNSON*, an indictment under statute for obtaining money by false pretenses, averring that the pretenses were practised upon one person and his money obtained with intent to defraud another, was held good. This indictment, observed the court, would manifestly be bad at common law, because the obtaining of property by false pretenses is not an offense punishable at common law. But even had false tokens, one of the means of deception mentioned in this statute, been used, it is contended that the indictment would still be defective by the rules of the common law, because the allegation that one was deceived, and another defrauded, is repugnant, absurd, and suicidal. And the case of *Rex v. Lara*, subsequently set out in this note, is relied upon as deciding this point. That case, which certainly seems to be directly in point, was an Old Bailey trial, in which, according to the report, the decision appears to have been made by the jury rather than the bench. At most, it was a hasty ruling during a criminal trial, in a tribunal more re-

markable for its promptitude than its deliberation in such trials; it never received a revision, and is not entitled to much respect.

So, it is held in *Reg. v. Brown* (1847) 2 Cox, C. C. (Eng.) 348, that under Stat. 7 & 8 Geo. IV. chap. 29, § 53, the pretense need not be made to the person from whom the money is obtained; the mode in which the pretense to A effects an obtaining of money from B being matter of evidence. See also *Reg. v. Moseley* (1861) Leigh & C. C. C. (Eng.) 92, 9 Cox, C. C. 16.

And see *Schayer v. People* (1894) 5 Colo. App. 75, 37 Pac. 43, as set out in the opinion of *COM. v. JOHNSON*.

Representation to agent or officer.

A false representation to an agent or clerk has been held a false pretense to the principal. *Com. v. Call* (1839) 21 Pick. (Mass.) 515, 32 Am. Dec. 284 (agent); *Com. v. Harley* (1844) 7 Met. (Mass.) 462 (representations made to clerk who communicates them to one of firm); *People v. Cadot* (1903) 138 Cal. 527, 71 Pac. 649 (false pretenses to agent); *People v. Wakely* (1886) 62 Mich. 297, 28 N. W. 871 (it is competent to allege in an information for false pretenses that the false representations were made to an agent, and if he had authority to sell the article obtained by such false pretense, the information will be sufficient although the principal did not act upon the representations made otherwise than through the agent); *State v. Taylor* (1902) 131 N. O. 711, 42 S. E. 539 (it is not necessary that the pretense be made to the principal, but if made to an agent, by means of which the property of the principal is obtained, it is sufficient); *People v. Eaton* (1907) 122 App. Div. 706, 107 N. Y. Supp. 849 (a representation to an agent of a corporation to obtain money from the corporation is a representation to the corporation). See also *State v. Turley* (1898) 142 Mo. 403, 44 S. W. 267.

So, representations made to an officer acting in behalf of a county will support a conviction of obtaining money or property from the county by false pretenses. *Roberts v. People* (1886) 9 Colo. 458, 13 Pac. 630 (presenting false accounts to board of county commissioners); *State v. Lynn* (1901) 3 Penn. (Del.) 316, 51 Atl. 878 (presentation of false bill for labor and services).

In an indictment for obtaining money

from a city by false pretenses by the presentation of a false bill for labor and material, an allegation that the accused pretended and falsely represented to the mayor is sufficient without its averring the channels or route (intermediate agents) by which the representations reached him. *People ex rel. Phelps v. Oyer & Terminer Ct.* (1881) 83 N. Y. 436. See also *State v. Stewart* (1900) 9 N. D. 409, 83 N. W. 869, where money was obtained from the county by presenting the auditor a false certificate of claim for bounty.)

An indictment charging the obtaining of money from the board of chosen freeholders by certain false pretenses made to the county collector is sufficient, it not being necessary that the pretenses be made to the person from whom the money was obtained. *State v. Crowley* (1877) 39 N. J. L. 264.

So, where an indictment for swindling charged that accused secured a loan from one's agent upon a mortgage on property which accused did not own, it was held in *Perry v. State* (1898) 39 Tex. Crim. Rep. 495, 46 S. W. 816, that there was no variance, although the mortgage and note set out in the indictment were executed to the principal, the evidence showing that the principal had nothing to do with the transaction except through his agent.

Where one was indicted under the act of 1815, chap. 143, for obtaining goods by false pretenses from a mercantile firm, pretenses proved to have been made to one partner were, in *Com. v. Moorar* (1834) Thacher Crim. Cas. (Mass.) 410, held to sustain the indictment. See also to the same effect. *Reg. v. Kealey* (1851) 1 Eng. L. & Eq. Rep. 585, 2 Den. C. C. 69, Temple & M. 405, 15 Jur. 230, 5 Cox, C. C. 193.

Advertisement.

It has been held that one may obtain goods or property from another under false pretenses by means of an advertisement to the general public.

Thus, where one obtained a check from a person by means of a fraudulent newspaper advertisement for a housemaid, it was held in *Reg. v. Silverlock* [1894] 2 Q. B. (Eng.) 766, 63 L. J. Mag. Cas. N. S. 233, 10 Reports, 431, 72 L. T. N. S. 298, 43 Week. Rep. 14, 18 Cox, C. C. 104, 58 J. P. 788, 9 Am. Crim. Rep. 276, 10 Am. Crim. Rep. 318, that the indictment was good, although it did not allege that the pretense was made to a particular person.
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See also *Reg. v. Randell* (1887) 57 L. T. N. S. (Eng.) 718, 52 J. P. 359, 16 Cox, C. C. 335, where one was held guilty of obtaining money under false pretenses where he induced persons to pay money for the privilege of competing in a word contest for prizes, the advertisement containing a false statement of facts.

Intent.

It is generally held unnecessary under statutes for obtaining money or property by false pretenses, to allege in the indictment the intent of the accused to cheat, injure, or defraud any particular person (*State v. Hazen* (1897) 104 Iowa, 16, 73 N. W. 359; *State v. Scott* (1871) 48 Mo. 422), and in some jurisdictions the statute expressly provides that it shall be sufficient to allege that accused did the act with intent to defraud, without alleging the intent to defraud any particular person (*State v. Blizzard* (1889) 70 Md. 385, 14 Am. St. Rep. 366, 17 Atl. 270; *State v. Dixon* (1888) 101 N. C. 741, 7 S. E. 870; *State v. Ridge* (1899) 125 N. C. 658, 34 S. E. 440; *Stat. v. Salisbury Ice & Fuel Co.* (1914) 166 N. C. 366, 52 L.R.A.(N.S.) 216, 81 S. E. 737).

So, it has been held that an intent to defraud need not be directed against the legal owner; it is sufficient if it is directed against anyone in lawful possession of the goods, or anyone who parts with property in reliance thereon. *Mack v. State* (1879) 63 Ala. 138.

In *Reg. v. Parkinson* (1876) 41 U. Q. B. 545, one was held guilty of obtaining money from an accountant by the pretenses although the money belonged to another person and there was no sufficient proof of an intent to defraud a particular person.

A conviction for obtaining money under false pretenses cannot be arrested because the indictment charged intent to defraud a fictitious person, where evidence shows that the real person for not known in the transaction, where statute provides that it shall be sufficient to charge intent to defraud without alleging an intent to defraud any particular person. *State v. Salisbury Fuel Co.* (1914) 166 N. C. 366, 52 L.R.A.(N.S.) 216, 81 S. E. 737.

It was held in *State v. Hartnett*, 98, as 7 Penn. (Del.) 204, 74 Atl. 82, that in order to find one guilty of attempting to obtain money under false pretenses from the county treasurer by sending a false bill to the levy collector, it was necessary to satisfy the jury that there was a reasonable doubt that defendant

tended to defraud the named county treasurer.

An indictment for fraud at common law, charging the false pretense to have been made to one person and the deceit to have been practised on a different person, is, in *Rex v. Lara* (1794) 2 Leach, C. L. (Eng.) 647, 2 East, P. C. 819, 6 T. R. 565, held bad. See, however, *Com. v. Call* (1839) 21 Pick. (Mass.) 515, 32 Am. Dec. 284.

So, an indictment alleging the employment of men to mine coal by the ton, and the use of false weights, sets out the first and second element necessary to constitute a cheat at common law, but is fatally defective in failing specifically to charge that any person was defrauded. *Com. v. Steen* (1896) 1 Pa. Super. Ct. 624.

In *Com. v. Harley* (1844) 7 Met. (Mass.) 506, it was held that a charge in an indictment at common law for conspiracy to defraud a particular individual was not supported by evidence of a conspiracy to cheat the public generally, although it did in fact operate to defraud the individual named; and that the variance between the allegations and the proof was fatal to the prosecution. See also to the same effect *Com. v. Kellogg* (1851) 7 Cush. (Mass.) 473.

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WASHINGTON SUPREME COURT. (In Banc.)

(*THE*) *YOUNG MEN'S CHRISTIAN ASSOCIATION OF SEATTLE*, Appt.,
v.

ERT E. PARISH, as County Assessor
of King County, Resp.

and (— Wash. —, 154 Pac. 785.)

observed— exemption — special law —
Young Men's Christian Association.
an exemption from taxation of property
But for the religious purposes of the association, is not within constitutional authority to exempt property by general laws, the property of other organizations by title to religious purposes is left subject to taxation.

another cases, see *Taxes*, I. f, 1, in *Dig.*
and N. S.

Lara, (February 5, 1916.)
is re

That, *AL* by plaintiff from a judgment
direct the Superior Court for King County
trial,

the — As to exemption from property
of property of Y. M. C. A. or Y.
by the A., see annotation following this
most, at, 275.
criminal D.
L.R.A.

It was held in *State v. Bourne* (1902) 86 Minn. 432, 90 N. W. 1108, that where in an indictment for larceny for obtaining money or property through false pretenses, it is charged that the intent is to defraud a particular person, it is not a variance if the proofs tend to show that some other person or corporation than the one specified in such criminal pleading was defrauded. In this case a deputy auditor forged orders on the county treasurer and sold them to a bank as genuine, and these orders, when innocently presented by the bank for payment, were paid by the county treasurer. It was contended that defendant's intent to defraud was to be tested by the actual result of his criminal acts, since he could premeditate only the natural consequence that followed; and when the treasurer innocently paid to the innocent purchaser of these forged orders their apparent face value, it conclusively established an intent to defraud the county rather than the bank, which it was urged was a fatal variance between the indictment and the proofs. The court observed, however, that it was not easy, upon the application of the rules of the common law or of common sense, to discover any legal force to this claim.
J. D. C.

dismissing an action brought to restrain defendant from listing for taxation certain real property. Affirmed.

The facts are stated in the opinion.

Messrs. George H. Walker and Fletcher Lewis, for appellant:

The exemption statute is constitutional.

State v. Vance, 29 Wash. 435, 70 Pac. 34;
State v. Sharpless, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737; *Leicht v. Burlington*, 73 Iowa, 29, 34 N. W. 494; *State ex rel. Van Riper v. Parsons*, 40 N. J. L. 123, 29 Am. Rep. 210; *State ex rel. Atty. Gen. v. Miller*, 100 Mo. 439, 13 S. W. 677; *Budd ex rel. State Commissioner v. Hancock*, 66 N. J. L. 133, 48 Atl. 1023; *State ex rel. Richards v. Hammer*, 42 N. J. L. 436; *State ex rel. Chamberlin v. Daniel*, 17 Wash. 111, 49 Pac. 243; *State v. Somerville*, 67 Wash. 642, 122 Pac. 324.

The entire property of the Young Men's Christian Association as described in the complaint is wholly used for the religious purposes of the association within the meaning of the statute.

Y. M. C. A. v. Douglas County, 60 Neb. 642, 52 L.R.A. 123, 83 N. W. 924; *Auburn v. Y. M. C. A.* 86 Me. 244, 29 Atl. 992; *Y. M. C. A. v. Keene*, 70 N. H. 223, 46 Atl.

186; *People ex rel. Gore v. Y. M. C. A.* 157 Ill. 403, 41 N. E. 557; *Thurston County v. Sisters of Charity*, 14 Wash. 267, 44 Pac. 252; *Foley v. Oberlin Cong. Church*, 67 Wash. 281, 121 Pac. 65; *Y. M. C. A. v. New York*, 113 N. Y. 187, 21 N. E. 86; *Com. v. Y. M. C. A.* 116 Ky. 711, 105 Am. St. Rep. 234, 76 S. W. 522; *Carter v. Whitecomb*, 74 N. H. 482, 17 L.R.A.(N.S.) 733, 69 Atl. 779; *Little v. Newburyport*, 210 Mass. 414, 96 N. E. 1032, Ann. Cas. 1912D, 425.

Messrs. Samuel Morrison and John F. Murphy, for respondent:

The exemption statute in question is unconstitutional.

Thurston County v. Sisters of Charity, 14 Wash. 267, 44 Pac. 252; *State ex rel. Chamberlin v. Daniel*, 17 Wash. 117, 49 Pac. 243; *Foley v. Oberlin Cong. Church*, 67 Wash. 281; *Y. M. C. A. v. Keene*, 70 N. H. 223, 46 Atl. 186; *Terry v. King County*, 43 Wash. 68, 86 Pac. 210, 9 Ann. Cas. 1170; *Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926.

Even if this court should find that the statute exempting the Young Men's Christian Association is constitutional, nevertheless no part of plaintiff's property was used for the religious purposes of the association within the meaning of the statute, with the possible exception of the auditorium.

Exemption laws are strictly construed.

Foley v. Oberlin Cong. Church, 67 Wash. 283, 121 Pac. 65.

A person claiming exemption must affirmatively show the facts rendering it exempt.

Watson v. Cowles, 61 Neb. 216, 85 N. W. 35; *Adelphia Lodge v. Crawford*, 157 Mo. 356, 57 S. W. 1020; *People ex rel. McCullough v. Bennett Medical College*, 248 Ill. 608, 140 Am. St. Rep. 237, 94 N. E. 110; *People ex rel. McCullough v. Deutsche Gemeinde*, 249 Ill. 132, 94 N. E. 162; *Re Gop-sill*, 77 N. J. Eq. 215, 77 Atl. 793; *People ex rel. Thompson v. Ravenswood Hospital*, 238 Ill. 137, 87 N. E. 305.

Words in common use are to be construed in their natural, plain, and ordinary significance.

State v. Miller, 72 Wash. 158, 129 Pac. 1100; 36 Cyc. 1114; *Knight's Estate*, 159 Pa. 500, 28 Atl. 303; *Re Fay*, 37 Misc. 532, 76 N. Y. Supp. 62; *People ex rel. McCullough v. Deutsche Gemeinde*, 249 Ill. 132, 94 N. E. 162; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179.

Whatever part of property is diverted to secular uses should be taxed.

37 Cyc. 944, 945; *Chapel of Good Shepherd v. Boston*, 120 Mass. 212; *Sisters of Peace v. Westervelt*, 64 N. J. L. 510, 45 Atl. 788; *Y. M. C. A. v. Keene*, 70 N. H. L.R.A.1916D.

223, 46 Atl. 186; *Y. W. C. A. v. Paterson*, 61 N. J. 420, 39 Atl. 655.

Main, J., delivered the opinion of the court:

This is an action brought for the purpose of restraining the county assessor of King county from listing for taxation certain real property. The trial resulted in a judgment dismissing the action. From this judgment, the plaintiff appeals.

The appellant, at the time the action was instituted, was the owner of lots 2 and 3 and the east half of lots 6 and 7, in block 21, of Boren's addition to the city of Seattle. This property fronted on the west side of Fourth avenue in the city of Seattle, and extended from Madison street to Marion street. The appellant had for some years owned lots 2 and 3, and had erected thereon a six-story brick and concrete building, which is known as the Y. M. C. A. building. After this building had been erected, the association acquired two adjacent half lots on the south, facing Fourth avenue and extending from the main building to Marion street. This latter property was, when acquired, and still is, improved by the east half of the former Stander Hotel, a six-story brick and stone structure. Since its purchase by the association, it has been connected with the main building as an annex thereof, and is permanently partitioned off from the unacquired part of the Stander hotel. The entire property thus owned by the association is used for the various activities and departments of the Young Men's Christian Association.

The objects of the association as set forth in its articles of incorporation, are: "The improvement of the spiritual, mental, social, and physical condition of the young men of Seattle by the support and maintenance of lectures, gospel services, libraries, reading rooms, gymnasiums, recreation grounds, etc. . . ."

The county assessor of King county was asserting the right to list this property for purposes of taxation upon the tax rolls for the year 1913, when the present action was brought for the purpose of restraining such listing.

The controlling question in the case is whether the statute under which it is claimed the property is exempt from taxation is constitutional or unconstitutional.

The statute, Rem. & Bal. Code. § 9098, as amended by chapter 117 of the Session Laws of 1913, relating to taxation, after exempting certain other specified property, provides: "Also, all property of Young Men's Christian Associations . . . which shall be wholly used, or to the extent solely used, for the religious purposes of such associations."

It will be noted that this is an exemption to the association by name, with a limitation that only such of its property as is "wholly used," or to the extent "solely used," for the religious purposes of such association, shall be exempt.

Section 2 of article 7 of the state Constitution, after requiring that the legislature shall provide by law a uniform and equal rate of assessment and taxation upon all property in the state, and prescribing such regulations by general law as shall secure a just valuation for the taxation of all the property, provides: "That the property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation."

Under this section of the Constitution, all property within the state is subject to taxation, unless it falls within one of the classes mentioned in the Constitution and is exempted therefrom by a general law. The question then arises: Is the statute by which the property of Young Men's Christian Associations is claimed to be exempt a general or a special law? If it is a special law, obviously the attempted exemption is invalid under the constitutional provision quoted. If it is a general law, then it conforms to the constitutional requirement.

The authorities are in substantial harmony upon the rule by which a law is to be tested to determine whether it is general or special. A "special law" is one which relates to particular persons or things, while a "general law" is one which applies to all persons or things of a class. A law is general when it operates upon all persons or things constituting a class, even though such class consists of but one person or thing; but the law must be so framed that all persons or things constituting the class come within its provisions. 4 Words & Phrases, 2d Series, p. 637; *Budd ex rel. State Commissioner v. Hancock*, 66 N. J. L. 133, 48 Atl. 1023; *State ex rel. Atty. Gen. v. Miller*, 100 Mo. 439, 13 S. W. 677; *Sutherland*, Stat. Constr. § 121.

In *Words & Phrases*, supra, the rule is stated: "A special law is one that relates to particular persons or things of a class, as distinguished from a general law, which applies to all persons or things of a class."

The rule is stated in *Budd v. Hancock*, supra, as follows: "A law is special in a constitutional sense when, by force of an inherent limitation, it arbitrarily separates some persons, places, or things from others upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, there-
L.R.A.1916D.

fore, what a law includes that makes it special, but what it excludes. If nothing be excluded that should be contained, the law is general. Within this distinction between a special and a general law, the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply. If the only limitation contained in a law is a legitimate classification of its objects, it is a general law. Hence, if the object of a law have characteristics so distinct as reasonably to form, for the purpose legislated upon, a class by itself, the law is general, notwithstanding it operates upon a single object only; for a law is not general because it operates upon every person in the state, but because every person that can be brought within its predicament becomes subject to its operation."

Many other authorities could be cited supporting the rule; but as the controversy upon this phase of the case is over the application of the law, rather than its statement, further citation in support of the rule seems unnecessary.

In applying the rule, this court in *Denver v. Spokane Falls*, 7 Wash. 226, 34 Pac. 926, held that an act of the legislature which attempted to confer upon certain municipal corporations which had previously undertaken to incorporate under an invalid law, the right to incorporate under the statute without reference to the population, but solely by reason of their peculiar condition, was a special, and not a general, law. It was there said: "As to such communities, is this a general or a special law? It is claimed by the learned counsel for the appellants that it is general, because it applies to all communities in the state similarly situated. But we think that cannot be said to be the exclusive test. If the operation and effect of a statute is necessarily limited to a particular class or number of persons or things, it is as much a special statute, whatever may be its form, as it would be if applied to but one person or thing only."

In *Terry v. King County*, 43 Wash. 61, 86 Pac. 210, 9 Ann. Cas. 1170, the court had under consideration a statute which specifically conferred upon King, Pierce, and Spokane counties and the cities of Seattle, Tacoma, and Spokane, power to contract indebtedness for the purpose of purchasing armory sites and assisting in the construction of armories. No other counties or towns in the state were mentioned in the act. Nor was it possible for any other county, even though its population should equal that of the counties named, to come within its provisions. It was there held that the law was special, and not general,

citing the previous case of *Denver v. Spokane Falls*, *supra*.

Applying the rule of law stated and its application as appears in the two cases last cited, to the facts in the present case, was the statute exempting the Young Men's Christian Association general or special? The exemption covers the property of such associations wholly used, or to the extent solely used, for religious purposes of the association. If the property should not be devoted to a religious purpose, then it does not come within the exemption. The effect of the statute is to exempt only the property of Young Men's Christian Associations which is devoted to religious purposes. Under this statute, other property in the state devoted to religious purposes would not be exempt. The property of the class referred to in the statute is that devoted to religious purposes. The association is one organization which devotes property to such purposes. The property of other associations devoted to a religious purpose could not claim the exemption. The statute is special, and not general, because it excludes from its operation the property of other organizations which is or may be devoted or set apart for religious purposes.

It would hardly be claimed that a statute exempting the church property of a particular religious denomination by name, and which thus would exclude from its provisions the church property of all other denominations, would be a general law. Likewise a statute which exempts property of Young Men's Christian Associations only to the extent such property is devoted to religious purposes, as already stated, must necessarily exclude the property of other organizations and associations devoting property to the same purposes. The operation and effect of the statute are limited to one of the organizations which compose a class, and is therefore special. The case

falls within the holdings of this court in the cases of *Denver v. Spokane Falls*, and *Terry v. King County*, *supra*.

A number of cases are cited in the briefs where the property of Young Men's Christian Associations has been held exempt. In every one of the cases cited, with one exception, the exemptions were under statutes which did not exempt the property of the associations by name, but exempted all property by general language which was devoted to religious, benevolent, or charitable purposes. Had the statute in this state under which this case arose contained some such general language, an entirely different question would be presented. The one case referred to as supporting an exemption where the statute applied to a Young Men's Christian Association by name was that of *Y. M. C. A. v. Keene*, 70 N. H. 223, 46 Atl. 186. In the state of New Hampshire, however, where that case was decided, there was no constitutional provision against the passage of a special law.

In reaching the conclusion that the statutory provision is unconstitutional, we have not overlooked the rule adopted by the previous decisions of this court that a law will be presumed constitutional and valid until the contrary clearly appears, and that it is the duty of the court to sustain the law unless its invalidity is so apparent as to leave no reasonable doubt upon the question. *State v. Somerville*, 67 Wash. 638, 122 Pac. 324; *State v. Pitney*, 79 Wash. 608, 140 Pac. 918, Ann. Cas. 1916A, 209. Notwithstanding this rule, we see no escape from the conclusion that the statute containing the exemption is special, and therefore, under the Constitution, is invalid.

The judgment will be affirmed.

Morris, Ch. J., and Mount, Ells, Parker, Holcomb, Chadwick, and Fullerton, JJ., concur.

Annotation—Exemption from property taxation of property of Young Men's Christian Association or Young Women's Christian Association.

As suggested by the title, the purpose of this note is the practical one of bringing together the cases which have passed specifically on the exemption from property taxation of property of the Young Men's Christian Association or the Young Women's Christian Association. The scope of the note, of course, precludes any investigation of the legal questions involved except so far as they have been presented in cases dealing with property of one or the other of these associations. Some of these questions have been treated in other notes. L.R.A.1916D.

See Index to L.R.A. Notes under the title, "Taxes, subtitle, "What taxable; exemptions."

Generally, as to effect of fact that property otherwise exempt from taxation is devoted to purposes of a particular society, see notes to *Widows & Orphans' Home v. Com.* 16 L.R.A.(N.S.) 829, and *Re Wilson*, 26 L.R.A.(N.S.) 697.

As to right of charitable, educational, or religious institutions to exemption from taxation as affected by the geographical field of operation, see notes to

Carter v. Whitcomb, 17 L.R.A.(N.S.) 733, and Re Assessment of Collateral Inheritance Tax, 51 L.R.A.(N.S.) 817.

It may be observed that no case involving a Young Men's Christian Association or Young Women's Christian Association has been found precisely in point with *Y. M. C. A. v. PARISH*, ante, 272, where the controlling question is whether the statute under which exemption is claimed is constitutional or unconstitutional as being general or special.

A Young Men's Christian Association organized to seek out young men and endeavor to bring them under moral and religious influences is, in *Com. v. Y. M. C. A.* (1903) 116 Ky. 711, 105 Am. St. Rep. 234, 76 S. W. 522, held to come within a statute exempting from taxation places used for religious worship and institutions of purely public charity, the association conducting religious services every Sunday afternoon, with the singing of hymns and expounding of the Scriptures, there being merely a nominal fee exacted for membership, the members having no property rights and receiving no profits or dividends, and the certificates of membership being not transferable and having no money value.

Speaking of the exemption claimed for the property of a Young Men's Christian Association, the charter of which announces as the corporate purpose the improvement of the spiritual, social and intellectual condition of the young men of the city, and declares that, in consideration of the proposed work of establishing a public library, the property of the association shall be free from taxation, the court in *State ex rel. Cunningham v. Board of Assessors* (1899) 52 La. Ann. 223, 26 So. 872, said: "It is claimed that the association having established a library, that the legislative act constitutes a contract entitling the association to exemption. The Constitution of 1868, under which this charter was obtained, requiring all property to be taxed, gave the legislature power to exempt property actually used for church, school, or charitable purposes, and the real and personal estates of any library. It is claimed that the building owned by the association is exempt because it is to be deemed used for charitable purposes. The argument is that caring for the social, moral, and spiritual condition of men is charity in the broadest sense, and that a place provided by the association where young men can assemble for religious exercises, and be secluded from temptation, is a charity and a blessing. We wish we could yield L.R.A. 1916D.

to this reasoning. It demonstrates the capacity of the association to aid in the intellectual improvement of young men, and the usefulness of the association in promoting religious purposes. But in our opinion the argument fails to bring the association and its rooms within the exemption granted in the Constitution to property actually used for charitable purposes. We are dealing with a question of exemption under the imperative rule so often affirmed, of strict construction. If the property of the association is to be exempt because of the tendency of the association to advance the intellectual and moral condition of young men, it would be the beginning of a latitudinous construction that far exceeds the bounds the Constitution imposes. The Constitution of 1879, like that of 1868, exempts 'the real and personal estates of public libraries.' We gather from the record the association has established such a library. To the extent the building is used for that purpose, in our opinion, the property is exempt from taxation."

A Young Men's Christian Association, the purpose of which is "the improvement of the spiritual, mental, social, and physical condition of young men," is in *Little v. Newburyport* (1912) 210 Mass. 414, 96 N. E. 1032, Ann. Cas. 1912D, 425, held a benevolent or charitable institution within the meaning of a statute exempting from taxation institutions of that character. It is stated that this association carries on a work which is intended and adapted for the improvement and elevation of young men, not only to bring them under good influences, but to promote their moral, mental, and physical welfare. It incurs expenses for this purpose, for which it relies mainly upon charitable contributions. In its essence, though not giving charity in the narrow sense of that meaning, it is a benevolent or charitable institution within the meaning of those words in the statute; and the facts that some of its benefits are afforded only to its members, and that the privileges of becoming active members, of voting and of holding offices, are limited, are not material. This same case holds that a fund bequeathed to trustees for the purpose of paying the net income thereof to this institution, for the general purposes of the association, is exempt from taxation under the statute.

The buildings of the Young Men's Christian Association of the city of Paterson, however, are held, in *Trustees of the Y. M. C. A. v. Paterson* (1898) 61

N. J. L. 420, 39 Atl. 655, affirmed without opinion in (1900) **64 N. J. L. 361, 45 Atl. 1092**, not used exclusively for charitable purposes within the meaning of a general act exempting buildings so used from taxation. The court stated that in all statutes exempting private property from taxation, words descriptive of the property must receive the narrowest interpretation of which they are reasonably capable. So interpreted, charitable purposes are eleemosynary purposes,—purposes connected with the distribution of charity, namely, of aid to the needy. It is impossible to hold that these buildings are in this sense used exclusively for charitable purposes. With slight exceptions those who use them are not the recipients of charity, but such as purchase the right to use them at a price deemed adequate. For these exceptions the contributions may compensate the association, and to this extent the buildings are used for charitable purposes; but this is too small in proportion to the aggregate to give character to the whole so as to justify a statement that the purposes are exclusively charitable.

So, the property of a Young Men's Christian Association was, in *New York Y. M. C. A. v. New York* (1889) **113 N. Y. 187, 21 N. E. 86**, reversing (1887) **44 Hun, 102**, held not to be exclusively used for the purposes of public worship, or exclusively used for those of a seminary of learning, so as to exempt it from taxation under a general act; the objects of the association as described in its charter are the improvement of the spiritual, mental, and social condition of young men in the city of New York; the means to be employed are sermons, libraries, reading rooms, social meetings, and other necessary incidents, among which are lectures, concerts, and entertainments, bath room and gymnasium, and instructions in penmanship, arithmetic, book-keeping, and drawing; the building contains above the basement, in which are the gymnasium, bowling alley, and bath room, twenty-two rooms, one only of which is devoted to purposes of public worship, and that not exclusively, since it is also used as a lecture hall.

The following cases, involving property of Young Men's Christian Associations, may be found in the note to *Com. v. Lynchburg Y. M. C. A.* **50 L.R.A. (N.S.) 1197**, which discusses the effect of using property of religious, charitable, or educational institution in secular business or for revenue, upon its right to exemption from taxation: *People ex rel. L.R.A.1916D.*

Gore v. Y. M. C. A. (1898) **157 Ill. 403, 41 N. E. 557** (property of Y. M. C. A. leased for profit not exempt); *Auburn v. Y. M. C. A.* (1894) **86 Me. 244, 29 Atl. 992** (same); *Y. M. C. A. v. Keene* (1900) **70 N. H. 223, 46 Atl. 186** (property taxable where part of building is let for purpose of profit or gain, the same not being used for purposes of association within the meaning of exempting statute); *Y. M. C. A. v. Douglas County* (1900) **60 Neb. 642, 52 L.R.A. 123, 83 N. W. 924** (property not exempt when partially used for business purposes); *Com. v. Y. M. C. A.* (1914) **115 Va. 745, 50 L.R.A.(N.S.) 1197, 80 S. E. 589** (dormitories for the use of which fee is charged, not taxable).

And the following cases may be added to the note above mentioned: *State ex rel. Koeln v. St. Louis Y. M. C. A.* (1914) **259 Mo. 233, 168 S. W. 589** (buildings not exempt when part rented for commercial purposes); *Ottawa Y. M. C. A. v. Ottawa* (1913) **29 Ont. L. Rep. 574, 5 Ont. Week. N. 383, 15 D. L. R. 718**, affirming (1910) **20 Ont. L. Rep. 567** (portion of building in which meals are served and bedrooms let to members is not subject to taxation).

Where a Young Men's Christian Association wished to erect a new building on a new site, but, because of a business depression, could not sell the old site, and a director, with a view of assisting the association, purchased a lease of the old site with an option to purchase, it was held in *Louisville v. Y. M. C. A.* (1915) — **Ky.** —, **178 S. W. 1168**, that the transaction was not a subterfuge to escape taxation, that it did not amount to a conveyance of the property, and that the property could not be taxed, since it remained in the hands of the association, which was purely a public charity, the option and lease, however, being taxable.

Vacant lots owned by the Young Women's Christian Association, purchased with money provided and to be used for acquiring a site and erecting thereon a building suitable for the purposes of the organization, are in *Y. W. C. A. v. Spencer* (1907) **29 Ohio C. C. 249**, held not within the meaning of a statute which provides that all buildings belonging to and lands actually occupied by charitable institutions shall be exempt from taxation.

The Christian Women's Exchange, established to assist poor women, is in *State ex rel. Cunningham v. Board of Assessors* (1899) **52 La. Ann. 223, 26 So. 872**, said to come within a statute

exempting from taxation all charitable institutions provided the property is not used or leased for purposes of private or corporate profit or income. The court said that this institution furnishes meals to the indigent, receiving a moderate price from those who can pay, and that the price of the meals is adjusted with no view to profit, but to provide for the expense of the meals, which are prepared by the orphans the institution feeds. The institution provides a free library for those it is designed to aid, receives and sells articles made by the poor women, to whom the proceeds accrue, with the deduction of a small amount to defray the expenses of sale. Beside this the institution provides rooms free of charge to the necessary employees, and to the young and unprotected females it affords a home at charges proportioned to actual expenses. The institution owns its build-

ing donated for the purpose, and it is used exclusively for that purpose. There is no leasing or use of the building for revenue, nor element of profit connected with it. The exchange is purely charitable in its purpose and uses.

So, a Women's Christian Association is, in *Philadelphia v. Women's Christian Asso.* (1889) 125 Pa. 572, 17 Atl. 475, held exempt from taxation as a public charity under a statute exempting the property of all institutions founded, endowed, and maintained by public or private charity, where there is no element of gain in the object or operations of the association, although it receives some compensation by furnishing with food and lodging the young women whose temporal, moral, and religious welfare it is the purpose of the association to improve. J. D. C.

DISTRICT OF COLUMBIA COURT OF APPEALS.

AULICK PALMER et al., Appts.,
v.

SARAH L. ERNESTINE KING.

(41 App. D. C. 419.)

Replevin — use of force to execute writ.

A marshal is liable in damages on his bond for an assault committed by his deputy in forcing his way through an open window in spite of the active resistance of the occupants of the premises, in order to execute a writ of replevin.

For other cases, see Bonds, II. c, 1, in Dig. 1-52 N. S.

(February 2, 1914.)

A PPEAL by defendants from a judgment of the Supreme Court in favor of plaintiff in an action brought to recover damages for an alleged breach of a covenant of the official bond of a marshal. Affirmed.

The facts are stated in the opinion.

Messrs. Clarence R. Wilson and Reginald S. Huldekoper, for appellants:

The entry complained of as trespass was lawful, as there was no "breaking" of the house of the appellee.

Lee v. Gansel, Cowp. pt. 1, p. 1; *Lofft*, 374; *Nixon v. Freeman*, 5 Hurlst. & N. 647, 20 L. J. Exch. N. S. 271, 6 Jur. N. S. 983, 2 L. T. N. S. 361, 15 Eng. Rul. Cas. 315; *Nash v. Lucas*, L. R. 2 Q. B. 590, 8 Best & S. 531; *Sandon v. Jervis*, El. Bl. & El. 935, 28 L. ed. Exch. N. S. 156, 5

Jur. N. S. 156, 7 Week. Rep. 290; *Genner v. Sparks*, 6 Mod. 173, 1 Salk. 79; *Anonymous*, 7 Mod. 8; *White v. Wiltshire*, 2 Rolle, Rep. 138, *Palmer*, 52, Cro. Jac. 555; 4 Bl. Com. 226; 2 Russell, Crimes, 901; *State v. Kennedy*, 16 Mo. App. 287; *Ray v. State*, 66 Ala. 281; *McGrath v. State*, 25 Neb. 780, 41 N. W. 780; *Timmons v. State*, 34 Ohio St. 426, 32 Am. Rep. 376; 6 Cyc. 173.

Even though the entry be considered a forcible breaking, the deputy marshal was not guilty of a trespass, because in the execution of the writ of replevin there is, in the officer executing the writ, the right to break and forcibly enter.

Semayne's Case, 5 Coke, 91, 1 Smith, Lead. Cas. 228; *Jones v. Herron*, 12 Pa. Co. Ct. 183; *Howe v. Oyer*, 50 Hun. 559, 3 N. Y. Supp. 726; *Keith v. Johnson*, 1 Dana, 605, 25 Am. Dec. 167; *De Graffenreid v. Mitchell*, 3 M'Cord, L. 506, 15 Am. Dec. 648; *Morris, Replevin*, 114; *Wells, Replevin*, § 287, p. 162.

Messrs. Henry H. Glassie and McNeill & McNeill, for appellee:

A marshal or his deputy cannot, for the purpose of executing mesne process in an ordinary replevin suit, lawfully commit a sudden assault upon the body of a person not named in the writ by forcing a violent entrance through a window of that person's dwelling house at which she is standing, and thereby blocking with her body.

Butterfield v. Oppenheimer, 45 N. Y. S. R. 81, 18 N. Y. Supp. 826; *Kelley v. Schuyler*, 20 R. I. 432, 44 L. R. A. 435, 78 Am. St. Rep. 887, 30 Atl. 893; *State ex rel. McPherson v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 237, 31 N. E. 950; *State v. Armfield*,

Note.—For right to break and enter dwelling to serve civil writ of process, see annotation following this case, post, 281. L.R.A.1916D.

9 N. C. (2 Hawks) 246, 11 Am. Dec. 762; *Curtis v. Hubbard*, 4 Hill, 437, 40 Am. Dec. 292; *Hillman v. Edwards*, 28 Tex. Civ. App. 308, 66 S. W. 788; *Gusdorff v. Duncan*, 94 Md. 160, 50 Atl. 574.

A suit to recover for injuries inflicted in the execution of a writ may be maintained upon the marshal's bond.

Lammon v. Feusier, 111 U. S. 17, 28 L. ed. 337, 4 Sup. Ct. Rep. 286; *West v. Cabell*, 153 U. S. 78, 85, 38 L. ed. 643, 644, 14 Sup. Ct. Rep. 752; *People ex rel. Kellogg v. Schuyler*, 4 N. Y. 173; *King v. Brown*, 100 Tex. 109, 94 S. W. 328; *Bell v. Peck*, 104 Cal. 35, 37 Pac. 766; *State ex rel. McPherson v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950; *Clancy v. Kenworthy*, 74 Iowa, 740, 7 Am. St. Rep. 508, 35 N. W. 427; *Yount v. Carney*, 91 Iowa, 559, 60 N. W. 114; *Greenberg v. People*, 225 Ill. 174, 8 L.R.A.(N.S.) 1223, 116 Am. St. Rep. 127, 80 N. E. 100; *Turner v. Sisson*, 137 Mass. 191.

Mr. Justice **Van Orsdel** delivered the opinion of the court:

Appellee, Sarah L. Ernestine King, filed a declaration in the supreme court of the District of Columbia against defendants, Aulick Palmer, United States marshal for the District of Columbia, and the United States Fidelity & Guaranty Company. The action is for damages upon the bond of the marshal and his surety to recover for an alleged breach of a covenant of the bond, which provided that the marshal, by himself and his deputies, shall faithfully perform all the duties of his office. The alleged breach grew out of the execution of a writ of replevin issued in a suit against one Allen S. King, husband of plaintiff, directed to the marshal, commanding him to seize a certain sewing machine, which, it afterwards developed, belonged to plaintiff.

It appears that the writ was placed in the hands of two of the marshal's deputies, who proceeded to the residence of plaintiff. One of the deputies rang the basement door bell, and plaintiff answered through an adjoining basement window, when the deputy stated that he had some legal papers for Mr. King, to which plaintiff replied that her husband was not at home, and suggested that the papers be left with her to deliver to him. She then opened the window, and the deputy started to climb through it. Plaintiff stood in front of the window, placed her hands on the shoulders of the deputy, and vigorously resisted his efforts to get through the window. He forced his way through, and, in doing so, pushed plaintiff against a shelf, whereby she sustained the injuries of which she complains. The sewing machine was in the

front basement room and in plain view of anyone looking through the window.

Defendants filed a demurrer to the declaration, which was overruled. Thereupon they pleaded performance of the conditions of the bond, upon which plea issue was joined. From a verdict and judgment in favor of plaintiff, defendants have prosecuted this appeal.

The sole question presented by the appeal is whether or not the deputy marshal exceeded his authority in forcing an entrance through the open window, in spite of plaintiff's resistance, in order to execute the writ of replevin. That an assault was committed is settled by the verdict of the jury. It must be conceded that the deputy had no right, even in his official capacity, to commit an assault upon plaintiff, unless it appears that he had a legal right to force his way through the open window in disregard of her opposition, when, if she sustained injuries, it would be her misfortune, and not the wrong of the officer. The question presented does not involve the right of an officer to enter a dwelling through an open window where there is no resistance offered and where the entrance involves no element of force. The suit is not for trespass *quare clausum fregit*, but for trespass upon the person of the plaintiff.

Since we have no statute defining the powers of officers in executing a writ of replevin, the common law furnishes the rule of procedure in this District. At common law, as to the right of an officer to enter a dwelling in the service of civil process, no distinction seems to exist between entrance by outer windows and outer doors. *Lee v. Gansel*, Cowp. pt. 1, p. 1, Lofft, 374; *Nixon v. Freeman*, 5 Hurlst. & N. 647, 29 L. J. Exch. N. S. 271, 6 Jur. N. S. 983, 2 L. T. N. S. 361, 15 Eng. Rul. Cas. 315; *Nash v. Lucas*, L. R. 2 Q. B. 590, 8 Best & S. 531. In other words, it is not important that the entrance here was accomplished through an open window, if, under the same circumstances, it could have been accomplished lawfully through the door.

Counsel for defendants insist that the writ of replevin is an exception to the law generally applicable to the execution of civil process. It is urged that, where a specific chattel is to be recovered, the officer is not obliged to respect the peace and protection which the law secures to the householder. In a few instances, where this distinction has apparently been recognized, writs for the seizure of a specific chattel have been confused with writs of seisin or *habere facias possessionem* for the recovery of specific real property. In *Semayne's Case*, 5 Coke, 91, 1 Smith, Lead. Cas. 238,

it is pointed out that, in respect of the execution of such writs against real property, there has been an adjudication adverse to the title of the holder, and the law no longer accords him any special privilege or security in it. "After judgment it is not the house in right and judgment of law of the tenant or defendant."

The authorities generally, with relation to the powers conferred at common law upon an officer in execution of the writ of replevin, go back to the resolutions in Semayne's Case. The following quotation from what was there decided is important: "But it was resolved, that it is not lawful for the sheriff (on request made and denial), at the suit of a common person, to break the defendant's house, *sc.* to execute any process at the suit of any subject; for thence would follow great inconvenience, that men as well in the night as in day should have their houses (which are their castles) broke, by color whereof great damage and mischief might ensue; for by color thereof, on any feigned suit, the house of any man, at any time, might be broke when . . . [he] might be arrested elsewhere, and so men would not be in safety or quiet in their own houses. . . . 5. It was resolved that the house of anyone is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases, after denial or request made, the sheriff may break the house; and that is proved by the statute of Westm. 1, chap. 17, by which it is declared that the sheriff may break a house or castle to make replevin, when the goods of another which he has distrained are by him [*i. e.*, the distrainer] conveyed to his house or castle, to prevent the owner to have a replevin of his goods, which act is but an affirmance of the common law in such points. But it appears there, that before the sheriff in such case breaks the house, he ought to demand the goods to be delivered to him: for the words of the statute are, after that the cattle shall be solemnly demanded by the sheriffs, etc."

This makes no exception of the writ of replevin. It expressly holds that an officer is not justified in breaking into a dwelling to seize the property of the owner upon civil process. The exception pointed out is where the goods of another than the householder are brought into his house to prevent

lawful execution and to escape process of the law. In such case the process is not against the owner of the dwelling, and the privilege and security which extend to him and his family are not invaded by the breaking, after a solemn demand for admission has been made by the officer.

The statute of Westm. 1, chap. 17, only related to the exception pointed out in Semayne's Case. The act was said in that case to be but an affirmance of the common law. From this statement, it would seem that, at common law, the peace and security of one's castle never did extend to the protection of a person who took his chattels there for the express purpose of making it a refuge from the execution of civil process. The statute was enacted to restrict the private remedy of distress and to furnish the tenant relief from a wrongful and excessive distraint by his landlord. The remedy of replevin, until quite recent times, was only used for the recovery of chattels taken wrongfully upon a distress. 3 Bl. Com. 146. It has now become an ordinary statutory proceeding to adjudicate rights to the title or possession of personal property. In *Corbett v. Pound*, 10 App. D. C. 17, 25, this court said: "And with us it is so greatly regulated by statute (D. C. Rev. Stat. §§ 814-824), that it may be said to have wholly lost any common-law character which it may have had, and to depend for its efficacy entirely upon statutory provisions."

The rule of the common law in respect of the execution of the writ of replevin, as disclosed in Semayne's Case has been approved in many English cases. In *Lee v. Gansel*, Cowp. pt. 1, p. 1, Lord Mansfield, after holding that the entrance of an officer through an open outer door or window to execute civil process must be quiet and peaceable, said: "The sound maxim of policy is this, 'that a greater evil should be avoided for a less, and that a less good should give way to a greater.' The outer door, therefore, or window of a man's house, says the law, shall not be broken open by process. This has been long and well understood. The ground of it is this: that otherwise the consequences would be fatal; for it would leave the family within naked and exposed to thieves and robbers. It is much better, therefore, says the law, that you should wait for another opportunity than do an act of violence which may probably be attended with such dangerous consequences."

The rule of the common law, as deduced from the cases, seems to be that an officer, in executing a writ of replevin, may not break an outer door or window of a dwelling to gain entrance to seize the property of the occupant or of a person rightfully domiciled therein. He may enter either an open outer

door or window, provided it can be accomplished without committing a breach of the peace; he may then, after a request and refusal, break open any inner doors belonging to the defendant, in order to take the goods. 3 Bl. Com. 417; Semayne's Case, 5 Coke, 91, 1 Smith, Lead. Cas. 238. We think a further reasonable rule is deducible from the cases that, when an officer, in the execution of a writ, finds an outer door or window slightly ajar, but not sufficiently so to admit him, he may open the door or window, provided he does not find it obstructed; but, if it is fastened or obstructed so as to require force to overcome the obstruction, he may not use such force, for such an entrance would constitute a breaking.

This rule has been recognized generally in this country where the common law has not been superseded by statute. In *Prettyman v. Dean*, 2 Harr. (Del.) 494, the court, considering an ordinary case of replevin, said: "The sheriff has a right to enter a house peaceably, where he finds the house open, for the purpose of executing a replevin. Being in, he has the right to execute the writ; if property be concealed, he has the right to break open inner doors, and generally use such force as is necessary to enable him to obey the command of his writ." To the same effect are *Kelley v. Schuyler*, 20 R. I. 432, 44 L.R.A. 435, 78 Am. St. Rep. 887, 39 Atl. 893; *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950; *Swain v. Mizner*, 8 Gray, 182, 69 Am. Dec. 244; *Snydacker v. Brosser*, 51 Ill. 357, 99 Am. Dec. 551; 3 Freeman, Execution, ¶ 468.

But it is sought by counsel for defendants to make a distinction between breaking and forcible entry. It is urged that, inasmuch as the officer found the window open, and, in order to enter through the open window, only used sufficient force to overcome the resistance of plaintiff, it cannot be denominated a breaking. We are not impressed by this contention. The deputy, in order to enter, was compelled to commit a breach of the peace, and this was forbidden at common

law. We are not disposed to make any distinction between a case where an officer finds a door or window slightly ajar, but obstructed; and where he finds it open, but the entrance obstructed by the lawful occupant of the dwelling, or otherwise, so as to require the exercise of force to overcome the obstruction.

In *State v. Beckner*, 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950, where an officer put his foot between the door and the jamb, thus preventing the owner from closing it, and then forced the door open against the resistance of the owner, it was held to constitute a breaking. In *State v. Armfield*, 9 N. C. (2 Hawks) 246, 11 Am. Dec. 762, a constable having a writ of *fi. fa.* against the property of one Patterson went with the defendant Armfield to Patterson's house to make the levy. A member of the family, observing their approach, rushed into the house and attempted to shut the door, but before it was entirely closed, the constable pushed it open and entered the house. In the opinion, the court said: "The law is clearly settled that an officer cannot justify the breaking open an outward door or window, in order to execute process in a civil suit; if he doth, he is a trespasser. A man's house is deemed his castle, for safety and repose to himself and family; but the protection thus afforded would be imperfect and illusive if a man were deprived of the right of shutting his own door when he sees an officer approaching to execute civil process. If the officer cannot enter peaceably before the door is shut, he ought not to attempt it, for this unavoidably endangers a breach of the peace, and is as much a violation of the owner's right as if he had broken the door at first." So, in the present case, the action of the officer in overcoming the resistance of plaintiff at the open window to gain entrance was as much a violation of plaintiff's right as if he had broken open the window for the same purpose.

The judgment is affirmed with costs.

Annotation—Right to break and enter dwelling to serve civil writ of process.

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II. General rule, 282.

III. What constitutes outer door, 288.

IV. What constitutes breaking and entry, 290.

V. Persons protected by outer door, 292.

VI. To complete levy or retake person arrested on civil process, 293.

VII. Inner doors, 295.

VIII. Effect of levy or service, 297. L.R.A.1916D.

I. Scope.

Whether or not a dwelling house may lawfully be broken or forcibly entered in the execution of a writ or process in a civil suit, and if not, what is the effect of the levy or service thus unlawfully made, are questions of considerable practical importance. It is with the investigation of these that this note is concerned. Obviously, therefore, it does not involve the consideration of the some-

what analogous questions of the right to break and enter buildings other than a dwelling house to serve a civil writ or process,¹ or of the right to so enter either a dwelling house or any other building to execute a writ or process in a criminal proceeding. And accordingly, since search warrants for stolen property² and writs of arrest in contempt proceedings³ partake more particularly of the nature of criminal processes, cases considering the question of the right to break a dwelling house in the execution of these writs are not included in this note.

II. General rule.

The common law, both in England and America, jealous of intrusion upon domestic peace and security, regards every man's house as his castle and fortress as

well for his defense against injury and violence as for his repose. It is this ancient and well-known principle that underlies the whole law of the right to break and enter a dwelling house to serve a civil writ or process. Accordingly, therefore, the authorities are substantially agreed that, as a general rule, in the absence of statute, the outer door or other outside protection to a dwelling house may not, even after request and refusal of admittance, be broken or forcibly entered in the execution of a civil writ or process, either against the person or property of the householder,⁴ except, perhaps, at the suit of the King.⁵ Of course, if the door or other protection is open, and the officer can enter peaceably without force and violence, he may do so;⁶ and being lawfully in the house,

¹ But in this connection, see cases like *Hodder v. Williams* [1895] 2 Q. B. (Eng.) 663, 65 L. J. Q. B. N. S. 70, 73 L. T. N. S. 394, 14 Reports, 747, 44 Week. Rep. 98; *Ryan v. Shilcock* (1851) 7 Exch. (Eng.) 72, 21 L. J. Exch. N. S. 55, 15 Jur. 1200; *Brown v. Glenn* (1851) 16 Q. B. (Eng.) 254, 20 L. J. Q. B. N. S. 205, 15 Jur. 189; *Dent v. Hancock* (1847) 5 Gill (Md.) 120; *Burton v. Wilkinson* (1846) 18 Vt. 186, 46 Am. Dec. 145; *Douglass v. State* (1834) 6 Yerg. (Tenn.) 525; *Solinsky v. Lincoln Sav. Bank* (1886) 85 Tenn. 368, 4 S. W. 836; *Clark v. Wilson* (1882) 14 R. I. 11; *Penton v. Browne* (1864) 1 Sid. (Eng.) 186; *Haggerty v. Wilber* (1819) 16 Johns. (N. Y.) 288, 8 Am. Dec. 321.

² As to what extent premises may be damaged in executing a search warrant, see note to *Buckley v. Beaulieu*, 22 L.R.A. (N.S.) 819. And see also *Fennemore v. Armstrong* (1915) — Del. —, 96 Atl. 204.

³ In this connection, however, see *Harvey v. Harvey* (1884) L. R. 26 Ch. Div. (Eng.) 644, 33 Week. Rep. 76, 48 J. P. 468; *Burdett v. Abbot* (1811) 14 East (Eng.) 157, 5 Dow, P. C. 165, 4 Taunt. 410, 12 Revised Rep. 450; *Howard v. Gossett* (1842) Car. & M. (Eng.) 380.

⁴ *Foley v. Martin* (1904) 142 Cal. 256, 100 Am. St. Rep. 123, 75 Pac. 842; *State v. Cox* (1815) 2 Harr. (Del.) 495, note; *Snydacker v. Brosse* (1869) 51 Ill. 357, 99 Am. Dec. 551; *Walker v. Fox* (1834) 2 Dana (Ky.) 404; *Oystead v. Shed* (1817) 13 Mass. 520, 7 Am. Dec. 172; *Swain v. Mizner* (1857) 8 Gray (Mass.) 182, 69 Am. Dec. 244; *Welsh v. Wilson* (1895) 34 Minn. 92, 24 N. W. 327; *Gordon v. Clifford* (1854) 28 N. H. 402; *Closson v. Morrison* (1867) 47 N. H. 482, 93 Am. Dec. 459; *Haggerty v. Wilber* (1819) 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *Curtis v. Hubbard* (1842) 4 Hill (N. Y.) 437, 40 Am. Dec. 292; *Hager v. Danforth* (1854) 20 Barb. (N. Y.) 16; *Glover v. Whittenhall* (1844) 6 Hill (N. Y.) 597; *State v. Armfield* (1823) 9 N. C. (2 Hawks) 246, 11 Am. L.R.A. 1916D.

Dec. 762; Jones v. Herron (1891) 12 Pa. Co. Ct. 183; *De Graffenreid v. Mitchell* (1826) 3 M'Cord, L. (S. C.) 506, 15 Am. Dec. 648; *Hillman v. Edwards* (1902) 28 Tex. Civ. App. 309, 66 S. W. 788; later appeal in (1903) 74 S. W. 787; *Clark v. Wilson* (1882) 14 R. I. 11; *Semayne's Case* (1604) 5 Coke (Eng.) 91, 1 Smith, Lead. Cas. 228.

⁵ Thus in *Semayne's Case* (Eng.) supra, it is said: "In all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming and to make request to open the doors; and that appears well by the statute of Westm. 1, chap. 17 (which is but an affirmation of the common law), as hereafter appears; for the law without a default in the owner abhors the destruction or breaking of any house (which is for the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no default is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it, and that appears by the book in 18 Edw. II. Executions, 252, where it is said, that the King's officer who comes to do execution, etc., may open the doors which are shut, and break them, if he cannot have the keys; which proves, that he ought first to demand them, 7 Edw. III. 16." And see *Keith v. Johnson* (1833) 1 Dana (Ky.) in 604, 25 Am. Dec. 167.

⁶ This is the view of substantially all of the authorities; but see in particular, *Foley v. Martin* (1904) 142 Cal. 256, 100 Am. St. Rep. 123, 75 Pac. 842; *Hager v. Danforth* (1854) 20 Barb. (N. Y.) 16; *Tutton v. Darke* (1860) 5 Hurlst. & N. (Eng.) 647, 29 L. J. Exch. N. S. 271, 6 Jur. N. S. 983, 2 L. T. N. S. 361, 15 Eng. Rul. Cas. 315; *Nixon v. Freeman* (1860) 5 Hurlst. & N. (Eng.) 653; *Long v. Clarke* [1894] 1 Q. B.

he is justified in using such force as is necessary to overcome any resistance he may meet with in the service of the process, being responsible only for the excess beyond what is necessary to enable him to accomplish his purpose. Nor does the fact that he is ordered to leave by the wife of the householder render him a trespasser in proceeding to make the service.⁷ But where he finds the house closed, he must remain without, or else be a trespasser and liable as such. While this obviously enables the householder, by closing his house, to prevent the prompt execution of the mandate of the law, yet, in the eye of the law, it is

better that the execution of the process should be delayed, and that the officer should remain without, waiting a favorable opportunity for the accomplishment of his purpose, than that he should enter with force and violence, against the wishes and protests of the householder, thus tending to breaches of the peace and the destruction of the security and tranquillity of the home by exposing it to attack from without.

This rule, with few exceptions, it is believed, is applicable to all writs and processes in civil suits. Thus, it has been deemed to apply to subpoenas,⁸ summonses,⁹ writs of attachment,¹⁰ fieri facias,¹¹

(Eng.) 119, 69 L. T. N. S. 654, 58 J. P. 150, 63 L. J. Q. B. N. S. 108, 9 Reports, 60, 42 Week. Rep. 130; *Miller v. Tebb* (1893) 9 Times L. R. (Eng.) 515; *Semayne's Case* (1604) 5 Coke (Eng.) 91, 1 Smith, Lead. Cas. 228.

⁷ *Hager v. Danforth* (1854) 20 Barb. (N. Y.) 16.

⁸ (N. Y.) Ibid; *State ex rel. Gehring v. Claudius* (1876) 1 Mo. App. 551.

In *State ex rel. Gehring v. Claudius* (Mo.) supra, the court said: "An officer serving civil process has no right to enter a private house forcibly, or against the will of the occupant. When an officer knocks at a door of a dwelling, and it is opened, he does not by this opening acquire the right of rudely intruding, telling the proprietor, who inquires what he wants or what his name is, 'that is none of his business,' and persisting, after he has said that he has a subpoena for the wife of the proprietor, and has been told that she is not at home, in searching the premises to satisfy himself of the truth of the information given him. Still less has he the right of thus intruding without the disclosure of his official character."

⁹ *Foley v. Martin* (1904) 142 Cal. 256, 100 Am. St. Rep. 123, 75 Pac. 842.

¹⁰ *Swain v. Mizner* (1857) 8 Gray (Mass.) 182, 69 Am. Dec. 244; *State v. Whitaker* (1890) 107 N. C. 802, 12 S. E. 456; *Burton v. Wilkinson* (1846) 18 Vt. 186, 46 Am. Dec. 145.

In *State v. Whitaker* (1890) 107 N. C. 802, 12 S. E. 456, the court said that while authority to break open a dwelling is given an officer by statute (Code, § 329) in case of "claim and delivery," where property is concealed, there is nothing in the Code which warrants such breaking in cases of "attachment and execution."

¹¹ *Saunders v. Millward* (1845) 4 Harr. (Del.) 246; *Snydacker v. Brosse* (1869) 51 Ill. 357, 99 Am. Dec. 551; *Keith v. Johnson* (1833) 1 Dana (Ky.) 604, 25 Am. Dec. 167; *Walker v. Fox* (1834) 2 Dana (Ky.) 404; *Calvert v. Stone* (1849) 10 B. Mon. (Ky.) 152; *Heminway v. Saxton* (1807) 3 Mass. 222; *Welch v. Wilson* (1885) 34 Minn. 92, 24 N. W. 327; *Curtis v. Hubbard* (1842) 4 Hill (N. Y.) 437, 40 Am. Dec. L.R.A.1916D.

202; *People v. Hubbard* (1840) 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; *Haggerty v. Wilber* (1819) 16 Johns. (N. Y.) 286, 8 Am. Dec. 321; *State v. Armfield* (1823) 9 N. C. (2 Hawks) 246, 11 Am. Dec. 762; *State v. Allison* (1855) 47 N. C. (2 Jones, L.) 339; *Frost v. Etheridge* (1826) 12 N. C. (1 Dev. L.) 30; *State v. Whitaker* (1890) 107 N. C. 802, 12 S. E. 456 (dictum); *De Graffenreid v. Mitchell* (1826) 3 M'Cord, L. (S. C.) 506, 15 Am. Dec. 648; *Burton v. Wilkinson* (1846) 18 Vt. 186, 46 Am. Dec. 145; *Seyman v. Gresham* (1602) Cro. Eliz. pt. 2 (Eng.) 908; *Semayne's Case* (1604) 5 Coke (Eng.) 91, 1 Smith, Lead. Cas. 228; *Buckingham v. Francis* (1825) 11 J. B. Moore (Eng.) 40; *White v. Whitshire* (1619) Palmer (Eng.) 52, 2 Rolle, Rep. 137, Cro. Jac. 555. But see *Keith v. Johnson* (1833) 1 Dana (Ky.) 604, 25 Am. Dec. 167, quoted, *infra*, note 18.

Discussing this question in the light of early English authorities, Walworth, Chancellor, in *Curtis v. Hubbard* (1842) 4 Hill (N. Y.) 437, 40 Am. Dec. 292, said: "The question whether the defendant in an execution had the right to close the doors of his house against the sheriff, to prevent a levy upon his property, appears to have been a matter of some doubt in England at a very early day. And Fitzherbert has a note of a case said to have been decided as early as 1325, Fitzh. Abr. title, Execution, pl. 252, H, 18 Edw. II., which is in favor of the right of the sheriff to enter the dwelling house forcibly, to seize goods upon execution. No such case, however, is to be found in the Year Books of that term; nor is it stated by Fitzherbert whether the execution was in favor of the King or of a private person. The question came before the Court of K. B. about one hundred and fifty years afterwards, Y. B. 18 Edw. IV. folio 4; and the decision was against the right of the sheriff to break the defendant's dwelling house with a view of levying an execution upon his goods therein. Again, in the latter part of the reign of Queen Elizabeth, 1602, in the case of *Seyman v. Gresham*, Cro. Eliz. pt. 2 (Eng.) 908 F. Moore, 668, Yelv. 29, the question was presented to the Q. B. for decision, in

retorno habendo,¹² replevin,¹³ civil arrest, either on a capias ad respon-

dendum or a capias ad satisfaciendum,¹⁴ distress warrants,¹⁵ and orders

a suit brought against the owner of a house, who had closed his doors against the sheriff, so that he could not enter to take the goods therein which belonged to the defendant in the execution. Upon the first argument, according to the report of the case by Moore, Popham, Ch. J., and Mr. J. Gawdy, relying upon the note of the case in Fitzherbert, were clearly of the opinion that the sheriff might break the door of the dwelling house to execute the process against the goods. Fenner and Yelverton, the other two justices, being of a contrary opinion, no judgment was then given. But a fifth judge, Mr. J. Williams, being appointed in the K. B. in the first year of James the First, the case was again argued the next year; and Williams concurring in opinion with Fenner and Yelverton, the decision was made against the sheriff's right as reported by Ld. Coke, in Semayne's Case (1604) 5 Coke (Eng.) 91, 1 Smith, Lead. Cas. 228. By this decision, the right to close the outer door of the dwelling house upon the sheriff when he came with an execution, at the suit of a private person, to levy upon goods, was placed upon the same basis as the right to prevent a similar entry when he came with like process to arrest the person of the defendant; and that appears to have been considered the settled law of England ever since. It has also been constantly recognized as the common law of the several states of the Union where the English common law prevails. Nor does the fact that the defendant in the execution was not in his house at the time when the sheriff opened the door and went in, contrary to his known will on the subject, alter his rights. For a man's house is his castle, not for his own personal protection merely, but also for the protection of his family and his property therein, while it is occupied as his residence."

In *Boggs v. Vandyke* (1840) 3 Harr. (Del.) 288, "the court charged that an officer has no right to open an outer door if it be closed, for the purpose of levying an execution; if the door be open, he may go in and make his seizure; if the door be closed and the officer raps at the door and receives permission from the person within to enter, or if the door be opened to him, he may enter; but without such permission he cannot enter, and his doing so would make him a trespasser ab initio."

Naturally, a special deputy may not legally do that which his principal is forbidden to do. *Calvert v. Stone* (1849) 10 B. Mon. (Ky.) 152.

¹² In *Snydacker v. Brosse* (1869) 51 Ill. 357, 99 Am. Dec. 551, where the court said: "It is a uniformly recognized rule of the common law that no officer has the legal authority to break an outer door, or other outside protection to an individual's house, for the purpose of executing civil process. Even to arrest a defendant on civil process L.R.A.1916D.

the officer must corporally seize or touch the defendant's body and thus render him a prisoner, before he can justify the breaking and entering the defendant's house to retake him; otherwise, he has no such power, but must watch his opportunity to arrest him; for every man's dwelling house is looked upon by the law as his castle of defense and asylum, wherein he should suffer no violence. 3 Bl. Com. 288. And in the execution of civil process against the goods of a defendant, an officer is equally powerless to force an entrance into the house of the defendant, for the purpose of seizing them. Blackstone says a sheriff may not break open any outer doors to execute either a fieri facias or a capias ad satisfaciendum; but he must enter peaceably, and may then, after a request and refusal, break open any inner doors belonging to the defendant, in order to take the goods. 3 Bl. Com. 417. And what is said of these writs is believed to be true of all civil process; and it follows that the writ of retorno habendo conferred no right on any constable to break an outer door or a window to effect an entrance into appellee's house."

¹³ See *infra*, this section.

¹⁴ *Barnard v. Bartlett* (1852) 10 Cush. (Mass.) 501, 57 Am. Dec. 123; *Swain v. Mizner* (1857) 8 Gray (Mass.) 182, 69 Am. Dec. 244; *Gordon v. Clifford* (1854) 23 N. H. 402; *Williams v. Spencer* (1810) 5 Johns. (N. Y.) 352; *State v. Allison* (1855) 47 N. C. (2 Jones, L.) 339; *De Graffenreid v. Mitchell* (1826) 3 McCord, L. (S. C.) 506, 15 Am. Dec. 648; *Hooker v. Smith* (1847) 19 Vt. 151, 47 Am. Dec. 679; *State v. Hooker* (1845) 17 Vt. 658; *Cook's Case* (1839) Cro. Car. (Eng.) 537; *Kerbey v. Denby* (1836) 2 Gale (Eng.) 31, 5 L. J. Exch. N. S. 162, 1 Mees. & W. 336, 1 Tyrw. & G. 688; *Aga Kurboolie Mahomed v. Reg.* (1843) 4 Moore, P. C. C. (Eng.) 239. And see *Snydacker v. Brosse* (Ill.) *supra*.

All who act with the sheriff in the breaking must share with him the consequences of the illegal act. *Hooker v. Smith* (1847) 19 Vt. 151, 47 Am. Dec. 679. And an indictment does not lie against the debtor for assaulting the officer who has broken the door. *State v. Hooker* (1845) 17 Vt. 658. But as this note is not concerned particularly with the question of assault in resisting the officer who has broken the outer door, see note to *State v. Selengut*, L.R.A. 1916B, 957, as to assault in resisting seizure of property under process, where cases of this character are considered.

But where a bailiff was shot and killed by the defendant while seeking to break the latter's house to arrest him on a capias ad satisfaciendum, the offense of the defendant was manslaughter, and not murder. *Cook's Case* (1839) Cro. Car. (Eng.) 537.

In *Hawkins v. Com.* (1854) 14 B. Mon. (Ky.) 395, 61 Am. Dec. 147, the court said: "It is true that with civil, instead of

for the sale of specific personal property.¹⁶

In an early English leading case¹⁷ it was resolved that when any house is recovered by any real action, or by eject firmæ, the sheriff may break the house, and deliver seisin or possession to the demandant or plaintiff, for the words of the writ are habere facias seisinam or possessionem, etc., and after judgment it

is not the house, in right and judgment of law, of the tenant or defendant.

Some courts, however, have confused cases of this kind with those in which the writ is directed against specific personal property, which, in the judgment of the law, is not that of the defendant. Thus, in a Kentucky case¹⁸ it was decided that under a statute authorizing an execution for the specific thing recovered in deti-

criminal, process in his hands, whether the state or a private person be the plaintiff in the writ, and though it authorize the arrest of the defendant, the sheriff cannot break open the outer door of his dwelling without first having requested the door to be opened, and at the same time disclosing the purpose of his request." This, however, is mere dictum for which no authority is cited.

In *Phillips v. Ronald* (1867) 3 Bush. (Ky.) 244, 96 Am. Dec. 216, it is declared that whatever may have been the common law as to the breaking into dwelling houses in the nighttime to execute process, § 746, Civ. Code, gives full authority to the officer having a writ of arrest, for the purpose of executing it at any time, whether night or day, to break into any house or inclosure, first having given the proper notice of the writ and his purpose to execute it.

¹⁵ *State v. Cox* (1815) 2 Harr. (Del.) 495, note; *Jewell v. Mills* (1867) 3 Bush (Ky.) 62; *Cate v. Schaum* (1878) 51 Md. 299; *Murray v. Vaughn* (1895) 16 Pa. Co. Ct. 657; *Ewald v. Fidelity Title & T. Co.* (1910) 43 Pa. Super. Ct. 593; *Mayfield v. White* (1811) 1 Browne (Pa.) 241; *Jones v. Parker* (1907) 81 S. C. 214, 62 S. E. 261; *Long v. Clarke* [1894] 1 Q. B. (Eng.) 119, 63 L. J. Q. B. N. S. 108, 9 Reports, 60, 69 L. T. N. S. 654, 42 Week. Rep. 130, 58 J. P. 150; *Nash v. Lucas* (1867) L. R. 2 Q. B. (Eng.) 590, 8 Best & S. 531; *Attack v. Bramwell* (1863) 3 Best & S. (Eng.) 520, 32 L. J. Q. B. N. S. 146, 9 Jur. N. S. 802, 7 L. T. N. S. 740, 11 Week. Rep. 309; *Anonymous* (1886) Comb. (Eng.) 17; *Reg. v. Sullivan* (1841) Car. & M. (Eng.) 209.

¹⁶ *Hillman v. Edwards* (1902) 28 Tex. Civ. App. 308, 66 S. W. 788, later appeal in (1903) 74 S. W. 787.

¹⁷ *Semayne's Case* (1604) 5 Coke (Eng.) 91, 1 Smith, Lead. Cas. 238.

¹⁸ *Keith v. Johnson* (1833) 1 Dana (Ky.) 604, 25 Am. Dec. 167, where, in holding that under the statute of 1828 (Sess. Acts, p. 159), authorizing an execution for the specific slave or thing recovered, a sheriff, if necessary to seize such property, is justified in entering into the defendant's dwelling house with force, if he find it closed and has reason to believe that the property sought is concealed therein, the court said: "The common law, jealous of intrusion upon domestic peace and security, did not permit an officer to break open an outer door of the defendant's dwelling house for the purpose of executing a ca. sa. upon L.R.A.1916D.

the person, or of levying a fi. fa. on the goods of the defendant, unless the King was plaintiff. Every man's house was deemed his castle, and an ordinary judicial writ did not authorize the opening of the outer door, lest the King's enemies might enter; but the officer, once legally in the house, had a right to open an inner door. 3 Co. Inst. 162; *Dalton, Sheriffs*, 350. But executions in civil cases for specific property might have authorized the breaking of the house, if the officer could not otherwise execute the command of the writ. Executions for the specific thing which had been adjudged to be the property of the plaintiff were of that character; such, for example, as a writ of seisin, or an habere facias possessionem; because, 1, if resisted, the officer could not execute the writ, unless he employed force to overcome the resistance; 2, the thing had been judicially ascertained to be the property of the plaintiff, and not of the defendant; 3, the defendant would be guilty of a contempt of the court, and a prostitution of his sanctuary, by concealing within his closed walls that which he knew not to be his, and which the law had commanded him to surrender to the true owner. Hence, when a writ of seisin was resisted, the officer had a right to employ whatever force the exigency made necessary to enable him to enter the house, and to turn the defendant out and put the plaintiff in. *Semayne's Case* (Eng.) supra. Hence, too, on a process of utlagatum, as the defendant had been guilty of a persevering contempt of the law, the officer had a right to break into the house to execute the writ, either on his person or his goods; and hence, also, when a distrainer refused to surrender goods which had been replevied, and attempted to secure them in his house, the officer had right to employ all the force that was necessary to enable him to enter the house, and restore the goods. *Dalton Sheriffs*, 373; *Semayne's Case* (1604) 5 Coke (Eng.) 93, 1 Smith, Lead. Cas. 228. And it is well settled that a sheriff had authority, at common law, to enter the house of A by force, to levy a fieri facias on the goods of B, the defendant in the execution, if B's goods were in A's house. *Semayne's Case* (Eng.) supra; *Penton v. Brown* (1664) 1 Sid. (Eng.) 186. An execution on a judgment in detinue did not, according to the common law, authorize the officer to enter the house of the defendant by force, because the process was in the alternative, and the defendant might have

nue, the outer door of the dwelling may be broken and entered, if necessary, in order to make a seizure. Obviously in the first case the judgment of the law that the house is not that of the defendant must necessarily deprive him of the protection of its outer door under the rule already considered. But in the latter case, it will be observed, the judgment of the law is that the specific personalty in question is not that of the defendant, and how this can, in any manner, affect his right to his dwelling and the complete protection of its outer door is indeed difficult to see.

• It has been stated, as a general rule, that the officer to whom a writ or order of replevin is directed may use what-

ever force is reasonably necessary to enable him to enforce it.¹⁹ The authorities, however, as is shown by the opinion in the annotated case, are not of one accord as to the right of the officer to break and enter a dwelling house in the execution of this writ.

A few cases sustain the view that the writ of replevin is an exception to the law generally applicable to the execution of civil process, and that the dwelling house of the defendant may be broken and entered, particularly after admittance has been demanded and refused.²⁰ This is upon the theory that the writ is for a specific chattel. These cases, however, have apparently confused writs for the seizure of a specific

discharged the judgment by tendering the alternate value; and because, also, the plaintiff might have distrained the goods of the defendant, to coerce a surrender of the specific thing which had been adjudged to him, the plaintiff. But now, since a plaintiff may have a peremptory execution for the thing alone, reason and analogy seem to authorize a forcible entry into the house of the defendant to take the specific property. Some of the reasons that authorized such an entry in virtue of a writ of seisin, a process of *utlagatum*, or to obtain restitution of goods that had been distrained and replevied, apply with full force to such a process as may now be issued in *detinue*. And, if the house of a stranger may be forcibly entered to levy a *fieri facias* on the goods of another person who is defendant in the execution, why may not the defendant's house be entered in the same way, in order to levy an execution on property which has been ascertained by a judgment against him to be, not his, but the plaintiff's? When a slave has been adjudged to be the property of the plaintiff, and when he elects to have a process to obtain the specific thing without evasion or alternative, why should not the officer have as much power under such a process as he would have under a writ of seisin commanding him to deliver possession of real estate to the plaintiff, or as he would have on the replevin of a distress to take and restore the identical goods which had been distrained; or as he would have under a *fieri facias* against B, to enter the house of A, and take the goods of B? The common law protects a man's house whilst it has his own goods in it; but it does not allow it to be closed upon a process against the goods of any other person; nor does it protect it when the process is issued against a specific thing which has been adjudged to the plaintiff, in a suit between him and the defendant, who has it in possession, and when it is either in his house, or the officer has good reason for suspecting that it is, and on proper demand is refused admittance."

The fact that the writ prescribed by this L.R.A 1916D.

statute commands the sheriff to take the *posse committatus*, if necessary, is additional proof, the court declared, that an effectual remedy which could not be eluded was intended by the legislature. *Keith v. Johnson* (Ky.) *supra*.

¹⁹ 34 Cyc. 1456.

²⁰ *Howe v. Oyer* (1889) 50 Hun, 559, 3 N. Y. Supp. 726; *Keith v. Johnson* (Ky.) *supra*; *Jones v. Herron* (1891) 12 Pa. Co. Ct. 183. In none of the cases, however, does this question appear to be necessary to the decision of the particular case. See, in this connection, the quotation from the *Keith Case* (Ky.) *supra*, note 18.

In the *Howe Case*, there was a statutory provision (N. Y. Code Civ. Proc. §§ 1701, 2922) requiring that, if a chattel which an officer has process to seize is secured or concealed in a building or inclosure, he must publicly demand its delivery before breaking open such building or inclosure. The question really decided was that a constable, after knocking at the door of a dwelling house in which such property was, announcing his presence, calling out the name of the occupant, and learning that no one was within, did not have to make a formal public demand by reading aloud the list of articles which he was seeking to replevy, but could lawfully break and enter the house and take the property. *Howe v. Oyer* (N. Y.) *supra*. The court said, however: "The right of the officer to forcibly enter the building to replevy the property is not derived from the statute. By the common law an officer, in the execution of process directing him to take specific property, might forcibly enter any building containing it after having demanded and been refused admission for the purpose of the execution of such process."

In *Jones v. Herron* (Pa.) *supra*, the house of a stranger to the writ was broken to replevy goods of one occupying the second floor. The court said: "The rule undoubtedly is that in executing civil process generally he [the sheriff] cannot break open doors or enter by force; but there are exceptions to it, of which replevin is one of the most important. The reason is that

chattel with writs of seisin and habere facias possessionem for the recovery of specific real property, which, as has already been pointed out, have entirely different effects upon the rights of the householder; and for this reason they are not believed to be well considered.

What, on the other hand, are regarded as the better considered cases, in strict accord with the law applicable generally to the execution of civil process, sustain

the view that the defendant's dwelling house may not be broken or forcibly entered to serve a writ of replevin although admittance is first demanded and refused. According to these authorities the writ is but a civil process, and while the officer may enter peaceably to execute it when he finds the house open, yet if he enters with force and violence, against the wishes of the householder, he is a trespasser.²¹

a man's house is his castle for the protection of himself and his property against civil process, as a writ of fieri facias to take his goods in execution, or a capias in a civil suit by a private person. For the command of the writ being to take his goods to sell them under a *fi. fa.*, he is entitled to the protection his castle affords him; but in a writ of replevin the command is to take the goods of a plaintiff who has entered security for their return if he fails to prove his title to the property, and under the common law and statute, the sheriff may break outer doors or enter by unusual ways for the purpose of executing the writ. *Semayne's Case* (1604) 5 Coke (Eng.) 91, 1 Smith, Lead. Cas. 228 is the leading case on the subject. It shows the instances in which the sheriff may break outer doors. Replevin is one of them, and this, it is said, is by statute Westm. 1, chap. 17. And although this statute is not among those reported to be in force in this state, yet it is said that the act is but an affirmation of the common law. *Morris, Replevin*, 113, 114; *Semayne's Case*. The sheriff may break open or beat down a castle, fort, or house, to make replevy and deliverance of cattle there imprisoned and withholden; but he may not break a close to make a replevin, where there is a gate, except that it be locked up. *Dalton, Sheriffs*, 353. Under the common law a man's house is his castle, and an officer cannot legally break in to execute a *ca. sa.* or *fi. fa.* upon the tenant or his goods, but he may do so where the process requires him to take possession of any particular thing, as to execute a writ of seisin, habere facias, replevin, or capias utlagatum. *Keith v. Johnson* (1833) 1 Dana (Ky.) 604, 25 Am. Dec. 167. By the common law an officer, in the execution of process directing him to take specific property, might forcibly enter any building containing it after having demanded and been refused admittance for the purpose of the execution of such process. *Howe v. Oyer* (N. Y.) supra. Text writers have written the same way. See *Freeman, Executions*, § 468; *Cobbey, Replevin*, § 647; *Murfree, Sheriffs*, § 156. The foregoing applies to cases in which the owner of the house is the defendant in the suit in replevin. But where a third person is the defendant in such a suit, then the asylum which a castle affords is no asylum for him. In *Semayne's Case*, the 5th resolution was, 'That the house of any one is not a castle or privilege but for himself, and shall not extend L.R.A.1916D.

to protect any person who flies to his house or the goods of any other, which are brought and conveyed into his house to prevent a lawful execution and escape the ordinary process of the law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin, there; and therefore in such cases, after denial or request made, the sheriff may break the house.' It is but polite, and therefore usual, to make demand first before breaking the doors, but the omission of this ceremony will not make the sheriff a trespasser. He acts, however, at his peril, for if he does not find the goods, he is a trespasser. But he is not an outlaw, and it is not lawful to beat him, for, if he gains admittance by fraud, an assault on him is not justifiable. *Rex v. Backhouse* (1772) Loftt (Eng.) 62."

²¹ *Kelley v. Schuyler* (1898) 20 R. I. 432, 44 L.R.A. 435, 78 Am. St. Rep. 887, 39 Atl. 893; *State ex rel. McPherson v. Beckner* (1892) 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950; *Bailey v. Wright* (1878) 39 Mich. 96; *Palmer v. King*, ante, 278, and see *Hillman v. Edwards* (1902) 28 Tex. Civ. App. 308, 66 S. W. 788, holding that an order for the sale of specific personal property, issued in an action to foreclose a lien thereon, has no greater force than a writ of replevin, and does not authorize the officer intrusted with its execution to break or forcibly enter the dwelling of the debtor for the purpose of seizing the property.

In *State ex rel. McPherson v. Beckner* (1892) 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950, the court said: "A distinction has been made in some cases between the right of an officer to break the outer door of a dwelling house in the service of an ordinary execution, and of a writ which requires him to take possession of a particular thing, such as a writ of replevin, holding that in the latter case he may, after first demanding admittance, break down the outer door. *Keith v. Johnson* (Ky.) and *Howe v. Oyer* (N. Y.) supra. In the latter case the officer was proceeding under a statute giving him extraordinary powers where the property had been concealed, somewhat similar to that given a sheriff by our Code (§ 1271), and is therefore not in point here. The writ of replevin mentioned in *Keith v. Johnson* (Ky.) supra, was such as issues after the final ownership of the property had been determined by the judgment of a court, and

III. What constitutes outer door.

The determination of what is the outer door of one's dwelling house within the rule above stated is not always an easy matter. Of course, the ordinary case of a single tenement, occupied by a single family, is comparatively simple. And an entry through a hole in an outer wall into a small room, thence through a staircase window by tearing away the boards covering it, is unlawful if the hole is not intended to have a door or window hung in it, for then the staircase window is the outer protection of the house. But if the hole is intended to have a door or window put into it, it constitutes the outer door, and the re-

moval of the boards from the staircase window is justifiable.²²

Frequently, however, especially in congested city districts where space is an item of considerable importance, the same building may be used as the residence of a number of families, or as the residence and place of business of one or more families, and here is presented the difficulty. It has been decided that if distinct portions of a building are occupied by one as a dwelling and a store, the door of an entry common to both portions is not the outer door of the dwelling, and may be broken open to levy upon goods in the store.²³ But the door of a single room, used both as

the owner of the dwelling been commanded to surrender the same to the true owner. The case is not an authority under a procedure such as is provided by our Code."

The question of the right to break the outer door of the defendant's house to serve a writ of replevin was not decided in *Kneas v. Fittler* (1816) 2 Serg. & R. (Pa.) 263. It did not appear in that case how the officers got into the house, and the court said that it could not be presumed that they broke the outer door.

In Indiana, a sheriff in actions of replevin may, under statute, § 1271, Rev. Stat. 1881, in some cases cause a building or inclosure to be broken open, but no similar statute give such a right to a constable, and except as modified by statute, the common-law principle that every man's house is to be treated as his castle and kept sacred from forcible intrusion prevails in that state. *State ex rel. McPherson v. Beckner* (Ind.) *supra*.

In *Rentschler v. Fox* (1902) 130 Mich. 498, 90 N. W. 275, it was held that under a statute (3 Comp. Laws, § 10,655) authorizing the officer with a writ of replevin to "break open any house, stable, outhouse, or other building in which such property may be concealed, having first demanded the deliverance thereof at the building or place where the same is concealed," a constable is not liable for unlocking the door of the defendant's dwelling to execute a writ upon the furniture therein after having first demanded admittance.

To replevy goods, the outer door of an untenanted dwelling may be broken, it seems. *Stitt v. Wilson* (1833) Wright (Ohio) 505.

²² *Whalley v. Williamson* (1836) 7 Car. & P. (Eng.) 294.

²³ *Stearns v. Vincent* (1883) 50 Mich. 209, 45 Am. Rep. 37, 15 N. W. 86. The court said: "The protection of the dwelling against entry for the service of process is in the outer door only, and it is optional with the owner to take it by closing the door against the officer, or to waive it by allowing him to enter. If the officer once gains entrance through the outer door without force or fraud, the privilege is gone. L.R.A.1916D.

and he may force open any other door if necessary to make complete service of his process. If, therefore, the door which was forced by this officer was the outer door of the plaintiff's dwelling, the officer, if he had succeeded in entering the store while the door stood open, might lawfully have forced the door to what constituted the dwelling in fact. But nothing seems plainer than that any such application of the principle deprives that which constitutes the dwelling in fact, namely, all that part of the building which is occupied by the family for domestic purposes, of any privilege at all. If the outer door of the store is to be deemed in law the outer door of the dwelling, then when that door is passed, the officer, for the service of his process, may lawfully force his way through any inner door; and through the door which constitutes the entrance to the second story as much as any other. *Williams v. Spencer* (1810) 5 Johns. (N. Y.) 352; *Hubbard v. Mace* (1819) 17 Johns. (N. Y.) 127. But as the very nature of the business to which the lower story was devoted requires it to be kept open for general access of the public, and a general license is given to everybody to enter for business purposes, it is obvious that to treat the outer door of the store as the outer door of the dwelling for the purpose of domestic protection, would be to sacrifice the business to the privilege or to surrender the privilege altogether. If this were a necessity of the situation, it must be submitted to; but all the necessity there is in the case arises from giving to the dwelling a definition which makes it embrace something which in fact is no part of the dwelling at all. The moment we limit the application of the term 'dwelling house' to that which is occupied by the family for dwelling purposes, and treat the remainder as being what it is in fact, namely, a shop devoted exclusively for business purposes, all difficulty disappears, and it becomes easy to give the householder his privilege, without depriving the officer of any right in respect to the shop which he would have if what to the business is the unimportant circumstance that the owner lived under the same

a shop and dwelling, may not be so entered while the room is being used in the latter capacity.²⁴

If a whole building is let to lodgers or tenants, each of whom occupies a distinct portion thereof, over which he exercises complete control, but uses an

entry in common with all the other tenants, the door of his apartments or tenement, whether it leads into the air or into a covered way, and not the street door to the entry, is the outer door of his dwelling.²⁵ And the fact that there are several doors to the apartments of a

roof instead of elsewhere did not exist. The officer, by following a customer into the store, would not then acquire the right to force his way into the dwelling, and the householder, by taking up his residence over the store, would not acquire the right to close his place of business against legal process,—a right which others do not have and which no principle of the common law was intended to confer. The privilege is thus preserved and absurd consequences avoided. The opposite conclusion would sacrifice both the privilege and the principle to a mere definition. In *Swain v. Mizner* (1857) 8 Gray (Mass.) 182, 69 Am. Dec. 244, it was decided that when a building is leased in distinct portions to several tenants, the door to the occupation of each tenant is to be deemed the outer door of his dwelling house, and that an officer, though he may be lawfully within the building, has no right to force such door for the service of process. The principle is applicable here. The outer door of the plaintiff's dwelling was the door into the part of the building occupied for domestic purposes, and it was behind that she must claim her protection, and not behind the door of the store."

²⁴ *Welsh v. Wilson* (1885) 34 Minn. 92, 24 N. W. 327.

²⁵ *Lee v. Gansel* (1774) Cowp. pt. 1 (Eng.) p. 1, Lofft, 374; *Williams v. Spencer* (N. Y.) and *Swain v. Mizner* (Mass.) supra, where the court said: "We think that the portion of the building occupied by the plaintiff, distinct from the hall, entry, and stairway leading to it, did constitute what must be considered in law his dwelling house. The whole structure appears never to have been designed as a tenement for a single family, but was so constructed as to afford separate and distinct habitations for several persons. Thus the plaintiff occupied all the rooms on one floor of the building, and the hall or entry through which he passed to reach either of the doors opening into any of the apartments occupied by him was used as a common passage way for all the tenants of the several portions of it. It would seem to make no difference whatever may be the character or peculiarity of the common passage by which access to a dwelling house is attained; whether it is a public or a private way; or whether it leads from one street to another, or only into a place or court to which there is but a single entrance; or whether it is an open street, or a way inclosed by buildings and covered with a roof. In the present instance, the hall, entry, and stairway served as a common and public passage way for many occupants L.R.A.1916D.

of entirely distinct habitations. All the right to which the plaintiff or any other of the tenants of the different parts of the building in this common passage way was entitled was the right of using it for that purpose in the enjoyment of the tenements which they severally possessed. The apartments occupied by the plaintiff constituted, in and of themselves, a complete habitation for himself and his family. He had the sole and exclusive use and possession of them, as completely as if they stood separate and apart from everything else, and were in any other distinct structure. The privilege which the law allows to a man's habitation clearly ought to attach to apartments so situated. It arises from the great regard which the law has for every man's safety and quiet; and therefore it protects him from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect. *Bacon Abr. Sheriff* (N) 3. And this reason shows that the principle of law which gives protection to dwelling houses has no reference whatever to their quality, construction, or magnitude, but is solely for the purpose of insuring the quiet convenience and security of those who inhabit and dwell in them. Domestic security and peace would be equally disturbed by violence in breaking the doors and forcing an entrance into a dwelling house, whether it should consist of the entire portions of a building, or of separate and distinct apartments within."

It was contended in this case that the door constructed and used for closing the entrance from the street or public highway into the common hall or entry of the building is to be considered the only outer door of the tenant's dwelling house; that is to say, that his house consisted of the apartments occupied by him and of the hall and entry used by him in common with the tenants of all other parts of the building. Answering this contention, and distinguishing the case of *Lee v. Gansel* (Eng.) supra, the court said: "But this latter fact is by no means shown. On the contrary, these appear to have constituted no part of his tenement. He had an easement in them only, in common with others, who all equally enjoyed the like privilege for the purpose of gaining access to their respective tenements. Reliance is placed with much confidence by the defendant on the case of *Lee v. Gansel* (Eng.) above cited, as a decisive authority against the position of the plaintiff, that the apartments in the building in which the alleged trespass was committed constituted his dwelling house. But the facts in the two cases are quite dissimilar, and therefore the same conclusion

tenant does not change the rule.²⁶ But if the landlord lives in the house with his tenants, even though he reserves to himself but a single room, he is considered in law the occupant of the whole, and the outer door of the house is the outer door of each tenant's apartment.²⁷

Where a dwelling house is so constructed as to be capable of use as a double house or a distinct residence for two families, each family having an outer door, a door leading from one family's residence into that of the other may not lawfully be broken and entered unless it is of common use and passage for both families, at the pleasure of both, either to go out of, or as a passageway to the interior of, the house.²⁸

is not necessarily to be deduced from each of them. From the statement of facts in the former case it appears that Gen. Gansel was a mere lodger in hired apartments in the house of Mayo, who was at the same time dwelling in it; that the apartments thus hired were in no way connected together, but were upon different floors; and that he had only a right in the kitchen, which clearly imports that he had no exclusive possession of the premises of which, to a certain extent, he had the use and enjoyment. But this plaintiff was a house-keeper, and not a lodger only. He was tenant of the apartments which he occupied; they were all on the same floor, and substantially connected together as a single tenement; he had the sole and exclusive possession of them; and in conducting and maintaining his domestic establishment he had no connection with or dependence upon the owner or the occupant of any other part of the building in which he resided. His tenancy resembles that of the occupants of chambers in the inns of court, and in colleges, opening upon a common staircase, which are conceded to be the dwelling houses of those who live in them. But further than this, it is distinctly stated by Lord Mansfield, that if that which was one house originally comes to be divided into separate tenements, and there is a distinct outer door to each tenement, they will be separate houses. But, without enlarging upon these considerations or seeking for any peculiar principles upon which the plaintiff's action may be maintained, we think it is clear that upon the precise facts stated in the bill of exceptions the apartments in the building, embracing all the rooms on one of its floors, which were hired by the plaintiff and occupied by him with his family as a separate and distinct tenement, constituted, while he was in such possession and use of them, his dwelling house; and that it was therefore entitled to the privilege and protection which the law affords to the habitations of men."

And where a house stood over a stable, and stairs, with a hatch gate at the bottom, led from the stable yard to an open L.R.A.1916D.

IV. What constitutes breaking and entry.

As to just what constitutes a breaking or forcible entry of the outer door or window of one's dwelling house, the authorities are not wholly agreed, although it seems quite clear that it is not necessary that such door or window or the locks and fastenings of either be actually broken or destroyed. What would be a breaking in burglary, it has been decided, is equally a breaking by the sheriff; and accordingly the right to even lift the latch of the door is denied.²⁹ But this is in conflict with other decisions to the effect that the door may be opened in the ordinary or usual manner, as by lifting the latch, turning the

gallery, from which doors opened to different apartments, a door across that part of the gallery which led to the chamber of the party arrested was the outer door of his dwelling. *Hopkins v. Nightingale* (1794) 1 Esp. (Eng.) 99.

²⁶ *Swain v. Mizner* (Mass.) supra, where the court said: "For although it was said by Lord Mansfield in *Lee v. Gansel* (Eng.) supra, that the having of four outer doors would lead to the grossest absurdity, since the greatest house in London has but one, that is not the manner in which, according to our prevailing habits and modes of living, our dwelling houses are here constructed. Many might undoubtedly be found here having four, and it would perhaps be difficult to find a house of any moderate degree of pretension which has less than two outer doors. While all the doors opening into any of the apartments occupied by the plaintiff are closed, each of them may be considered, and must be treated, as an outer door. They are all necessary to protect the habitation from the intrusion of those who have no license to enter it. Whether an officer who had lawfully passed through one of them might afterwards, for the purpose of completing the service of his process, treat the others as inner doors, need not now be considered, because no such question arises upon the facts reported. The complaint against the defendant is confined to the breaking open of one of the doors, before he had obtained an entrance into any part of that portion of the building which was in exclusive occupation of the plaintiff."

²⁷ *Cantrell v. Conner* (1875) 6 Daly (N. Y.) 39; *Lee v. Gansel* (Eng.) supra.

²⁸ *Stedman v. Crane* (1846) 11 Met. (Mass.) 295.

²⁹ *Curtis v. Hubbard* (1841) 1 Hill (N. Y.) 336, affirmed in (1842) 4 Hill 437; *Walker v. Fox* (1834) 2 Dana (Ky.) 404.

As to burglary by raising window already partly open, see note in 17 L.R.A. (N.S.) 1102; by forcing screen door or window, see notes in 17 L.R.A. (N.S.) 1100 and 38 L.R.A. (N.S.) 770; or by pushing open door already partly open, see note

knob, or sliding back the bolt, or turning the key left in the lock,³⁰ even after sealing a fence or a wall to get to it.³¹ Using a duplicate key or picking the lock, being unusual ways of entering, are forbidden.³²

A window which is partly closed may be opened further to make an entry,³³ but to open one which is entirely closed, although not fastened, is unlawful.³⁴ And when the outer door is closed a lawful entry cannot be made through a

window, access to which is gained by opening a door into a closet and using a stepladder.³⁵ Likewise, opening a closed shutter is unlawful.³⁶

And although neither the door nor window is closed or locked, an entry is nevertheless without justification if the householder is present, evidencing a desire to exclude the officer by closing his house against him, even after the latter is partly in. The officer's appearance may be so sudden as to prevent fasten-

in 47 L.R.A.(N.S.) 717. For breaking in burglary as affected by defendant's authority to enter building, see note in L.R.A. 1915D, 1015.

³⁰ *Eldridge v. Stacey* (1862) 15 C. B. N. S. (Eng.) 458, 10 Jur. N. S. 517, 9 L. T. N. S. 291, 12 Week. Rep. 51; *Long v. Clarke* [1894] 1 Q. B. (Eng.) 119, 63 L. J. Q. B. N. S. 108, 9 Reports, 60, 69 L. T. N. S. 654, 42 Week. Rep. 130, 58 J. P. 150; *Crabtree v. Robinson* (1885) L. R. 15 Q. B. Div. (Eng.) 312, 54 L. J. Q. B. N. S. 544, 33 Week. Rep. 936, 50 J. P. 70; *Boyd v. Profaze* (1867) 16 L. T. N. S. (Eng.) 431; *Cate v. Schaum* (1878) 51 Md. 299; *Groves v. Bloxom* (1864) 3 Houst. (Del.) 544.

And see *infra*, this section, *Murray v. Vaughn* (1895) 16 Pa. Co. Ct. 657, and *Ewald v. Fidelity Title & T. Co.* (1900) 43 Pa. Super. Ct. 593.

³¹ *Eldridge v. Stacey* (1863) 15 C. B. N. S. (Eng.) 458, 10 Jur. N. S. 517, 9 L. T. N. S. 291, 12 Week. Rep. 51; *Long v. Clark* [1894] 1 Q. B. (Eng.) 119, 63 L. J. Q. B. N. S. 108, 9 Reports, 60, 69 L. T. N. S. 654, 42 Week. Rep. 130, 58 J. P. 150. But see *Scott v. Buckley* (1867) 16 L. T. N. S. (Eng.) 573, which the court in the *Long Case* said must be incorrectly reported.

³² *Ewald v. Fidelity Title & T. Co.* (1910) 43 Pa. Super. Ct. 593, following and quoting from *Murray v. Vaughn* (1895) 16 Pa. Co. Ct. 657, where the court said: "Some conflict of authority exists on the question whether the landlord may lift the latch of a door which is shut, but not locked, or may turn a key purposely left in the lock upon the outside, or may draw a bolt fastened to the outer woodwork; but we need not now enter into this controversy. If a man merely latches his door, or if he purposely leaves the key in the lock upon the outside, he may perhaps be regarded as inviting all persons to enter his house who have business therein. But, however that may be, he certainly is not extending an invitation to enter if he locks the door and carries the key away in his pocket. Instead of making it easy to enter, he is thus doing all that he can to prevent an entrance, and if his landlord afterwards picks the locks, or (as in the case before us) avails himself of another key which happens to fit, he does a legal wrong as completely and of the same kind as if he broke down the door with a hammer."

³³ *Crabtree v. Robinson* (1885) L. R. 15 Q. B. Div. (Eng.) 312, 54 L. J. Q. B. N. S. L.R.A.1916D.

544, 33 Week. Rep. 936, 50 J. P. 70; *Miller v. Tebb* (1893) 9 Times L. R. (Eng.) 515. In the former case the court said: "The cases seem to result in this, that to make an entry the latch of a door may be lifted though the door be closed, but that in the case of a window, entry can only be made if the window is to some extent open, and that for the purpose of entry in such cases the window may be further opened."

³⁴ *Nash v. Lucas* (1867) L. R. 2 Q. B. (Eng.) 590, 8 Best & S. 531 (distress); *Reg. v. Lockwood* (1856) 4 Week. Rep. (Eng.) 465 (distress); *Boyd v. Profaze* (1867) 16 L. T. N. S. (Eng.) 431 (distress); *Cate v. Schaum* (1878) 51 Md. 299 (distress); *Curtis v. Hubbard* (1841) 1 Hill (N. Y.) 336 (execution); *Hillman v. Edwards* (1902) 28 Tex. Civ. App. 308, 66 S. W. 788 (order of sale); *Groves v. Bloxom* (1864) 3 Houst. (Del.) 544 (execution).

So, where a broker distraining for rent directed an employee of the landlord, who found himself, after the completion of his work, locked in an area on the leased premises, and wished to get out, to try a window of the dwelling, and the window, being closed, but not locked, was opened and entered, and upon the front door being opened by such employee, the broker entered and distrained, the opening of the window constituted a breaking of the dwelling, and being one transaction with the opening of the outer door, the distress was unlawful. *Nash v. Lucas* (1867) L. R. 2 Q. B. (Eng.) 590, 8 Best & S. 531.

³⁵ *Foley v. Martin* (1904) 142 Cal. 256, 100 Am. St. Rep. 123, 75 Pac. 842 (summons).

And in *Hillman v. Edwards* (1902) 28 Tex. Civ. App. 308, 66 S. W. 788, it was decided that the officer executing process may not climb through an outer open window, if that is an unusual place of entry.

³⁶ *Jewell v. Mills* (1867) 3 Bush (Ky.) 62, where the court said: "Having the distress warrant in his hands did not authorize the constable to force a lock of an outer door, nor to unlatch nor to loose the fastening of a window shutter of an outer window to enter the house to make a levy. He has no right to force open an outer door or window which is closed and fastened, although he may not break the lock or catch, to make a levy of a fieri facias or distress warrant. The removal or displacing the fastenings of either, without breaking the same, will constitute him a trespasser."

ing or entirely closing the door or window, but if there is an attempt to close, the officer may not lawfully resist.³⁷

An entry, however, upon the express invitation of a servant, in the absence of his master, unaccompanied by any fraud or violence on the part of the officer, is not unlawful.³⁸

V. Persons protected by outer door.

The protection of the outer door extends not only to the householder and his goods, but to his children and domestic servants, his permanent boarders and lodgers, and all who have, without fraud or covin, made the house their lawful home. The repose and tranquillity of the family, which it is the purpose of the law to preserve, would be as much disturbed by a forcible entry to serve pro-

cess upon a servant or boarder who has acquired by contract, express or implied, a right to enter the house at all times and to remain in it as long as he pleases, as if the object were to serve process upon the householder himself.³⁹

Not every person, however, who may chance to be within the house, is entitled to the protection of its outer doors and windows. Thus, a stranger who flees there to escape arrest, on civil process, or to fraudulently conceal his goods from levy, is not so favored; and an officer, after demand and refusal of admittance where such would not be a useless ceremony, is justified in breaking or forcibly entering the house in order to execute the mandate of his writ.⁴⁰ Here, too, it would seem that the sanctity of the home is as much violated as if the

³⁷ *State v. Armfield* (1823) 9 N. C. (2 Hawks) 246, 11 Am. Dec. 762 (execution); quoted from in *PALMER v. KING*, ante, 278; *State ex rel. McPherson v. Beckner* (1892) 132 Ind. 371, 32 Am. St. Rep. 257, 31 N. E. 950; *United States v. Stott* (1825) 2 Cranch, C. C. 552, Fed. Cas. No. 16,408 (distress); *Boyd v. Profaze* (1867) 16 L. T. N. S. (Eng.) 431 (distress); *Parke v. Evans* (1812) Hobart (Eng.) 62a.

³⁸ *Hitchock v. Holmes* (1876) 43 Conn. 528 (attachment) where the court said: "The record shows that the defendant, having the writ in his possession, proceeded to the plaintiff's house and rang the bell; the servant opened the door; the defendant asked first for the plaintiff and then for his wife; both were absent; the servant told him that the wife's mother was within and asked if he would like to see her; he replied that he would, and entered, and when within attached the furniture in question. Upon these facts we are of opinion that this entry was lawfully made. The plaintiff's servant opened the door; the officer remained outside until invited to enter; he was under no legal obligation, unasked, either to disclose the reason why he wished to enter and see some one of the inmates, or to decline the offer of admission voluntarily made. If, upon knocking at the door, the occupant from within had bidden him to enter, he might have opened the door and entered without giving notice that he intended to serve process; if he had found the door open, he might have entered without summoning the master of the house to hear a declaration as to his intention. The entry, having been made without force, peaceably and even permissively, was quite within the demands of the law concerning the service of process."

³⁹ *Curtis v. Hubbard* (1842) 4 Hill (N. Y.) 437, 40 Am. Dec. 292, affirming (1841) 1 Hill, 336; *Oystead v. Shed* (1817) 13 Mass. 520, 7 Am. Dec. 172; *Gordon v. Clifford* (1854) 28 N. H. 402; *Walker v. Fox* (1834) 2 Dana (Ky.) 404; *Semayne's Case* L.R.A.1916D.

(1804) 5 Coke (Eng.) 91, 1 Smith, Lead. Cas. 228.

This, it seems, includes a guest and his goods if there is no purpose to avoid the process. *Curtis v. Hubbard* (1841) 1 Hill (N. Y.) 336.

⁴⁰ *Oystead v. Shed* (1817) 13 Mass. 520, 7 Am. Dec. 172; *Burton v. Wilkinson* (1846) 18 Vt. 186, 46 Am. Dec. 145; *Curtis v. Hubbard* (1841) 1 Hill (N. Y.) 336; *De Grafenreid v. Mitchell* (1826) 3 McCord, L. (S. C.) 506, 15 Am. Dec. 645; *Gusdorff v. Duncan* (1901) 94 Md. 160, 50 Atl. 574; *Gordon v. Clifford* (1854) 28 N. H. 402; *Semayne's Case* (1804) 5 Coke (Eng.) 91, 1 Smith, Lead. Cas. 228, and see *Jones v. Herron* (1891) 12 Pa. Co. Ct. 183.

In *Semayne's Case* (1804) 5 Coke (Eng.) 91, 1 Smith, Lead. Cas. 228, it was said: "The house of anyone is not a castle or privilege but for himself, and shall not extend to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of the law; for the privilege of the house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there, and therefore in such cases, after denial on request made, the sheriff may break the house. And this is proved by the statute of Westm. 1, chap. 17, by which it is declared that the sheriff may break a house or castle to make replevin, when the goods of another which he has distrained are by him . . . [i. e., the distrainer], conveyed to his house or castle to prevent the owner to have a replevin of his goods; which act is but an affirmance of the common law in such points. But it appears there that, before the sheriff in such case breaks the house, he ought to demand the goods to be delivered to him; for the words of the statute are, after that the cattle shall be solemnly demanded by the sheriffs, etc."

So, in *Gordon v. Clifford* (1854) 28 N. H.

process were against the master of the house himself, but the law considers the latter as conspiring with the defendant in the writ, and will not allow him to make his house a place of refuge for strangers. An officer, however, acts at his peril in breaking and entering a dwelling to take the person or property of a stranger, for, if that which he is commanded to take is not there, he becomes a trespasser *ab initio* and is liable as such.⁴¹ Likewise, if he enters with permission, and, after being directed to leave, forcibly or against the will and protests of the owner, goes upstairs, through passages and chambers, his conduct not only amounts to a trespass, but constitutes him a trespasser *ab initio*.⁴²

VI. To complete levy or retake person arrested on civil process.

The outer door is not always a protection to those having a lawful domicile in the dwelling. For when the execution of

the process has been properly commenced, the officer may afterwards break the outer door of either the house of the debtor or that of a third person, if necessary, for the purpose of continuing and completing the execution. If the defendant, after an arrest, escape and take refuge either in his dwelling house, or that of another, the officer may pursue, and, after demand and refusal of admission, unless such would be a useless ceremony, may break the house for the purpose of making recaption.⁴³ And the principle is the same where the officer has made a levy upon goods which he has not abandoned.⁴⁴ If the defendant afterwards shuts them up in his dwelling, and the officer cannot gain admittance upon a reasonable demand, he may force the doors for the purpose of regaining his possession and legal control over the property. A different rule would put the officer in a most perilous position. By the original levy, he makes

402, where the domicile of the defendant was fraudulently taken up with the express object of defeating the collection of a tax, the outer door was not privileged.

⁴¹ Walker v. Fox (1834) 2 Dana (Ky.) 404; Johnson v. Leigh (1815) 6 Taunt. (Eng.) 246, 1 Marsh. 565, 16 Revised Rep. 614; Morrish v. Murray (1844) 13 Mees. & W. (Eng.) 52, 2 Dowl. & L. 199, 13 L. J. Exch. N. S. 261; Cooke v. Birt (1814) 1 Marsh. (Eng.) 333, 5 Taunt. 765, 15 Revised Rep. 652, and see other cases cited in footnote 40. But when the officer is seeking the goods of the owner of the house, his justification does not depend upon their being found, as his house is the most natural place for the goods to be. And on the same principle, where there is a judgment against an administratrix *de bonis testatoris*, and she marries, the sheriff may enter her husband's house to search for the goods of the testator. Cooke v. Birt (Eng.) supra. And a sheriff may enter the house of a stranger to the writ when the doors are open, to execute a *feri facias de bona testatoris*, if the goods are there. Biscop v. White (1600) Cro. Eliz. pt. 2 (Eng.) p. 759.

⁴² Gudsorff v. Duncan (1901) 94 Md. 160, 50 Atl. 574.

⁴³ Allen v. Martin (1833) 10 Wend. (N. Y.) 300, 25 Am. Dec. 564; Sandon v. Jervis (1858) El. Bl. & El. (Eng.) 935, 5 Jur. N. S. 156, 28 L. J. Exch. N. S. 156, 7 Week. Rep. 290; Anonymous (1774) Loft (Eng.) 390, 6 Mod. 105; Genner v. Sparks (1704) 6 Mod. (Eng.) 173, 1 Salk. 79. And see Snyder v. Brosse (1869) 51 Ill. 357, 99 Am. Dec. 551.

Even if the officer can touch the debtor through an open window, without breaking into the house, this is a sufficient arrest to justify a subsequent breaking to take the debtor into custody, although the window be one broken not by the officer himself, L.R.A.1916D.

but in a scuffle between him and the debtor. Sandon v. Jervis (1858) El. Bl. & El. (Eng.) 935, 5 Jur. N. S. 156, 28 L. J. Exch. N. S. 156, 7 Week. Rep. 290; Anonymous (1702) 7 Mod. (Eng.) 8.

Where, after peaceably entering the outer door, the officer is forcibly expelled, demand of re-entry under such circumstances is not requisite to justify his breaking open the door. The law in its wisdom only requires this ceremony to be observed where it may possibly be attended with some advantage, and may render the breaking open of the door unnecessary. Allen v. Martin (1833) 10 Wend. (N. Y.) 300, 25 Am. Dec. 564; Aga Kurboolie Mahomed v. Reg. (1843) 4 Moore, P. C. C. (Eng.) 239. In the last case it is said: "Without an actual arrest, there was no rescous or escape; but the proposition that till an actual arrest had taken place, the prosecutor might forcibly expel the officer and those acting in his aid, and lock the outer door, so as to entitle himself to the protection of his castle, cannot be supported. The outer door being open, they were entitled to enter the house under civil process; and then being lawfully in the house, to arrest him, he was guilty of a trespass by expelling them. The act of locking the outer door was unlawful, and he could confer no privilege upon himself by that unlawful act."

⁴⁴ Eagleton v. Gutteridge (1843) 11 Mees. & W. (Eng.) 465, 2 Dowl. N. S. 1053, 12 L. J. Exch. N. S. 359 (distress); Bannister v. Hyde (1860) 2 El. & El. (Eng.) 627, 29 L. J. Q. B. N. S. 141, 6 Jur. N. S. 171, 1 L. T. N. S. 438 (distress); Eldridge v. Stacey (1863) 15 C. B. N. S. (Eng.) 458, 10 Jur. N. S. 517, 9 L. T. N. S. 291, 12 Week. Rep. 51 (distress); Boyd v. Profaze (1867) 16 L. T. N. S. (Eng.) 431 (distress); State v. Cox (1815) 2 Harr. (Del.) 495, note (distress); Reg. v. Sullivan (1841) Car. & M.

himself answerable to the creditor for the goods, or for so much of them as will be sufficient to satisfy the debt; and if his control over the property is made to depend upon the will of the debtor, it is easy to see that the goods may be wasted or destroyed, and yet the officer be charged with the payment of the debt. When the levy has been duly made, the property is in the custody of the law, and the officer may do whatever is necessary for the purpose of maintaining his legal control over it. Merely because the officer did not remove the goods from the premises is no rea-

son for likening this case to the suffering of a voluntary escape after an arrest upon a writ against the person.⁴⁵ And service upon the officer, between the levy of the writ and his forcible entry to regain control of the property, of a judge's order staying all proceedings upon the writ, preparatory to a motion to set it aside, does not affect the officer's right to break and enter the dwelling for the purpose mentioned.⁴⁶

But simply having the property pointed out to him, without taking possession of it, is not sufficient to justify a subsequent forcible entry.⁴⁷

(Eng.) 209 (distress); *Saunders v. Millward* (1845) 4 Harr. (Del.) 246 (fi. fa.); *Howe v. Oyer* (1889) 50 Hun, 559, 3 N. Y. Supp. 726 (replevin); *Glover v. Whittenhall* (1844) 6 Hill (N. Y.) 597 (fi. fa.); *De Graffenreid v. Mitchell* (1826) 3 (fi. fa.) where the property was taken *McCord, L. (S. C.)* 506, 15 Am. Dec. 648 after levy and concealed by one who claimed it.

But see *Randall's Case* (1820) 5 N. Y. City Hall Rec. 141, 1 Wheeler, C. C. 258.

In *Groves v. Bloxom* (1864) 3 *Houst. (Del.)* 544, it was decided that if the goods have previously been taken upon a fi. fa. and left in the house, the officer may lawfully take and carry them away under a venditioni exponas issued upon it, provided he does not use unnecessary force.

In *State v. Coxe* (1815) 2 Harr. (Del.) 495, note, the court said: "An entry to sell resembles the case of breaking open an outer door to retake one who has escaped after arrest on a *capias ad respondendum*, which may unquestionably be done, even on Sunday."

And in *Hillman v. Edwards* (1902) 28 *Tex. Civ. App.* 308, 66 S. W. 788, it was held that an officer who, in executing an order for the sale of specific property, has effected a lawful entry into the dwelling of the defendant, and thereby acquired the right to use all necessary force in making a levy, but who voluntarily leaves without doing so, is not entitled to re-enter the house by force.

While the voluntary departure of a person left in possession of the goods, merely to obtain refreshment, and with no intention of abandoning the distress, is not such an abandonment as to deprive him of the right to break and enter upon his return (*Bannister v. Hyde* (1860) 2 *El. & El. (Eng.)* 627, 29 L. J. Q. B. N. S. 141, 6 *Jur. N. S.* 171, 1 L. T. N. S. 438, the rule is otherwise, it seems, if the return is delayed too long. Thus, in *Russell v. Rider* (1834) 6 *Car. & P. (Eng.)* 416, one in possession of goods distrained for rent left the house in a state of excitement bordering on insanity, supposed by the landlord to have been produced by drugged liquor administered by someone in the house. After six days the landlord, apparently without demand of ad-

mission, broke into the house and carried away the goods. It was decided that he was not justified in breaking into the house after so long a delay.

In *Com. v. Moreland* (1880) 9 *W. N. C. (Pa.)* 272, where the constable had previously made a levy for rent in arrear in the regular way, and opened the door with a false key when he went back to sell, it was decided that an assault and battery upon him by the tenant was justifiable, as the officer was a trespasser. But see what is said in *Murray v. Vaughn* (1895) 16 *Pa. Co. Ct.* 657, about this case.

⁴⁵ *Glover v. Whittenhall* (1844) 6 *Hill (N. Y.)* 597 (fi. fa.), where the court said: "But it is not unusual in this state after a levy upon goods, to leave them in the possession of the debtor, either with or without a receiptor. It is an act of kindness towards the debtor, which, although it may render the officer answerable to the creditor, or involve him in difficulty with third persons, does not amount to an abandonment of the levy so far as the debtor himself is concerned. As to him, the property is still in the custody of the law, and the officer may come again at pleasure to complete the execution of the process."

⁴⁶ (N. Y.) *Ibid.*

⁴⁷ Thus, a constable, who went to a dwelling house with a writ of replevin for a sewing machine of one of the members of the family, and stated to the head of the family that he had a writ of replevin for the machine, but went away after the same was pointed out to him, without taking possession of it, was not, upon his return later in the day, justified in forcing open the outer door, which the head of the family had partly opened, but which she was endeavoring to close as soon as she learned who he was. *State ex rel. McPherson v. Beckner* (1892) 132 *Ind. 371*, 32 *Am. St. Rep.* 257, 31 *N. E.* 950.

The machine being in the house without fraud, the shifting of it to another room, and the substitution of another in its place could in no manner authorize the officer to break the outer door, he necessarily being in ignorance of the change, and having the right, when once lawfully admitted, to break down inner doors in the discharge of his official duties. (*Ind.*) *Ibid.*

If the officer has lawfully entered the debtor's house and seized the goods, he is justified in breaking open the outer door to carry away the property, there being no one whom he can request to open it.⁴⁸ Or if the sheriff's bailiffs, lawfully in the house, are locked in by the owner, the sheriff may break the outer door to rescue them and complete the execution.⁴⁹

VII. Inner doors.

The privilege of the outer door or other outside protection to a dwelling house does not extend to all the doors of

the house; and being peaceably in the building, the officer has the right to execute his writ. And, if the person or property sought be concealed, the officer has the right, after demand and refusal of admittance, when such will not be a useless ceremony, to break open inner doors, and generally to use such force as is necessary to enable him to obey the command of his writ. So rooms, even those of lodgers, closets, trunks, wardrobes, etc., may be entered in this way in search for the person or property sought under the writ.⁵⁰ And the officer, to arrest a lodger, who refuses

⁴⁸ *Pugh v. Griffith* (1838) 7 Ad. & El. (Eng.) 827, 3 Nev. & P. 187, 7 L. J. Q. B. N. S. 169.

⁴⁹ *White v. Whitshire* (1618) *Palmer* (Eng.) 52, 2 Rolle Rep. 137, Cro. Jac. 555, and see *Pugh v. Griffith* (Eng.) *supra*.

⁵⁰ *Prettyman v. Dean* (1839) 2 Harr. (Del.) 494; *Snydacker v. Brosse* (1869) 51 Ill. 357, 99 Am. Dec. 551; *Stearns v. Vincent* (1883) 50 Mich. 209, 45 Am. Rep. 37, 15 N. W. 86; *Clark v. Wilson* (1882) 14 R. I. 11; *State v. Thackam* (1794) 1 Bay (S. C.) 358; *Hubbard v. Mace* (1819) 17 Johns. (N. Y.) 127; *Gordon v. Clifford* (1854) 28 N. H. 402; *Hillman v. Edwards* (1902) 28 Tex. Civ. App. 308, 66 S. W. 788; *Rex v. Bird* (1680) 2 Shower, K. B. (Eng.) 87; *Anonymous* (1686) Comb. (Eng.) 17; *Lóng v. Clarke* [1894] 1 Q. B. (Eng.) 119, 63 L. J. Q. B. N. S. 108, 69 L. T. N. S. 654, 9 Reports, 60, 42 Week. Rep. 130, 58 J. P. 150; *Smith v. Butler* (1695) Comb. (Eng.) 326; *Waterhouse v. Saltmarsh* (1619) *Hobart* (Eng.) 263a; *Ratcliffe v. Burton* (1802) 3 Bos. & P. (Eng.) 223, 6 Revised Rep. 771, and see *Whalley v. Williamson* (1836) 7 Car. & P. (Eng.) 294, *supra*, note 22, and *Re Fogarty* (1797) 2 Dane, Abr. (Mass.) 652, as cited in 2 Decem. Dig. § 37, p. 1091.

In *Lee v. Gansel* (1774) Cowp. pt. 1 (Eng.) p. 1, Lofft, 374, where it was sought to extend the privilege of the outer door to inner doors, Lord Mansfield said: "The books talk of the privilege of a mansion house and of the privilege of the door of it, which cannot be broken open. The whole question will therefore turn upon the extent of that which is called privilege. Now this rule of privilege, arising from a sound maxim of policy, is no privilege of a debtor properly speaking who absconds from justice in avoidance of legal process, but is annexed to the house and door (to which door I forbear at present to give any particular epithet), for the protection of a man and his family. It is therefore by consequence only, that the privilege is a protection to such a person, and not for his own sake. The sound maxim of policy is this: 'That a greater evil should be avoided for a less, and that a less good should give way to a greater.' The outer door, therefore, or window of a man's house, says the law, L.R.A.1916D.

shall not be broken open by process. This has been long and well understood. The ground of it is this; that otherwise the consequences would be fatal; for it would leave the family within, naked and exposed to thieves and robbers. It is much better, therefore, says the law, that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences. But as this is a maxim of law in respect of political justice, and makes no part of the privilege of a debtor himself, it is to be taken strictly, and not to be extended by any equitable analogous interpretation. The oldest case to be found in the books that takes notice of this privilege and warrants it, and upon which authority it was allowed at all, is a case in the Year-Book 18 Edw. IV. p. 4, pl. 19. 'There, an action of trespass was brought for breaking the outer door in execution of a fieri facias. The court held that trespass would lie, for the officer shall not break open an outer door to execute his process; but when the officer had so got in, he broke open a trunk, and took out the goods that were in it; in respect of which they held that trespass would not lie; for he had a right to break the trunk, and take the goods.' I quote this case not to imply that I should perhaps have been of the same opinion myself in a case of the first impression; but to shew, that the rule of privilege is taken most rigidly. Afterwards, in *Semayne's Case* (1604) 5 Coke (Eng.) 93, 1 Smith, Lead. Cas. 228, the same strict doctrine was held, namely, 'that breaking open the outer door was a trespass, but that taking away the goods was lawful.' In (1602) *Yelv.* 29, which was the same case, *Popham* doubted whether even the outer door was privileged, because it would be a hindrance to justice; but afterwards, in (1604) 5 Coke (Eng.) 92b, 93a, the whole court held, 'that the outer door ought not to be broken open;' and grounded their opinion upon the single authority of 18 Edw. IV. p. 4, pl. 19, before quoted. You see from hence with what rigour the privilege has been construed in the oldest cases. But no case or dictum has been cited at the Bar, nor indeed did there ever exist a case, which intimated a doubt whether an inner door might not be

broken open. In *Parke v. Evans* (1612) Hobart (Eng.) 62a, and *Waterhouse v. Saltmarsh* (1619) Hobart (Eng.) 263a, among other outrageous things the bailiff broke open a chamber door, having entered legally at the outer door; but such breaking was held lawful, the first entrance at the outer door which was open, having been legal; and yet the latter was a very harsh case, for they broke in when the man and his wife were in bed, and behaved with great violence and outrage. But I lay stress on this to show how strictly the privilege has been understood, when the outer door or window is secure, and when the entrance has not been forcible through either of them, so as to lay open the house and its inhabitants to insult and violence from without; but, on the contrary, has been quiet and peaceable. In addition to these authorities, I recollect a note of a case lately determined, which says, 'an inner door has no protection at all.' It was the case of *Astley and Pindar*, and was heard in the year 1760, Mich. 1 Geo. II. There, all the other charges against the bailiffs were answered except breaking the inner door, which was accompanied with such violence that the door fell, and the officer with it into the room; but all the court were of opinion that the officers, having lawfully entered at the outer door, might break open the inner to execute the duty of their office. Besides these cases, and in conformity to the principles upon which they have gone, I shall cite a very sensible and material distinction from a book in my hands, which is *Fost. C. L. title, Homicide, chap. 8, § 20*, which is this. 'The rule that every man's house is his castle, when applied to arrests on legal process, has been carried as far as political justice will warrant, and perhaps further than in the scale of reason and sound policy they will warrant. But in cases of life we must adhere to rules well known and established. But this rule is not one of those that will admit of any extension. It must, therefore, as I have before hinted, be confined to the breach of windows and of outer doors intended for the security of the house against persons from without, endeavoring to break in.'

In *Ratcliffe v. Burton* (1802) 3 Bos. & P. (Eng.) 223, Lord Alvanley, Ch. J., answering the question whether an officer who enters one's house to serve a civil process without any particular reasons for supposing him to be there has a right to break open such inner doors as happen to be shut, without any previous demand of admittance, said: "If the officer have certain knowledge that the party is within the house, it might be absurd for him to demand any admittance; since if he were to do so, the party might possibly escape by the window while the officer was demanding admittance at the door. No authority has been cited to show that where the officer enters merely for the purpose of ascertaining whether the party be there, he can justify violence for that purpose without a previous demand of admittance. It L.R.A.1916D.

would be carrying the law upon this subject to an alarming extent, if the court should hold that because a man happens to owe money in any part of England, the sheriff of the county in which his house is situated may break open every door and every trunk in which a man might be concealed, and this as often as he should think proper before the return of the writ. It appears to me that the law has gone quite far enough upon this subject. It has said that the outer door of the house is the man's castle, but that the inner doors may be broken open for the execution of civil process. It has never said, however, that the officer may justify breaking the inner doors without averring a previous demand of peaceable admittance, or shewing why such violence was necessary. Without such averment, it does not appear that he did nothing more than was necessary towards making a reasonable search. In this case the defendant neither states that the party was there, nor even that he had reasonable ground for suspicion. Had neither of these circumstances been stated, I do not say that he would have been guilty of a trespass. I desire to be considered as confining these observations to the case of civil process only, without in any degree extending them to the case of criminal process. The present, therefore, being a case of civil process, I do not think the justification stated by the defendant sufficient to entitle him to the judgment of the court."

The opinion of the other judges were to the same effect. And while *Hutchison v. Birch* (1812) 4 Taunt. (Eng.) 619, 13 Revised Rep. 703, wherein the sheriff was seeking goods under a *fi. fa.*, has been regarded as casting some doubt upon this decision, it is not believed to establish a rule that demand of admittance is never necessary, for the plea, as Lord Alvanley in the earlier case said it must, showed why it was necessary to break the door; namely, "because the sheriff could not otherwise get at the goods."

In *Kneas v. Fidler* (1816) 2 Serg. & R. (Pa.) 263, the court said: "It has been contended on the part of the plaintiff, that the sheriff's officer who executes a replevin enters the defendant's house at his peril, although the outer door be open, and that he is a trespasser if the goods be not found there; but I do not take the law to be so. The writ commands the sheriff to replevy certain goods which are in the possession of the defendant; he has a right, therefore, to enter the defendant's house for the purpose of searching for the goods, I say nothing of his right to break the outer door, in case of being refused admittance, because the point does not arise in this case. Hard, indeed, would be the condition of the officer, if the legality of his entry depended on the contingency of his finding the goods, and strange would be the law, if the defendant in replevin, by adding wrong to wrong, by secreting or removing from his house the goods which he had unlawfully taken, should have an action against a minister of justice, for coming to search, according to

him admission to his bedroom, is justified in leaving the house, and breaking an outer window of the apartment.⁵¹

But a mere suspicion that a stranger is in the house is not sufficient to justify the breaking of inner doors, and if the party sought is not there, the officer is a trespasser ab initio.⁵²

VIII. Effect of levy or service.

While there is some conflict as to the effect of a levy or service effected by an unlawful breaking of the outer door or

the command of his writ, for what there was good reason to suppose would be found."

If an officer with a writ of replevin enter and make search upon the invitation of the owner of the dwelling house, he is not liable in damages unless he does unnecessary injury in the search. *Bruce v. Ulery* (1883) 79 Mo. 322.

If he search property belonging to a stranger to the writ, found in the house, upon the invitation of the latter, and under a bona fide impression that it is the property of the defendant, the same rule of liability applies. (Mo.) *Ibid*.

If the plaintiff in the writ accompanies the officer, the same rules apply to him. (Mo.) *Ibid*.

⁵¹ *Lloyd v. Sandilands* (1818) 8 Taunt. (Eng.) 250.

And breaking the door of the bedroom of a lodger under a ca. sa. is not sufficient to entitle him to a discharge from custody, where the officer was lawfully in the house. *Levitt v. Dymoke* (1868) Ir. Rep. 3 C. L. 1.

⁵² *Johnson v. Leigh* (1815) 6 Taunt. (Eng.) 246, 1 Marsh. 565, 16 Revised Rep. 614; *Morrish v. Murray* (1844) 13 Mees. & W. (Eng.) 52, 2 Dowl. & L. 199, 13 L. J. Exch. N. S. 261.

⁵³ *Cate v. Schaum* (1878) 51 Md. 299; *Bailey v. Wright* (1878) 39 Mich. 96; *People v. Hubbard* (1840) 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; *Curtis v. Hubbard* (1842) 4 Hill (N. Y.) 437, 40 Am. Dec. 292; *Holker v. Hennessey* (1897) 141 Mo. 527, 39 L.R.A.165, 64 Am. St. Rep. 524, 42 S. W. 1090; *Welsh v. Wilson* (1885) 34 Minn. 92, 24 N. W. 327; *Closson v. Morrison* (1867) 47 N. H. 482, 93 Am. Dec. 459; *Isley v. Nichols* (1831) 12 Pick. (Mass.) 270, 22 Am. Dec. 425; *Crabtree v. Robinson* (1885) L. R. 15 Q. B. Div. (Eng.) 312, 54 L. J. Q. B. N. S. 544, 33 Week. Rep. 936, 50 J. P. 70; *Attack v. Bramwell* (1863) 3 Best & S. (Eng.) 520, 32 L. J. Q. B. N. S. 146, 9 Jur. N. S. 892, 7 L. T. N. S. 740, 11 Week. Rep. 309; *Kerbey v. Denby* (1836) 1 Mees. & W. (Eng.) 336, 2 Gale, 31, 5 L. J. Exch. N. S. 162, 1 Tyrw. & G. 688.

In *Isley v. Nichols* (1831) 12 Pick. (Mass.) 270, 22 Am. Dec. 425, the leading case on this question in this country, the court, after reaching the conclusion that a valid and lawful act cannot be accomplished by an unlawful means, said: "But upon L.R.A.1916D.

window of a dwelling house, due chiefly to the dictum of a few early English decisions, the American cases, which contain the better considered opinions on the question, are substantially agreed in holding that the levy or service so made is void. This, it is believed, is the only logical result of the general rule of non-entry of the outer door, as to hold otherwise would be to put a premium upon force and violence, and result in the creation of a legal right by the doing of an illegal act.⁵³ And it has been de-

more general grounds, assuming the question to be open for examination, both upon considerations of principle and policy, it appears to the court that it would be dangerous to establish the rule that although a man's house is his castle, his asylum, and it shall not be forced for the purpose of serving civil process, and upon a balance of the considerations of expediency, the law holds it wise to allow this exemption in favor of the peace and security of families by day and by night, even though the service of civil process is thereby delayed or defeated, yet that a legal right of property may be acquired by the direct violation of this settled and salutary principle of law. Such a decision would afford a direct encouragement to the rash and turbulent creditor to violate the rules of law, and to do that which might lead to an open breach of the peace, by giving legal effect to his attachment, if he can procure force enough to make one by unlawful and violent means. It is to be recollected that an officer, whilst acting within the scope of his authority and in conformity to the rules of law, is not only entitled to the protection of the law, but has power to command the assistance of all other citizens; and the law extends the like protection to them. But it would be placing such officer and his assistants in a most critical and questionable predicament if they could be employed in making a lawful attachment by unlawful means. Should the officer refuse to make an attachment under these circumstances, even where the doors are forced by others for the purpose of enabling him to enter and make the attachment, would he be responsible to the creditor for the nonfeasance? Would citizens be liable to damages, or to punishment, were they to refuse to aid an officer who should undertake to make such attachment? Should resistance be made from within, and force be repelled by force, would not the assailants be acting unlawfully; would not the owner and inmates of the house be acting lawfully? Should death ensue, would it not be murder in the assailants? But it is unnecessary to multiply questions with a view to suggest all the possible ill consequences which must arise from holding that the act is wrongful, and yet that a valid right can be acquired by means of such wrong act. The consequences must be obvious. If such a trans-

action can take place in the daytime, it may in the night. If the owner of the house may defend by force himself, he may call in the assistance of others. If his house is assailed by force, he may use adequate force to repel it. To such a conflict of rights and powers, we think the establishment of the proposition contended for by the defendants would directly lead. They can only be avoided by either legalizing the attachment and the means of affecting it, by authorizing the officer to break open the doors of a dwelling house to serve civil as well as criminal process, and by placing within his reach a sufficient force to enable him to accomplish it, by holding all resistance unlawful, and by thus throwing around the officer and his assistants the broad shield of the law for their protection; or else, by holding that when the means are unlawful, all the declared objects and purposes to be accomplished thereby are alike unlawful, and that no legal right can thereby be acquired, either by the officer himself or by his employers. But as it is a well-settled rule of law, established upon considerations of policy, that the doors of a dwelling house cannot lawfully be forced for the service of civil process, we think it follows, as a necessary legal consequence, that no valid attachment can be thereby made."

Reviewing some of the authorities having an apparently different aspect from this position, the court further said: "In Bacon's Abridgment, and by other respectable compilers, it is stated that on a *capias*, or *feri facias*, the sheriff is not authorized to break the door of a dwelling house, though the execution would be good. Bacon, Abr. Sheriff (N) 3. The authorities on the subject are stated with great clearness and fullness in a note by Mr. Metcalf, the American editor of Yelverton's Reports, p. 29. On a reference to the case in the Year Book 18 Edw. IV. folio, 4, which is usually cited as the foundation of the supposed rule, we think it is quite manifest that the real point decided there was, that a sheriff is not justified in breaking a dwelling house in order to execute a *feri facias*, for a *feri facias* will not excuse an officer for breaking a dwelling house. Lord Coke, in his report of Semayne's Case (1604) 5 Coke (Eng.) 93, Smith, Lead. Cas. 228, refers to the same case in the Year Books, and says it was resolved by Littleton and all his companions, 'that the sheriff cannot break the defendant's house by force of a *feri facias*, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good.' It is obvious, from the facts, that this point was not raised or decided in Semayne's Case, and it is not mentioned by the other reporters of the same case. In Lee v. Gansel (1774) Cowp. pt. 1 (Eng.) p. 1, Lofft, 374, though the above cases are cited by Lord Mansfield, as they stand, yet he used them for another and distinct purpose, and he expressed no opinion, nor had he, in the case before him, occasion to express any, upon the point now under consideration."

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The court also said: "In *Heminway v. Saxton* (1807) 3 Mass. 222, the action was trespass *quare clausum*, against a deputy sheriff and his assistants, alleging that they broke and entered the plaintiff's dwelling house, and took and carried away sundry articles of property, with other wrongs. The defendants justified under a writ against the plaintiff and an attachment of the goods made thereon; but the plaintiff had judgment. No question was made of the validity of the attachment, and it does not appear whether the value of the goods was included in the damages; and it is not, therefore, a direct authority for anything more than that it is unlawful to break a dwelling house, in order to make an attachment upon a writ, and that an action of trespass will lie for it, by the owner, whose goods are thus attached, against the officer. But as it is a general rule in trespass, that the plaintiff shall be indemnified for all losses sustained in consequence of the tortious act of the defendant, and as the value of the goods is commonly the most considerable, and often the only item of loss in such cases, it may be presumed that if a different rule had been adopted in this case, some notice would have been taken of it. If the damages were given according to the usual rule, the case is an authority against the validity of such an attachment. In *Widgery v. Haskell* (1809) 5 Mass. 155, 4 Am. Dec. 41, Parsons, Ch. J., referred to the common position found in the compilers, as it would naturally present itself to his recollection at the moment, as an apt illustration of the argument which he was enforcing. The proposition he was illustrating was this: That the protection of a debtor's effects from attachment in his house is not the design of the law, but only an incidental protection, resulting from the provision that a man's house is his castle. He then adds: 'And if his effects are found without his castle, they may be attached; and even in his castle an attachment would be good, although the party might be punished as a trespasser for invading the castle.' This dictum would be entitled to great weight had it been the result of examination and reflection; but we think it very manifest that it was not. The case turned upon the validity of a trust assignment by an insolvent debtor, to an assignee of his own choice, without the act or consent of any of his creditors; and one argument in support of it was, that in effect a debtor might do the same thing; that is, dispose of his property at his own will, without the assent of his creditors, by collecting his effects within his dwelling house and paying whom he pleased. It was this argument which the chief justice was answering; which he did very powerfully, by showing that although a debtor might do this, it was not because the law deemed it a purpose just and lawful in itself, and one which might be accomplished in other modes, but was necessarily incidental to another and higher principle of the law, designed to afford security to a man and his

family, by the protection of his dwelling house. It was, therefore, concluded that this protection could not be extended to a conveyance in trust, of goods not within the debtor's dwelling house. That part of the proposition which we are now examining, that the attachment of the property would be good, though the entry of the house was wrongful, was obviously not a point in the case; as it is everywhere conceded that the protection of the dwelling, and not an immunity of goods from attachment on civil process, is the object of the legal maxim, we think it equally clear that this position was not necessary to support the argument which the chief justice was maintaining."

In this same connection Walworth, Chancellor, in *Curtis v. Hubbard* (1842) 4 Hill (N. Y.) 437, 40 Am. Dec. 292, said: "The remaining question is, whether a sheriff, who has entered the house of another in direct violation of the law, for the purpose of arresting the owner or seizing his goods, can be justified in consummating the wrong by arresting his person or removing the goods, where it is all one continuous act. I think, upon authority as well as upon principle, he cannot. And I fully concur in the opinion of the learned Chief Justice of Massachusetts in the case of *Ilisley v. Nichols* (1832) 12 Pick. (Mass.) 270, 22 Am. Dec. 425, upon this question. As a general rule, no person can acquire a right to the custody of the person or the possession of the property of another by his own illegal act. And I think this would never have been considered an exception to that rule, had not the language of the case cited from the Year Books been misapprehended. In *Semayne's Case*, either the counsel, or one of the judges who delivered the opinion of the majority of the court, is represented as saying: 'By Littleton and all his companions it is resolved that the sheriff cannot break the defendant's house by force of a fieri facias, but he is a trespasser by the breaking, and yet the execution which he then doth in the house is good.' But that certainly could not have been intended as a translation of the language in the case in the Year Book 18 Edw. IV. And Cowper has done great injustice to *Ld. Mansfield* by quoting, as if it was his own language, a statement of that case which bears no resemblance to the note of the decision as it is in the Year Book. A very fair translation of the whole case is given by Mr. Metcalf, in his note to the case of *Semayne v. Gresham* (1602) Yelv. (Eng.) 20; which translation does not vary materially from that of Mr. J. Cowen in the case of *People v. Hubbard* (1840) 24 Wend. (N. Y.) 371, 35 Am. Dec. 628. The substance of it is, that the sheriff had an execution against a party in a civil suit who had locked up his goods in a chest in his house; and the sheriff went and broke open the house and seized the goods and carried them off. The case being stated to the court for its decision whether the sheriff was guilty of a tort, Littleton and his associate judges held that L.R.A.1916D.

the party injured might have a writ of trespass against the sheriff for breaking his house, notwithstanding the execution; for, as they say, 'the fl. fa. will not excuse him of the breaking of the house, but of the taking of goods only.' Not that it would excuse the sheriff for having taken the goods in this particular case, after he had wrongfully broken into the house where they were. But the words 'des biens,' which, literally translated, is 'of the goods,' seem to have led to the erroneous conclusion that the court meant to decide that the taking of the goods in the particular case then stated to the court was a justifiable act, notwithstanding the breaking of the house to get access to them. In the French and Norman French languages, the article is frequently used in cases where we dispense with it. And 'des,' which appears to be a contraction of the preposition 'de' and the article 'les,' is used where we make use of the corresponding preposition only. Thus, the English expression, 'the laws of men,' would, in French, be 'les lois des hommes;' that is, literally, 'the laws of the men.' *Ld. Mansfield*, who seems to have taken it for granted that in the case in the Year Books the court had decided that the taking of the goods was lawful notwithstanding the illegality, intimates that he would not probably have so decided in a case of the first impression. *Lee v. Gansell* (1774) Lofft (Eng.) 381; Cowp. pt. 1, p. 6. And it is certain no such question could have arisen in *Semayne's Case*, as no goods had been there taken by the sheriff; for it was an action against the owner of the house for shutting his doors and refusing to permit the sheriff to enter and seize the goods. The fact also that in the subsequent case of *Yates v. Delamayne* (1777) (Eng.) cited in *Bacon Abr.* title, Execution (N) the court set aside the levy on an execution, because the sheriff had illegally entered the defendant's house to execute the writ, is conclusive to show that it was not then considered as settled law in England that the sheriff had a right to seize the defendant's goods after having obtained access to them by his own wrongful act. That case, too, appears to have been decided in 1776, only two years after the case of *Lee v. Gansell*, and while *Ld. Mansfield* continued to preside in the Court of K. B."

In *Bailey v. Wright* (1878) 39 Mich. 96, the court said: "It is admitted this was a trespass, but it is claimed the levy may be a good levy in spite of the wrongful acts by which it was accomplished. We think this is too dangerous a doctrine to be tolerated. Public policy requires above all things that courts and officers executing their process shall respect the lawful rights of all persons. The practical permission which overzealous officers would receive to commit wrongs with substantial impunity, if their levies should be held good without regard to the manner of their enforcement, would remove every check on lawlessness. To hold that an act is lawful which may be lawfully resisted is absurd. Such miscon-

cided that the levy being unlawful, a sale of the property is illegal, and that the debtor is not responsible for expense of the levy and sale.⁵⁴

duct should neither be justified nor winked at. Any officer who breaks the law should be held to be entirely without excuse, and as fully responsible as any other malefactor. The doctrine on this subject is so fully discussed in *Isley v. Nichols* (1831) 12 Pick. (Mass.) 270, 22 Am. Dec. 425, and *People v. Hubbard* (1840) 24 Wend. (N. Y.) 369, 35 Am. Dec. 628, that we need not go into any further investigation. The doctrine is sensible and just, and is the only one whereby private safety and public peace can be preserved. There can be no respect for courts and their process if their

ministers are upheld in violations of law, or if they can be lawfully opposed in exercising their functions, as they may be if such levies are held valid."

In *Hodgson v. Towing* (1836) 5 Dowl. P. C. (Eng.) 410, a defendant arrested on a *capias ad satisfaciendum* after the officer had broken an outer door was discharged out of custody on a summary application.

⁵⁴*Hillman v. Edwards* (1903) — Tex. Civ. App. —, 74 S. W. 787, later appeal (1902) 28 Tex. Civ. App. 308, 66 S. W. 788. W. W. A.

KENTUCKY COURT OF APPEALS.

LOUISVILLE WATER COMPANY, Appt.,
v.

H. E. LALLY.

(168 Ky. 348, 182 S. W. 186.)

Water company — negligent turning on of water — forcing open faucet.

A water company cannot be held liable for negligently turning water into the pipes of a house so violently as to force open a screw faucet and flood the property, since such forcing of the faucet would be impossible.

For other cases, see Evidence, XII. d, in Dig. 1-52 N. S.

(February 8, 1916.)

APPEAL by defendant from a judgment of the Common Pleas Branch Fourth Division of the Circuit Court for Jefferson County, in plaintiff's favor, in an action brought to recover damages for the alleged negligent flooding of plaintiff's house. Reversed.

The facts are stated in the opinion.

Mr. A. J. Carroll, for appellant:

If the injury would not have occurred but for the plaintiff's negligence, he cannot recover even if the defendant is guilty of negligence.

Hummer v. Louisville & N. R. Co. 128 Ky. 486, 108 S. W. 885; *Sandy River Cannel Coal Co. v. Caudill*, 22 Ky. L. Rep. 1175, 60 S. W. 180; *Chesapeake & O. R. Co. v. Conley*, 136 Ky. 601, 124 S. W. 861.

Messrs. O'Neal & O'Neal and C. H. Searcy for appellee.

Clarke, J., delivered the opinion of the court:

Appellee lived at 225 Shawnee Drive,

Note. — As to power of court to disregard testimony because contrary to scientific principles, see annotation following this case, post, 301.
L.R.A.1916D.

Louisville, Kentucky, on the 28th of July, 1914, and owned the property. About 5 o'clock in the afternoon he, his wife, and three children were leaving the house to spend the evening with his brother, when, through one of the children wanting a drink, it was found the water had been turned off from his house, and none could be drawn from the faucets. They left their home and returned about half-past 10 o'clock that evening, when they discovered that the water from the faucet at the washstand in the bathroom on the second floor had overflowed the basin, and flooded a considerable portion of the house, damaging the walls, floors, and furnishings.

Appellee instituted this action against appellant, and recovered a judgment for \$694 for the damage sustained by reason of the flooding of his house, and appellant, having been denied a new trial, is appealing.

Appellee's petition as amended alleges that the flooding of his house was caused by the gross negligence and carelessness of appellant in suddenly turning on and into the pipes of his home a large and tremendous volume of water of extreme velocity, in such way and manner as to forcibly cause same to run through the faucet and piping in said residence, thereby causing and permitting said water to flood the premises.

The evidence shows that the water was turned back into the pipes supplying appellee's house and other houses in the neighborhood within a short time after he left his home. The only evidence that can be construed to indicate that there was any negligence in the way in which the water was turned on again into these pipes by appellant is given by two ladies living in the same square with appellee, who testify that when the water was turned on upon this occasion the pipes and faucets in their homes were caused to shake and to make

such an unusually loud noise as to frighten them. None of the pipes or faucets in any of these residences were broken or bursted, or damaged in any way. Appellee testifies that the faucet from which the damaging water flowed was in perfect condition, both before and after the accident; that no pipe or fixture or fastening in his home was hurt or damaged by the turning on of the water. There is no explanation in any of the proof from which it can be conceived how the faucet that caused this damage could have been turned on by the force, volume, or velocity of the water returning into the pipes, not even from the testimony of the two ladies, to whom we referred above, that the water had been turned into the pipes by appellant with such unnecessary and unusual force as to cause the pipes to rattle and give forth a loud noise. Appellee testifies that, when he went up to examine the cause of the flooding of the house, he found the faucet of the washbasin open to such an extent that it required two or three turns to close it; that the faucet was one of those screw faucets that turn, comparatively new, and that it was not hurt.

Counsel for appellee have not favored us with a brief; neither the pleadings nor the proof afford any reasonable explanation of how that faucet could have been turned on by the return of the water into the pipes when turned on by appellant, and we are unable to imagine how that could have done it. The only explanation, consistent with physical and mechanical laws with which we are familiar, that we are able to imagine, is that appellee, or some member of his family, left the faucet turned on, and that the waste pipe from the basin was obstructed in some way, which prevented the water from escaping through the waste pipe as fast as it came through the faucet, and that the overflow was caused in this way. We have been unable to discover the scintilla of

evidence of negligence upon the part of appellant that would justify the court in overruling its motion for a peremptory instruction at the close of appellee's testimony. The evidence in this case can supply the necessary scintilla only by the indulgence in the theory that the force with which appellant turned the water into the pipes opened the faucet by unscrewing it at the washstand, and that would be to suppose a circumstance inherently impossible and absolutely at variance with well established and universally recognized physical and mechanical laws. Water may be turned into pipes with sufficient force to burst them or tear off fixtures such as the faucet, but not so as to unscrew the faucet.

This court, in the case of Louisville & N. R. Co. v. Chambers, 165 Ky. 705, 178 S. W. 1041, after stating the "scintilla rule" prevailing in this state, said: "These rules cannot apply where the only evidence upon which such adverse party rests his right to succeed consists of a statement of alleged facts, inherently impossible and absolutely at variance with well-established and universally recognized physical laws."

If a statement of alleged facts inherently impossible and absolutely at variance with well-established and universally recognized physical laws will not supply the required scintilla of evidence, a theory inherently impossible based upon a statement of alleged facts certainly cannot supply it.

If this case should be tried again, instruction No. 3 should not be given, as it completely destroys the effect of instruction No. 4, which correctly presented the defense of contributory negligence.

It results, therefore, that appellant's motion for a directed verdict should have been sustained, and the judgment herein is reversed and remanded for proceedings consistent herewith.

Annotation—Power of court to disregard testimony because contrary to scientific principles.

Earlier cases considering the question under annotation will be found in annotations in *Chybowski v. Bucyrus Co.* 7 L.R.A.(N.S.) 357; *Fleming v. Northern Tissue Paper Mill*, 15 L.R.A.(N.S.) 701; and *Wichita Ice & Cold Storage Co. v. Sheppard*, 28 L.R.A.(N.S.) 648.

As to credibility and effect of testimony of one injured at a railroad crossing that he looked and listened, where he must have detected the train had he looked or listened, see note to *McCarthy v. Bangor & A. R. Co.* L.R.A.1915B, 140.

Evidence which is opposed to well-known and recognized scientific facts L.R.A.1916D.

about which there is no conflict, and which was a basis of a judgment in the lower courts, will be reviewed and the judgment reversed if justice requires. *Hudson v. Rome, W. & O. R. Co.* (1895) 145 N. Y. 408, 40 N. E. 8.

Testimony of witnesses which is contrary to physical law is of little or no value whatever. *McLeod v. Miller* (1915) — Nev. —, 153 Pac. 566.

But in order that testimony as to the manner an injury was inflicted may be disregarded as contrary to physical laws, it must be shown to be such by demonstration, and not by mere conflict of

evidence; and such demonstration must be shown affirmatively, and not depend upon the credibility of witnesses. *Winkler v. Power & Min. Machinery Co.* (1910) 141 Wis. 244, 124 N. W. 273.

While appellate courts uniformly refuse to weigh evidence, they do not renounce the right to reject entirely the testimony of witnesses found to be repugnant to physical law and facts. Testimony to be entitled to any weight must be within the bounds of reason; failing in this it cannot be denominated evidence, and should be cast out as devoid of probative force. But when the testimony of witnesses can reasonably be reconciled to the physical facts, the courts will not reject it, nor weigh it, notwithstanding it may believe the weight of physical evidence opposes that given by witnesses. It is the duty of courts to determine what constitutes substantial evidence, and the business of triers of facts to settle conflicts therein. *Stafford v. Adams* (1905) 113 Mo. App. 717, 88 S. W. 1130.

And so it was held that no law of physics need be disregarded in accepting testimony that one's hand was forced a distance of 18 inches onto a saw as the result of a blow from a stick which had been caught in a revolving wheel; considering that such one was standing on the side of the table which carried the exposed saw and on a line with the wheels and a pile of waste, and that the stick declined from this pile towards the wheels, which were rapidly revolving, their rotary motion being towards the saw. (Mo.) *Ibid.*

So, also, in *Phillips v. Southwest Missouri R. Co.* (1913) 170 Mo. App. 416, 155 S. W. 470, the court stated that while it was willing to give full force and effect to the rule laid down to the effect that courts are not bound to give credence to the evidence of witnesses which is so opposed to natural law and the physical facts as to be manifestly false, yet it was not prepared to say that it is a physical impossibility for a heavy fender on a street car, in a sudden and violent fall, not stopping until the front end of it came within 7 inches of the ground, to so strike one with such force as to break his leg a few inches above the ankle.

And an impossible state of facts against natural laws is not shown by testimony that a man sixty-seven years of age, weighing 175 pounds, threw a man sixty-four years of age and weighing 165 pounds a distance of 7 feet, so as to warrant such testimony being dis-

regarded as unworthy of belief. *Peterson v. Liddington* (1915) — Ind. App. —, 108 N. E. 977.

But testimony as to the quantity of water essential to the proper irrigation of lands will be disregarded although uncontroverted, where the absurdity of such testimony is manifest. *Whited v. Cavin* (1909) 55 Or. 98, 105 Pac. 396. It was claimed in this case that a flow of 17 inches of water per acre was necessary, but the court pointed out that 1 inch of water under 6-inch pressure miner's measurement is one fortieth of a second foot and furnishes a flow of 675 gallons per hour, which in thirty days would furnish 1½ acre feet or 6 acre feet of water for a four months' irrigation, and so a flow of 17 inches would cover an area equal to 1 acre to a depth of 25½ feet each month or 102 acre feet during an irrigation season of four months. And added that the quantity allowed by the government for irrigation season in similar localities and altitudes with like soil is usually about 1½ acre feet.

So, also, testimony that a certain wine is "Ohio claret wine" within the law and the definition of the food department will be disregarded where, to give it weight, the characteristics, distinctive, and predominant ingredients of the grape, tartaric acids, must be disregarded, which would take away the most obvious and convincing means of identifying a true claret wine. *United States v. 60 Barrels of Wine* (1915) 225 Fed. 846.

And that an engine and cars which left the tracks and smashed into and through the front fence and yard of certain premises, so jarred, shook, and moved the house that a woman sleeping in bed was thrown from her position thereon, over the foot thereof, which was 2 feet higher than the mattress, was held in *Louisville & N. R. Co. v. Chambers* (1915) 165 Ky. 703, 178 S. W. 1041, to be inherently impossible, and so absolutely inconceivable that testimony to that effect could not be accepted as true, where the evidence was that neither the engine nor the car struck the house, and that, aside from the breaking of a pane of glass in the front door by a flying picket from the fence, nothing inside the house was disturbed, except that strings suspending a couple of pictures broke and the stovepipe became disconnected, and especially in view of the fact that other occupants of the dwelling were not thrown from their bed or seriously disturbed, and one was not even awakened.

It will not be declared as a matter of law to be a physical impossibility that a car could be started with such violence as to cause one alighting to lose her balance and be thrown down, and the car stopped within 2 or 3 feet. *Zeiler v. Metropolitan Street R. Co.* (1911) 153 Mo. App. 613, 34 S. W. 1067.

And in *Elliott v. Metropolitan Street R. Co.* (1911) 157 Mo. App. 517, 138 S. W. 663, it was held that testimony that a car started with such violence as to throw one into the rear vestibule, and stopped again within 2 or 3 feet, is not opposed by physical fact or law, citing *Zeiler v. Metropolitan Street R. Co.* (Mo.) supra.

But testimony that a boy successfully boarded a freight train running at the speed of an express train, and that the train was brought to a dead stop within 10 feet, is so repugnant to the laws of physics of common knowledge that a reasonable mind must reject it as wholly impossible of belief. *Giles v. Missouri P. R. Co.* (1913) 169 Mo. App. 24, 154 S. W. 852.

Testimony that one alighting from a car, and, while her hand was still on the hand holds, was hurled to the pavement by a sudden jerking of the car, is not so opposed to natural law as to be incredible because of fact that she fell forward, and so tending to show that she must have negligently stepped from a moving car. *Pickens v. Metropolitan Street R. Co.* (1907) 125 Mo. App. 669, 103 S. W. 124. The court stated that the direction of her fall doubtless was influenced by three opposing forces,—the eastern motion she derived from the car, her southward motion in attempting to step from it, and the resistance offered by her attachment to the hand hold, which certainly could have greatly influenced the direction and nature of the fall. And the same doctrine was applied in *Barnett v. Metropolitan Street R. Co.* (1909) 138 Mo. App. 192, 120 S. W. 730.

And in *Klass v. Metropolitan Street R. Co.* (1913) 169 Mo. App. 617, 155 S. W. 57, action by passenger on street car for injuries alleged to have been caused by being thrown to the pavement as a result of a sudden starting of the car as she was alighting, there was testimony that, although the car was moving eastward, the injured passenger was thrown to the east; and it was contended that this testimony was physically impossible, as a person on the south side of an east-bound car, who is facing east and standing on the steps when the car stops, will invariably be thrown backwards to-

wards the west as the car starts east again suddenly. The court in answering this contention said: "Of course we are not bound to give any consideration to the testimony of a witness that is repugnant to undisputed and indisputable physical facts and laws, but we do not regard the testimony of this witness as falling under that rule. Counsel for defendant assert that, in the position occupied by Mrs. Klass as described by the witness, the certain effect of a sudden forward start of the car would have been to throw her westward against the rear end of the vestibule, and not forward, but it must be borne in mind that several opposing and mutually modifying forces were brought into action, namely: First, the jerk of the car, which, if not interfered with, would have thrown the woman in the opposite direction; second, the force produced by the movement of Mrs. Klass in leaving the car, which at the time was exerted in a direction at right angles to that of the motion of the car; third, the resistance to the suddenly introduced force offered by the hand hold; and, fourth, the involuntary effort a person will make to retain his equilibrium under such circumstances. Obviously the direction given the falling body of a person who has some means and opportunity for resistance to the major force would vary in different instances, and would depend on the relative strength of the interacting forces. It would not do for us to indulge in a dogmatic conclusion, and to pronounce that to be impossible which not only is possible, but is well within the scope of the reasonable results of the forces brought into play. The question of whether or not the testimony of the witness is consistent with physical fact and law in this instance should be regarded as one of fact for the jury to determine."

But in *Scroggins v. Metropolitan Street R. Co.* (1909) 138 Mo. App. 215, 120 S. W. 731, testimony of one that as she was about to alight from a car, she having released her hand hold at the time she went to step, that she was thrown from the car head first in the direction the car was moving by a sudden starting of it, was held to be in opposition to the undisputed physical facts and laws of motion and physical forces as to not warrant relief. The court said: "How could the sudden starting of the car when she was in that position have the effect of throwing her head first in the direction in which the car was going; the natural result of such

start would have been to jerk her feet towards the east and to pitch her body in the opposite direction; that would have been the effect produced on an inanimate body in her position, and the only modifying force that could have given a different direction to her fall would have been her subconscious efforts to counteract the sudden force exerted against her. Manifestly such involuntary but unsupported efforts could not have produced a counteracting force so pronounced as to overcome the impetus given her body by the starting of the car, and to pitch her body in a direction opposite to that it otherwise would have taken, and that, too, with a momentum so great to cause her to slide head first on the pavement in the direction the car was going. Her version of the occurrence is too unreasonable to pass muster. Clearly her fall was caused by her own negligence in attempting to alight from a rapidly moving car."

And following the Scroggins Case as authority, it was held in *Daniels v. Kansas City Elev. R. Co.* (1913) 177 Mo. App. 280, 164 S. W. 154, where one thrown from a car fell forward with the car, that testimony that, as he was boarding the car and before he could get his hand on the hand hold, he was thrown from the car by a sudden forward jerk, was contrary to natural law, and should not be credited.

In *St. Louis Southwestern R. Co. v. Britton* (1911) 111 C. C. A. 216, 190 Fed. 316, a female passenger on a railroad train who was seated on the left side of the car, facing the direction the train was going, and near the aisle, claimed that, because of the stopping of the train with a sudden jerk or jolt, she was thrown against the window sill and

her left side and back injured. But the court, in reversing a judgment in her favor, said that, viewing her testimony in the most favorable light, she was not injured by being thrown, and was not thrown against the car window, but that she labored under an hallucination in that respect; that a sudden stopping of the train would have precipitated her forward, and not thrown her sideways some distance to the window; and, further, that sitting where she was, had she been suddenly thrown sideways against the window sill, she would not have been struck in the side and back below the ribs, but much higher up, at or about the shoulders.

But in *Missouri, K. & T. R. Co. v. Morin* (1906) — *Tex. Civ. App.* —, 144 S. W. 1191, action for injuries to one working in a car, alleged to be due to such car being struck by another car in process of switching, it was contended that in view of the testimony that the injured party was lying on some sacks while up in the east end of the car, against the east wall, with his head to the east, a little diagonally across the sacks, with his feet up against the south side of the car, his further testimony that he was thrown in a westerly direction was contrary to natural law, as the engine which struck his car came from the east. But the court said that, while it would not consider evidence that is in direct conflict with known and recognized natural or physical laws, yet, considering his position and the force of the jar, they could not say what effect the physical or natural law would have in such a contingency as to the manner in which he would be thrown, and so would not say that it should be disregarded.

J. H. B.

MINNESOTA SUPREME COURT.

W. D. WASHBURN, JR., Respt.,
v.

GREGORY COMPANY, Appt.

(125 Minn. 491, 147 N. W. 706.)

Tax — minerals.

1. Where mineral interests in real estate are owned separately from the interests in the surface, such mineral interests are land,

Headnotes by BUNN, J.

Note. — For interest of other than the owner of the soil in mineral in situ as independent subject of taxation, see annotation following this case, post, 307. L.R.A.1916D.

taxable as such, and should be taxed separately from the surface interests.

For other cases, see *Taxes*, I. e, in *Dig.* 1-52 N. S.

Same — certificate — sufficiency.

2. A tax certificate, based upon tax proceedings in which the property is described by its government description, without mentioning a mineral interest owned separately from the surface, does not cover such mineral interest.

For other cases, see *Taxes*, III. f, in *Dig.* 1-52 N. S.

(May 29, 1914.)

A PPEAL by defendant from a judgment of the District Court for Crow Wing County in plaintiff's favor in an action to

determine adverse claims to certain mineral interests reserved by plaintiff in a deed executed by him. Affirmed.

The facts are stated in the opinion.

Mr. Leon E. Lum, for appellant:

The time for redemption from the sale thereunder having expired, a tax judgment regularly entered, the court having jurisdiction of the subject-matter, is conclusive as to all defenses except that the tax was paid or the property was exempt.

That after transfer reserving minerals alone or minerals with an easement in the surface, or sale of the minerals and an easement, or minerals alone, land is assessed and taxed as if the separation of interests had not been made, does not affect the court's jurisdiction.

McQuade v. Jaffray, 47 Minn. 326, 50 N. W. 233; Hoyt v. Clark, 64 Minn. 139, 66 N. W. 262; Falvey v. Hennepin County, 76 Minn. 257, 79 N. W. 302; Minneapolis R. Terminal Co. v. Minnesota Debenture Co., 81 Minn. 67, 83 N. W. 485; Hause v. St. Paul, 94 Minn. 115, 102 N. W. 221; Obst v. Ramsey County, 95 Minn. 123, 103 N. W. 893.

Mr. C. E. Purdy, for respondent:

The owner of land may segregate the mineral estate from the rest of the land, and convey one part without the other.

Carlson v. Minnesota Land & Colonization Co., 113 Minn. 361, 129 N. W. 768; Buck v. Walker, 115 Minn. 243, 132 N. W. 205, Ann. Cas. 1912D, 882.

In order to tax the plaintiff's estate it was incumbent upon the state to describe the estate as an estate in minerals and mineral rights, and tax it as such.

Jaggard Taxn. § 67, p. 368; Re Maplewood Coal Co., 213 Ill. 283, 72 N. E. 786.

The tax is levied and becomes a legal and valid tax when the final operative step has been taken so as to create a specific charge upon the land.

Libby v. West St. Paul, 14 Minn. 248, Gil. 181; McCormick v. Fitch, 14 Minn. 252, Gil. 185.

The mineral estate must be separately taxed.

Logan v. Washington County, 29 Pa. 373, 14 Mor. Min. Rep. 108; Sanderson v. Scranton, 105 Pa. 469; Rockwell v. Warren County, 228 Pa. 430, 139 Am. St. Rep. 1006, 77 Atl. 665; State v. Downman, — Tex. Civ. App. —, 134 S. W. 793; 37 Cyc. 775; Greene County v. Lattas Creek Coal Co., 179 Ind. 212, 100 N. E. 561.

The statutes of Minnesota provide for the assessment and taxation of the mineral estate apart from the surface rights.

Minn. Gen. Laws 1905, chap. 161; Gilfillan v. Hobart, 35 Minn. 185, 28 N. W. 222; L.R.A.1916D.

Henkel v. Pioneer Sav. & L. Co., 61 Minn. 35, 63 N. W. 243.

Bunn, J., delivered the opinion of the court:

Plaintiff was the owner of certain real estate in Crow Wing county, Minnesota. April 15, 1907, he executed and delivered a deed, which was duly recorded, describing the land by its government description, but "reserving . . . all ores, mines, minerals, fossils, mineral oils, and mineral paints which may be in or upon said lands, with the privilege of searching, digging, boring, shafting, and mining therefor on any and every part of the said premises . . . together also with the right of building, maintaining as long as needed, and removing when not needed, any buildings, structures, etc., needed for such mining operations." There was a provision for the payment of damages to any buildings of the grantee, or injury to the soil for cultivation, caused by any mining operations.

Plaintiff brought this action to determine adverse claims to the interest reserved by him in the deed. Admittedly he still owns this interest unless his title was divested by the sale of the land to the state for the taxes of 1907, and the expiration of the time for redemption. Defendant is the owner of this tax title, through assignment from the state, and claimed to have acquired thereby the title of plaintiff to the mineral rights reserved by the deed. The decision of the trial court was that plaintiff was the owner of these mineral rights. Judgment was entered accordingly, and defendant appealed.

The question involved is whether the tax proceedings, in which the land was described by its government description, without in terms including or excluding the mineral rights held by another than the owner of the surface, operated to assess and levy a tax upon such mineral rights, and to convey such rights to the purchaser at the tax sale.

If the tax was assessed and levied upon the entire land, including the mineral rights, and if the taxing officers might legally so assess and tax together the surface and mineral rights, the irregularity in not taxing separately the interests of the different owners did not affect the jurisdiction of the court in the tax proceedings. Under our statutes the true ownership of lands sought to be charged by tax proceedings is not material. McQuade v. Jaffray, 47 Minn. 326, 50 N. W. 233; Minneapolis R. Terminal Co. v. Minnesota Debenture Co. 81 Minn. 66, 83 N. W. 485; Ballard v. Hunter, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261. As stated in the Ballard Case (p. 258) with reference to the statutes of

Arkansas, our statutes "virtually make the land a party to the suit to collect the taxes. It is from the lands alone, and not from their owner, that the taxes are to be satisfied." In the *Minnesota Debenture Co. Case*, land consisting of two distinct parcels with different owners was assessed, taxed, proceeded against, and sold as one parcel. It was held that this might have been a defense if presented when application for judgment was made, but that the owner or owners of the land were concluded by the judgment in the tax proceedings.

If, however, the description of the property in the tax proceedings and certificate covered only the estate of the owner of the surface, and not that of the owner of the mineral rights, the taxes were not a lien upon the estate of the latter, and the judgment did not attach to or the certificate convey such interest.

It is well settled in this state, as elsewhere, that the owner of land may segregate the mineral estate from the rest of the land, and convey either interest without the other. It is also clear that the reservation in this case was valid. *Carlson v. Minnesota Land & Colonization Co.* 113 Minn. 361, 129 N. W. 768; *Buck v. Walker*, 115 Minn. 239, 132 N. W. 205, Ann. Cas. 1912D, 882. As stated by Chief Justice Start in the *Buck Case*: "Contracts excepting ores and minerals from grants of land, with a reservation of the right to enter upon the portion thereof granted, are in accordance with long-established usage, and have been invariably held by the courts to be valid." As stated by Mr. Justice Lewis in the *Carlson Case*: "The owner may convey any part of real estate. He may convey some particular deposit or stratum and retain the surface, or he may convey a part or all of the mineral strata or deposits and retain the surface. Such strata or deposits are land." There is no dissent from the proposition that such an interest so created or reserved is land, whatever may be the case under leases or other contracts under which the right to mine is granted for a fixed term. "The minerals and the surface interests may, by separate conveyance, become separate pieces of real estate, and held by different persons, and each estate may be separately seized and sold by execution, and each may be defeated by the statute of limitations as any other real estate. See *Kincaid v. McGowan*, 88 Ky. 91, 13 L.R.A. 289, 4 S. W. 802, where the matter is fully discussed. The mineral estate, when severed by conveyance, being separate real estate, may be taxed as other real estate." *Stuart v. Com.* 94 Ky. 595, 23 S. W. 367. That mines may form a distinct possession and a different inheritance L.R.A.1916D.

from the surface lands was the settled law in England and in this country long before the enactment of any statute on the subject. *Caldwell v. Copeland*, 37 Pa. 427, 78 Am. Dec. 436, 1 Mor. Min. Rep. 189. It would seem to follow logically that the mineral estate, being land, is taxable separately from the surface, when the owners are different, just as when the owner of a tract of land conveys a part of it to another the parcel of each is taxable separately. And that this is the law, even in the absence of statute, there can be no doubt. 37 Cyc. 775, and cases cited in note 64; note to *Wolfe County v. Beckett*, 17 L.R.A.(N.S.) 688.

Many of the authorities cited, notably the *Pennsylvania* and *Illinois* cases, hold that where there is a divided ownership there must be a divided taxation. The statutes of several states provide that the interests in such cases shall be separately taxed. We do not, however, refer to these cases for the purpose of supporting the view that prior to the enactment of chapter 161, p. 196, Laws 1906, a separate assessment and taxation was obligatory in the sense that an attempt to tax the two interests together would necessarily make a judgment void on collateral attack. We place emphasis on the state of the law at the time this statute was enacted as an aid in ascertaining the object of the legislature. Chapter 161, p. 196, Laws 1905, in force at the time of the assessment and levy in question, and now Gen. Stat. 1913, § 1973, reads as follows: "That whenever any mineral, gas, coal, oil, or other similar interests in real estate are owned separately and apart from and independently of the rights and interests owned in the surface of such real estate, such mineral, gas, coal, oil, or other similar interests may be assessed and taxed separately from such surface rights and interests in said real estate, and may be sold for taxes in the same manner and with the same effect as other interests . . . are sold for taxes."

As we have stated, it was the unquestioned law, at the time this statute was passed, that mineral interests in real estate owned separately and apart from interests in the surface were real estate and might be assessed and taxed separately from the surface interests, and "sold for taxes in the same manner and with the same effect as other interests in real estate are sold for taxes." Before the statute, it was not only proper to tax the mineral interest separately, but it was plainly an irregularity to assess to one owner as one property both the surface and the mineral rights, when they were owned separately. The legislature must be credited with some object in

passing the law. Whether this object was to make it obligatory to assess and tax mineral rights separately from the interest in the surface, or whether it was to declare and make clearer the already clear common law on the subject, may be open to doubt; but in either case there is a statutory direction to the taxing officers how to proceed when the interests are owned separately. It is not necessary to hold, as we view the case, that under this statute an assessment and tax against both interests together is fatal to the jurisdiction of the court to render a judgment, and that therefore the owner of either interest who has failed to defend in the proceedings can attack the judgment collaterally. But it was the duty of the taxing officers, under the statute, as well as under the common law, to assess and tax separately the interests of plaintiff and those of the owner of the surface. The deed separating the mineral rights from the surface rights was of record at the time the tax was levied and became a lien. It is to be presumed that the taxing officers intended to follow the law. These considerations are helpful in reaching a decision whether the description of the property used in the tax proceedings includes the mineral rights. It contains no mention of any such right or interest. Manifestly it would have been easy to have described the property taxed as "mineral rights," as it would have been to describe it as "surface rights." The description used does neither, but is merely the government description. The interest of plaintiff in the minerals was plainly real estate, and properly taxable separately. The law directed the assessing officers to tax it separately. If the separate interest of the mineral owner is covered by this description, the result is that his property is taxed without notice to him, under the guise of taxing the property of another. The courts do not favor such a result. In *Eastman v. St. Anthony Falls Water Power Co.* 43 Minn. 60, 44 N. W. 882, the question was as to what land was included in the description used in the tax proceedings. Mr. Justice Vanderburgh said: "The title

of each party being of record, it will not be presumed that the separate property of different parties is embraced under one general description in tax proceedings, if the same may be applied and limited to the land of one, and not to that of the other. The description, when applied to the subject-matter, . . . is susceptible of the construction claimed for it by the defendant. An opposite construction would be misleading, . . . and ought not therefore to be upheld." This language seems particularly appropriate here. The description in the case at bar when applied to the subject-matter, and viewed in the light of the facts and the law as they existed at the time the tax was levied, is fairly susceptible of the construction claimed for it by the plaintiff and adopted by the learned trial court. We therefore decide that the mineral or mineral rights of plaintiff were not covered by the description in the tax proceedings, and were not taxed in those proceedings.

It does not seem important that the mineral estate may have escaped taxation. That the assessor omitted to assess this interest does not influence the decision in the present case. Nor do we regard as vital the fact that there may be difficulties in arriving at the true value of mineral rights. There is nothing whatever in the law or in this opinion that in any way tends to permit the owner of a separate mineral estate to escape paying taxes on his property.

We fully appreciate that in Minnesota the tax is upon the land, and that its ownership is not the material thing. But it is nevertheless true that the land of one person should not pay the taxes that ought properly to be paid by the land of another. The judgment in the tax proceedings does not affect the mineral estate of plaintiff, because that estate was not described in the proceedings. We do not hold that defendant's tax title is void, but simply that it does not cover the "land" of plaintiff.

Judgment affirmed.

Petition for rehearing denied.

Annotation—Interest of other than the owner of the soil in mineral in situ as independent subject of taxation.

The present note supplements that to *Wolfe County v. Beckett*, 17 L.R.A. (N.S.) 688. These notes are limited strictly to the question indicated in the title, and do not include cases dealing with the taxability of mining claims on public lands, or with the taxation of mines as such, or the proceeds of mines.

Land may be divided horizontally as L.R.A.1916D.

well as vertically; one may own the surface and another the minerals underground, and each estate be subject to taxation. *Greene County v. Lattas Creek Coal Co.* (1913) 179 Ind. 212, 100 N. E. 561; *Northern P. R. Co. v. Mjelde* (1913) 48 Mont. 287, 137 Pac. 386.

The principle stated in the earlier note that, when, by an instrument in proper

form, the fee in the mineral is severed from the fee in the surface, each fee or interest is separately assessable and taxable to the owner thereof as real estate, is sustained also by *Cherokee & P. Coal & Min. Co. v. Crawford County* (1905) 71 Kan. 276, 80 Pac. 601; *State v. Downman* (1911) — *Tex. Civ. App.* —, 134 S. W. 787, and other cases subsequently cited in this note.

This principle has received the sanction of the United States Supreme Court as against an objection based upon the guaranty of the equal protection of the laws by the 14th Amendment. Thus, the assessment for taxing purposes of mineral rights where they have been separately conveyed and are owned by persons other than the owners of the surface estates, without any corresponding deduction from the assessments against the surface owners, does not violate U. S. Const. 14th Amendment as discriminating against the owners of the mineral rights so assessed, where it does not appear that mineral rights known to exist were consciously relieved from taxation if they belonged to the owners of the surface. *Downman v. Texas* (1913) 231 U. S. 353, 58 L. ed. 264, 34 Sup. Ct. Rep. 62.

But the guaranty of the equal protection of the laws by the state and Federal Constitution was held, in *State ex rel. Owen v. Donald* (1915) 161 Wis. 188, 153 N. W. 238, to be violated by the provisions of the Wisconsin statute (Laws 1913, chap. 367) in relation to the separate taxation of rights and reservations in respect of minerals, which restrict the purchasers in case of the sale of such rights or reservations for non-payment of taxes to the state and the owner of the fee to which the right or reservation is attached. From the concurring opinion of Timlin, J., it would appear that this decision was rendered upon the express assumption that the statute should be taken to include exceptions and grants of ores or minerals as well as reservations of the right to take away ores and minerals. The court observed that treating this statute, as it must be treated, as a taxing statute, the purpose of which is to raise money, the limitation of the bidders is not germane to, but in contravention of, that purpose. Another reason for holding the statute unconstitutional was that the provisions for the state advancing money to the county on account of the sales of such property, in connection with the provision that the owner of the remaining interest may redeem within three years, L.R.A.1916D.

or, in many cases, within a longer period, amounted in practical effect to the state advancing money to the favored person, who had an option to repay the state the amount advanced, with interest, and take the property or let the state keep the same. Winslow, Ch. J., and Siebecker and Kerwin, JJ., dissented upon the ground that a mining right is a perproperty right of such a markedly different character from that of other forms of property that it may properly be the subject of classification, provided the uniformity rule of taxation be not violated.

A statute which provides that where the surface of land is held by one person and the minerals by another, the commissioner shall ascertain the fair market value of their respective interests, makes the two holdings distinct and separate subjects of taxation. *Tiller v. Excelsior Coal & Lumber Corp.* (1909) 110 Va. 151, 65 S. E. 507.

It is the duty of taxing officers to assess and tax separately the interests of a grantor and grantee in a conveyance describing the land by its government description "but reserving . . . all ores, mines, minerals, fossils, mineral oils, and mineral paints which may be in or upon said lands," under the common law as well as under the Minnesota statute, which expressly provides for such separate assessment. *WASHBURN v. GREGORY Co.* ante, 304.

The decision in *WASHBURN v. GREGORY Co.* was followed by *Tyndall v. Du Bois* (1914) 125 Minn. 536, 147 N. W. 708.

In *Riggs v. Sullivan County* (1914) 181 Ind. 172, 103 N. E. 1075, the court declared that mining interests in mineral are the subject of horizontal severance from the surface, and taxable as real estate; and held, or at least assumed, that such severance brought into operation the statute declaring that whenever a division or partition has been made, or other changes take place in the ownership of any tract or lot of land or any part thereof by conveyance, sale, devise, or descent, the county auditor shall transfer the same on the last appraisal list, and apportion the same and the valuation thereof, with all delinquent taxes, to the several owners.

The right or interest embodied in a reservation in a conveyance to the grantor, his successors, and assigns of all mineral upon or in the land conveyed, constitutes an interest in real estate, subject to taxation as such, and is neither a mine nor a mining claim within art. XII. § 3, of the Constitution, providing in effect for the taxation of the annual

net proceeds of all mines and mining claims. *Northern P. R. Co. v. Mjelde*, (1913) 48 *Mont.* 287, 137 *Pac.* 386.

An instrument in form similar to an ordinary conveyance of real estate, and containing all the requisites essential to deeds of conveyance of real property, purporting to grant and convey all metals and ores "in place or severed from the earth, which might or could be worked for profit by underground excavation or open workings, or both," conveys interests in land which are subject to taxation separate from the land itself; and it is not incumbent upon the state to show that the lands described in the instrument contained any mineral ores or valuable substances, the burden being upon the owner of such interest to show that the lands do not contain such minerals. *State v. Downman* (1911) — *Tex. Civ. App.* —, 134 *S. W.* 787. The judgment in this case was affirmed by the United States Supreme Court in (1913) 231 *U. S.* 353, 58 *L. ed.* 264, 34 *Sup. Ct. Rep.* 62. The Supreme Court, however, did not pass independently upon the proposition above stated, but merely held that it did not involve a violation of the 14th Amendment of the Federal Constitution.

The interest under a conveyance of the "coal and other minerals" underlying a prescribed tract of land, though no coal or other mineral was ever mined from the tract, was held in *Greene County v. Lattas Creek Coal Co.* (1913) 179 *Ind.* 212, 100 *N. E.* 561, to be subject to taxation under the statute declaring that "all lands" within the state are subject to taxation. This reverses the decision of the Indiana appellate court (1911) — *Ind. App.* —, 96 *N. E.* 633, holding that the assessment of the coal and other minerals was invalid for the reason that they were not within the meaning of the term "mine or quarry" in the section of the statute providing that, in valuing any real property in which there is a mine or quarry which is owned by a person other than the owner of the surface of the lands, the mine or quarry shall be separately valued and assessed to the respective owners. The supreme court held that the fact that the interest was under ground would not exclude it from the general statute above referred to.

The Kansas statute which provides for the assessment and taxation of minerals in the earth when the ownership of them is in one person and the fee of the surface of the land is in another should be construed as part of the general tax law L.R.A.1916D.

of the state, and thus be supplied with provisions for its enforcement. *Cherokee & P. Coal & Min. Co. v. Crawford County* (1905) 71 *Kan.* 276, 80 *Pac.* 601.

In *Rockwell v. Warren County* (1910) 228 *Pa.* 430, 139 *Am. St. Rep.* 1006, 77 *Atl.* 665, affirming (1909) 39 *Pa. Super. Ct.* 468, the supreme court repudiated the attempted distinction between seated and unseated land in respect to the severability of estates in the surface and the oil, gas, and coal or other minerals underlying the surface, and held that the oil, gas, and minerals reserved from the grant of the surface of tracts of unseated land are the subjects of separate taxation as real estate.

A novel question was presented in *McCormick v. Berkey* (1913) 238 *Pa.* 264, 86 *Atl.* 97. The owner of a tract of 245 acres conveyed 192 acres thereof, reserving to the grantor all the minerals underlying the same; subsequently the grantor executed a deed purporting to convey to a third person the entire tract of 245 acres, reserving and excepting the 192 acres previously conveyed; the 53 acres and the minerals underlying the 192 acres were assessed separately, the former as seated, and the latter as unseated, lands; and the latter was sold as unseated lands for the nonpayment of taxes due from the original grantor for years subsequent to the conveyance. It was held that the original deed worked a severance of the minerals laterally and of the surface rights in the 192-acre tract, but did not have the effect to sever perpendicularly the minerals underlying the 192-acre tract from the remaining part of the 245-acre tract, and there was no authority to assess or sell the mineral right underlying the 192 acres as unseated land distinct and separate from the 53-acre tract. The court said that it is the duty of the taxing officers to assess the entire adjacent real estate holding of the owner, not severed or detached by his own act as a single body, and they have no authority to divide them and assess them severally for the purposes of taxation; this rule applies where a tract of land has been assessed as a whole and part of the surface or minerals has been sold. The court further said that the assessment of the 53-acre tract was the assessment of the surface and all the minerals, and the taxes paid under such assessment were the taxes on the whole body of land.

Under the Michigan statute providing that in determining the value of real estate for the purposes of taxation, the assessors shall consider the "quantity and

value of standing timber, water power, and privileges, mines, minerals, quarries, or other valuable deposits known to be available there, and their value," it is held in effect in *Curry v. Lake Superior Iron Co.* (1916) — *Mich.* —, 157 N. W. 19, that all estates in any particular description of land must be assessed together. The ultimate question in that case, whether the owner of the mineral right could obtain and hold a tax title as against the owner of the surface, is not within the scope of this annotation.

As shown in the earlier note, if the instrument by which the right to the mineral is created is, when properly construed, a mere lease or license, and does not dis sever the fee in the mineral from the fee in soil or surface, while it may by virtue of a local statute be taxable as personal property, it is not ordinarily taxable as real property.

The court in *Rockwell v. Warren County (Pa.)* supra, clearly observes the distinction between the grant or reservation of coal, oil, or gas in place, and a mere license to mine the coal or to drill for oil and gas, unaccompanied by the right of ownership in the minerals underlying the surface, and declares that the freehold constitutes an estate in land taxable as such, but the latter does not.

It is apparent, however, that the term "real estate" for the purposes of taxation may be so defined by statute as to cover the interest in mineral even in a lease which does not sever the fee of the mineral from the surface.

Thus, the rights of a holder of an oil lease may be taxed separately from those of the owner of the fee, under a statute providing that the term "real estate" shall include all mines and minerals in and under land and all rights and privileges pertaining thereto. *Graciosa Oil Co. v. Santa Barbara County* (1909) 155 Cal. 144, 20 L.R.A.(N.S.) 211, 99 Pac. 483. It was so held notwithstanding that the lease in question was construed to vest in the lessee merely an estate for years, so far as necessary for the purpose of taking oil therefrom, and did not create an absolute present title to the oil strata in place. The court observed that an absolute estate in underlying strata may be created, and the estate of the owner of the overlying land and of the owner of the subterranean stratum will be as distinct and separate as is the ownership of respective owners of two adjoining tracts of land; adding that for the purposes of separate ownership land may be divided horizontally as well as superficially and vertically. As shown, L.R.A.1916D.

however, the court held that the rights under the lease were within the statute, notwithstanding that the lease did not sever the estates in the surface and the subterranean stratum. The fact that this condition was not created by the lease in question was not regarded as excluding it from the operation of the statute providing for separate taxation.

Oil and gas.

See also cases cited in note in 17 L.R.A.(N.S.) 688; and *Rockwell v. Warren County (Pa.)* and *Graciosa Oil Co. v. Santa Barbara County (Cal.)* supra.

The question whether the fee in oil and gas may, like the fee in solid mineral, be severed from the fee in the surface, is not within the scope of these notes, except so far as it has arisen in taxation cases.

For the purpose of ownership and conveyance of solid minerals, the earth may be divided horizontally as well as vertically, and title to the surface may rest in one person, and title to the strata beneath the surface containing such minerals in another; and the same principle applies to oil and gas. *Texas Co. v. Daugherty* (1915) — *Tex.* —, L.R.A.—, —, 176 S. W. 717. The court, after an extended discussion, repudiated the attempted distinction between oil and gas and solid minerals as subjects of distinct interests in real property.

"Oil leases," so-called, which purported to grant, bargain, sell, and convey all the oil, gas, coal, and other minerals in and under a particular tract of land; habendum: "To have and to hold . . . the above-described premises, rights, properties, and privileges, . . . under the said grantee, and the heirs, successors, and assigns of such, forever, upon the following terms," under penalty of forfeiture of "the rights and estates hereby granted" in certain contingencies,—were held in *Texas Co. v. Daugherty (Tex.)* supra, to constitute a grant of a defeasible title in fee to the oil and gas in the ground, and so separately taxable to the grantee as an interest in real property. The decision, as noted, was made to turn upon the character of the instrument of conveyance as distinguished from the mere grant of a license or privilege. In that respect the opinion of the supreme court differs from that of the Texas court of civil appeals ((1913) 160 S. W. 129), whose judgment in this case was affirmed, as the latter court deemed it unnecessary to determine whether the leases in controversy, when tested by the common law, conveyed any title to the

oil or gas beneath the surface, as in any event the interest created would be subject to taxation under the provision of the statute that real property, for the purposes of taxation, should be construed to include the land and all the rights and privileges belonging to it or in any wise appertaining thereto.

The right under "an oil and gas lease, so-called, which purports to grant to one and his heirs all the oil and gas in and under" the described premises, was held in *People ex rel. Carrell v. Bell* (1908) 237 Ill. 332, 19 L.R.A.(N.S.) 746, 86 N. E. 593, 15 Ann. Cas. 511, to convey a freehold interest, and to be taxable as an interest in real property, under a statute declaring that any mining right or right to dig for or obtain iron, lead, copper, coal, or other mineral from land, may be conveyed by deed or lease; and when the owner of any land shall convey, by deed or lease, any mining right therein, such conveyance shall be considered as so separating such right from the land that the same shall be taxable as real estate.

But oil and gas, while lying in a strata of earth, constitute a sort of *ferre naturæ*, which, if taxed at all prior to being reduced to possession, must be taxed

as real property to the owner of the land under which for the time being they may lie, and cannot be taxed against one who has a mere lease or license to go upon the premises, search for, and, if found, take them away. In *Re Indian Territory Illuminating Oil Co.* (1914) 43 Okla. 307, 142 Pac. 997. It will be observed that the hypothesis of this proposition does not include a case where the fee of the oil or gas is severed from the fee of the soil.

Where the petroleum, gas, etc., underlying a tract of land was conveyed by a deed wherein the grantee covenanted for himself, his successors, grantees, and assigns to pay all taxes assessed upon "said premises," and the company that succeeded to the title of the grantee had physical and visible occupancy of the surface of the real estate over the entire tract, it was held liable for all taxes assessed against the premises whether for surface or for minerals; it appearing that the words, "said premises," were used by the parties in their deed in four places, and in each place referred to the whole property; that is, the surface, oil, gas, and minerals. *Potter Gas Co. v. Dunshie* (1910) 42 Pa. Super. Ct. 457.

G. H. P.

KENTUCKY COURT OF APPEALS.

CHESAPEAKE STONE COMPANY, Appt.,

v.

J. C. L. HOLBROOK.

(168 Ky. 128, 181 S. W. 953.)

Master and servant — explosion of missed shot in quarry — negligence of employer.

1. That a common laborer in a stone quarry was not at the place where he was assigned to work at the time he was injured by the explosion of a missed shot will not prevent his holding the master liable for the injury if he was not directed to work in any one spot, nor warned or forbidden to go to the place where the ex-

plosion occurred, and had no knowledge that a shot had failed to explode.

For other cases, see *Master and Servant*, II b, 3, a, in *Dig. 1-52 N. S.*

Same — blasting — missed shot — liability for explosion.

2. The owner of a quarry is not relieved from liability for injury to an employee by explosion of a missed shot by the fact that the one in charge of the blasting believed all the shots had been exploded, and that the debris from the blast covered the ground so that ordinary inspection would not disclose the fact that one had missed. For other cases, see *Master and Servant*, II, a, 4, c, in *Dig. 1-52 N. S.*

Same — duty to inspect for missed shots.

3. The owner of a quarry who employs

Note. — As to liability of master for injuries caused by unexploded charge left after a blast, see note to *Jobe v. Spokane Gas & Fuel Co.* 48 L.R.A.(N.S.) 931. And see also in this connection the note to *Fredericks v. Ft. Dodge Brick & Tile Co.* 48 L.R.A.(N.S.) 925, on liability of master for injuries due to dangerous condition of earth and rock left after blasting, and other notes there referred to.

As to negligence of fellow servant concurring with failure of master to establish or L.R.A.1916D.

enforce proper rules or regulations for conduct of business, see note to *Schwarzschild & S. Co. v. Weeks*, 4 L.R.A.(N.S.) 516.

The admissibility, as *res gestæ* of statements made some time after an accident, including those made by a servant, is discussed in the note to *Walters v. Spokane International R. Co.* 42 L.R.A.(N.S.) 917; and see later cases, *Greener v. General Electric Co.* 46 L.R.A.(N.S.) 975, and *Callahan v. Chicago, B. & Q. R. Co.* 47 L.R.A.(N.S.) 587.

dynamite in the work is bound, after the attempted firing of several charges at one time, to use the highest degree of care practicable under the surrounding circumstances to ascertain whether or not all the charges had exploded, before permitting laborers to go to the spot to work.

For other cases, see Master and Servant, II. a, 4, e, in Dig. 1-52 N. S.

Evidence — purpose of organizing corporations.

4. In an action to hold the lessor of a quarry liable for injury to an employee of the lessee, on the theory that the lessee was a dummy organized to shield the true owner from liability for such injuries, evidence of a former owner of the stock that he organized the lessee for that purpose, and sold both corporations to the present owners with notice of the facts, is admissible.

For other cases, see Evidence, XI. e, in Dig. 1-52 N. S.

Master and servant — dummy lessee — liability for injuries.

5. The owner of a stone quarry who organizes a dummy corporation to which the quarry is leased for the purpose of avoiding liability for injury to employees in operation of the quarry is liable for such injuries.

For other cases, see Master and Servant, I. b, in Dig. 1-52 N. S.

Same — act of fellow servant — negligence of master.

6. That the actual explosion of a missed charge of dynamite in a stone quarry was caused by a fellow servant of the person injured thereby does not relieve the employer from liability for the injury, if its real cause was the employer's failure to exercise proper care to discover the danger.

For other cases, see Proximate Cause, V. in Dig. 1-52 N. S.

Evidence — action for injury to employee — statement of coemployee.

7. In an action for injury to an employee of a stone quarry by the accidental explosion of a missed charge of dynamite, evidence of a statement by the one in charge of the blasting shortly after the accident, that he knew the dynamite was there, is not admissible.

For other cases, see Evidence, X. e, in Dig. 1-52 N. S.

Appeal — erroneous admission of evidence — nonprejudicial error.

8. Admission in an action to recover for injuries to an employee in a stone quarry by the accidental explosion of a missed blasting charge, of a statement by the one in charge of the blasting that he knew that the charge was there, is not prejudicial where the employer had failed to use proper care to determine whether it was or not.

For other cases, see Appeal and Error, VII. m, 3, a, (2), in Dig. 1-52 N. S.

(January 27, 1916.)

A PPEAL by defendant from a judgment of the Circuit Court for Carter County L.R.A.1916D.

in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. H. L. Woods and John M. Theobald for appellant.

Messrs. James Clay and E. Hogge for appellee.

Carroll, J., delivered the opinion of the court:

The appellant, Chesapeake Stone Company, was engaged in operating a stone quarry, and in the conduct of its work it used charges of dynamite, fired by caps and fuse. The appellee, Holbrook, while engaged at work as a day laborer for the company in its quarry, was permanently and seriously injured by the explosion of a stick of dynamite left in a rock at the place where he was working by other servants of the company who had charge of the blasting in its quarry.

It appears that a few days before appellee received the injuries complained of eight or nine holes about 18 inches deep and confined to a small space were drilled for the purpose of putting in them the dynamite, and that after these holes were drilled, McCoy, an employee of the company, loaded them with sticks of dynamite prepared with caps and fuse, for the purpose of blasting; that McCoy attempted to set off all these charges of dynamite at one time, and doubtless thought he had done so, but the dynamite in one of the holes did not explode. Some days after this the appellee was working in company with a collaborer named Henderson, in the rock where the dynamite had been placed, and Henderson, who was using a pick in the course of his work, happened to strike with the pick the unexploded charge of dynamite, causing it to explode, with the result that Henderson was immediately killed and the appellee seriously and permanently injured. In this suit to recover damages for the injuries so sustained the appellee had a judgment for a moderate sum, and the stone company appeals.

Counsel for the company devote some part of their argument to an effort to show that appellee was not working at the place he was assigned to work, and that Henderson was not doing the things that he had been directed to do. But we do not find any merit in either of these contentions. Appellee was employed as a common laborer. He was not directed to work in any spot in the quarry, nor was he warned or forbidden to go to or about the place where he was when the explosion occurred. Under these circumstances, and being ignorant of the presence of the dynamite, he had a right to assume that it would be safe for him to go in

and about the quarry at any place near the place at which he was assigned to work. It may also be said that Henderson, when he struck this charge of dynamite, was performing service in the course of his employment, and, of course, did not suspect that unexploded dynamite was in the rock at the place he was working.

It is further suggested by counsel that this dynamite which exploded may have been put there by some person other than McCoy, or by some person not connected with the company; but this suggestion is entirely unsupported by any fact or circumstance shown in the record. In fact, we think there can be no reasonable doubt that the dynamite that exploded had been placed in one of the holes by McCoy, but for some unexplained reason did not explode when he attempted to fire off these several charges. It may be true that McCoy thought all the dynamite had been exploded, and it may also be true that the dynamite that did explode covered the premises with rock and dirt to such an extent that it could not be told by an ordinary inspection that one charge had not been exploded; but these circumstances do not excuse the company from liability.

It does not appear that any careful inspection of the premises after the explosion by McCoy was made for the purpose of ascertaining whether it had all exploded. There was only what may be called a casual inspection or examination. McCoy says that he believed all the charges had exploded, and that the debris prevented him from telling with certainty whether they had or not, but he did not make, nor did anyone else, any careful inspection for the purpose of determining whether all of the charges had exploded. In work like this the stone company was under a duty to exercise ordinary care to furnish appellee a reasonably safe place in which to work, and, considering the dangerous nature of dynamite and the fact that the company knew it had been put a few days before at the place where Henderson and appellee were working, this duty imposed upon it the further duty of making a very careful examination after the explosion by McCoy to ascertain whether or not all of the charges of dynamite had exploded. And this duty it did not perform, nor did it warn Henderson or appellee of the probable presence of the dynamite.

Dynamite is an inherently dangerous agency, and persons who use it must exercise care corresponding with the danger. When dynamite in the course of work is put in holes for the purpose of being exploded, and is attempted to be exploded, the master must make a very careful examination for the purpose of ascertaining whether all the charges

have exploded before he sends other men to work at this place with implements that might cause an explosion by coming in contact with any charge that had not exploded. What kind of an inspection he should make, or what efforts he should resort to, or what methods he should use, for the purpose of definitely ascertaining whether the dynamite has been exploded or not, are questions that must be settled according to the nature and circumstances of the surrounding conditions. But whatever effort or whatever method or whatever inspection is resorted to, it must be sufficient to meet the high degree of care exacted; and this degree of care is the highest degree of care practicable under the surrounding conditions.

We had before us in *Harp v. Cumberland Teleph. & Teleg. Co.* 25 Ky. L. Rep. 2133, 80 S. W. 510, a case something like this. In that case Harp was employed by the telephone company in the work of digging post holes, and when he went to work to complete the digging of a hole that had been partially made the day before by other servants of the company, some dynamite that had been left in the hole by other servants exploded, causing the injuries of which he complained. In discussing the duty and liability of the telephone company the court said: "As has been repeatedly held by this court, it is the duty of the employer to supply the servant with reasonably safe and suitable tools and machinery to perform the work required of him, and equally his duty to furnish him a reasonably safe place to work, and to see that it is kept so. . . . The appellant had the right to assume that the foregoing rule would be observed by the foreman and other servants of appellee on the occasion of receiving his injuries, and it was their duty to know that there was dynamite in the hole in which he was ordered to dig, and to remove it, or warn him of its presence in time to have prevented his injuries. It is manifest from the evidence that some of the appellee's servants then present did know that there was dynamite in the hole, for they had a few days previously left it there, and further manifest that appellant did not know it was there. It could not be seen because covered by both mud and water. It matters not that it was left in the hole by a fellow servant of appellant, as the negligence of such servant was and is imputable in such a case to the appellee as master."

In *Cincinnati N. O. & T. P. R. Co. v. Padgett*, 158 Ky. 301, 164 S. W. 971, Padgett was injured by the explosion of a stick of dynamite that had been placed in a bucket of pitch. In stating the duty of persons using the dynamite, the court said: "It is the duty of persons who keep in their possession or employ in their business that which, un-

less carefully guarded and cautiously used, is dangerous to others, to exercise such care to see that the dangerous agency is so kept and used as not to inflict injury upon others, as an ordinarily prudent person would be expected to exercise in the use and keeping of such dangerous agency."

In *Jobe v. Spokane Gas & Fuel Co.* 73 Wash. 1, 48 L.R.A.(N.S.) 931, 131 Pac. 235, the court, in setting out the duty and liability the master is under to protect his servant from injury caused by the presence of powder that had not exploded, said: "In the employment of inherently dangerous agencies, such as powder or other explosives, it is the duty of the master to exercise a degree of care for the safety of the servant commensurate with the danger reasonably to be anticipated."

In *Blaisdell v. Davis Paper Co.* 75 N. H. 497, 139 Am. St. Rep. 735, 77 Atl. 485, in discussing the duty of the master in a case like this, the court said: "In view of the extreme hazard which would be created by the presence of such an explosive in ground which a gang of men were removing with pick and shovel, it cannot be said as matter of law that it was not the master's duty to use every precaution human ingenuity could suggest, or else warn the workmen of the danger."

And in *Mather v. Rillston*, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464, 18 Mor. Min. Rep. 165, the Supreme Court used this strong language: "Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained."

In the case we have the court told the jury, in substance, that it was the duty of the defendant to furnish the plaintiff a reasonably safe place in which to work and to see that it was kept so, and that, if the defendant knew, or by the exercise of ordinary

care could have known, of the presence of the dynamite at the place at which he was directed to work, it was its duty to remove the same or warn him of its presence in time to have prevented the injury. This instruction is complained of, but we think it was too favorable to the company. It did not impose on it the high degree of care required to be exercised under the circumstances. The jury should have been told that it was the duty of the company to exercise the highest degree of care practicable under the existing conditions for the purpose of discovering whether any of the dynamite had been left unexploded, and if it knew, or by the exercise of this degree of care could have known, of the presence of the dynamite, it was its duty to remove the cause of the danger or warn appellee of the danger.

This suit was brought against the Chesapeake Stone Company and the Highland Stone Company. The petition charged that the Highland Stone Company was a corporation created under the forms of law for the sole purpose of aiding and assisting the Chesapeake Stone Company to escape liability for injuries that might happen to its servants working in the quarry; that the Highland Stone Company was an insolvent, irresponsible concern, while the Chesapeake Stone Company, the real owner and operator of the business, was solvent and responsible, but was using the name of the Highland Stone Company as the operator of the quarry in a fraudulent effort to protect itself from suits growing out of the operation of the quarry by it, and judgment was sought against each of the companies. It is right hard to tell from the evidence which of these companies was the real owner and operator of the quarry. Both of them appear to have been owned by the same people, and both of them figure in more or less degree in the operations of the quarry. There was evidence that appellee and other employees were paid by checks of the Highland Stone Company, and there was also evidence that the foreman who employed appellee employed him to work for the Highland Company. It was further shown that the name of the Chesapeake Stone Company was printed or marked on the crusher used by the company. And the evidence of one W. B. Whitt throws a good deal of light on the connection of these companies in the operation of the quarry, which connection it was apparently the purpose of the officers to conceal. Whitt testified that at one time he was the owner of practically all of the stock of the Chesapeake Stone Company, which then owned and operated the quarry, and that for the purpose of protecting it and the stockholders from suits and liability he organized the Highland Stone Company with a capital

stock of \$500; that it was organized solely for this purpose, and that, pursuant to it, it leased the quarry from the Chesapeake Stone Company at a rental so high that it would be impossible for the Highland Stone Company to ever make any profit; that after operating the quarry this way for a few years he sold both companies to Ireland & Francis, who owned them at the time appellee was injured, telling them at the time of the sale why the Highland Stone Company had been organized and how the business between it and the Chesapeake Stone Company was conducted. This witness also said that about the time appellee was injured he purchased from the Chesapeake Stone Company a lot of crushed stone manufactured at this quarry and paid this company for it, and also purchased from it dynamite for which he paid it.

It is complained that this evidence was not competent, but we think it was. In the absence of any other evidence to the contrary, it is fair to assume that Ireland & Francis were using the Highland Company for the purpose that Whitt had used it, and that the Chesapeake Company was the real owner and operator of the quarry. The appellee sued both of these companies, and, not having in his possession the facts or the records showing their relation, he had the right to show by such facts and circumstances as were available to him the business relations between them and which one of them was, in truth, the owner and operator of the quarry. The officers of these companies, of course, knew whether the companies, were operating the quarry jointly, or, if one of them was operating it, which one. They also knew the relation these companies sustained toward each other, and, if only one of them was liable for injuries suffered by employees in the quarry, which one of them it was. But, curiously enough, not one of the officers of either of these companies was offered as a witness, nor was any evidence introduced in behalf of either of the companies showing their relation to each other, or which one of them was, in fact, the owner of or operating the quarry.

Under the circumstances related, we think there was sufficient evidence to authorize the jury to find, as they did, against the Chesapeake Stone Company alone.

The stockholders of a solvent corporation will not be allowed to incorporate a dummy corporation for the sole purpose of trying to protect the solvent corporation from suits and damages in the operation of the work in which it is engaged; and, when a person has a cause of action arising either in contract or tort against corporations conducting their business in this way, he may sue both of them, and if the evidence is suf-

ficient, recover against the solvent corporation, although his contract was made with the dummy, and it was apparently in control of the work in which the employee was injured. The question as to which one of these companies was the real owner and operator of the quarry was submitted to the jury in an instruction telling them, in substance, that if they believed from the evidence that the Highland Stone Company was not operating the property in good faith, but solely for the purpose of permitting the Chesapeake Stone Company to escape liability for plaintiff's injuries, they should find against the Chesapeake Stone Company alone, but if they believed that the Highland Stone Company was the real owner and operator of the quarry, they should find against it alone. Under this instruction the jury found against the Chesapeake Stone Company alone, and we think the evidence warranted such a finding.

There is some criticism of the instructions, but we think it is not well founded. It is also said that Henderson and the appellee were fellow servants, and the jury should have been instructed on this issue. We do not think so. These men were not fellow servants in the sense that the company was not responsible for injuries to one caused by the act of the other. The failure of the company to exercise the degree of care required of it caused, not only the death of Henderson, but the injury to appellee, and under no view of the case that we can think of should the company be excused for the injuries inflicted upon appellee.

It is further urged that it was error to permit Clarence Henderson, a witness for appellee, to relate a conversation with Will McCoy shortly after the accident, in which McCoy, as Henderson testified, said: "We knew that dynamite was there. It was in that lot of shots that was put there a week ago."

This evidence was not competent, but neither did it prejudice the substantial rights of the appellant. The evidence showed conclusively that the dynamite had been put there by McCoy, and, whether he or the company knew it was there or not at the time of the accident, it is very clear that the required degree of care was not exercised to discover its presence. Not having exercised the requisite care, the situation is virtually the same as if it had known the dynamite was there and failed to warn the employees of its presence.

Upon the whole record, we think the appellant had a fair trial, and that the judgment against it was authorized by the law and evidence. Wherefore the judgment is affirmed.

WISCONSIN SUPREME COURT.

F. E. CURTICE, Appt.,
v.

CHICAGO & NORTHWESTERN RAIL-
WAY COMPANY, Resp't.

(— Wis. —, 156 N. W. 484.)

Limitation of actions — amendment of action for injury to show interstate character of transaction.

The amendment of a complaint seeking damages for injury to a railroad employee, so as to show that at the time of the injury the railroad was an interstate railroad, and that the injury occurred in interstate commerce so as to come within the operation of the Federal employers' liability act, does not, although there was nothing in the original complaint to show that relief was not sought under the state law, as plaintiff's counsel claimed the intent to be, constitute a new cause of action so as to be affected by the statute of limitations, if the original action was brought in time. *For other cases, see Limitation of Actions, IV. b, in Dig. 1-52 N. S.*

(Barnes and Vinje, JJ., dissent.)

(February 22, 1916.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Brown County dismissing a complaint filed to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servants. Reversed.

Statement by Kerwin, J.:

This action was brought to recover for personal injuries. The original complaint, omitting the title, was as follows:

"First. That the defendant is a railway corporation organized under the laws of the state of Wisconsin; that at all times herein mentioned, it owned and operated a line of railway in and through said state, and between the cities of Marinette and Green Bay, Wisconsin.

"Second. That at all times hereinafter stated, when injured, plaintiff, a resident of said city of Green Bay, was in the employ and service of defendant as a freight con-

Note. — For relation of new pleadings to statute of limitations, see notes to *Missouri, K. & T. R. Co. v. Bagley*, 3 L.R.A.(N.S.) 259; *Bourdreaux v. Tucson Gas, E. L. & P. Co.* 33 L.R.A.(N.S.) 196, and *Philadelphia, B. & W. R. Co. v. Gatta*, 47 L.R.A.(N.S.) 932. See also later case, *Motsenbocker v. Shawnee Gas & E. Co.* L.R.A.1916B, 910.

Generally, as to shifting from the state law to the Federal employers' liability law, or vice versa, including the amendment of pleadings for that purpose, see annotation in L.R.A.1915C, 80. L.R.A.1916D.

ductor on one of defendant's freight trains operating between said cities; that on the 9th day of October, 1911, while running southerly, and about to head in onto the siding at Little Suamico, a station on said line in Oconto county, the defendant's said freight on which plaintiff then was employed as conductor was carelessly and negligently run into by one of defendant's passenger trains following after, before the freight had time to pull onto the siding, and plaintiff was injured as hereinafter alleged.

"Third. On information and belief, plaintiff alleges that defendant's servants in charge of the said passenger train knew of its presence and that the said passenger was following close after on the same block; that said servants had been warned to that effect by a caution card or notice delivered to them at Pensaukee, a station next north of Little Suamico, providing and directing that they proceed with caution, prepared to stop within their vision, and that they might expect to find extra 116, plaintiff's said freight train, within the block; that, notwithstanding, defendant's servants in charge and control of said passenger train did not proceed with caution, and so as to be able to stop within the vision, but recklessly, carelessly, and negligently ran said passenger train at a high and dangerous rate of speed, and so ran it against and into the said freight at said place.

"Fourth. That the defendant's servants, the train despatcher, and others having control of the running of said trains, while the said freight was proceeding south, carelessly and negligently suffered and caused the said passenger train to be let onto the said block with the said freight, thereby causing the said passenger to enter the block and proceed on its way southerly before the block was clear, and before the freight had left it, which made it possible and likely that such an accident might happen.

"Fifth. That the said passenger train, by reason of the aforesaid negligence, ran into the said freight with great force and violence, and the plaintiff was, by the said negligence, severely and greatly injured, to wit, plaintiff's left hip and leg were severely sprained and injured; that he was confined to the hospital for some ten days on account thereof, and suffered great pain; that said injury has continued, causes the plaintiff pain, and renders him unable to do any kinds of manual labor that he could formerly do; that said injury has caused plaintiff loss and damage in expense for treatment, and in loss of time and earnings still does, and will in the future, greatly impair plaintiff's ability to earn a livelihood,—all to his damage in the sum of \$5,000.

"Wherefore plaintiff demands judgment against the defendant for said sum and for costs."

Among other things, the defendant set up facts showing that at the time of injury the plaintiff and defendant were engaged in interstate commerce, and that the cause of action, if any existed, was under the Federal act (act April 22, 1908, chap. 149, 35 Stat. at L. 65, U. S. Comp. Stat. 1913, §§ 8657-8665), not under the laws of the state of Wisconsin. Judgment was demanded by defendant abating the action.

Afterwards the plaintiff was allowed to amend his complaint by adding allegations to the effect that defendant's road runs through the state of Michigan and between the cities of Green Bay, Wisconsin, and Menominee, Michigan, and that plaintiff and defendant were, at the time of the injury alleged, engaged in interstate commerce. Defendant then amended its answer, setting up the statute of limitations. At the time of the amendment of the complaint, two years from the time of the alleged injury had expired. The court below held that the original cause of action was one under the state law, and that the amendment of the complaint set up a cause of action under the Federal act, and that such action was barred by the two-year statute, and sustained the defendant's demurrer and dismissed the complaint. The plaintiff appealed to this court from the judgment dismissing the complaint.

Messrs. Martin, Martin, & Martin, for appellant:

The amendment does not introduce a new cause of action, but is descriptive of the original action, and relates back to the commencement of the action.

Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Bixler v. Pennsylvania R. Co. 201 Fed. 553; Reardon v. Balaklala, 193 Fed. 189; Gainesville Midland R. Co. v. Vandiver, 141 Ga. 350, 80 S. E. 997; Smith v. Atlantic Coast Line R. Co. 127 C. C. A. 311, 210 Fed. 761; Cincinnati, N. O. & T. P. R. Co. v. Goode, 163 Ky. 60, 173 S. W. 329; Vickery v. New London Northern R. Co. 87 Conn. 634, 89 Atl. 277; Nashville, C. & St. L. R. Co. v. Hill, 146 Ala. 240, 40 So. 612; Galveston, H. & S. A. R. Co. v. Perry, 38 Tex. Civ. App. 81, 85 S. W. 62; Kuhns v. Wisconsin, I. & N. R. Co. 76 Iowa, 67, 40 N. W. 92; Gordon v. Chicago, R. I. & P. R. Co. 129 Iowa, 747, 106 N. W. 177; Norfolk Beet-Sugar Co. v. Hight, 59 Neb. 100, 80 N. W. 276; Cleveland, C. C. & St. L. R. Co. v. Bergschicker, 162 Ind. 108, 69 N. E. 1000; Illinois C. R. Co. v. Weiland, 179 Ill. 609, 54 N. E. 300; Sheffield v. Harris, 112 Ala. 614, 20 So. 955; L.R.A.1916D.

Morrow v. Gaffney Mfg. Co. 70 S. C. 242, 49 S. E. 573; Missouri P. R. Co. v. Moffatt, 60 Kan. 113, 72 Am. St. Rep. 343, 55 Pac. 837; Roseberry v. Newport News & M. Valley R. Co. 19 Ky. L. Rep. 194, 39 S. W. 407, 1 Am. Neg. Rep. 602; Schieffelin v. Whipple, 10 Wis. 81; Fox River Valley R. Co. v. Shoyer, 7 Wis. 365; Chicago City R. Co. v. Cooney, 196 Ill. 466, 63 N. E. 1029; Thayer v. Smoky Hollow Coal Co. 129 Iowa, 550, 105 N. W. 1024; Detroit v. Wayne Circuit Judge, 125 Mich. 634, 85 N. W. 1; Merrill v. Wright, 54 Neb. 517, 74 N. W. 955; Love v. Southern R. Co. 108 Tenn. 104, 55 L.R.A. 471, 65 S. W. 475; Patillo v. Allen-West Commission Co. 65 C. C. A. 508, 131 Fed. 680; State use of Zier v. Chesapeake Beach R. Co. 98 Md. 35, 56 Atl. 385; Bell v. Floyd, 64 S. C. 246, 42 S. E. 104.

Mr. Gerald Clifford also for appellant.

Mr. Edward M. Smart, for respondent:

An amendment of the complaint changing the cause of action from one under the Wisconsin statute to one under the Federal employers' liability act constitutes the substitution of an entire new cause of action, so as to make the statute of limitations applicable.

Union P. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877; Hughes v. New York, O. & W. R. Co. 158 App. Div. 443, 143 N. Y. Supp. 603; Moliter v. Wabash R. Co. 180 Mo. App. 84, 168 S. W. 250; Allen v. Tuscarora Valley R. Co. 229 Pa. 97, 30 L.R.A.(N.S.) 1096, 140 Am. St. Rep. 714, 78 Atl. 34; Creteau v. Chicago & N. W. R. Co. 113 Minn. 418, 129 N. W. 855; Brinkmeier v. Missouri P. R. Co. 81 Kan. 101, 105 Pac. 221; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, 33 Sup. Ct. Rep. 651, Ann. Cas. 1914C, 156; Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, 35 Sup. Ct. Rep. 306; Niles v. Central Vermont R. Co. 87 Vt. 356, 89 Atl. 629; Midland Valley R. Co. v. Ennis, 109 Ark. 206, 159 S. W. 214; Hall v. Louisville & N. R. Co. 157 Fed. 464; United States v. Dalcour, 203 U. S. 408, 51 L. ed. 248, 27 Sup. Ct. Rep. 58; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; Meinshausen v. A. Gettelman Brewing Co. 133 Wis. 95, 13 L.R.A.(N.S.) 250, 113 N. W. 408; Missouri, K. & T. R. Co. v. Bagley, 65 Kan. 188, 3 L.R.A.(N.S.) 259, 69 Pac. 189.

Kerwin, J., delivered the opinion of the court:

The point involved upon this appeal, under the assignments of error, is whether the amended complaint set up a different cause of action than that stated in the original complaint. The contention of the appellant is that there is but one cause of action, and

that under the Federal act, while on the part of the respondent it is insisted that the original complaint set up a cause of action under the state law, and that the amendment changed it from a cause of action under the state law to one under the Federal act.

It is obvious that but one cause of action existed upon all the facts stated in the amended complaint. It is equally obvious that the original complaint was defective in failing to state certain facts going to show that at the time the injury was sustained the parties were engaged in interstate commerce. Nothing stated in the amended complaint was in conflict or inconsistent with the allegations of the original complaint. The cause of action upon which the plaintiff sought to recover damages was defectively stated in the original complaint, and the defects were cured by the amendment. But one cause of action was stated. The amendment related back to the original complaint and became a part of it; hence the statute of limitation was no defense. *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134; *Gainesville Midland R. Co. v. Vandiver*, 141 Ga. 350, 80 S. E. 997; *Bixler v. Pennsylvania R. Co.* (D. C.) 201 Fed. 553; *Smith v. Atlantic Coast Line R. Co.* 127 C. C. A. 311, 210 Fed. 761; *Cincinnati, N. O. & T. P. R. Co. v. Goode*, 163 Ky. 60, 173 S. W. 329; *Vickery v. New London Northern R. Co.* 87 Conn. 634, 89 Atl. 277; *Schieffelin v. Whipple*, 10 Wis. 81; *Callahan v. Chicago & N. W. R. Co.* 161 Wis. 288, 154 N. W. 449.

Counsel for respondent has favored us with a very able and exhaustive discussion of cases touching the question involved, and we confess that there is some lack of harmony in the decisions. We think, however, that most, if not all, of the authorities cited by counsel for respondent, can be distinguished from the instant case.

We shall not attempt to discuss the numerous cases referred to by counsel for respondent, except two which are particularly relied upon, namely, *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877, and *Meinshausen v. A. Gettelman Brewing Co.* 133 Wis. 95, 13 L.R.A.(N.S.) 250, 113 N. W. 408.

In *Meinshausen v. A. Gettelman Brewing Co.*, supra, there were two causes of action, the amended complaint setting up a new and different cause of action from that set up in the original complaint; therefore the case is not in point.

We think a careful examination of *Union P. R. Co. v. Wyler*, supra, will show that it is clearly distinguishable from the instant case. In the *Wyler* Case the amendment

changed not only the cause of action, but the nature and substance of the cause of action. The whole discussion in the opinion in the *Wyler* Case goes upon the idea that an entirely new and different cause of action cannot be set up by way of amendment, and thus escape the plea of the statute of limitation on the ground that the new cause of action related back to the time of filing the complaint. But the facts in the *Wyler* Case and the reasoning in the opinion have no application to a case where there is but one cause of action, which is defectively stated and the defect cured by amendment.

The learned trial judge below seems to have attached importance to the fact that counsel for appellant stated that he intended to state a cause of action under the state law. We think this statement wholly immaterial. The mental operations of counsel could not create two causes of action where but one existed. The intent of the pleader might be significant or helpful in giving construction to an allegation which was ambiguous or of doubtful meaning. But there is no such question here.

There is another feature of this case which is worthy of notice. When the defendant answered the original complaint it set up the facts which were omitted in the plaintiff's defective complaint and necessary to perfect the cause of action under the Federal act, and which were afterwards set up by plaintiff in the amendment complained of. The defendant was therefore in no way surprised or prejudiced by the amendment. Doubtless the case could have gone to trial on the pleadings as originally framed, and the complaint on the trial amended or treated as amended in accordance with the issues made by the pleadings as originally framed. *Callahan v. Chicago & N. W. R. Co.* 161 Wis. 288, 154 N. W. 449; *Bieri v. Fonger*, 139 Wis. 150, 120 N. W. 862; *Graber v. Duluth, S. S. & A. R. Co.* 159 Wis. 414, 150 N. W. 489; *Wabash R. Co. v. Hayes*, 234 U. S. 86, 58 L. ed. 1226, 34 Sup. Ct. Rep. 729, 6 N. C. C. A. 224.

As said in *Union P. R. Co. v. Wyler*, 158 U. S. at pp. 297, 298, 39 L. ed. 990, 991, 15 Sup. Ct. Rep. 882: "The whole doctrine of relation rests in a fiction of law, adopted to subserve, and not to defeat, right and justice."

We are convinced that the amendment did not introduce a new cause of action, but cured the defective cause of action originally pleaded; hence the amendment was proper.

The judgment is reversed, and the cause remanded for further proceedings according to law.

Barnes, J., dissenting:

The original complaint carefully avoided any reference to the Federal statute. It contained no allegation tending to show that plaintiff was engaged in interstate commerce when hurt. It shows, with considerable care and particularity, that he was engaged in intrastate commerce. Had a motion been made to make the pleading more definite and certain in reference to the nature of plaintiff's employment, it would have received short shift, because it was neither indefinite nor uncertain in this regard. If the action had been begun on this complaint in the Federal court, it would, I think, very promptly have been held that it did not state a cause of action under the Federal act. Defendant pleaded as a defense to the action that plaintiff was engaged in interstate commerce when injured. Had plaintiff demurred to this defense, the demurrer would, I believe, have been just as promptly overruled, on the theory that such answer, if true, stated a good defense. A perfect cause of action was stated under the law of Wisconsin, while no cause of action was stated under the law of the United States. To be sure, little need be added to the complaint to bring the case under the Federal law. The statement of the simple fact that at the time plaintiff was injured he was engaged in interstate commerce would have been all-sufficient. But the pleading of this simple fact would produce important results. Without such allegation the rights of the parties would have to be determined by the existing law in one jurisdiction. With it they would have to be determined by the law of another jurisdiction. The change indicated would work a change from state to Federal law, and there are substantial and important differences between them. Under the state law contributory negligence is a complete defense where the negligence of the defendant is less than that of the servant. If the servant is negligent, but his negligence is less than that of the master, there can be a full recovery Stat. 1911, § 1816. Under the Federal act contributory negligence is not a defense, but affects the amount of recovery. Under the state law assumption of hazard is no defense to such an action as we have here. Under the Federal law it is a complete defense. Under the state statute defendant would be liable for the negligence of a fellow servant when such negligence causes the injury in whole or in greater part. The Federal statute is different in verbiage at least. The manner of submitting the two actions is different, and the beneficiaries are different. A cause of action includes the facts showing plaintiff's right and its violation by the defendant. *McArthur v. L.R.A.1916D.*

Moffett, 143 Wis. 564, 33 L.R.A. (N.S.) 264, 128 N. W. 445. Enough has been said to show that a person who is injured by a railway company while engaged in intrastate commerce has different rights and a different cause of action from what he would have, had he been injured while engaged in interstate commerce.

It is true that the plaintiff did not, in fact, have two causes of action in reference to which he might exercise a right of election. There was only one cause of action, and whether it came under state or Federal law depended on the facts. Undoubtedly the pleader in the present case was mistaken as to what the facts were when the complaint was drawn. It was stated on the oral argument by counsel for the appellant that it was supposed that the train on which plaintiff was employed when injured started from Marinette, when as a matter of fact it started from Menominee. Instead of its being an intrastate train, it was an interstate train. On the facts before him the able counsel for the plaintiff stated a perfectly good cause of action under the state law, such a cause as he frankly said he intended to state. There is no defect in the pleading. It is almost a model. Counsel found himself, in the position he would have been in had he brought an action of tort, and found, when he came to trial, that on his evidence he could only recover on contract; or if he had brought an action on express contract, but found that he could not prove it and would have to recover on quantum meruit if at all. The cause of action declared on would be different from the one on which recovery could be had. Now if a client discloses to his lawyer the facts on which he claims to have a right of action against someone and such facts would give a right of action, and the pleader, following the facts as they have been detailed to him, states a perfectly good cause of action in the complaint drawn, I do not believe there is any infirmity in the pleading, or that it contains a defective statement of a cause of action. The trouble is with the facts, not with the pleading. A cause of action is defectively stated when some material allegation is omitted therefrom and without which the complaint on its face does not state any cause of action whatever. Whether a cause of action is stated, as well as the nature of the cause of action, must be determined from an examination of the complaint itself, and not from a consideration of extraneous facts which are not set forth in the pleading. It is a contradiction to say in one breath that a complaint states a good cause of action and in the next to say that it states a defective cause of ac-

tion. Whether it is one or the other must be determined from the face of the pleading. It cannot be that a good cause of action cannot be set forth in a complaint simply because the party is unable to prove the necessary facts to establish it.

In this instance the plaintiff was anxious to bring his case under the state law, and the defendant was desirous that it should fall under the Federal act. Both were of the mind that it would be more advantageous for the defendant to have the case come under the Federal law. This court had decided that unless the question of the application of the Federal law was raised in some appropriate way before or during the trial, the defendant would be held to have waived the benefit of it. *Leora v. Minneapolis, St. P. & S. Ste. M. R. Co.* 156 Wis. 386, 146 N. W. 520, 8 N. C. C. A. 108. So the defendant, to protect its rights here, promptly raised the question at the first opportunity by appropriate averments in its answer. Under our Code system of pleading, the allegation stood as denied unless the plaintiff chose to amend his complaint by alleging the same fact. It is said in the opinion of the court that because of this allegation the defendant was in no way surprised or prejudiced by the amendment, and that the case could have "gone to trial on the pleadings as originally framed, and the complaint on the trial amended or treated as amended in accordance with the issues made by the pleadings as originally framed."

This is a rather jaunty way to dispose of what will, I think, at least be conceded to be a close question. One of the issues raised by the original pleading was whether the plaintiff was engaged in interstate commerce when hurt. The defendant took the affirmative and the plaintiff the negative of the question. If the defendant prevailed, it would be entitled to judgment dismissing the complaint. If plaintiff then brought the proper action, the bar of the statute of limitations would be a complete defense. I hardly think the court seriously intends to hold that an amendment which deprives a litigant of the benefit of a statute of limitations is one which in no way prejudices him. Neither do I think that where a defendant sets up proper defensive matter in an answer which by force of law stands as denied by the plaintiff, the court can thereafter, for the purpose of avoiding a limitation statute, transfer such allegation to the complaint as of the time it was drawn. A defendant should not be made to suffer for drawing a proper pleading. The averment was essential unless defendant was willing to waive the benefit of the Federal law. In this case no trap was laid L.R.A.1916D.

the plaintiff. He was promptly advised of the dangers ahead. He did not heed the warning given, but because it was given it is held that defendant was not surprised or prejudiced by what was subsequently done. Doubtless the parties could have gone to trial on the pleadings as originally framed. If they did, judgment would have to go for defendant if it prevailed on its contention that the case was within the Federal statute. There would be no occasion to amend or treat as amended the original complaint to make it conform to the issues made by the "pleadings as originally framed," because such issues were made up by the original complaint and answer. It seems to me to be rather grasping at straws in this case to say that the complaint is in any way aided or improved by what is alleged in the answer. If defendant sought a continuance on the ground of surprise when the amended complaint was served, a court would say at once that it was not surprised. But there is no claim of surprise. Defendant is relying on a statute of limitation, and such a defense is no longer unconscionable in this state. *Whereatt v. Worth*, 108 Wis. 291, 81 Am. St. Rep. 899, 84 N. W. 441.

I dislike to see the plaintiff lose what may be a meritorious cause of action because of the mistake made here. The question before us is one which arises under the laws of the United States and one on which the Federal Supreme Court has the final say. Its decisions in such cases are not only valuable as precedents, but are binding on this court. If I read those decisions aright, that court has held that where rights are asserted under one law in an original pleading and under another by an amended pleading, in other words, where there is a change from law to law, there is a change of causes of action, and that if a limitation statute has run on the amended cause of action at the time the amendment is made, it is a good defense, although it had not run when the action was originally commenced. This is what I think the court decided in *Union P. R. Co. v. Wyler*, 158 U. S. 285, 39 L. ed. 983, 15 Sup. Ct. Rep. 877. This decision was approved in the *Wulf Case*, 226 U. S. 575, 57 L. ed. 355, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, where the distinction between it and the case under consideration was clearly pointed out, and where it was held, in accordance with the uniform current of authority, that an amendment changing the beneficiary was not a change of causes of action.

In the opinion of the court it is stated that the *Wyler Case* is clearly distinguishable from the present case, because there the amendment changed not only the cause of

action, but the nature and substance of the cause of action. I am unable to see any distinction in principle between the two cases. In the Wyler Case plaintiff was injured in Kansas and brought a common-law action to recover damages for his injury in the state of Missouri, alleging as a ground of negligence that defendant employed an incompetent fellow servant who was responsible for plaintiff's injury. Thereafter plaintiff, probably doubting his ability to prove the cause of action stated, amended his complaint by alleging that he was injured through the negligence of a fellow servant, referring to the same servant who was alleged to be incompetent in the original complaint. The amendment further set forth that the injury occurred in the state of Kansas, and that under a statute of that state the master was liable for an injury which occurred through the negligence of a fellow servant. To this amendment the defendant set up, by way of defense, that the statute of limitations had run at the time the complaint was amended, and the question, and the sole question, in the case, was whether there was a change of causes of action. The original action, as before stated, was the usual common-law action for negligence. The amended complaint was based on the common law as amended in the particular stated by a statute of the state of Kansas. The court held that there was a change of causes of action because there was a change from law to law. In the instant case the action was brought under the common law as amended by the statutes of the state of Wisconsin. Under the amended complaint a cause of action was stated under the common law as amended by the statutes of the United States. It seems to me that there is a change from law to law as much in the one case as there is in the other, and that the doctrine of the Wyler Case is fully approved in Missouri, *K. & T. R. Co. v. Wulf*, supra. If I have a correct concept of what has been decided in these two cases, I think they are decisive of the case at bar.

Cases not decided by the Federal Supreme Court do not have the same binding force and effect on this court as do the decisions of that court, but it is entirely germane to the question under discussion to say that the great weight of authority supports the contention here made by the respondent. Among the cases holding that under substantially similar facts the allowance of such an amendment as was here made changes the cause of action stated in the original complaint, and that the defense of the statute of limitations is available as of the time the amendment is made, are the following: *Allen v. Tuscarora Valley R. Co.* L.R.A.1916D.

229 Pa. 97, 30 L.R.A.(N.S.) 1096, 140 Am. St. Rep. 714, 78 Atl. 34; *Bradley v. Chicago-Virden Coal Co.* 231 Ill. 622, 83 N. E. 424; *Henderson v. Moweaqua Coal Min. & Mfg. Co.* 145 Ill. App. 637; *McHugh v. St. Louis Transit Co.* 190 Mo. 85, 88 S. W. 853; *Wasson v. Boland*, 136 Mo. App. 622, 118 S. W. 663; *Hall v. Louisville & N. R. Co.* (C. C.) 157 Fed. 464, affirmed in 98 C. C. A. 664, 174 Fed. 1021; *Wongert v. Carpenter*, 101 Mich. 395, 59 N. W. 662; *Hughes v. New York, O. & W. R. Co.* 158 App. Div. 443, 143 N. Y. Supp. 603; *Moliter v. Wabash R. Co.* 180 Mo. App. 84, 168 S. W. 250; *Brinkmeier v. Missouri P. R. Co.* 81 Kan. 101, 105 Pac. 221; *Creteau v. Chicago & N. W. R. Co.* 113 Minn. 418, 129 N. W. 855.

The cases relied on by appellant, with two or three not very important exceptions, are cases where there was a change of beneficiary by amendment. Such a change is held by nearly all courts not to change the cause of action. In fact I see little difference between the situation presently before the court and that which confronted this court in *Stevens v. Brooks*, 23 Wis. 196; *Meinshausen v. A. Gettelman Brewing Co.* 133 Wis. 95, 13 L.R.A.(N.S.) 250, 113 N. W. 408, and *Haverlund v. Chicago St. P. M. & O. R. Co.* 143 Wis. 415, 128 N. W. 273.

Vinje, J.:

I concur in the foregoing dissenting opinion of Mr. Justice Barnes.

CONNECTICUT SUPREME COURT OF ERRORS.

GEORGE S. CHATFIELD COMPANY,
Appt.,

v.

FRANCIS T. REEVES, Mayor of Waterbury.

(87 Conn. 63, 86 Atl. 750.)

Mandamus — to compel mayor to sign warrant — remedy at law.

Since the grantor has an adequate remedy at law to recover the purchase price of land sold and conveyed to a city, he will not be awarded a writ of mandamus to compel the mayor to countersign a warrant for the money, although the city charter prescribed such warrant as the method by which payments are to be made out of the city treasury.

For other cases, see *Mandamus*, I. d., in *Dig.* 1-52 N. S.

(May 8, 1913.)

Note. — For mandamus to compel issuance of municipal warrant to pay indebtedness, see annotation following this case, post, 324.

A PPEAL by relator from a judgment of the Superior Court for New Haven County dismissing an application for a writ of mandamus to compel respondent to countersign an order for money in payment of land purchased by the board of education for school purposes. Affirmed.

The facts are stated in the opinion.

Messrs. Nathaniel R. Bronson, Lawrence L. Lewis, and Charles E. Hart, Jr., for appellant:

The lack of adequate remedy at law justifies the institution of this mandamus proceeding.

State v. Staub, 61 Conn. 567, 23 Atl. 924; American Casualty Ins. & Secur. Co. v. Fyler, 60 Conn. 448, 25 Am. St. Rep. 337, 22 Atl. 494; Bassett v. Atwater, 65 Conn. 360, 32 L.R.A. 575, 32 Atl. 937; 26 Cyc. 315, 435; Merrill, Mandamus, §§ 109, 135, 136, pp. 180, 168, 171; Pond v. Parrott, 42 Conn. 13; Spelling Extr. Relief, § 1647, pp. 1347, 1369; State ex rel. Minneapolis Tribune Co. v. Ames, 31 Minn. 440, 18 N. W. 277; High, Extr. Legal Rem. §§ 80, 107, 351, 356; State ex rel. McCormick v. Fisher, 5 Penn. (Del.) 273, 64 Atl. 68; Clapp v. Titus, 138 Mich. 41, 100 N. W. 1005; Daniels v. Miller, 8 Colo. 542, 9 Pac. 18.

It is the duty of the mayor to sign the order issued in pursuance thereto, without inquiring whether the appropriation was wisely and properly made or authorized or not.

State ex rel. Ahrens v. Fiedler, 43 N. J. L. 400; McCullough v. Brooklyn, 23 Wend. 458; High, Extr. Legal Rem. ¶¶ 17, 104, 105, 351, 356; Apgar v. School Dist. 34 N. J. L. 308; State ex rel. Minneapolis Tribune Co. v. Ames, 31 Minn. 440, 18 N. W. 277.

Mr. Francis P. Guilfoile, for appellee:

The mayor is under no legal duty to sign a warrant or order for the payment of a bill against the city which has been approved without being sworn to as required by the city charter.

2 Smith, Modern Law of Mun. Corp. § 942; State ex rel. Salmon v. Haynes, 50 N. J. L. 97, 11 Atl. 151; State, Berry, Prosecutor, v. Daly, 50 N. J. L. 356, 13 Atl. 6; Dill. Mun. Corp. 5th ed. § 790; Spencer's Appeal, 78 Conn. 303, 61 Atl. 1010; Morey v. Hoyt, 65 Conn. 524, 33 Atl. 496.

Mandamus should never be issued without a clear legal right being shown, or in a case where it would work inequity to the party against whom it is sought.

Chesebro v. Babcock, 59 Conn. 214, 22 Atl. 145; State ex rel. Howard v. Hartford Street R. Co. 76 Conn. 178, 56 Atl. 506. L.R.A.1916D.

Prentice, Ch. J., delivered the opinion of the court:

The relator claims that the city of Waterbury owes it \$9,000 for a tract of land sold and conveyed by it to the city. The charter of the city prescribes the method by which payments are to be made out of its treasury. The machinery thus provided includes the countersignature by its mayor of an order drawn by the city clerk upon the city treasurer. It is charged that the defendant as the city's mayor, in violation of his duty as such officer, neglected and refused to perform the ministerial duty of countersigning an order in favor of the relator for said sum of \$9,000, duly and regularly prepared and presented to him for the payment of the relator's claim then due and payable, and the superior court is asked to issue its writ of mandamus to compel such countersignature.

A "writ of mandamus is an extraordinary remedy, to be applied only under exceptional conditions, and is not to be extended beyond its well-established limits." Lahiff v. St. Joseph's Total Abstinence & Benev. Soc. 76 Conn. 648, 65 L.R.A. 92, 100 Am. St. Rep. 1012, 57 Atl. 692.

"The essential conditions without which the writ will not be issued to enforce the performance of a ministerial duty, are (1) that the party against whom the writ is sought must be under an obligation imposed by law to perform some such duty, that is, a duty in respect to the performance of which he may not exercise any discretion; (2) that the party applying for the writ has a clear legal right to have the duty performed; and (3) that there is no other sufficient remedy." Bassett v. Atwater, 65 Conn. 355, 360, 32 L.R.A. 575, 32 Atl. 937; State ex rel. Berger v. Hurley, 73 Conn. 536, 48 Atl. 215. The same principle is more succinctly stated in State v. New Haven & N. Co. 45 Conn. 331, 343, as follows: "The writ of mandamus is designed to enforce a plain, positive duty upon the relation of one who has a clear legal right to have it performed, and where there is no other adequate legal remedy." The existence of the conditions first enumerated in Bassett v. Atwater, as above recited, leads inevitably to the result that this relator is not entitled to the writ which he seeks, unless, among other things, the city, during the time of the mayor's neglect or refusal to countersign the order, was indebted to it for the amount named therein, and it was entitled to have forthwith that amount from the city. Under such conditions, the relator would be in a position to successfully maintain a civil action for the recovery of the \$9,000, and, judgment being entered therefor, to have an execution which he could

satisfy by levying upon the private estate of any inhabitant of the city. *Beardsley v. Smith*, 16 Conn. 368, 380, 41 Am. Dec. 148; *Union v. Crawford*, 19 Conn. 331, 333. Here was a remedy through a resort to ordinary legal proceedings. Was it adequate or sufficient within the meaning and application of the rule above quoted?

We have always recognized the extraordinary character of proceedings by mandamus, and that its use would be justified only when necessary to supplement the deficiencies of ordinary legal processes. *Bassett v. Atwater*, supra. We have consistently held to this rule, oft repeated and emphasized, and have applied it in both its letter and spirit. All attempts to appropriate it to use as an ordinary civil action have been steadily discountenanced. In this we have been less liberal in permitting its employment than have the courts in some jurisdictions. For instance, it is not uncommonly held elsewhere that the existence of adequate equitable remedy would not prevent the issuance of the writ. *Brennan v. Butler*, 22 R. I. 228, 47 Atl. 320; *State ex rel. Wilson v. Longstreet*, 38 N. J. L. 312; *Baltimore University v. Colton*, 98 Md. 623, 64 L.R.A. 108, 57 Atl. 14; *State ex rel. Elliott v. Custer*, 11 Ind. 210.

We have held otherwise, and confined the issuance of the writ to situations where the aggrieved party has adequate remedy neither at law nor in equity. *State ex rel. Howard v. Hartford Street R. Co.* 76 Conn. 174, 184, 56 Atl. 506. So, again, we have held that mandamus will not lie where an action on the case will afford satisfaction equivalent to the specific relief claimed. *American Asylum v. Phoenix Bank*, 4 Conn. 172, 178, 10 Am. Dec. 112. "Adequate remedy at law means a remedy vested in the complainant to which he may at all times resort at his own option fully and freely without let or hindrance." *Atwood v. Partree*, 56 Conn. 80, 83, 14 Atl. 85, 87; *Wheeler v. Bedford*, 54 Conn. 244, 249, 7 Atl. 22.

The relator's remedy by civil action is one at law, and it would result in his obtaining the identical relief he seeks, to wit, the recovery of the amount due him. No legal obstacle to obtaining it could be interposed which could not have been, and in fact was not, interposed in the present proceeding. The relator would not be relegated to an uncertain source of satisfaction. The immediate result of the litigation would, in fact, be more favorable to it, as it would secure not merely an order for money, which might be ignored, but a process which could be effectually used to obtain it. In both cases the existence of a present obligation would have to be shown. That shown, the relator's course in a civil action would be L.R.A.1916D.

simple. The provisions of the city charter regulating payments out of the treasury prescribe several steps to be taken before the mayor is required to countersign an order. The obligation assumed in a mandamus proceeding to establish that these have been regularly taken adds not a little to the relator's burden. We fail to discover any particular in which the remedy by an ordinary civil action is not as convenient, beneficial, and efficient as that which mandamus could afford. For this reason alone, the trial court was amply justified in denying the peremptory writ. Substantially the same question here presented arose in *Colley v. Webster*, 59 Conn. 361, 20 Atl. 334, where a prosecuting agent sought the writ against a clerk of the police court to compel the payment of certain fees which had been refused. Among other reasons assigned for denying the writ was the fact that, if the agent was entitled to the fees, he had a good cause of action against the city therefor, and that, for that reason, he had adequate remedy by such action.

Counsel for the relator have referred us to a number of cases, and there are others to the same effect, which have held that the signature of a public officer to an order, warrant, or other paper calling for the payment of money may be compelled by mandamus. We do not question that this may be true under certain conditions. They have also pointed out to us a few cases which they claim support their position here. Upon their face they may appear to do so; but upon examination it will be found that they present conditions by no means analogous to those in the present case as bearing upon the matter of the alternative remedy. *McCullough v. Brooklyn*, 23 Wend. 458, is one of the cases thus referred to. Upon examination it will be found that the only alternative remedy which the relator in that case had was an action against the officer for neglect of duty, with its uncertainty as to satisfaction of judgment. There was no right of action against the city. It was upon these grounds that the court rested its conclusion that the relator had no other adequate remedy, and that therefore mandamus was an appropriate one. In the opinion appears the following language, often quoted and sometimes misconceived or misused, upon which, doubtless, counsel here rely: "Although, as a general rule, a mandamus will not lie where the party has another remedy, it is not universally true in relation to corporations and ministerial officers. Notwithstanding they may be liable in an action on the case for a neglect of duty, they may be compelled by mandamus to exercise their functions according to law." Page 461. It needs

only a casual study of this language to discover that it furnishes no justification for the broad proposition that whenever a public corporation is indebted to a creditor mandamus will lie to compel its auditor, disbursing or other officer, whose duty it may be to draw, approve, or countersign an order, warrant, or check, or do any other ministerial act required of him by the prescribed procedure in the matter of payment, to perform that duty. The limitation of the doctrine of the case is clearly indicated in the passage cited, and unmistakably brought out in other portions of the opinion. Reference to other New York cases clearly discloses the distinction recognized in the McCullough Case, places the doctrine of that jurisdiction beyond question, and manifests its complete harmony without conclusion that, where there is direct and complete remedy by action against the municipality, mandamus will not lie. *People ex rel. Perkins v. Hawkins*, 46 N. Y. 9, 11; *People ex rel. Lunney v. Campbell*, 72 N. Y. 496, 498. The following language of the opinion in the first of the two cases last cited leaves no room for misunderstanding: "Nor will a mandamus lie where the party has a plain legal remedy by action. . . . An action against public officers for neglect to perform their duty would not be considered such a remedy as to supersede that by mandamus."

State ex rel. Ahrens v. Fiedler, 43 N. J. L. 400, is another case relied upon by counsel. There it was sought to compel a mayor to sign an order upon the treasurer for the payment of a claim against the city. It was said that the relator did not have adequate remedy by an action to recover the claim, for the reason that, even though he could maintain an action against the city, a judgment thus obtained would not advance his claim beyond its present status. Such judgment, it was said, would fix the liability of the city and determine the amount due, which had already been done by city action, and the plain implication of the opinion is that it would accomplish nothing more. *State ex rel. Minneapolis Tribune Co. v. Ames*, 31 Minn. 444, 18 N. W.

277, is a similar case also referred to. It was there held that a city officer might be compelled to sign an order on the city treasurer for the payment of an obligation of the city. The court said that there was not adequate remedy by action to recover the claim, for the reason that upon the recovery of judgment it would be necessary for the relator to present its claim to the comptroller and the council and obtain an appropriation for its payment upon an order which must be signed by the defendant official, or to wait until a tax could be levied to pay it under a charter provision referred to. It is manifest that the relators in these two cases did not stand in the same position with respect to their right to obtain satisfaction under a judgment against the city, as that in which this relator stands, and that the difference is a material one.

The opinion in *Apgar v. School Dist.* 34 N. J. L. 308, when read by itself, has the appearance of giving more support to the relator's contention than any other to which we have been referred. When, however, it is read in the light which the later case in the same jurisdiction, already noticed, sheds upon the position in which a judgment creditor attempting to secure satisfaction of his judgment is placed in that state, that support disappears.

There is also a class of cases where the claims were against the state, ordinarily not subject to suit. We have not examined all of them to determine whether among them may not be found one or more in jurisdictions where the state had subjected itself to suit. We are satisfied, however, that there are few, if any, such in the list.

The respondent asserts that the relator has failed to show either a clear right to receive the \$9,000 from the city, or a duty upon the respondent in the prescribed course of procedure to countersign the order, and urges a variety of reasons for this contention. In view of our conclusion already reached, we have no occasion to pass upon the correctness of it.

There is no error.

The other Judges concur.

Annotation—Mandamus to compel issuance of municipal warrant to pay indebtedness.

- I. Scope, 325.*
 - II. Ministerial and discretionary functions, 325.*
 - III. Illegality or other defense, 329.*
 - IV. Existence of other adequate remedy, 331.*
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- V. Where title to office is in question, 333.*
- VI. Effect of lack of funds, 334.*
- VII. Right to writ upon assigned claim, 334.*
- VIII. Effect of appeal from claim, 335.*
- IX. Miscellaneous, 335.*

I. Scope.

This note is limited to a consideration of the cases involving the right of a municipal creditor to compel an officer of the city to issue or sign a warrant, and does not concern itself with the right of the creditor to demand that his claim be audited or that his warrant be paid.

Upon this latter point see the note with respect to mandamus to compel payment of municipal debt by custodian of municipal funds.¹

In connection with this subject reference is also made to the note on the unconstitutionality of statute as defense against mandamus to compel payment of public money.²

II. Ministerial and discretionary functions.

The cases show that the general rule holding mandamus proper in proceedings to compel the performance of ministerial functions, and improper in proceedings to compel the performance of discretionary functions, is applicable to this branch of the subject. Indeed, the rule is of very general application, and in only one case has it at all been called into question.³

On account of the dissimilarity in the duties and functions of the various city

officers, and because of the difference in acts and ordinances creating municipal offices in various cities and states, no rules can be laid down with respect to the nature of the functions of any particular officers or groups of officers. In the very great majority of the cases, however, in which the question has come up for consideration, the function of the officer in question has been held ministerial. The reason for this is plain. In practically every instance a claim must be presented to some preliminary officer or body for audit, allowance, or adjustment of some kind before demand is made for a warrant. This preliminary board or officer having performed a discretionary function in allowing or adjusting the claim, the courts take the view that, in the absence of language in the act or ordinance clearly indicating a grant of discretion to the officer issuing the warrant, nothing remains to the latter but the purely ministerial function of drawing or signing the instrument. This view is a reasonable one. In the absence of language indicating an intent to submit claims to a second examination, it seems that such an intent ought not to be presumed.

Where, for example, a claim has been submitted to the city council⁴ or to a

¹ Appended to Ray v. Wilson, 14 L.R.A. 773.

² Appended to State ex rel. New Orleans Canal & Bkg. Co. v. Heard, 47 L.R.A. 516.

³ In Wood v. Strother (1888) 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766, however, where the action is brought against an auditor who, according to statute, "must be satisfied that the proceedings have been legal and fair" before issuing a street assessment warrant, and where it is urged that if such auditor has examined the proceedings "and become satisfied that they are not legal, the most that can be said is that he has committed an error in a matter confided to his discretion, and that the function of the writ is not to review such exercise of discretion," the court holds it a "perversion of language" to say that mandamus will not issue to control discretionary actions. "The propriety of the issuance of the writ in any case must depend upon whether, under the law of the state where the litigation arises, the determination was intended to be final; and if not, upon whether the system of practice furnishes any other adequate remedy," says the court. "There is nothing in the language of the act," it is said later on, "which shows that it was intended to be final. It certainly would not be final in favor of the contractor. In the numerous cases in which street assessments have been before the court, we have never seen it suggested that the signature of the

auditor cured previous illegality; and it seems clear that it would not do so. Why, then, should it be final against the contractor, and be conclusive that the proceedings are illegal when it is apparent that they are not so?"

⁴ Where the council has allowed a claim for a rebate by the holder of a liquor license who has gone out of business, the duty of the mayor to sign the warrant drawn in pursuance thereof is ministerial and may be compelled by mandamus. State ex rel. Maddaugh v. Ritter (1913) 74 Wash. 649, 134 Pac. 492.

Under a statute providing that "all moneys shall be drawn from the treasury in pursuance of an order of the city council by a treasury warrant signed by the mayor and countersigned by the clerk," the act required of the mayor in signing a warrant issued upon a claim allowed by the council is merely ministerial, and mandamus will lie to compel his performance thereof. People v. Hastings (1880) 5 Ill. App. 436. The claim in this case was for lumber furnished the city.

And where a borough council has ordered the payment of a debt on a building contract, the president's function in signing the order is merely ministerial, and he may be compelled to perform it by mandamus. Breslin v. Earley (1908) 36 Pa. Super. Ct. 49.

Where the council has appropriated a certain sum to be paid for property con-

city board,⁵ and has been allowed, the function of the auditor or mayor in issuing or signing the warrant is merely ministerial. The council in the one instance, and the board on the other, have examined the facts and with due consideration have arrived at their conclusion. It is hardly to be believed that the opinion of the auditor or the mayor was intended to overthrow that conclusion, in the absence of specific statutory provision to that effect.⁶

With respect to the office of mayor, however, there must be taken into consideration the veto power, which is usually one of the incidents thereof. Distinction must be made between an exercise of this power and the mere refusal to sign a warrant in pursuance of an order or resolution approved by the mayor or passed over his veto. The veto power is unquestionably a discretionary function.⁷ However, the exercise of the veto exhausts the discretionary functions of the mayor with respect to a particular resolution, and if the council,

also in the exercise of discretion, passes the resolution over his veto, he can offer no further resistance. When, therefore, warrants for the payment of the claim thus approved over his veto are presented for his signature, a ministerial function only remains, and it is his duty to sign irrespectively of his objections.⁸

When a claim has been audited and approved by the proper officers before presentation to other officers for signature, it seems that a situation is presented somewhat similar to the one presented where a claim has been approved by the council, although the presumption of exclusive discretion in auditing officers⁹ is perhaps weaker than in the case of the legislative body. The function of signing the warrant is regarded as a merely ministerial one, and one, therefore, the performance of which can be compelled by mandamus.⁹

A like situation is presented where a claim is approved by the proper officers, and a certificate of that fact is issued to the officers whose duty it is to draw

demned, and the auditor has received the vouchers of the city solicitor therefor in accordance with the ordinance, his duty to issue the warrants on the treasury is ministerial, and he will be compelled by mandamus to perform it. *Ryan v. Hoffman* (1875) 26 Ohio St. 109.

In *People ex rel. Reynolds v. Flagg* (1853) 16 Barb. (N. Y.) 503, it is held that the office of comptroller is a subordinate administrative office, and that the comptroller has no right or power to question the "expediency, judiciousness, or discretion of the legal acts of the government." The decision is accordingly reached that such comptroller cannot question a claim which has been allowed by the council, but that he can be compelled by mandamus to issue warrants thereon.

And see *Doverspike v. Magee* (1912) 51 Pa. Super. Ct. 525, an action by a patrolman to compel the mayor and comptroller to issue and sign a warrant for his salary in accordance with an order passed by the council, where, without specifically holding the functions of such officers to be ministerial, mandamus is held to lie against them.

⁵ In *Com. ex rel. Walton v. Lyndall* (1869) 2 Brewst. (Pa.) 425, where mandamus is issued to the city comptroller, directing him to sign a warrant issued to the relator by the board of school comptrollers for her salary as teacher, the court says that the defendant, being a ministerial officer, may be compelled to perform his functions.

⁶ Under a statute providing that a warrant shall not be issued if, for any cause, the comptroller cannot give it his approval, his function of countersigning a warrant is discretionary and cannot be controlled by mandamus. *Dechert v. Com.* (1886) 113 Pa. L.R.A.1916D.

229, 6 Atl. 229. In this case the claim was for the construction of a sewer and had been approved by the council.

⁷ Under a charter providing that all orders upon the city treasurer must be signed by the mayor, except such orders as are passed by the council over his veto, the mayor is given the veto power over orders as well as resolutions, and his refusal to sign an order passed by the council for the payment of aldermen amounts to an exercise of that discretionary power, and mandamus will not be issued to compel his signature. *State ex rel. Rudolph v. Hutchinson* (1908) 134 Wis. 283, 114 N. W. 453.

⁸ Where the council has approved a claim over the mayor's veto, his resistance to the claim is overcome, and the duty of countersigning warrants drawn for the payment thereof is merely a ministerial duty, the refusal to perform which will be compelled by mandamus. *State ex rel. Ahrens v. Fiedler* (1881) 43 N. J. L. 400 (claim for filling lots); *State ex rel. Salmon v. Haynes* (1887) 50 N. J. L. 97, 11 Atl. 151 (salary of stenographer); *State ex rel. American La France Fire Engine Co. v. Seymour* (1909) 79 N. J. L. 92, 74 Atl. 439 (claim for fire apparatus); *State ex rel. C. Reiss Coal Co. v. Born* (1897) 97 Wis. 542, 73 N. W. 105 (claim for removing bar from river).

⁹ Where the comptroller has audited claims and approved them, his remaining duty to issue warrants thereon is merely ministerial and may be compelled by mandamus. *State ex rel. Pinse v. Mount* (1869) 21 La. Ann. 352.

In the absence of a contrary provision in a city charter, "a claim of a class for the payment of which the council is empowered to make an appropriation, having

and sign the warrant. Under such circumstances it is considered that all the discretion necessary has been exercised by the certifying officer or body, and that nothing but the ministerial function of drawing and signing the warrant remains.¹⁰ This rule is, of course, always open to an exception where the statute clearly indicates an intention to impose upon the countersigning officers discretionary power with respect to the claim.¹¹

first been audited and adjusted by the comptroller, and an appropriation for its payment made and authorized by the requisite and duly recorded vote of the council, when an order for its payment, in due form and duly signed by the clerk, is presented to the mayor for his signature, it is his duty as mayor to sign it within such reasonable time as may be necessary to enable him to make the inquiries before indicated, as to whether the council has kept within its jurisdiction and whether the appropriation has been authorized by the necessary vote," and mandamus may be sought to compel his signature. *State ex rel. Minneapolis Tribune Co. v. Ames* (1884) 31 Minn. 440, 18 N. W. 277; *State ex rel. Treby v. Vasaly* (1906) 98 Minn. 46, 107 N. W. 818. This is on the ground that such duty is purely ministerial.

However, in *People ex rel. Duff v. Booth* (1867) 49 Barb. (N. Y.) 31, affirming (1866) 32 How. Pr. 17, under a charter provision to the effect that no money shall be paid out of the treasury except upon warrants signed by the mayor and comptroller, and countersigned by the clerk, it is held that "the power of determining a litigated claim against the city has not been vested in the comptroller, or any of the city officers, to the exclusion of the mayor," and that the duty to sign warrants was not purely ministerial. The claim in this case was for repairing streets, and after it had been audited the mayor refused to sign the warrant on the ground that the claimant was not the partner of the person to whom the warrant was drawn.

¹⁰ Where, under a contract between the city and a person who is about to engage in the construction of a public improvement, the certificate of acceptance of the city engineer, approved by the commissioner of public works, is made conclusive upon the contractor, the comptroller's duty to issue warrants for the payment of claims with respect to the work is merely ministerial and may be compelled by mandamus. *Re Freel* (1896) 148 N. Y. 165, 42 N. E. 586, affirming (1895) 89 Hun, 79, 35 N. Y. Supp. 59 (reservoir); *People ex rel. Rodgers v. Coler* (1900) 56 App. Div. 98, 67 N. Y. Supp. 701, reversing (1900) 32 Misc. 78, 66 N. Y. Supp. 163, affirmed on other grounds in (1901) 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716 (street grading); *People ex rel. L.R.A.1916D.*

Submission of proper claims to a court for settlement would seem to render superfluous any further exercise of discretion by any officer or body with respect thereto. When, therefore, a court has settled or approved a claim properly submitted to it, the function exercised by those officers whose duty it is to draw and sign a warrant therefor is merely ministerial, and its performance may be compelled by mandamus.¹²

And where a claim has been reduced

Treat v. Coler (1900) 56 App. Div. 459, 68 N. Y. Supp. 767, affirmed in (1901) 166 N. Y. 144, 59 N. E. 776 (sewer); *People ex rel. Rolf v. Coler* (1901) 58 App. Div. 131, 68 N. Y. Supp. 448 (pier).

And under a statute providing that the fees of the harbor master shall be prescribed by the board of harbor commissioners and paid by the city, upon the certificate of the harbor commissioners the city council is not vested with discretion with respect to order the drawing of the warrant, and mandamus may be brought to compel it to act. *Quigg v. Evans* (1898) 121 Cal. 546, 53 Pac. 1093.

¹¹ Under a statute providing that the comptroller may refuse to countersign warrants if, from any cause, he cannot give his approval thereto, his function in countersigning such warrants is discretionary, and if any reasonable ground arises for his disapproval thereof, he cannot be compelled by mandamus to perform such function. *Com. ex rel. City Sewage Co. v. Hancock* (1872) 9 Phila. (Pa.) 535. In this case the claim had been certified by the board of health for services rendered by relator under a contract with respect to cleaning the streets.

¹² Where the legislature provides that the court shall determine the compensation due referees for adjudging claims against a city, no discretion is left to the mayor and council with respect to the issuance of warrants for the amounts of such sums as are awarded, and mandamus will issue against them to compel their performance of the act. *Guthrie v. Territory* (1892) 1 Okla. 188, 21 L.R.A. 841, 31 Pac. 190.

And where by statute the circuit court is given the duty of making settlement of all claims due the sheriff, the auditor of the city has no power or authority to inquire into the correctness of such settlement, and he may be compelled to draw warrants therefor by mandamus, when his only defense for his failure to do so is the incorrectness of the settlement. *State ex rel. Troll v. Brown* (1898) 72 Mo. App. 651.

In *Shaw v. Howell* (1866) 18 La. Ann. 195, the duty of the auditor to issue a warrant was held ministerial where the clerk and judge of the district court had approved a voucher for the claim in accordance with law; and mandamus was issued to compel the issuance thereof.

to judgment both the correctness of the claim and its proper amount are fixed, and no officer charged with the duty of drawing warrants therefor may be heard to object.¹³

In the case of claims for salary by public officers or employees whose compensation is fixed by law, the function of drawing warrants therefor, and countersigning them, is considered merely ministerial.¹⁴ This rule is, of course,

open to exception where the statute expressly grants the power of discretion to the officer whose duty it is to draw or countersign warrants.¹⁵ And where the amount of compensation is nowhere fixed by law, nor ascertainable by computation, such discretion must be exercised in fixing the amount properly due as is entirely incompatible with the position that the act is merely ministerial.¹⁶

¹³ "The drawing of a warrant for the payment of a demand or claim which has been audited, approved, or established by the action of the city council, or by a judgment of a court of competent jurisdiction, is regarded as a duty purely of a ministerial nature, and hence properly falling within the scope of mandamus." *Altgelt v. Campbell* (1904) — Tex. Civ. App. —, 78 S. W. 967. In this case the claim upon which the action was based had been reduced to judgment.

Mandamus was held proper in *State ex rel. Carondelet Canal & Nav. Co. v. Pillsbury* (1878) 30 La. Ann. 705, to compel an auditor to issue a warrant for the payment of a judgment, on the ground that, the amount of the indebtedness having been fixed by proper authority, the ministerial act of drawing the warrant only remained.

¹⁴ "Mandamus is an appropriate remedy to compel an auditing officer to issue a warrant for the compensation of the employees or officers of a city, county, or state, where the amount thereof is so fixed by law, ordinance, or otherwise that the act of auditing the same and drawing a warrant accordingly is merely ministerial in character." *Scott v. Boyle* (1912) 164 Cal. 321, 128 Pac. 941. In this case mandamus was issued to compel the city auditor to draw a warrant in favor of a deputy sealer of weights and measures for his salary.

In *State ex rel. Dudley v. Daggett* (1902) 28 Wash. 1, 68 Pac. 340, an action by corporation counsel to compel the issuance of warrants for his salary, it is said: "The salary being fixed by law and payable in warrants drawn on the city treasurer, and the duty of the comptroller in the premises being clearly defined by the ordinance and charter, there is no room for the exercise of such judgment or discretion as will preclude the court from compelling the performance of the duty by the writ of mandamus."

In *Granger v. French* (1908) 152 Mich. 356, 125 Am. St. Rep. 416, 116 N. W. 181, where a justice of the peace is suing to compel the issuance and countersigning of warrants for his salary, the court says that "mandamus is the proper remedy to enforce the payment by a municipal corporation of a salary, the amount of which is fixed."

And in *State ex rel. Hawes v. Mason* (1899) 153 Mo. 23, 54 S. W. 524, it is held "where the Constitution or an act of the legislature creates an office and fixes the L.R.A.1916D.

salary thereof, the time of the payment of the same, and authorizes or directs the comptroller or auditor to draw his warrant to pay the same, that the Constitution in the one case, and the legislature in the other, thereby makes the appropriation, and no further appropriation is necessary to authorize the auditor to draw his warrant for its payment." Under such a statute dealing with the police department of the city, it is held that the auditor may be compelled by mandamus to draw warrants for the pay roll of the police department, whether the city council has made an appropriation therefor or not.

Where the salary of a public officer is fixed by ordinance, and by ordinance made payable in equal monthly instalments, no further allowance or appropriation by the council is necessary to impose upon the auditor a duty to draw warrants therefor, such as would render him amenable to mandamus. *Kendall v. Raybauld* (1896) 13 Utah, 226, 44 Pac. 1034.

Mandamus is held in *Puterbaugh v. Wadham* (1912) 162 Cal. 611, 123 Pac. 804, to be the proper remedy to compel the auditing committee of a city to draw warrants to pay the salary of a justice of the peace, where such salary is fixed by law.

And see *Schmitt v. Dooling* (1911) 145 Ky. 240, 36 L.R.A.(N.S.) 881, 140 S. W. 197, Ann. Cas. 1913B, 1078, where mandamus was granted city firemen to compel the issuance of warrants for their salaries.

¹⁵ In *Runkle v. Com.* (1881) 97 Pa. 328, an action to compel the city comptroller to sign warrants for relator's salary as city clerk and secretary of the water board, it is held that, under statutes requiring the comptroller to pass on the rectitude of warrants, his function is discretionary. The court says: "Where a person or body is clothed with judicial, deliberative, or discretionary powers, and he or it has exercised such powers according to his or its discretion, mandamus will not lie to compel a revision or modification of the decision resulting from the exercise of such discretion; though, in fact, the decision may have been wrong."

¹⁶ Where a sergeant of a city was seeking to compel the payment of fees not fixed by statute, it was said in *Richmond City v. Epps* (1900) 98 Va. 233, 35 S. E. 723, that, "as no provision has been made by statute fixing the fees or the compensation of the sergeant of a city, who is by virtue of his office the keeper of its jail,

III. *Illegality or other defense.*

In accordance with the general rule with respect of ministerial and discretionary functions, the right of an officer to defend an action of mandamus to compel the issuance of a warrant on the ground of illegality, or other valid defense to the claim, is dependent upon whether his function in issuing the war-

rant in question is discretionary or ministerial. If the statute has operated to make such function discretionary, the officer unquestionably may make use of such defenses.¹⁷ But if his duty with respect thereto is merely ministerial, there is no ground for permitting him to set up any of the defenses which may exist with reference to the claim.¹⁸ It

for receiving and supporting persons confined in jail for a violation of the ordinances of the city; and as the city of Richmond has not adopted by ordinance the scale of fees fixed by statute for receiving and supporting persons confined in jail for the violation of the criminal laws of the state, nor prescribed any other specific compensation to its sergeant for like service, it therefore follows, in accordance with the well-established rule that mandamus only lies in a case of this nature where there is a clear right to a fixed sum of money, or to an amount ascertainable by a mere computation, . . . that the petitioner is not entitled to the writ." And in another place it is said: "Mandamus only lies in a case of this nature where there is a clear right to a fixed sum of money, or to an amount ascertainable by a mere compensation, and where the issue of a warrant therefor and its payment is merely a ministerial duty."

And where, in an action by a sergeant of police to compel the issuance of a warrant for the amount of his salary, there were no allegations nor proof of a definite salary attached to the office, it was held that there was no right to mandamus. *Moore v. State* (1903) 4 Neb. Unof. 235, 93 N. W. 986.

¹⁷ In *Rooney v. Snow* (1906) 131 Cal. 51, 63 Pac. 155, an action to compel the city auditor to draw a warrant for the repayment of license money paid to the city under a mistake, it is held that the city is not responsible in the matter, and that, despite the ordinance allowing the claim and directing the auditor to draw a warrant for its payment, the auditor is justified in refusing to draw such warrant, where the city charter requires him to determine the legality of every claim.

And in *People ex rel. Green v. Wood* (1862) 35 Barb. (N. Y.) 653, 13 Abb. Pr. 374, 22 How. Pr. 286, where the mayor refused to countersign a warrant, it is held that his duty is discretionary, and that, although the claim has been audited and settled by the proper authorities, he may not be compelled by mandamus to countersign the warrant. The court bases its decision on the ground that the sole object of having the mayor countersign such warrants is "to secure the treasury against the negligence or dishonesty of those officers who are intrusted with the settlement of claims against the city." In this case the contention of the mayor was that the relator had not performed his contract for the removal of offal from the city streets. L.R.A.1916D.

In *Com. ex rel. Edison Electric Illuminating Co. v. Foster* (1906) 215 Pa. 177, 64 Atl. 367, a mandamus was refused against the comptroller of a city for the purpose of compelling him to issue warrants for electric light furnished the city under a contract, where no appropriation had ever been made for the payment of any moneys under the contract, and the comptroller was charged by statute not to suffer any appropriation to be overdrawn.

But although the court holds, in *Com. ex rel. Century Co. v. Philadelphia* (1896) 176 Pa. 588, 35 Atl. 195, that the duties of the comptroller are partly discretionary, mandamus is issued to compel him to sign warrants for the payment of books purchased by the school board, the court being of the opinion that the availability of the books to school purposes is not a matter for his consideration.

¹⁸ Where, under city ordinances, the act of the clerk in drawing and countersigning a warrant is merely ministerial, he may be compelled by mandamus to perform such act with respect to a claim audited and allowed by the council, although the reason for his refusal is the illegality of the claim. *Wycoff v. Strong* (1914) 28 Idaho, 502, 144 Pac. 341. The claim in this case was for materials furnished and work done by plaintiff in the construction of sewers.

In *Rice v. Gwinn* (1897) 5 Idaho, 394, 49 Pac. 412, under an act providing that "all warrants drawn upon the treasurer must be signed by the mayor," it is held that the mayor has no right to refuse to sign a warrant drawn by the council, although the claim which it is intended to pay is illegal; and mandamus is held proper in such a case to compel the mayor's signature.

And in *State ex rel. Kran v. Hodapp* (1908) 104 Minn. 309, 116 N. W. 589, where the city auditor refused to draw the order for the payment of a claim for interest on a debt which arose in connection with the improvement of a city park, on the ground that the amount of indebtedness thereby created exceeded the limit authorized by the city charter, it was held that the recorder's duty was merely ministerial, and that he was "in no position to urge the illegality of the contract in defense of his refusal."

And in *State ex rel. Wunderlich v. Kalkofen* (1907) 134 Wis. 74, 113 N. W. 1091, an action to compel a town board to issue an order for the payment of a claim allowed in town meeting, it is said: "We know of no reason nor of any authority to support the contention that, after the tax-

has been held, however, that a person seeking mandamus must show that he has a clear legal right to have the duty performed.¹⁹ In accordance with this rule the court will deny the writ when it discovers the existence of some illegality,

or other defense which will raise a doubt as to the relator's right to the relief sought, and he will be left to pursue one of the ordinary actions, in which the defense may properly be considered.²⁰

Irrespective of the nature of the

payers of a municipality have so submitted to taxation, and the money has actually accumulated in the hands of the public treasurer, and neither the taxpayers nor the electors have in any manner changed their position, the officers upon whom rests the mere ministerial duty of effecting such purpose can legitimately raise the question of the legality of the demand the money was raised to discharge, and delay or defeat the execution of such purpose."

But in *McDermont v. Dinnie* (1896) 6 N. D. 278, 69 N. W. 294, an action to compel the issuance of a warrant to a judge of the municipal court for his salary, the question of the constitutionality of the statute creating the court is held a proper subject of defense on behalf of the mayor and auditor.

¹⁹ In *Scanlan v. Schwab* (1902) 103 Ill. App. 93, the court says that mandamus should never be awarded unless the relator has a clear legal right to have the thing sought. The court did not concern itself with the question as to whether the act was ministerial or discretionary. The action was brought to compel the mayor to countersign a warrant drawn in accordance with the orders of the council, which contained a clause allowing interest on the claim. Under statute interest was allowable on warrants only when there were no funds with which to pay them. Mandamus was refused in this case because of the failure of the petition to allege the lack of such funds.

In *Stegmaier v. Goeringer* (1907) 218 Pa. 499, 67 Atl. 782, 11 Ann. Cas. 973, an action against the comptroller of a city to compel his countersignature of warrants drawn in pursuance of a resolution by the council authorizing the expenditure of a sum of money for decorations during a public celebration, it is held that, no bills or vouchers showing the money to have been expended by relator having been presented to defendant, relator has not shown a specific legal right, nor has he performed all the prerequisite conditions necessary to give him the right to the action. The court says: "When a private relator seeks to compel by mandamus a public official to perform an alleged duty, the burden is on him to show that he has performed every prerequisite condition necessary to compel such action, and that it has been refused by the public official. This is true whether the duty to be performed is ministerial or discretionary, for even if the duty is ministerial the private relator must show that he has placed himself in a position to legally demand the performance of the duty."

And in *People ex rel. Rolf v. Coler* (1901) 58 App. Div. 131, 68 N. Y. Supp. L.R.A.1916D.

448, where it is shown that the relator, who is seeking to compel the issuance of a warrant for money due him as engineer in the erection of a pier, has not performed his contract in all respects, and that the city may have a good defense to his claim, the writ is denied. The court says that "the party moving for the writ must establish a clear legal right thereto."

Where, in *State ex rel. O'Hara v. Fagan* (1893) 56 N. J. L. 279, 27 Atl. 1089, the mayor refused to sign a warrant for the salary of the counsel to the commissioners of adjustment on the ground that the salary had been overpaid, and that he had approved the resolution passed by council directing the issuance of such warrant by mistake, it was held that, for these two reasons, the relator had not shown himself the possessor of such a right to have the warrant issued as the law ought to enforce, and mandamus was refused.

And where work had been illegally let to a person who was not the lowest bidder, it was held in *People ex rel. Coughlin v. Gleason* (1890) 121 N. Y. 631, 25 N. E. 4, reversing (1889) 22 N. Y. S. R. 103, 4 N. Y. Supp. 383, (1890) 55 Hun, 610, 30 N. Y. S. R. 351, 8 N. Y. Supp. 728, that the holder of the claim therefor was not entitled to a writ to compel the mayor to sign a warrant.

²⁰ In *Com. ex rel. Century Co. v. Philadelphia* (1896) 176 Pa. 588, 35 Atl. 195, an action against the comptroller and the board of education to compel the former to sign warrants to pay for books purchased by the board, it is said that, "had the board of education at any time indicated that there was any defense to this claim, it is clear that there could be no remedy by mandamus, but only by suit prosecuted to judgment."

Where there is a dispute between the city and the electric lighting company which has contracted to light certain buildings, with respect to what buildings are included therein, and the director of public safety refuses to sign warrants for light furnished, on the ground that the contract has not been complied with, the relator cannot compel him to do so by mandamus, it having a remedy in the usual course of law by means of a suit to recover its claim, in which the dispute between the parties may be determined. *Kensington Electric Co. v. Philadelphia* (1898) 187 Pa. 446, 41 Atl. 309.

And in *Padavano v. Fagan* (1901) 66 N. J. L. 167, 48 Atl. 998, where the mayor interposed the defense to an action to compel the issuance of a warrant for the payment of a claim for removing ashes and garbage, that the resolution passed by the

function, however, it has been held that, where the illegality²¹ or irregularity²² of the proceedings had in connection with the claim appears on the face of papers which it is the duty of the officer to examine before issuing the warrant, he may properly refuse to issue or sign it. And the same is true where his information with respect to the illegality or irregularity is based upon his personal knowledge that he has not performed certain acts prerequisite to the allowance of the claim.²³

Where formalities in the presentation of a claim have been waived, their lack cannot be considered as a defense to an

action to compel the issuance or signing of the warrant.²⁴

IV. Existence of other adequate remedy.

The general rule that mandamus will not lie where the party seeking it has an adequate remedy by ordinary action is applicable to actions to compel a municipal officer to issue a warrant.²⁵ In California the party must have a remedy which is not only adequate but also equally as convenient, beneficial, and effective as the proceeding by mandamus.²⁶

The courts are practically unanimous in holding that an action against the city

council containing the claim had not been presented for his signature, mandamus is refused on the ground that the relator must establish his right to the money in a proceeding in which the city might present a defense.

²¹ Where the council had no authority to direct the drawing of the order which relator is suing to compel defendant to countersign, and the illegality of the proceedings appears upon the face of the resolution and the order, "the court should not exercise its mandatory power to compel the performance of an act having only that illegal object" of procuring payment in view. *State ex rel. Waitt v. Hill* (1884) 32 Minn. 275, 20 N. W. 196.

²² In *State, Berry, Prosecutor, v. Daly* (1888) 50 N. J. L. 356, 13 Atl. 6, where the claim had been audited and approved by the council, but the jurat made by relator upon the presentation of his claim had not been signed by the treasurer, mandamus to compel the mayor to sign the warrant was refused.

²³ In *State ex rel. Seiter v. Hoffman* (1874) 25 Ohio St. 328, an action by the superintendent of street improvements to compel the issuance of a warrant for his salary, where the auditor defends upon the ground that he has not certified to the council the existence of funds to pay such claim, as required by statute before the ordinance authorizing the expenditure can go into effect, it is held that mandamus will be refused to compel the issuance of the warrant.

²⁴ Where formalities in the presentation of a claim for services as night watchman and deputy marshal have been waived by the village council and the claim allowed, the president of the village cannot assign the lack of such formalities as a defense in an action to compel him to sign an order of payment. *Kriseler v. Le Valley* (1900) 122 Mich. 576, 81 N. W. 580.

And in *Clapp v. Titus* (1904) 138 Mich. 41, 100 N. W. 1005, an action by a village officer to compel the president of the village to sign orders for salary voted by the council, where the president did not put his refusal upon the failure to observe certain formalities in the presentation of the ac-

count, it is held that such failure will not render mandamus improper.

²⁵ *GEORGE S. CHATFIELD CO. v. REEVES*, ante, 321, and cases cited hereafter in this subdivision.

But in *State ex rel. Wunderlich v. Kallofen* (1907) 134 Wis. 74, 113 N. W. 1091, an action to compel a town board to issue an order for the payment of a claim allowed in a town meeting, it is said: "That where one's claim against a municipality has been allowed and nothing remains to be done to enable him to obtain his pay but to issue to him the proper warrant on the municipal treasury, he may proceed by mandamus to compel its issuance in case of a refusal to do so, notwithstanding he may also, if he chooses, proceed by action, is not an open question." And, quoting from an earlier case, the court continues: "Generally, the enforcement of a debt or contract right to money against a public corporation must be by the ordinary processes of an action; but when all the purposes of such an action are accomplished by the voluntary act of the corporate body in conceding the debt and ordering payment, and the only obstacle is the refusal or neglect of some officer to perform a ministerial duty, the creditor need not be driven to take the steps which would otherwise be necessary to establish his right against the corporation, but may have a writ against the individual officer to compel performance."

²⁶ It is said in *Raisch v. Board of Education* (1889) 81 Cal. 542, 22 Pac. 890, that "it has been held in this state that to supersede the remedy by mandamus, the party must not only have a specific, adequate, legal remedy, but one competent to afford relief upon the very subject-matter of his application, and one which is equally convenient, beneficial, and effective as the proceeding by mandamus."

And it is said in *Ross v. Board of Education* (1912) 18 Cal. App. 222, 122 Pac. 967, that "the general rule that mandamus will not lie where any other remedy is provided is subject to the qualification that mandamus may be invoked in those cases where the remedy by any other form of action or proceeding would not be equally as convenient, beneficial, and effective."

on the claim is not adequate within the meaning of the term as used in this connection.²⁷ Such an action is not against the same party, does not afford the same relief, as mandamus, and, in the absence of a statute providing some other means of enforcing a judgment against a municipality, leaves the holder

of the claim still in need of a warrant and at the mercy of the same officer who now refuses to issue one. In a few cases, however, such an action against the city has been held adequate and the writ denied.²⁸ And this course seems to be beyond criticism where the holder of a judgment against a city may

See also *Wood v. Strother* (1888) 76 Cal. 545, 9 Am. St. Rep. 249, 18 Pac. 766, supra, II.

²⁷ It is said in *State ex rel. Dudley v. Daggett* (1902) 28 Wash. 1, 68 Pac. 340, an action by corporation counsel to compel the issuance of warrants for his salary, that "the relief which would be afforded by an action against the city is relief against another party, is different in kind, less speedy and complete than that afforded by the present proceeding." It is further held that, under the charter provision requiring that the salary shall be payable in warrants, "the right to sue the city for the salary is doubtful without first proceeding to compel the issuance of the warrant by the comptroller."

So, an ordinary civil action against the city on a bill for printing is held in *State ex rel. Minneapolis Tribune Co. v. Ames* (1884) 31 Minn. 440, 18 N. W. 277, to be neither speedy nor adequate as compared with mandamus. Upon recovering a judgment against the city, the court says that "it would be necessary for it [relator] to present its claim to the comptroller and the council, to obtain an appropriation for its payment upon an order which must be signed by the mayor, or to wait until a tax could be levied to pay it." Such procedure would not, it is held, "afford the relator the particular right which the law accords him, viz., to have a properly authenticated order or warrant upon the treasurer as an evidence of indebtedness, and as a means of securing prompt payment of his claim out of the funds in the city treasury."

And in *State ex rel. Ahrens v. Fiedler* (1881) 43 N. J. L. 400, an action to compel the mayor to sign a warrant issued on relator's claim for the filling of lots, an action against the city was held inadequate within the meaning of the rule. "A judgment would not advance his claim beyond its present status," says the court. "It would fix the liability of the city and determine the amount due. The resolution of appropriation has already fixed the liability and determined the amount. The injury to relator is solely from defendant's refusal to do this ministerial act."

It is no adequate remedy on behalf of employees of a house of refuge to whom the city auditor refuses to issue warrants for their salary, that they may bring an action therefor against the city. *State ex rel. Mix v. Cleveland* (1889) 10 Ohio Dec. Reprint, 571. "It would be far from being an adequate remedy, that every month when the salaries become due, a large number of claimants, each of them, must have his suit L.R.A.1916D.

at law for the recovery of his salary," is the way the court puts it.

Where warrants for sums due for supplies furnished a library board had been intrusted to the librarian, who presented them to the city treasurer and absconded with the money received, it is held in *Robertson v. Alameda Free Public Library* (1902) 136 Cal. 403, 69 Pac. 88, that a suit against the city or the treasurer is not a "plain, speedy, or adequate remedy."

And so, in *People ex rel. New York & H. R. Co. v. Havemeyer* (1874) 3 Hun (N. Y.) 97, 16 Abb. Pr. N. S. 219, 47 How. Pr. 494, an action by a railroad to compel the mayor to sign a warrant for the city's share of the cost of an improvement, it is held that an action against the city for the amount due would not be an adequate remedy.

Mandamus is said, in *Kendall v. Raybaud* (1896) 13 Utah, 226, 44 Pac. 1034, to be "the only plain, speedy, and adequate remedy" to compel an auditor to issue a warrant for the payment of a salary due the inspector of provisions.

And in cases where policemen have sought to maintain actions against the city for their services, it has been held that their remedy is by mandamus to compel the board of police commissioners to issue the proper warrants. *Sanford v. Kansas City* (1879) 69 Mo. 466; *Riley v. Kansas City* (1888) 31 Mo. App. 439.

²⁸ In *Holmes v. Brown* (1908) 18 Manitoba L. R. 48, an action to compel the mayor to sign a check for the amount of a claim against the city, it is held that the plaintiffs have an adequate remedy by way of an action against the city; "and the mere fact that the other remedy is not against the defendant in the mandamus proceeding does not prevent the rule applying."

So, in *Re Whitaker* (1890) 18 Ont. Rep. 63, an application for a mandamus commanding the mayor to sign warrants for payment to the applicant of his salary as chief constable, it is held that the applicant has a claim for services against the town, and that his proper remedy is by suit.

And in *People ex rel. Green v. Wood* (1862) 13 Abb. Pr. (N. Y.) 374, 35 Barb. 653, 22 How. Pr. 286, an action to compel the mayor to countersign a warrant for a claim for the removal of offal from the city streets, it is held that the relator has an action against the city; and that he has, therefore, no right to mandamus.

It is held in *Farr v. St. Johnsbury* (1901) 73 Vt. 42, 50 Atl. 548, that the owner of a claim against a town for the destruction of a spring by the excavation of the base-

levy execution upon the private estate of any inhabitant of the city.^{28a}

And it has been held that an action against the officers refusing to draw the warrant, for neglect of duty²⁹ or breach of contract,³⁰ is not an adequate remedy. But where the relator may proceed against such officers by attachment, the situation is not so clear and the courts are not in harmony.³¹

ment for a school building has an "adequate remedy in an action at law" to recover it, and the writ is denied.

^{28a} *GEORGE S. CHATFIELD Co. v. REEVES*, ante, 321, wherein it is held that the holder of a claim against a city for a tract of land sold to the city for school purposes may maintain a civil action for the recovery of his claim, and, judgment having been entered therefor, have an execution which he may satisfy by levying upon the private estate of any inhabitant of the city, and that, consequently, the holder of such a claim has an adequate remedy by an action at law, which will obviate the necessity for a writ of mandamus.

²⁹ In *Raisch v. Board of Education* (1889) 81 Cal. 542, 22 Pac. 890, an action to compel the board to draw a draft on the school fund of the city to pay for articles purchased under contract with plaintiff, it is held that, in view of the fact that the board had the power to pay only by drawing drafts on the school fund, its contract to pay must be construed to be one to draw drafts, and not to pay money directly, and that the only action accruing to plaintiff from the failure to draw such a draft was against the members of the board for neglect of duty. The existence of such a right of action was held not to bar the right to sue for mandamus, the court assigning as its reason that "such an action evidently would not have been equally convenient, beneficial, and effective as the proceeding by mandamus, since it would not have compelled the board to do what it had contracted to do, and what, as we have seen, official duty required it to do."

³⁰ In *Ross v. Board of Education* (1912) 18 Cal. App. 222, 122 Pac. 967, an action to compel the board to approve a demand on the school fund of the city for the payment of plaintiff's salary as storekeeper for the board, it is held that, in view of the fact that the board had the power to pay only by drawing drafts on the school fund, its contract to pay must be construed to be one to draw drafts, and not to pay money directly, and that any ordinary action which "plaintiff might have had against the defendants individually or as a board for breach of the contract would not be 'equally convenient, beneficial, and effective as the proceeding by mandamus, since it would not have compelled the board to do what it had contracted to do'."

³¹ Mandamus to compel mayor to counter-sign a warrant issued on a judgment was denied in *People ex rel. Pond v. Wood* L.R.A.1916D.

V. Where title to office is in question.

Mandamus will not issue to compel the delivery or signing a warrant for a salary where there is a dispute as to the relator's title to the office.³² This rule can be accounted for on two grounds. In the first place, quo warranto is the proper proceeding when the title to public office is involved. In the second place,

(1855) 2 Abb. Pr. (N. Y.) 90, on the ground that, the superior court having ordered the comptroller to pay the judgment, the relator had a simple, direct, and effective remedy in that court by attachment.

But, on the other hand, it is held in *Chapin v. Port Angeles* (1903) 31 Wash. 535, 72 Pac. 117, that the remedy prescribed by a statute providing that attachment may issue against the officer of a corporation who fails to satisfy a judgment is not adequate where a judgment creditor is seeking to compel the issuance of warrants for the payment of his claim.

³² In *State ex rel. Simmons v. John* (1883) 81 Mo. 13, defendant refused to sign a warrant because it had been drawn by a person whom he alleged not to be the registrar and treasurer of the city. A dispute as to the proper incumbent of that office was involved. The court said: "The right to an office cannot be determined in a proceeding by mandamus to compel the payment of salary to a person claiming such office, or in a proceeding like the present, to compel the performance of official duty alleged to be obligatory by reason of the official character of such claimant. In such cases he who has the better prima facie right must be recognized, until, by contesting the election or by proceedings in quo warranto, the rights of the parties are finally determined." The writ was refused on the ground that the person who had drawn the warrant did not have prima facie right to the office.

And in *State ex rel. Goodnow v. Police Comrs.* (1899) 80 Mo. App. 206, an action to compel the issuance of warrants for salary earned after relator's discharge from the police force, in which relator urged, as his ground for transfer of the case to the supreme court, that the title to an office was involved, it is said that "if it involves the title, then the relator should be denied the writ, since mandamus is not a proper proceeding in such cases." The case subsequently came before the supreme court and that court held that the relator was not entitled to the writ, for the reason that his discharge was lawful. (1902) 184 Mo. 109, 71 S. W. 215, 88 S. W. 27.

In *Davenport v. Los Angeles* (1905) 146 Cal. 508, 80 Pac. 684, however, an action by a councilman who had not been allowed to take his seat, to determine his right thereto and to compel the auditor to draw a warrant for the salary due him, mandamus with respect to the warrant was issued. But in this case, although the principal re-

as has been pointed out above,³³ the writ will be denied when the existence of a possible defense is made to appear.

VI. Effect of lack of funds.

Upon the question of the effect of the lack of funds with which to pay the warrants sought, upon the right of the holder of a claim to compel the issuance of the warrants, the courts are about equally divided. One group of courts takes the position that, without funds out of which he can demand payment, the warrant would be useless to the relator, and that he is not therefore entitled to the writ.³⁴ Other courts, however, take the opposite view, and hold the lack of funds to be immaterial.³⁵

But where the payment of warrants is provided for not only out of a specific fund, but by some other means, such as the receipt thereof as taxes,³⁶ the exist-

ence of such a fund must be looked upon as immaterial, regardless of the position taken by the court, in the absence of such other means.

VII. Right to writ upon assigned claim.

No sufficient reason is apparent why, as a general rule, the ordinary principle that an assignee may bring suit upon the assigned claim does not extend to mandamus to compel the issuance of a warrant. But where the body which passes upon claims against the city has authorized the payment of the claim in the name of the assignor, it has been held that the assignee cannot compel the issuance of a warrant in his name.³⁷ And where the assignment is void, mandamus will, of course, lie by the assignor to compel the issuance of a warrant to himself.³⁸

lief sought was a determination of relator's right to the office, the court made no objection to the use of mandamus for that purpose. If mandamus is proper for that purpose, one of the objections to its use to compel the issuance of a warrant where there is a dispute as to relator's title to office is removed.

³³ See footnote 20 and the corresponding text.

³⁴ In *Board of Improvement v. McManus* (1891) 54 Ark. 446, 15 S. W. 897, an action by a judgment creditor against the board to compel the issuance of a warrant on the treasurer of the board, where the board answered that there were no funds in the treasury, the court said: "The creditor of the board is entitled to a warrant only as a means to collect his claim, and whenever the court would be authorized to order the principal act of payment, it could order the issuance of the warrant as an incident; but the court could not order payment in this case, because such order could not be obeyed."

And in *Sherman v. Smith* (1896) 12 Tex. Civ. App. 580, 35 S. W. 294, where the city's levy of taxes for general purposes had reached the maximum constitutional limit, and the taxes so levied and all available funds were required for its maintenance, mandamus was refused to compel the issuance of a warrant on a judgment rendered upon a tort.

In *State ex rel. Lynne v. Calhoun* (1875) 27 La. Ann. 167, an action by a judgment creditor to compel the issuance of warrants, the court held that there was no right of mandamus in plaintiff, inasmuch as he had failed to prove his allegations that there was, at the time of making his demand, money in the city treasury specially designated and set apart for the payment of judgments.

³⁵ It is said in *McEvers v. Boyle* (1914) 25 Cal. App. 476, 144 Pac. 308, an action by a deputy sealer of weights and measures L.R.A.1916D.

to compel the issuance of warrants for his salary, that "for the purpose of this inquiry it is immaterial whether there are or not" funds in the treasury of the city applicable to the payment of the warrants demanded.

And see *Scott v. Boyle* (1914) 25 Cal. App. 806, 149 Pac. 311, which involved similar facts, and which was decided upon the authority of the preceding case.

So, it is held in *State v. Hoffman* (1880) 35 Ohio St. 435, that in a proceeding to compel the auditor to issue a warrant, it is not material to inquire whether or not there is sufficient money in the city treasury to pay it.

³⁶ In *Little Rock v. United States* (1900) 43 C. C. A. 261, 103 Fed. 418, it is held that, inasmuch as the warrants issued by cities in Arkansas may be paid not only by the appropriation of money, but also by their receipt as taxes, the lack of funds with which to pay certain warrants is no defense to an action of mandamus to compel the mayor, clerk, and city council to issue and deliver them.

³⁷ *Scheerer v. Edgar* (1888) 76 Cal. 569, 18 Pac. 681, was an action by the assignee of a judgment against the city and county of San Francisco. The board of supervisors had authorized the payment of the judgment in the name of the original holder thereof, and the auditor had drawn a warrant in his name. Admitting that the auditor had notice of the assignment before he drew such warrant, the court held that he had no authority, and could not be compelled by mandamus, to draw a warrant in favor of the assignee. While admitting the auditor's right to disobey an illegal order, the court holds it "to be beyond his power to substitute his own affirmative action for that of the board as to matters within their jurisdiction."

³⁸ *Granger v. French* (1908) 152 Mich. 356, 125 Am. St. Rep. 416, 116 N. W. 181, in which the assignment by a justice of the peace of his salary is held void.

VIII. Effect of appeal from claim.

Until the holder of the claim is finally adjudged to have a clear legal right thereto, he is not entitled to mandamus.³⁹ Therefore, it has been held that, during an appeal from the allowance of a claim made by a city board, mandamus will not lie to compel the delivery of a warrant.⁴⁰

³⁹ See footnote 19 and the corresponding text.

⁴⁰ In *Lobeck v. State* (1904) 72 Neb. 595, 101 N. W. 247, a company which was doing street repairing for the city was suing to compel the comptroller of the city to deliver a warrant for the amount of an estimate allowed by the board of public works, the mayor, and the council, with respect to which, however, an appeal by a taxpayer was pending. The court held that "the effect of the appeal was to at least suspend the order of the board during its pendency, and while the case was pending and undisposed of in the district court mandamus would not lie to compel the delivery of the warrant."

⁴¹ *People ex rel. Fuller v. Coler* (1898) 33 App. Div. 617, 53 N. Y. Supp. 1090, affirmed without opinion in (1899) 158 N. Y. 667, 52 N. E. 1125, reversing (1898) 24 Misc. 11, 53 N. Y. Supp. 200 (against comptroller on claim for salary by inspector of construction); *Smith v. Com.* (1861) 41 Pa. 335 (against mayor on claim for services ren-

IX. Miscellaneous.

In several instances mandamus has been denied on the merits of the case itself without any discussion of the action.⁴¹ And in others mandamus has been granted to compel the issuance of a warrant to pay an indebtedness without any question being raised as to the propriety of the action itself.⁴²

dered as high constable); *State ex rel. Ashland Water Co. v. Bardon* (1899) 103 Wis. 297, 79 N. W. 226 (against mayor and comptroller on claim for water furnished to fire hydrants).

⁴² *Ross v. Wimberly* (1882) 60 Miss. 345 (against mayor on claim for salary by town marshal); *State ex rel. Crane v. Shoenthal* (1908) 76 N. J. L. 378, 69 Atl. 972 (against mayor on claim for additional work performed by city engineer); *People ex rel. Cronin v. Coffey* (1892) 131 N. Y. 569, 30 N. E. 64, affirming without opinion (1891) 62 Hun. 86, 16 N. Y. Supp. 501 (against comptroller on claim for teacher's salary); *People ex rel. Rolf v. Coler* (1901) 58 App. Div. 347, 68 N. Y. Supp. 1101, reversing (1900) 33 Misc. 351, 68 N. Y. Supp. 446 (against comptroller on contract for construction of pier); *State ex rel. Ward v. Hubbard* (1901) 22 Ohio C. C. 252, 12 Ohio C. D. 87 (against clerk of board of education on claim for salary as teacher)

E. L. D.

IOWA SUPREME COURT.

J. A. BALDWIN et al., Appts.,
v.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILWAY COMPANY.

(— Iowa, —, 156 N. W. 17.)

Carrier — limitation of time for bringing action — reasonableness.

1. A limitation by contract of the time for bringing action to recover for injury to cattle while being transported by an interstate railroad company to six months is not unreasonable.

For other cases, see *Carriers*, III. g, 4, in Dig. 1-52 N. S.

Same — notice of injury — reasonableness.

2. A provision in a contract for shipment of live stock that notice shall be given of any injury before the stock is removed from place of shipment or destination, as the

Note. — As to reasonableness of the time fixed in a contract of shipment of live stock, for presentation of claim for damages, see annotation following this case, post, 341.

As to reasonableness of the time fixed in a contract of shipment for bringing action, see annotation following *Cooke v. Northern P. R. Co.* post, 345.
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case may be, and before it is mingled with other stock is reasonable, and no action can be maintained against the carrier if notice is not given.

For other cases, see *Carriers*, III. g, 4, in Dig. 1-52 N. S.

(January 19, 1916.)

APPEAL by plaintiffs from a judgment of the District Court for Van Buren County in defendant's favor in an action brought to recover damages for injury to cattle while in defendant's possession for transportation. Affirmed.

Statement by Gaynor, J.:

Action to recover damages for injury to cattle and depreciation in value due to a failure on the part of the company to transport and deliver them at their destination within a reasonable time. Defense interposed, that the action was not brought within the time provided in the contract, and that no notice of the injury or damage was served upon the defendant before said stock was removed from the destination and mingled with other stock, as required by the terms of the contract of shipment or bill of lading. Judgment in the court below for the defendant. Plaintiffs appeal.

Messrs. Work & Irish for appellants.

Messrs. Sloan & Sloan, F. W. Sargent, and J. H. Johnson, for appellee:

The shipments in question were interstate shipments, and the written contracts under which the shipments were made were provided for in defendant's tariff of rates on file with the Interstate Commerce Commission, and in force and effect at said time, and were valid.

Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; Chicago, B. & Q. R. Co. v. Miller, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; Chicago, St. P. M. & O. R. Co. v. Latka, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; Kansas City Southern R. Co. v. Carl, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556; Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; George N. Pierce Co. v. Wells F. & Co. 236 U. S. 278, 59 L. ed. 576, 35 Sup. Ct. Rep. 351; Herminghaus v. Adams Exp. Co. 167 Iowa, 230, 149 N. W. 234; Heilman v. Chicago & N. W. R. Co. 167 Iowa, 313, 149 N. W. 436.

The provision in the written contract which provided that suit should be brought within six months was valid.

Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

The provision in the written contracts requiring the plaintiffs to give written notice of their claim for loss or damage within one day was valid.

Clegg v. St. Louis & S. F. R. Co. 122 C. C. A. 273, 203 Fed. 971; Kidwell v. Oregon Short Line R. Co. 125 C. C. A. 313, 208 Fed. 1; Spada v. Pennsylvania R. Co. 86 N. J. L. 187, 92 Atl. 379; Riddler v. Missouri P. R. Co. 184 Mo. App. 709, 171 S. W. 632; Dunlap v. Chicago & A. R. Co. 187 Mo. App. 201, 172 S. W. 1178; Bowman v. Missouri, K. & T. R. Co. 185 Mo. App. 25, 171 S. W. 642; Smith v. St. Louis & S. W. R. Co. 186 Mo. App. 401, 171 S. W. 635; St. Louis Southwestern R. Co. v. Burnett, — Ark. —, 174 S. W. 1165; Adams Exp. Co. v. Cook, 162 Ky. 592, 172 S. W. 1096; Henry v. Chicago, M. & P. S. R. Co. 84 Wash. 633, 147 Pac. 425.

An agreement to furnish a special train for which no provision is made in the tariff of rates is void.

Chicago & A. R. Co. v. Kirby, 225 U. S. 155, 56 L. ed. 1033, 32 Sup. Ct. Rep. 648, Ann. Cas. 1914A, 501; Winn v. American Exp. Co. 149 Iowa, 259, 128 N. W. 663; Siemonsma v. Chicago, M. & St. P. R. Co. L.R.A.1916D.

158 Iowa, 483, 139 N. W. 1077; Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 58 L. ed. 901, 34 Sup. Ct. Rep. 556.

Where different rates are specified in the tariff of rates filed with the Interstate Commerce Commission, giving the shipper an option to ship under a limited liability contract, or, by paying a higher rate, to ship without a limitation of liability on the part of the carrier, it is incumbent upon the plaintiff to prove the rate that he paid, and that the rate so paid entitles him to a recovery under said published tariff of rates.

Heilman v. Chicago & N. W. R. Co. 167 Iowa, 313, 149 N. W. 436.

The live stock contracts in question were by reference made a part of the tariff of rates duly filed with the Interstate Commerce Commission, and the provisions of said live stock contract can be attacked only by direct proceeding before the Interstate Commerce Commission.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 Ann. Cas. 1075; Boston & M. R. Co. v. Hooker, 233 U. S. 97, 58 L. ed. 868, L.R.A.1915B, 450, Ann. Cas. 1915D, 593; Chicago, R. I. & P. R. Co. v. Cramer, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; Missouri, K. & T. R. Co. v. Harri-man, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

Gaynor, J., delivered the opinion of the court:

In the month of March, 1912, the plaintiffs delivered to the defendant company at St. Paul, Minnesota, five loads of cattle to be transported over defendant's lines to certain points in Iowa. Certain carloads were consigned to J. W. Riggs, Douds, Iowa, and certain carloads to J. A. Baldwin, at Selma, Iowa. It is claimed by the plaintiffs that the defendant was negligent in transporting said cattle, and the same were unreasonably delayed in transit, and were neglected and uncared for during transportation; that by reason thereof the cattle were damaged when they arrived at their destination; that two of the cattle were dead, and others were rendered worthless, or practically so; that all the cattle were damaged more or less. Upon this alleged negligence, the plaintiffs ask recovery of the defendant in sum of \$589 on the first count of their petition.

The record discloses that on January 13, 1913, the plaintiffs delivered to the defendant company at Selma, Iowa, certain fat cattle to be transported by said company over its lines to the stock yards in Chicago, Illinois. The plaintiffs claim that the cattle were unreasonably delayed in transit

through the negligence of the defendant; that if said cattle had been transported with reasonable diligence, they would have arrived in Chicago in time for the Wednesday market, January 15th; that they did not arrive at the stock yards until 6:30 p. m. Wednesday, too late for that day's market; that by reason of the delay in transportation the cattle were depreciated, and were bruised and injured by reason of the long confinement, and when delivered were in a weakened, sickened, and stunted condition, and their value impaired. For the purposes of this case we may assume that these allegations are true, and that the plaintiffs suffered damage substantially as claimed by them, and that such damage was the proximate result of defendant's negligence.

The defendant answers plaintiffs' petition, and admits that it received the cattle for transportation to the various stations mentioned by the plaintiffs, but says that at the time it received the cattle for shipment, the plaintiffs entered into a written contract covering the transportation of the cattle, which, so far as material to this controversy, reads as follows: "That as a condition precedent to claiming or recovering damages for any loss or injury to or detention of live stock, or delay in transportation thereof, covered by this contract, the second party, as soon as he discovers such loss or injury, shall promptly give notice thereof in writing to some general officer, claim agent, or station agent of the first party, or to the agent at destination, or to some general officer of the delivering line, before such stock is removed from the point of shipment, or from the place of destination, as the case may be, and before such stock is mingled with other stock; and such written notice shall in any event be served within one day after delivery of the stock at its destination, in order that such claim may be fully and fairly investigated. It is agreed that a failure to strictly comply with all the foregoing provisions shall be a bar to the recovery of any and all of such claims."

With the further provision: "That no suit or action against the first party for the recovery of any claim by virtue of this contract shall be sustainable in any court of law or equity, unless such suit or action be commenced within six months next after the cause of action shall occur; and, should any suit or action be commenced against the first party after the expiration of six months, the lapse of time shall be constituted conclusive evidence against the validity of such claim, any statute of limitations to the contrary notwithstanding."

The contract, with these provisions in it, L.R.A.1916D.

was signed by both the plaintiffs and the defendant company, and constitutes the bill of lading or contract under which the cattle were shipped. At the time the shipments were made, the company had two tariff rates on cattle,—one rate where the shipment was made with a limitation as to the amount of recovery in case of loss; a higher rate where the shipment was made without limitation. These cattle, it appears, were shipped at the lower tariff rate. These tariff rates had been filed with the Interstate Commerce Commission and certified to by the secretary. One of these tariff rates was introduced in evidence and known as the Western Trunk Line Circular, and provided:

"Live stock—limitation of liability.

"Rates on live stock published in tariffs will apply on shipments made at owner's risk, with a limitation of liability on the part of the railroad company as a common carrier, under the terms and conditions of the current live stock contract provided by said company; the contract to be first duly executed in the manner and form provided for therein. On shipments made without limitation of carrier's liability at common law, not less than 150 per cent of the rate named will be charged, and, under this status, shippers will have the choice of executing and accepting the contract for shipment of live stock with or without limitation of liability, the rates to be made as provided for herein."

It was shown that this provision in the Western Trunk Line Circular was in effect and applied on the shipments that were made to the Union Stock Yards, Chicago, Illinois, as well as to the other shipments. It is conceded that no notice of the alleged injury to the stock was even given the defendant prior to the commencement of the action. The action was commenced on the 13th day of March, 1913.

As to the first count of plaintiffs' petition, it is clear that if the provision of the contract relied upon was one which, under the law, the parties had a right to enter into, and one that was binding upon both parties, the plaintiffs are not entitled to recover, for it appears that the action was not commenced for nearly a year after the alleged damage, and that no notice was given, as required by the contract.

These were interstate shipments, and therefore governed, not by the laws of this state, but by the acts of Congress and the decisions of the Supreme Court of the United States, and it follows that § 2074 of the Code of 1897 does not apply. We are cited by the plaintiffs both to this section and to the case of *Cramer v. Chicago, R. I. & P. R. Co.* 153 Iowa, 111, 133 N. W. 387.

The Cramer Case, however, was reversed by the Supreme Court of the United States. 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383. See *Heilman v. Chicago & N. W. R. Co.* 167 Iowa, 313, 149 N. W. 436.

In *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, the Supreme Court of the United States had occasion to pass upon the exact question that is here presented, so far as the first count of plaintiffs' petition is concerned. In that case, which went from Missouri, the stipulation in the shipping contract provided that no suit should be brought after the lapse of ninety days after the happening of any loss or damage. The Supreme Court said: "It is conceded that there are statutes in Missouri, the state of the making of the contract, and the state in which the loss and damage occurred, and in Texas, the state of the forum, which declare contracts invalid which require the bringing of an action for a carrier's liability in less than the statutory period, and that this action, though started after the lapse of the time fixed by the contract, was brought within the statutory period of both states. The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment, declared by the Carmack amendment of the Hepburn act of June 29, 1906 [chapter 3591, § 7, §§ 11, 12, 34 Stat. at L. 595, U. S. Comp. Stat. 1913, § 8592]. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question, to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation. . . . The liability imposed by the statute is the liability imposed by the . . . special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence [citing authorities]. The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies [citing cases]. A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in *L.R.A.1916D.*

Southern Exp. Co. v. Caldwell, 21 Wall. 264, 22 L. ed. 556. Such limitations in bills of lading are very customary and have been upheld in a multitude of cases [citing cases]. . . . The provision requiring suit to be brought within ninety days is not unreasonable."

It follows, therefore, that if ninety days is not an unreasonably short time in which to require actions to be instituted and prosecuted in cases of this kind, six months not only is not unreasonable, but must be held a reasonable restriction upon the right to maintain the action. This case is conclusive on plaintiffs' right to recover on the first count of his petition.

On the second count, involving the right of the plaintiffs to recover for the injury to the fat cattle shipped by it to the Union Stock Yards in January, 1913, it appears that this action was brought within six months, so the six months' limitation on the right to maintain the action is not involved in the determination of plaintiffs' rights under this count. It appears, however, that these cattle arrived at the Union Stock Yards at about 6:30 P. M. on Wednesday, the 15th, but too late for that day's market; that the market closed at 3 o'clock; that they were placed upon the market the next morning, and were sold and passed out of the control of the plaintiffs; that the injury to these cattle was discovered by the plaintiffs upon their arriving in Chicago; that no notice was given to the company, or to any of the agents of the company mentioned in the contract, at any time prior to the beginning of this action, or any claim filed for damages, or any notice given that the cattle were damaged or injured in transit, as required by the terms of the contract hereinbefore set out.

We are not prepared to say at this time, nor do we make any pronouncement, as to whether or not notice should be given within one day after the delivery of the stock at its destination. We make no pronouncement as to whether that is a reasonable time within which to require the notice to be given under all circumstances; but the provision of the contract requiring the plaintiffs to promptly give notice in writing to some general officer, claim agent, or station agent of the first party, or agent at destination, or to some general officer of the delivery line, before such stock is removed from the point of shipment or the place of destination, as the case may be, and before such stock is mingled with other stock, is a reasonable provision, and clearly the defendant was entitled to notice before these acts took place, the effect of which was to deprive defendant of an opportunity to examine the cattle and ascertain for

itself whether or not the claim for damages was well founded.

This action was not commenced until nearly sixty days after the cattle had been disposed of by the plaintiffs, had passed out of their control, and were no longer subject to inspection by the defendant. This provision in principle is analogous to those provisions of the statute which provide for the giving of notice to a city of personal injury as a condition precedent to the right to maintain an action. We are not withholding authority on this question. See *Clegg v. St. Louis & S. F. R. Co.* 122 C. C. A. 273, 203 Fed. 971. In that case the provision was substantially the same as the one now under consideration, and the court said: "We are clearly of the opinion that the eleventh provision in the contract above quoted, relative to giving notice, was a valid one, and the failure to give the notice fatal to plaintiff's right to recover,"—citing cases.

In *Kidwell v. Oregon Short Line R. Co.* 125 C. C. A. 313, 208 Fed. 1, the United States circuit court of appeals had occasion to pass upon a similar question, and said: "A stipulation that notice of a claim for damages be given before the stock is removed or intermingled with other stock, as a condition precedent to recovery, is a reasonable one, and it has been so held by the supreme court of the state in which the contract in this case was made,"—citing authorities.

In *Southern Exp. Co. v. Caldwell*, 21 Wall. 264-272, 22 L. ed. 556-559, it was held: "An agreement that in case of failure by the carrier to deliver goods, he shall not be liable unless a claim shall be made by the bailor or by the consignee within a specified period, if that period be a reasonable one, is not against the [public] policy of the law, and is valid."

In that case it is said: "It may be remarked . . . that the stipulation is not a conventional limitation of the right of the carrier's employer to sue. He is left at liberty to sue at any time within the period fixed by the statute of limitations. He is only required to make his claim within ninety days, in season to enable the carrier to ascertain what the facts are, and, having made his claim, he may delay his suit. . . . A common carrier is always responsible for his negligence, no matter what his stipulations may be. But an agreement that, in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor or by the consignee within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no public policy. It excuses no negligence. It is per-L.R.A.1916D.

fectly consistent with holding the carrier to the fullest measure of good faith, of diligence, and of capacity, which the strictest rules of the common law ever required."

It is further said: "If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally misssent, or if they have in fact been properly delivered. With the bailor the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss, if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible, to ascertain the actual facts. For these reasons such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers."

A limitation of this character was also held binding upon the parties, and not unreasonable, and not in contravention of the policy of the law, in *Spada v. Pennsylvania R. Co.*, by court of errors and appeals of New Jersey, reported in 86 N. J. L. 187, 92 Atl. 379. It seems to us the only question that can be made is as to the reasonableness of the time fixed in the contract in which the notice is required to be given. In the *Clegg* Case, *supra*, 122 C. C. A. 273, 203 Fed. 971, the contract was in all respects the same as the contract here under consideration as to the requirement touching notice, and it was held to be reasonable. In *Missouri, K. & T. R. Co. v. Kirkham*, 63 Kan. 255, 65 Pac. 261, 10 Am. Neg. Rep. 263, the provision in the shipping contract was: "The shipper further expressly agrees that, as a condition precedent to his right to recover any damages for any loss or injury to . . . cattle resulting from carrier's negligence as aforesaid, including delays, he will give notice in writing to the conductor in charge of the train, or the nearest station or freight agent of the carrier on whose line the injuries occur, before said cars leave that carrier's line, or before the cattle are mingled with other cattle, or removed from pens at destination. In his notice he shall state place and nature of the injuries complained of, to the end that they may be fully and fairly investigated; and said shipper shall, within thirty days after the happening of the injuries complained of, file with some freight or station

agent of the carrier on whose line the injury occurred his claim therefor, giving the amount. Shipper's failure to comply with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries resulting to said cattle, as aforesaid. . . . No agent of this company has any authority to waive, modify, or amend any of the provisions of this contract.' . . . No notice or claim of damages was made to the conductor in charge of the train at Burlington, or to the station agent at said place, until the following day, and until the cattle had been removed from the pens at point of destination."

The court said: "Live stock contracts similar in their nature to the one here involved have received the consideration of this court, and where fairly entered into by both parties, in the absence of fraud, have been held conclusive and binding upon the parties [citing cases]. Hence it must be held that the terms and conditions of this special contract were binding upon these parties, and should have been so declared by the court."

In *St. Louis & S. F. R. Co. v. Phillips*, 17 Okla. 264, 87 Pac. 470, the provision in the contract was: "No carrier shall be responsible for loss or damage of any of the freight shipped, unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this notice must be given within thirty hours after the arrival of the same at destination."

It was further provided in the shipping contract or bill of lading: "That as a condition precedent to a recovery for any damages for delay, loss, or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or nearest station agent of the first party, or to the agent at destination, or to some general officer of the delivering line, before such stock is removed from the point of shipment, or from the place of destination, and before such stock is mingled with other stock; such written notification to be served within one day of the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated."

And it was provided that a failure to comply with the provisions of this clause shall be a bar to the recovery of any and all damages. The court said: "Now the proposition presents itself: Was this provision of the bill of lading and shipping contract a reasonable one, and one which the law would enforce? The validity of a contract of this nature, and of this special provision requiring notice in writing to be

given of the loss or injury within a reasonable time as a condition precedent to the shipper's right of action, has been so repeatedly and often supported by the decisions of the various courts of this country as to become a well-recognized and settled rule of law."

And it was held that this provision was a valid, binding contract on the plaintiff, and that a failure to comply with it defeated his right to recover.

In the case of *Texas C. R. Co. v. Morris*, 1 Tex. App. Civ. Cas. (White & W.) 158, it was held that a railroad company may, by special contract, require a shipper of cattle to serve a written notice of a claim for damages for loss or injury to the cattle while in transit, before the cattle are removed from the place of delivery and mingled with other stock, as a condition precedent to his right to recover for such damages. The same was held in *Atchison, T. & S. F. R. Co. v. Crittenden*, 4 Kan. App. 512, 44 Pac. 1000, in which the court, in passing upon a contract similar to the one under consideration, says: "So far as it required the shipper to give notice in writing of his loss or injury, it is a valid, binding contract. By its terms Crittenden was compelled to give notice in writing to the company of his claim for loss or injury to said stock before the stock was removed from the place of destination or delivery, and before said stock was mingled with other stock. Failing to comply with the terms of the contract, he cannot recover."

. . . These provisions of the contract are just and equitable. The company is entitled to a written notice that the shipper claims damages, so as to permit the company to have a thorough investigation made of the nature of the claim and the condition of the stock before the stock is removed from its premises, or before it is mingled with other stock so as to render its identification difficult. . . . The shipper must prove such notice to have been given before he can recover."

There are other questions discussed by counsel, but as the provisions of this contract are binding upon the parties and control their rights, and inasmuch as there was no attempt made on the part of the plaintiffs to perform any of these conditions precedent to its right to recover, we must hold, under the authorities herein cited, that the District Court was right in directing a verdict for the defendant as it did in this case, and the cause is therefore affirmed.

Evans, Ch. J., and Deemer and Ladd, JJ., concur.

Annotation—Reasonableness of the time fixed in a contract of shipment of live stock, for presentation of claim for damages.

This is a continuation of the note to *Wabash R. Co. v. Thomas*, 7 L.R.A. (N.S.) 1041.

These notes presuppose that a stipulation in a carrier's contract limiting the time for the presentation of claims for damages is valid if it allows a reasonable time. This assumption, it may be observed, is in accordance with the Federal rule as to interstate shipments, which, as shown by the notes to *Adams Exp. Co. v. Croninger*, 44 L.R.A. (N.S.) 257, and *Louisville & N. R. Co. v. Miller*, 50 L.R.A. (N.S.) 819, have been removed from the operation of state laws on the subject. Intrastate shipments, of course, remain subject to local laws. In this connection, see notes—

—as to validity of contract limiting time for bringing action or for presentation of claims for damages, where statute or Constitution prohibits carrier from limiting its common-law liability, in *Liquid Carbonic Co. v. Norfolk & W. R. Co.* 13 L.R.A. (N.S.) 753;

—as to validity of stipulations in carrier's contract requiring notice of loss within a specified time, as applied to loss due to carrier's negligence, in *Houtz v. Union P. R. Co.* 17 L.R.A. (N.S.) 628;

—as to notice of loss or injury to goods required by carrier's contract as a condition precedent, in *Hoye v. Pennsylvania R. Co.* 17 L.R.A. (N.S.) 642;

—as to removal of live stock from carrier's premises before notice of claim for damages, where such notice is given in time for examination, in *Missouri, K. & T. R. Co. v. Davis*, 24 L.R.A. (N.S.) 866.

As stated in 4 R. C. L. § 253, the one essential of stipulations of this nature is that they be reasonable. This is, however, purely relative, and a stipulation perfectly reasonable under one state of facts would be quite as unreasonable under another. Whether in any particular case the stipulation under consideration is valid is therefore dependent on the peculiar facts and circumstances of that case, the chief query being whether sufficient time has been given to enable the shipper to discover the loss and give notice thereof, this again being largely dependent on distance and the facilities of communication. From the very nature of such a requirement it is evident that no helpful, general rule can be laid down.

As shown in the note in 7 L.R.A. (N.S.) 1041, the courts not infrequently determine the reasonableness or unreasonableness of the time fixed in a stipulation with reference to the actual facts as they afterwards developed.

And numerous cases have upheld as reasonable a provision in a contract of shipment requiring, as a condition precedent to a recovery of damages for injuries to live stock, that the shipper give notice in writing of the claim therefor to some general officer or station agent at the nearest station, before such stock is removed or mingled with other stock, such notice to be served within one day after delivery of the stock at destination. *Clegg v. St. Louis & S. F. R. Co.* (1913) 122 C. C. A. 273, 203 Fed. 971 (interstate); *St. Louis Southwestern R. Co. v. Burnett* (1915) — Ark. —, 174 S. W. 1165 (interstate); *St. Louis Southwestern R. Co. v. Haynie* (1915) — Ark. —, 179 S. W. 170 (interstate); *St. Louis & S. F. R. Co. v. Pearce* (1907) 82 Ark. 353, 118 Am. St. Rep. 75, 101 S. W. 760, 12 Ann. Cas. 125 (interstate); *Missouri & N. A. R. Co. v. Ward* (1914) 111 Ark. 102, 163 S. W. 164 (intrastate); *Aull v. Missouri P. R. Co.* (1909) 136 Mo. App. 291, 116 S. W. 1122 (intrastate); *Moore v. St. Louis & S. F. R. Co.* (1910) 143 Mo. App. 675, 127 S. W. 921 (interstate); *McElvain v. St. Louis & S. F. R. Co.* (1913) 176 Mo. App. 379, 158 S. W. 464, later appeal (1915) — Mo. App. —, 180 S. W. 1018 (interstate); *Sims v. Missouri P. R. Co.* (1914) 177 Mo. App. 18, 163 S. W. 275 (interstate); *St. Louis & S. F. R. Co. v. Young* (1912) 30 Okla. 588, 120 Pac. 999 (interstate); *St. Louis & S. F. R. Co. v. Ladd* (1912) 33 Okla. 160, 124 Pac. 461 (interstate).

So, in *Riddler v. Missouri P. R. Co.* (1914) 184 Mo. App. 709, 171 S. W. 632, the court, observing that the question as to the reasonableness of the time depends on the character of the shipment, the situation of the parties, and the circumstances of each particular case, held that the period of one day allowed by a stipulation in an interstate contract as to live stock, requiring notice within one day after delivery of the stock at destination and before such stock was removed, was not unreasonable, it appearing that the consignee saw at once that the cattle were stale and in poor condition on account of being held over, and that the time limited did not expire until more than two hours after the cattle had been sold on the market.

The same stipulation was, in *Shelton v.*

St. Louis & S. F. R. Co. (1908) 131 Mo. App. 560, 110 S. W. 627, upheld as reasonable, the facts regarding the failure to give notice within the stated time being insufficient to suggest its application as unreasonable, and nothing being done until some days after the stock was actually unloaded by shipper's agents, commingled with other stock of the same kind, and sold upon the market.

But the requirement of notice within one day after delivery at destination and before the stock is mingled with other stock has been held unreasonable where the loss or damage could not be ascertained within the limited time. *Eoff v. Scullin* (1915) — Ark. —, 179 S. W. 663 (interstate); *McKinstry v. Chicago, R. I. & P. R. Co.* (1911) 153 Mo. App. 546, 134 S. W. 1061 (interstate); *Pierson v. Northern P. R. Co.* (1911) 61 Wash. 450, 112 Pac. 509 (intrastate).

So, a stipulation requiring notice of claim within one day after delivery of live stock at destination and before mingling them with other stock is held unreasonable and contrary to statute in *Nashville, C. & St. L. R. Co. v. Hinds* (1912) 9 Ala. App. 534, 60 So. 409 (interstate). See also *Northern Alabama R. Co. v. Bidgood* (1912) 5 Ala. App. 658, 59 So. 680 (intrastate).

So, a stipulation for the presentation of a claim within five days after the unloading of stock is unreasonable where the damage cannot be ascertained within that time. *Crawford v. Southern R. Co.* (1915) 101 S. C. 522, 86 S. E. 19 (interstate).

And in *Williams v. Yazoo & M. Valley R. Co.* (1908) 93 Miss. 77, 46 So. 399 (interstate), the court stated that it was very questionable if the time (ten days after arrival of shipment of mules) could be in any case upheld as a reasonable regulation.

Where stock was billed through to a certain town, a provision requiring written notification of injuries to be given to the carrier at another town en route was, in *St. Louis, I. M. & S. R. Co. v. Dunn* (1910) 94 Ark. 407, 127 S. W. 464 (intrastate), held unreasonable, the carrier having no opportunity to ascertain the full extent of the injury to the stock until unloaded at final destination.

If a shipper cannot give notice within ten days from the time the stock is removed from the cars, because of his inability to ascertain the damage, he should exercise diligence and give notice L.R.A.1916D.

within a reasonable time at least. *Letts v. Wabash R. Co.* (1908) 131 Mo. App. 270, 111 S. W. 138 (intrastate).

It was held in *Holland v. Chicago, R. I. & P. R. Co.* (1909) 139 Mo. App. 702, 123 S. W. 987, that the failure of a shipper to give notice within twenty-seven days after delivery of cattle at destination, where he could not ascertain the damage before that time, would not defeat recovery where he kept the cattle separate and gave the carrier an opportunity to investigate, although the contract called for notice within a day after delivery at destination.

The contract in *Pecos & N. T. R. Co. v. Evans-Snider-Buel Co.* (1906) 42 Tex. Civ. App. 60, 93 S. W. 1024 (interstate), provided that, as a condition precedent to the shipper's right to recover damages for loss or injury to stock during transportation, he or his agent in charge should give notice in writing of his claim to the nearest station agent, or if the stock is delivered to consignee at a point beyond the company's road, to the nearest station agent of the last carrier making such delivery, before such stock should be removed from the place of destination or from the place of delivery to the consignee, and before such stock should be slaughtered or intermingled with other stock, and that the shipper should not move the stock from the station or stock yards until the expiration of three hours after the giving of the notice; and a failure to comply in every respect with the terms of the contract should be a complete bar to recovery; the written notice provided for in the contract could not and should not be waived by any person except a general officer of the company, and by him only in writing; nor should any such damage be recoverable unless written claim therefor should be presented to the company within ninety-one days after the same may have occurred; it was held that the requirements were so interdependent as to be inseparable, and as a whole they were unreasonable and void. The above case was affirmed in (1906) 100 Tex. 190, 97 S. W. 466, without reference to the question under discussion.

In *Deans v. Atlantic Coast Line R. Co.* (1910) 152 N. C. 171, 67 S. E. 332 (interstate), a stipulation requiring written notice of loss within thirty days after arrival, to the agent at the point of delivery, was held unreasonable, but an instruction that notice within sixty days

would be reasonable was held not error. The court observed that the standard bill of lading adopted by the Interstate Commerce Commission in 1908, prescribing four months as the time limit in which claims for loss were to be made, was not adopted until two years after the shipment in the present case.

There are many cases which have held or assumed the time allowed to be reasonable, and the stipulation therefor valid, without expressly making the question of unreasonableness turn upon the facts of the particular case as they afterwards developed, though it may be said that it did not appear in these cases that the time allowed was unreasonable tested by such facts. In this class of cases (supplementing those in 7 L.R.A. (N.S.) 1042) a notice within the following periods has been held or assumed to be reasonable:

—within five hours after the stock was unloaded, *Bowman v. Missouri, K. & T. R. Co.* (1914) 185 Mo. App. 25, 171 S. W. 642 (interstate);

—within one day after delivery at destination, *Smith v. St. Louis & S. W. R. Co.* (1914) 186 Mo. App. 401, 171 S. W. 635 (interstate);

—within five days after unloading at destination, *Hamilton v. Chicago & A. R. Co.* (1913) 177 Mo. App. 145, 164 S. W. 248 (interstate); *Dunlap v. Chicago & A. R. Co.* (1914) 187 Mo. App. 201, 172 S. W. 1178 (interstate);

—within ten days after stock is unloaded, *Armstrong v. Illinois C. R. Co.* (1913) 162 Ky. 539, 172 S. W. 947 (interstate);

—within ten days from date of unloading at destination and before mingling with other stock, *Kidwell v. Oregon Short Line R. Co.* (1913) 125 C. C. A. 313, 208 Fed. 1 (interstate); *Illinois C. R. Co. v. Wade* (1911) 1 Tenn. C. C. A. 780 (interstate); *Howard v. Illinois C. R. Co.* (1914) 161 Ky. 783, 171 S. W. 442 (interstate); *Frank Smith Meat Co. v. Oregon R. & Nav. Co.* (1911) 59 Or. 206, 117 Pac. 303 (intrastate);

—within thirty days after loss or damage occurred, *Adams Exp. Co. v. Cook*, (1915) 162 Ky. 592, 172 S. W. 1096 (interstate);

—within ninety-one days (probably from time of delivery), *International & G. N. R. Co. v. Heittner* (1906) 42 Tex. Civ. App. 617, 94 S. W. 189 (intrastate).

Some cases wherein the contract of shipment of cattle requires the notice of claim for loss to be given to some officer of the carrier or its nearest station agent, L.R.A.1916D.

before the stock is moved from its place of destination or delivery, or is delivered to the consignee or mingled with other stock, hold or assume that such a stipulation is reasonable, and consequently valid, without showing that the reasonableness is or is not dependent upon the circumstances as they are finally developed in connection with the individual case. The following cases supplementing those in 7 L.R.A. (N.S.) 1042 are of this class: *Roberts v. Georgia, S. & F. R. Co.* (1911) 10 Ga. App. 100, 72 S. E. 942 (intrastate); *Southern R. Co. v. Forrest* (1909) 132 Ga. 853, 65 S. E. 93 (intrastate); *Hayes v. Missouri, K. & T. R. Co.* (1911) 84 Kan. 1, 113 Pac. 42 (intrastate); *Giles v. Atchison, T. & S. F. R. Co.* (1914) 92 Kan. 322, 140 Pac. 875 (intrastate); *Jones-Lane Co. v. Atlantic Coast Line R. Co.* (1908) 148 N. C. 580, 62 S. E. 701 (intrastate; provision unavailable in this case, however, because animal was injured before delivery, while in custody of carrier); *Austin-Stephenson Co. v. Southern R. Co.* (1909) 151 N. C. 137, 65 S. E. 757 (interstate); *Duvall v. Norfolk Southern R. Co.* (1914) 167 N. C. 24, 83 S. E. 21 (intrastate); *Kime v. Southern R. Co.* (1910) 153 N. C. 398, 69 S. E. 264 (interstate); *Baldwin v. Atlantic Coast Line R. Co.* (1915) — N. C. —, 86 S. E. 776 (interstate); *Mobile & O. R. Co. v. Brownsville Livery & Live Stock Co.* (1910) 123 Tenn. 298, 130 S. W. 788 (interstate).

A stipulation in a contract of freightment of live stock, requiring the owner to give notice in writing of his claim for damages, to some officer of the company or its nearest station agent, before the stock is removed from the place of destination, is a reasonable stipulation, binding on the owner, and he cannot recover on failure to give such notice, though he did not go in person or send an agent with the stock, as in such case he should have sent a copy of the contract to the consignee in order that the latter might have complied with the stipulation. *St. Louis & S. F. R. Co. v. Phillips* (1906) 17 Okla. 264, 87 Pac. 470 (interstate).

Other cases where the contract contained stipulations of this character recognized more or less clearly the principle that the reasonableness of the requirement as to the time within which notice of claim for damages must be given is to be determined by the circumstances as they afterwards develop; and the validity or invalidity, as the case may be, of the contract, and its conclu-

siveness upon the shipper, are determined according as the result shows that the shipper could or could not have reasonably given the notice so as to have accomplished the result aimed at by the stipulation,—namely, the prevention of fraud in the presentation of ungrounded claims. Thus, supplementing 7 L.R.A. (N.S.) 1043, the following intrastate shipment cases may be noted:

A stipulation requiring written notice of claim to some officer of the company or to the nearest station agent before the stock is removed or mingled with other stock will be upheld as reasonable in the absence of a showing that it works a hardship in the particular case. *Atchison, T. & S. F. R. Co. v. Coffin* (1910) 13 **Ariz.** 144, 108 **Pac.** 480. See also to the same effect: *Louisville & N. R. Co. v. Tharpe* (1912) 11 **Ga.** App. 465, 75 **S. E.** 677 (interstate); *Southern R. Co. v. Adams* (1902) 115 **Ga.** 705, 42 **S. E.** 35 (interstate); *Southern R. Co. v. Toller-son* (1907) 129 **Ga.** 647, 59 **S. E.** 799 (interstate); *Baldwin v. Chicago, R. I. & P. R. Co.* ante, 335 (interstate).

There are cases (supplementing 7 L.R.A.(N.S.) 1043) holding that a stipulation requiring notice before removal, although it may be reasonable as a general proposition, will not be held binding upon the shipper where it does not appear that there was an officer or station agent at the point of destination, or so situated that notice could be reasonably served upon him within the time stipulated.

Thus, in the following interstate shipment cases a stipulation requiring notice of claim within a certain time is deemed unreasonable in the absence of an agent upon whom service of notice could be made: *Wall v. Northern P. R. Co.* (1914) 50 **Mont.** 122, 145 **Pac.** 291; *Hovey v. Tankersley* (1915) — **Tex.** Civ. App. —, 177 **S. W.** 153; *Chicago, R. I. & G. R. Co. v. Whaley* (1915) — **Tex.** Civ. App. —, 177 **S. W.** 543.

So, in *St. Louis & S. F. R. Co. v. Kimberlin* (1908) 51 **Tex.** Civ. App. 124, 111 **S. W.** 671, it was held unreasonable to require notice of damages within one day after the delivery of the stock when that time was insufficient and the facts did not show that there was any agent at the place of delivery to whom to give notice.

So, a stipulation requiring notice to a general officer of the carrier before removal, and within five days after delivery of stock, has been held an unreasonable restriction upon the right to recover L.R.A.1916D.

damages, especially where the general claim agent was notified and the stock agent made an investigation. *Jones Bros. v. Quincy, O. & K. C. R. Co.* (1906) 117 **Mo.** App. 523, 94 **S. W.** 735 (intrastate).

Where the delivery is to be made by a connecting carrier, numerous cases have held that if the carrier wishes to take advantage of the condition requiring notice to be given before the stock is removed from its place of destination, it must show that it had an officer or agent where the shipper could reasonably find him so as to give the required notice. See cases in note, 7 L.R.A.(N.S.) 1044.

Generally, the reasonableness of a stipulation requiring the presentation of a notice of claim within a certain time is a question of fact. See cases in 7 L.R.A.(N.S.) 1045.

So, where notice of claim was required to be given to an agent within one day after the delivery of the stock, and there was no agent nearer than 35 miles from the delivery point, the reasonableness of the limitation was held a question for the jury. *St. Louis, I. M. & S. R. Co. v. Furlow* (1909) 89 **Ark.** 404, 117 **S. W.** 517.

So, whether the time provided within a contract for giving notice is reasonable or unreasonable is a question of fact to be determined by the circumstances of the case. *St. Louis & S. F. R. Co. v. Phillips* (1906) 17 **Okl.** 264, 87 **Pac.** 470; *Arnold v. Louisville & N. R. Co.* (1908) 4 **Ga.** App. 519, 61 **S. E.** 1050.

So, a finding of the court that a stipulation requiring a shipper to give notice of loss within ten days after the unloading of the sheep was reasonable, where the answer contained no allegation, and there was no proof on the subject, is a mere conclusion of law, and will be treated as no finding on the subject, the question of reasonableness being one of fact. *Houtz v. Union P. R. Co.* (1908) 33 **Utah.** 175, 17 L.R.A.(N.S.) 628, 93 **Pac.** 439.

And it was a question for the jury in *Southern Kansas R. Co. v. Curtis Bros.* (1907) 44 **Tex.** Civ. App. 477, 99 **S. W.** 566, whether or not ninety-one days was a reasonable time under the circumstances presented.

While a clause in a contract for the shipment of live stock, providing that, as a condition precedent to the shipper's right to recover any damages for loss or injury, he should give notice in writing of his claim therefor before the animals are removed from the place of destina-

tion, and before they are mingled with other animals, is *prima facie* reasonable and binding, nevertheless it may be waived or rendered unreasonable and unenforceable in the particular case by the conduct of the carrier; and in *Arnold v. Louisville & N. R. Co. (Ga.) supra*, it was held a question for the jury as to whether the carrier, by refusing the shipper transportation on the freight train, and by unloading the stock into his agent's pens before he had time to inspect them, did not waive or render unreasonable in the particular case this clause of the contract.

And it is proper to instruct the jury as to what matters may be considered in determining what is a reasonable time to file claims for damages to a shipment of live stock. *Cleveland, C. C. & St. L. R. Co. v. Hayes (1914) 181 Ind. 87, 104 N. E. 581.*

But the submission to the jury of the

reasonableness of a stipulation was in *Crawford v. Southern R. Co. (1915) 101 S. C. 522, 86 S. E. 19*, held error, where it was undisputed that the damage to the stock was not ascertainable within such time.

And where, from the nature of the injury alleged and proved to have been inflicted upon the cattle, it must have been apparent at once upon their arrival at destination that they were seriously damaged, and that there was nothing to prevent the shipper from making the necessary claim and giving the railroad company an opportunity to examine the live stock within the time and in the manner limited in the shipping contract, the question of the reasonableness of such a provision is a question of law for the court. *St. Louis & S. F. R. Co. v. Ladd (1912) 33 Okla. 160, 124 Pac. 461.*
J. D. C.

NORTH DAKOTA SUPREME COURT.

JOHN D. COOKE, Appt.,

v.

NORTHERN PACIFIC RAILWAY COMPANY, Resp't.

(32 N. D. 340, 155 N. W. 867.)

Commerce — interstate shipments — Carmack amendment.

1. Under the Carmack amendment it was the clear intention of Congress to remove from the realm of state regulations and restrictions all contracts involving interstate shipments of freight and live stock.

For other cases, see Commerce, II. c, in Dig. 1-52 N. 8.

Carrier — limitation of liability — Federal statute.

2. The liability imposed by the Federal statutes upon carriers of interstate shipments is the liability imposed by common law upon a common carrier, and such liability may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt the carrier from liability due to its negligence.

For other cases, see Carriers, III. g, in Dig. 1-52 N. 8.

Headnotes by FISK, Ch. J.

Note. — As to reasonableness of the time fixed in a contract of shipment for bringing action, see annotation following this case, post 350.

As to reasonableness of time fixed in a contract of shipment of live stock for presentation of claim for damages, see annotation following *Baldwin v. Chicago, R. I. & P. R. Co. ante, 335.*
L.R.A.1916D.

Same — limitation of action — contract.

3. A stipulation in such special contract, that no action to recover damages for loss or injury to live stock, etc., shall be sustained unless commenced within sixty days after the damage shall occur, is held unreasonable and void.

For other cases, see Carriers, III. g, 4, in Dig. 1-52 N. 8.

(September 20, 1915.)

APPEAL by plaintiff from a judgment of the District Court for Stutsman County in defendant's favor in an action upon a shipping contract brought to recover damages for alleged negligent injury to a shipment of live stock while in defendant's possession for transportation. Reversed.

The facts are stated in the opinion.

Messrs. Knauf & Knauf and S. E. Ellsworth, for appellant:

Defendant, by its long delay in pleading or in showing an intention to place any reliance upon the limitation clause in its contract, is conclusively deemed to have waived any benefits to be derived from the same in this action.

New York C. R. Co. v. Lockwood, 17 Wall. 357, 380, 381, 21 L. ed. 627, 640, 641, 10 Am. Neg. Cas. 624; Southern Exp. Co. v. Caldwell, 21 Wall. 264; 22 L. ed. 556; Houtz v. Union P. R. Co. 33 Utah, 175, 17 L.R.A. (N.S.) 628, 93 Pac. 439; Texas & P. R. Co. v. Reeves, 90 Tex. 499, 59 Am. St. Rep. 830, 39 S. W. 564; Central Vermont R. Co. v. Soper, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879.

The benefits of a reasonable condition for limitation of action contained in a contract

may even, though pleaded and relied upon, be waived by the subsequent conduct of the defendant.

Adams v. Colorado & S. R. Co. 49 Colo. 475, 36 L.R.A.(N.S.) 412, 113 Pac. 1010; 6 Cyc. 509, and cases cited; *Gulf, C. & S. F. R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109.

Messrs. Watson & Young and E. T. Conmy, for respondent:

This shipment, being an interstate shipment, is regulated and controlled exclusively by the laws of Congress, and the liability of the defendant here must be determined under the laws of Congress and the construction placed upon said laws by the United States courts.

Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; *Chicago, St. P. M. & O. R. Co. v. Latta*, 226 U. S. 519, 57 L. ed. 328, 33 Sup. Ct. Rep. 155; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; *D. E. Foote & Co. v. Stanley*, 232 U. S. 494, 58 L. ed. 698, 34 Sup. Ct. Rep. 377; *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576.

The condition in the contract requiring that suit be commenced in two months is valid and enforceable.

Riddlesbarger v. Hartford F. Ins. Co. 7 Wall. 386, 19 L. ed. 257; *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556; *Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879; *Ginn v. Ogdensburg Transit Co.* 29 C. C. A. 521, 57 U. S. App. 403, 85 Fed. 985; *Cox v. Central Vermont R. Co.* 170 Mass. 129, 49 N. E. 97; *North British & M. Ins. Co. v. Central Vermont R. Co.* 9 App. Div. 4, 40 N. Y. Supp. 1113, affirmed in 158 N. Y. 726, 53 N. E. 1128; *McCarty v. Gulf, C. & S. F. R. Co.* 79 Tex. 33, 15 S. W. 164; *Thompson v. Chicago & A. R. Co.* 22 Mo. App. 321; 6 Cyc. 508; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 671, 672, 673, 57 L. ed. 690, 697, 698, 33 Sup. Ct. Rep. 397.

Waiver of a provision on the back of a shipping receipt, exempting the carrier from liability unless notice of loss or damage is given within a specified time, is not available to a shipper in an action against the carrier unless pleaded by the shipper.

Frey v. New York C. & H. R. R. Co. 114 L.R.A.1916D.

App. Div. 747, 100 N. Y. Supp. 225; *Eureka F. & M. Ins. Co. v. Baldwin*, 62 Ohio St. 368, 57 N. E. 57; *Griffith v. Newell*, 69 S. C. 300, 48 S. E. 259; *Essex v. Murray*, 29 Tex. Civ. App. 368, 68 S. W. 736; *Cox v. Markham*, 39 Tex. Civ. App. 637, 87 S. W. 1163; *Fauble v. Davis*, 48 Iowa, 462; *List & Son Co. v. Chase*, 80 Ohio St. 42, 88 N. E. 120, 17 Ann. Cas. 61; *Neuberger v. Robbins*, 37 Utah, 197, 106 Pac. 933; *Thompson v. St. Charles County*, 227 Mo. 220, 126 S. W. 1044; *McCall Co. v. Segal*, — Tex. Civ. App. —, 126 S. W. 913; *Re Warner*, 158 Cal. 441, 111 Pac. 352; *Feuchtwanger v. Manitowoc Malting Co.* 109 C. C. A. 461, 187 Fed. 713; *Iola Portland Cement Co. v. Ullmann*, 159 Mo. App. 235, 140 S. W. 620; *Symms-Powers Co. v. Kennedy*, 33 S. D. 355, 146 N. W. 570; 9 Cyc. "Contracts," 727; *Clegg v. St. Louis & S. F. R. Co.* 122 C. C. A. 273, 203 Fed. 971.

The condition requiring suit, to be brought within a period of two months is not unreasonable.

Great Northern R. Co. v. O'Connor, 232 U. S. 508, 58 L. ed. 703, 34 Sup. Ct. Rep. 380, 8 N. C. C. A. 53; *Riddlesbarger v. Hartford F. Ins. Co.* 7 Wall. 386, 19 L. ed. 257; *Central Vermont R. Co. v. Soper*, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879; *Ginn v. Ogdensburg Transit Co.* 29 C. C. A. 521, 57 U. S. App. 403, 85 Fed. 985; *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567; *Gulf, C. & S. F. R. Co. v. Gatewood*, 79 Tex. 89, 10 L.R.A. 419, 14 S. W. 913; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 672, 57 L. ed. 698, 33 Sup. Ct. Rep. 397.

Fisk, Ch. J., delivered the opinion of the court:

Plaintiff and appellant seeks to recover damages from defendant railway company upon a special contract entered into on March 9, 1907, for the transportation of certain horses and other property from the Minnesota Transfer to McHenry, in this state. He alleges in his complaint that through the negligence of the defendant in handling the car in which such horses were transported, and through unreasonable delay in transporting the car, such horses were greatly injured, which injury resulted in the death of several of the horses and permanent injuries to the remainder. This action was commenced in April, 1913, but in October, 1908, plaintiff brought an action to recover damages connected with this same shipment, basing his action, not on the contract, but upon the defendant's common-law liability. In such former litigation the defense interposed was that the parties had entered into a special contract governing such shipment, and that their

rights and liabilities should be measured by such contract. Such defense was sustained both in the trial court and in this court. *Cooke v. Northern P. R. Co.* 22 N. D. 266, 133 N. W. 303. For a general statement of the facts we refer to the opinion in that case.

The contract in suit is the ordinary stock contract used by the defendant company, and contains, among other things, a statement that:

The shipment is made "at the published tariff rate which applies to shipments under a limited liability contract, the same being a reduced rate made upon the terms and conditions following, which are admitted and accepted by the undersigned shipper as just and reasonable, that is to say:" Then follow numerous stipulations, among which are the following:

"(3) And it is hereby further agreed that the value of the live stock to be transported under this contract does not exceed the following mentioned sums, to wit: Each horse, \$75; each mule, \$75; each stallion, \$100; each jack, \$100; each ox or steer, \$50; each bull, \$50; each cow, \$30; each calf, \$10; each pig, \$10; each sheep or goat, \$3; such valuation being that whereon the rate of compensation to said carrier for its services and risks connected with said property is based."

"(6) The said shipper further agrees that, as a condition precedent to his right to recover any damages for loss or injuries to any of said stock, he will give notice in writing of his claim therefor to some officer or station agent of the said company before said stock has been removed from the place of destination or mingled with other stock.

"(7) It is further agreed and provided that no suit or action to recover any damages for loss or injury to any of said stock, or for the recovery of any claim by virtue of this contract, shall be sustained by any court against said company, unless suit or action shall be commenced within sixty (60) days after the damage shall occur, and on any suit or action commenced against said company after the expiration of said sixty (60) days, the lapse of time shall be taken and deemed conclusive evidence against the validity of said claim, any statute to the contrary notwithstanding."

Plaintiff offered testimony tending to show negligence on the part of the company in handling such car, and the resulting damage occasioned thereby; also that he served notice upon the station agent of the defendant company at McHenry on March 18th, and before the stock had been removed from McHenry, of his claim for damages, and rested. Thereupon counsel for defendant moved for a directed verdict, L.R.A.1916D.

basing the motion upon the ground, among others, that plaintiff failed to commence his action within the period of sixty days as stipulated in the contract, which motion was granted, and it is this ruling which constitutes the chief complaint of appellant on this appeal. If the stipulation requiring suit to be brought within sixty days is valid and binding, then, of course, the ruling of the court in directing the verdict in defendant's favor must be sustained, for, concededly, no action was brought until long after such time had elapsed.

In construing such stipulation, as well as the other provisions of the contract, it is settled beyond question by the highest court in our land that the contract, being one covering an interstate shipment, is removed from the realm of local state regulations and restrictions, and the same is regulated and controlled exclusively by the laws of Congress, and the liability of the defendant must therefore be determined by the laws of Congress as construed by the United States courts. *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Chicago, B. & Q. R. Co. v. Miller*, 226 U. S. 513, 57 L. ed. 323, 33 Sup. Ct. Rep. 155. In both of these cases it was squarely held that the provisions of § 20 of act Feb. 4, 1887, as amended by act June 29, 1906, 34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, § 8563, known as the Carmack amendment, manifested a purpose on the part of Congress to take possession of the subject of the liability of a carrier by railroad for interstate shipments, and that the regulations therein should supersede all state regulations upon the same subject. *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Chicago, R. I. & P. R. Co. v. Cramer*, 232 U. S. 490, 58 L. ed. 697, 34 Sup. Ct. Rep. 383; *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 667, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

It goes without saying that these decisions of the Supreme Court of the United States are absolutely controlling upon the state courts. As said by this court in the recent case of *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576: "The decisions of the Supreme Court of the United States on Federal questions are absolutely controlling when the same questions are presented in state courts, and the latter have no alternative but to follow the Federal authorities."

As before stated, the contract in suit, covering, as it does, an interstate shipment, falls clearly within the Carmack amendment aforesaid. This being true, we are next to inquire whether the stipulation in the contract requiring suit to be commenced

within sixty days is valid and enforceable. Referring to the decisions of the United States Supreme Court, and especially to *Adams Exp. Co. v. Croninger*, supra, we find it there announced that the liability imposed by the Federal statute upon carriers of interstate shipments is the liability imposed by the common law upon a common carrier, and that such liability may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt the carrier from responsibility for damages due to its negligence. In this connection see also *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397. In the opinion in the latter case Mr. Justice Lurton, in passing upon the validity of a stipulation in a special contract limiting the time in which suit might be brought to the period of ninety days from the loss or happening of any damage, said:

"The court below held that the stipulation in the shipping contract that no suit shall be brought after the lapse of ninety days from the happening of any loss or damage, 'any statute or limitation to the contrary notwithstanding,' was void. It is conceded that there are statutes in Missouri, the state of the making of the contract, and the state in which the loss and damage occurred, and in Texas, the state of the forum, which declare contracts invalid which require the bringing of an action for a carrier's liability in less than the statutory period, and that this action, though started after the lapse of the time fixed by the contract, was brought within the statutory period of both states. The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment of the Hepburn act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or legislation. *Adams Exp. Co. v. Croninger*, supra; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176. The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. *Adams Exp. Co. v. Croninger* and *Michigan C. R. Co. v. Vreeland*, cited L.R.A.1916D.

above; *York Mfg. Co. v. Central R. Co.* 3 Wall. 107, 18 L. ed. 170; *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624; *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 267, 22 L. ed. 556, 558; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717, 5 Sup. Ct. Rep. 151.

"The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. That is a question of law for the determination of the court. Such stipulations have been sustained in insurance policies. *Riddlesbarger v. Hartford F. Ins. Co.* 7 Wall. 386, 19 L. ed. 257. A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556. Such limitations in bills of lading are very customary and have been upheld in a multitude of cases. We cite a few: *Central Vermont R. Co. v. Soper* (C. C. A. 1st C.), 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879; *Ginn v. Ogdensburg Transit Co.* (C. C. A. 7), 29 C. C. A. 521, 57 U. S. App. 403, 85 Fed. 985; *Cox v. Central Vermont R. Co.* 170 Mass. 129, 49 N. E. 97; *North British & M. Ins. Co. v. Central Vermont R. Co.* 9 App. Div. 4, 40 N. Y. Supp. 1113, affirmed in 158 N. Y. 726, 53 N. E. 1128. Before the Texas and Missouri statutes forbidding such special contracts, short limitations in bills of lading were held to be valid and enforceable. *McCarty v. Gulf, C. & S. F. R. Co.* 79 Tex. 33, 15 S. W. 164; *Thompson v. Chicago & A. R. Co.* 22 Mo. App. 321. See cases to same effect cited in 6 Cyc. 508. The provision requiring suit to be brought within ninety days is not unreasonable."

After a thorough research we find no case decided by the United States Supreme Court upholding a similar limitation where the time fixed for bringing suit was less than ninety days, but counsel for respondent cite two decisions from state courts upholding, as reasonable, stipulations fixing the time at forty days. These are *Gulf, C. & S. F. R. Co. v. Trawick*, 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567; *Gulf, C. & S. F. R. Co. v. Gatewood*, 79 Tex. 89, 10 L.R.A. 419, 14 S. W. 913; but it will be noticed that in neither of the contracts involved in these cases does it appear that there was a stipulation similar to that in the contract in the case at bar, requiring

notice of loss or injury to be given by the shipper to the carrier before the stock has been removed from the place of destination or mingled with other stock; and in the last case cited the carrier notified the plaintiff twenty-five days after the delivery that his claim would not be paid.

The question of whether such a stipulation is reasonable depends to a considerable extent upon the purpose sought to be subserved by such stipulation, which is to apprise the carrier promptly, to the end that it may protect itself against fraudulent and unjust claims for damages. Were it not for the sixth stipulation above referred to, requiring notice to be given by the shipper before the stock is removed from the point of destination and mingled with other stock, we might feel inclined to uphold the seventh stipulation, requiring suit to be brought within sixty days, as not unreasonable; but we think, in the light of such prior stipulation, it is manifestly unreasonable to limit plaintiff to sixty days in which to commence his action.

Another reason which prompts us in arriving at this conclusion is the fact that, although plaintiff made prompt claim to damages by serving upon the station agent of the defendant company at McHenry a written notice, defendant took no action thereon at all, and by its silence, no doubt, lulled the plaintiff into a sense of security in waiting, and we think he was justified in delaying action in the hope and belief that his claim would be finally adjusted. In view of these facts, defendant does not stand in a favorable light before the court in urging such defense, and we think it should be held to have waived such stipulation.

Another consideration which has some weight with us in arriving at the above conclusion is the fact that plaintiff did not, and in the nature of things could not, within the limited time fixed in such stipulation, know of the extent of the injuries inflicted upon the stock through defendant's negligence. In this connection we approve the language of the supreme court of Texas in *Gulf, C. & S. F. R. Co. v. Stanley*, 89 Tex. 42, 33 S. W. 109. The shipping contract in that case contained a clause limiting the time for bringing action to "forty days next after the loss or damage shall have occurred." Upon the trial it was disclosed that at a certain place en route the cattle were unloaded for feeding and watering, and were crowded together in muddy pens in such numbers that it was impossible for them to take sufficient food and water, and that, in consequence, some died and others were greatly injured. In its opinion the court said: "The defendant, by counsel, asked the court to charge the jury that, if L.R.A.1916D.

the notice was not given, the plaintiff could not recover, and also, in effect, that, if the suit was not instituted within forty days from the time the cause of action accrued, it was not bound. Both of these charges were refused, and their refusal brings up the question as to the validity of the two stipulations in the contract which have been quoted. A stipulation of the character of these in question, to be valid, must be reasonable. At the time the cattle were reshipped at Purcell the plaintiff, according to his own testimony, knew that his cattle had been crowded in pens and had suffered for the want of food and water, but did not know the extent of his damages. Under the circumstances, he could, at most, have made only a vague complaint, which would have subserved no useful purpose to either party. It was by no means certain that any serious loss would ensue, and, if the contract is to be construed as requiring notice in such a case, we think it must be held unreasonable."

In the case of *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, 10 Am. Neg. Cas. 624, the Supreme Court of the United States held that a condition in a contract with an express company limiting the right of action to ninety days was reasonable, but the property was entirely lost and never delivered. In the recent case of *Missouri, K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397, in which the same period of time was held to be a reasonable limitation, the cattle whose loss was made the basis of the claim for damage were killed instantaneously by reason of a negligent derailment of the train. The doctrine of neither case is applicable to the facts of the case at bar. There the damage was immediately determinable, and the full period of ninety days without a waiver on the part of the railroad company was allowed plaintiff in which to bring his action.

In *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556, the court, in considering the question of whether the period of ninety days was a reasonable limit in which the shipper might make claim to damages, held such stipulation reasonable, but added: "Possibly such a condition might be regarded as unreasonable, if an insufficient time were allowed for the shipper to learn whether the carrier's contract had been performed."

In the case at bar, as before stated, the full damage to plaintiff was not, and could not have been, known within the time stipulated for the commencement of an action; for but two out of eight horses were killed or died from injuries at St. Cloud, the point where it is alleged that the defendant's chief act of negligence in the handling of

the car took place. Plaintiff contends that another horse died in the following November, and still another in December, 1907, and one in the following year, and the last one within three months of the trial of this action. We therefore think that there is much force in appellant's contention that it was impossible for him to know within such period of sixty days anything definite with reference to the extent of his damage, and that, as applied to the facts in this case, such stipulation is unreasonable.

In this connection we call attention to the recent case of *Pierson v. Northern P. R. Co.* 61 Wash. 450, 112 Pac. 509, which involves contract stipulations the same as in the case at bar, and wherein the Washington court, under facts similar to those here involved, held unreasonable the stipulation requiring written notice to be given to some officer or station agent of the company before the stock was removed from the place of destination or mingled with other stock. The court said: "This clause of the contract would perhaps be effectual in some cases, but in a case like the present, where the nature and extent of the injuries to the animals surviving could not be ascertained with any degree of certainty within the limited time provided in the contract, the stipulation is unreasonable and inapplicable,"—citing numerous authorities.

Upon parity of reasoning it seems to us that the other stipulation requiring suit to be commenced within sixty days should likewise be held, under these facts, to be unreasonable.

In addition to the above authorities, see valuable note to the case of *Hafer v. St. Louis Southwestern R. Co.* Ann. Cas. 1913E, 866, where many authorities are collected on the subject. See also *Texas & P. R. Co. v. Langbehn*, — Tex. Civ. App. —, 158 S. W. 244, and *Pacific Coast Co. v. Yukon Independent Transp. Co.* 83 C. C. A. 625, 155 Fed. 29.

It has been held, and we think properly, that where a shipping contract limits the time within which an action for damages

must be brought, such time must be not only reasonable, but there must be prompt action on the part of the carrier in denying its liability to the end that the shipper may be duly apprised of the fact that suit will be necessary. *Lasky v. Southern Exp. Co.* 92 Miss. 268, 45 So. 869. See also *James v. Chicago, R. I. & P. R. Co.* 81 Kan. 23, 105 Pac. 40.

In view of our conclusion, which leads to a reversal of the judgment, it is but fair to the learned trial judge to state that he was evidently influenced in his decision by certain language found in our former opinion, which he construed as a holding to the effect that the contract in question was in all things valid. The use of such language was, perhaps, unfortunate, but nevertheless the fact remains that the question as to the validity of each of the various stipulations in such special contract was not before us for decision on that appeal, and any such expression was therefore mere dictum. All that we were required to decide, and all that was there decided, was that plaintiff could not maintain his action in tort on the common-law liability when the proof showed that he entered into a special contract governing the rights and liabilities of the parties pertaining to such shipment.

Regarding the validity of the stipulation limiting the extent of defendant's liability, we are not called upon to express an opinion. Such question was neither passed, upon by the trial court nor argued in the briefs of counsel. It would therefore be improper for us to consider it at this time.

Judgment reversed, and a new trial ordered.

Burke, J., being disqualified, did not participate; Honorable *W. L. Nuessle*, Judge of Sixth Judicial District, sitting in his stead.

Petition for rehearing denied December 22, 1915.

Annotation—Reasonableness of the time fixed in a contract of shipment of goods or live stock for bringing action.

Generally as to validity of contract limiting time for bringing suits, see note to *Hartwell v. Northern P. Exp. Co.* 3 L.R.A. 344.

As to validity of contract limiting time for bringing action, or for presentation of claims, for damages, where statute or Constitution prohibits carrier from limiting its common-law liability, see note to L.R.A.1916D.

Liquid Carbonic Co. v. Norfolk & W. R. Co. 13 L.R.A.(N.S.) 753.

The reasonableness of the time fixed in a contract of shipment of live stock for presentation of claim for damages is discussed in notes to *Wabash R. Co. v. Thomas*, 7 L.R.A.(N.S.) 1041, and *Baldwin v. Chicago, R. I. & P. R. Co.* ante, 335.

Similar in character to the stipulation in contracts of carriage prescribing a certain time within which notice of loss must be given are the provisions frequently met with in bills of lading, which require that any action to recover for loss or damage to the article shipped should be begun within a specified period. The parties may, if they see fit, fix by agreement a shorter time for the bringing of suit on the contract than that provided by the statute of limitations; and if the period therein limited is reasonable, suit must be brought within that time or the shipper's right of action will be barred. Such a provision is prohibited by no rule of law nor by any consideration of public policy, nor is it at all affected by the existence within the jurisdiction of a statutory or constitutional prohibition against carriers limiting or restricting their common-law liability; since it is held that such a stipulation does not in any way defeat the complete vestiture of the right to recover, but merely requires the assertion of that right by action at an earlier period than would be necessary to defeat it through the operation of the ordinary statute of limitations. But the limitation must be reasonable, and if the period of time specified is such that under the facts of the particular case the shipper could not, with reasonable diligence, be enabled to bring suit before it expired, the attempted limitation is void. 4 R. C. L. § 256.

Thus the time allowed in the following interstate shipments was held unreasonable:

It may be observed that state laws with respect to interstate shipments were superseded by the Carmack amendment of June 29, 1906 (34 Stat. at L. 593, chap. 3591, § 7, Comp. Stat. 1913, § 8592), to the act of February 4, 1887 (24 Stat. at L. 386, chap. 104, § 20), which furnishes the exclusive rule on the subject of the liability of the carrier under contracts for interstate shipments. See notes to *Adams Exp. Co. v. Croninger*, 44 L.R.A. (N.S.) 257, and *Louisville & N. R. Co. v. Miller*, 50 L.R.A. (N.S.) 819.

A stipulation in an interstate shipment of live stock limiting the time for bringing suit to sixty days is in *COOKE v. NORTHERN P. R. Co.* held unreasonable for reasons clearly stated in the opinion.

So, a stipulation in a contract for an interstate shipment of live stock, requiring suit to be instituted and citation served within forty days after a breach of contract, was in *Gulf, C. & S. F. R. Co. v. Hume Bros.* (1894) 6 **Tex. Civ. App.** 653, 24 S. W. 915, held unreasonable.

able and void as to the provision requiring service of citation in forty days. The court said: "This contract requires that not only suit shall be commenced, but that citation shall be served, within forty days next after the damage or loss occurs. We believe that inasmuch as the contract requires citation to be served within forty days, it renders it unreasonable, and that it is an improper stipulation to be imposed upon the shipper. It places the carrier in a position to defeat the contract by its bringing about a situation that will or may make it difficult or impossible for the shipper to obtain the service of the citation. It is admitted that it is not probable that the carrier would do that, but it is possible that it may; and the fact that it may be and can be done is what, in our opinion, renders for one reason that provision of the contract unreasonable. But the principal ground upon which we hold it unreasonable is that it makes the shipper responsible for the diligence of the officer who is intrusted by law with the execution and service of the process. Neither the shipper nor the carrier can control him in this matter to the extent that would absolutely require him within a certain or given number of days to execute the service of citation."

On a later appeal of the *Hume Case* (1894) 87 **Tex.** 211, 27 S. W. 110, the entire clause of the contract was pronounced nugatory; since the stipulation as to service of citation being unlawful, the two acts of filing suit and service of citation were so blended that they could not be separated. See also to the same effect *Gulf, C. & S. F. R. Co. v. Elliott* (1894) — **Tex. Civ. App.** —, 26 S. W. 636, and *Gulf, C. & S. F. R. Co. v. Stanley* (1895) 89 **Tex.** 42, 33 S. W. 109.

On the other hand, the following periods after the occurring of the loss or damage have been upheld as reasonable in case of shipment of live stock:

—six months, *St. Louis & S. F. R. Co. v. Pearce* (1907) 82 **Ark.** 339, 101 S. W. 763 (interstate); *St. Louis Southwestern R. Co. v. Butler* (1907) 82 **Ark.** 469, 102 S. W. 378 (intrastate); *St. Louis & S. F. R. Co. v. Burgin* (1907) 83 **Ark.** 502, 104 S. W. 161 (interstate); *Hafer v. St. Louis Southwestern R. Co.* (1911) 101 **Ark.** 310, 142 S. W. 176, Ann. Cas. 1913E, 866 (interstate); *Missouri & N. A. R. Co. v. Ward* (1914) 111 **Ark.** 102, 163 S. W. 164 (intrastate); *Atchison, T. & S. F. R. Co. v. Baldwin* (1912) 53 **Colo.** 416, 128 **Pac.** 449 (interstate); *Enright v. Atchison, T. & S. F. R. Co.* (1915) 96 **Kan.** 546, 152 **Pac.** 629 (interstate);

Sims v. Missouri P. R. Co. (1914) 177 Mo. App. 18, 163 S. W. 275 (interstate); *St. Louis & S. F. R. Co. v. Pickens* (1915) — *Okla.* —, 151 Pac. 1055 (interstate);

—ninety-one days, *Ray v. Missouri, K. & T. R. Co.* (1915) 96 Kan. 8, L.R.A.—, —, 149 Pac. 397 (interstate);

—ninety days, *Missouri, K. & T. R. Co. v. Harriman* (1913) 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397 (interstate); *Adams v. Colorado & S. R. Co.* (1911) 49 Colo. 475, 36 L.R.A. (N.S.) 412, 113 Pac. 1010 (intrastate); *Watt v. Missouri, K. & T. R. Co.* (1913) 90 Kan. 466, 135 Pac. 600 (interstate); *Missouri, K. & T. R. Co. v. Hancock* (1910) 26 Okla. 254, 109 Pac. 220 (interstate);

—forty days, *McCarthy v. Gulf, C. & S. F. R. Co.* (1890) 79 Tex. 33, 15 S. W. 164 (interstate); *Galveston, H. & S. A. R. Co. v. Silegman* (1893) — *Tex. Civ. App.* —, 23 S. W. 298 (intrastate); *Gulf, C. & S. F. R. Co. v. Gatewood* (1890) 79 Tex. 89, 10 L.R.A. 419, 14 S. W. 913 (intrastate); *Gulf, C. & S. F. R. Co. v. Trawick* (1887) 68 Tex. 314, 2 Am. St. Rep. 494, 4 S. W. 567 (intrastate); *Gulf, C. & S. F. R. Co. v. Clarke* (1893) 5 Tex. Civ. App. 547, 24 S. W. 355 (intrastate); *Gulf, C. & S. F. R. Co. v. White* (1895) — *Tex. Civ. App.* —, 32 S. W. 322 (interstate).

So, where a contract for an interstate shipment of live stock provided that an action must be brought within sixty days after any loss or damage should occur, and a shipper, instead of bringing an action, used nearly all the time in trying to effect a settlement, it was stated in *Thompson v. Chicago & A. R. Co.* (1886) 22 Mo. App. 321, that, conceding that the shipper was justified in not bringing his action during the time of his negotiations for a settlement, yet the twelve days remaining after he discovered he

could not settle were a reasonable time in which he might and should have begun his suit.

So, in the case of goods, the following period was deemed reasonable:

—one year, *Ingram v. Weir* (1909) 166 Fed. 328 (interstate);

—three months, *Cox v. Central Vermont R. Co.* (1898) 170 Mass. 129, 49 N. E. 97 (interstate); *North British & M. Ins. Co. v. Central Vermont R. Co.* (1896) 9 App. Div. 4, 40 N. Y. Supp. 1113, affirmed without opinion in (1899) 158 N. Y. 726, 38 N. E. 1128; *Central Vermont R. Co. v. Soper* (1894) 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879 (interstate; the court observing that very likely an exception would arise if there was an entire lack of knowledge on the part of the consignee, during the entire period of limitation, of the existence of any loss or damage, when coupled with a lack of circumstances imposing the duty of making inquiry, or for so much of the period as practically bars investigation during what remains of it, even with the utmost diligence; but this case involves only circumstances transpiring in the ordinary course of transactions, and which must, therefore, be assumed to have been anticipated and met by the express stipulation which parties have agreed on);

—ninety days, *Texas & P. R. Co. v. Langbehn* (1913) — *Tex. Civ. App.* —, 158 S. W. 244 (interstate);

—sixty days, *Pacific Coast Co. v. Yukon Independent Transp. Co.* (1907) 83 C. C. A. 625, 155 Fed. 29 (interstate).

The reasonableness of the time fixed is generally a question of fact to be determined by the jury. *Gulf, C. & S. F. R. Co. v. Hume Bros.* (1894) 87 Tex. 211, 27 S. W. 110; *Texas & P. R. Co. v. Hawkins* (1895) — *Tex. Civ. App.* —, 30 S. W. 1113. J. D. C.

OKLAHOMA SUPREME COURT.

W. C. BOLEN et al., Pliffs. in Err.,

v.

C. L. LIGETT.

(— Okla. —, 154 Pac. 547.)

Name — fictitious — "Bros."

1. The adoption by a firm composed of

Headnotes by SHARP, J.

Note. — As to what names or designations are within statutes requiring the filing of a certificate giving certain information regarding a business conducted under an L.R.A.1916D.

two brothers of their surname, followed by the word "Bros.," as the name of the firm, is not the adoption of a "fictitious name, or a designation not showing the names of the persons interested as partners in such business," within the meaning of § 4469, Rev. Laws 1910.

For other cases, see *Name*, in *Dig.* 1-52 N. S.

Action — fictitious name — partnership.

2. Section 4471, Rev. Laws 1910, does not forbid a firm composed of two brothers who

assumed or fictitious name or a designation not showing the names of the persons interested, see annotation following this case, post, 355.

have adopted as the partnership name their surname, followed by "Bros.," from maintaining an action on or on account of any contracts made in their partnership name in any court of this state.

For other cases, see Name, in Dig. 1-52 N. S.

(January 11, 1916.)

ERROR to the County Court for Washita County to review a judgment in defendant's favor in an action brought to foreclose a chattel mortgage given as security for the payment of a promissory note executed by defendant to plaintiffs. Reversed.

The facts are stated in the opinion.

Messrs. Massingale & Duff, for plaintiffs in error:

Plaintiffs, doing business as Bolen Bros. were not violating the statute by failing to publish the statement required, and by failing to record a similar statement in the office of the clerk of the district court of said county.

Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659; McLean v. Crow, 88 Cal. 644, 26 Pac. 596; Guiterman v. Wishon, 21 Mont. 458, 54 Pac. 566; Vaughan v. Kujath, 44 Mont. 484, 120 Pac. 1121; Walker v. Stimmel, 15 N. D. 484, 107 N. W. 1081; Bovee v. De Jong, 22 S. D. 183, 116 N. W. 83; Czatt v. Case, 61 Ohio St. 392, 55 N. E. 1004; Castle Bros. v. Graham, 180 N. Y. 553, 73 N. E. 1120; Baker v. Van Ness, 25 Okla. 34, 105 Pac. 660; Patterson v. Byers, 17 Okla. 633, 89 Pac. 1114, 10 Ann. Cas. 810; North v. Moore, 135 Cal. 621, 67 Pac. 1037.

Messrs. Brett & Billups, for defendant in error:

The plaintiffs at the time in question, doing business under the firm name of Bolen Bros., by failing to publish the statement required by statute and by failing to record a similar statement in the office of the clerk of the district court of said county, were violating the statute.

Baker v. Van Ness, 25 Okla. 34, 105 Pac. 660; North v. Moore, 135 Cal. 621, 67 Pac. 1037; Smith v. Woods, 33 Okla. 233, 124 Pac. 1089; Pendleton v. Cline, 85 Cal. 142, 24 Pac. 659; Doob v. Lovell Mfg. Co. 4 Ohio S. & C. P. Dec. 189.

Sharp, J., delivered the opinion of the court:

This action was commenced December 28, 1911, to foreclose a chattel mortgage given as security for the payment of a promissory note executed by defendant to plaintiffs. The petition, among other things, alleged that plaintiffs were a copartnership doing business in Sentinel, Oklahoma, under the firm name and style of Bolen Bros. Defendant answered, setting up as a defense that

plaintiffs were transacting business in the state of Oklahoma under a fictitious name and designation not showing the names of the persons interested in said partnership, and had not filed with the clerk of the district court of Washita county, Oklahoma, a certificate stating the names in full of the members of said copartnership and their place of residence, and caused the same to be published in some newspaper for four weeks in said county as required by law, and prior to the bringing of said action, and that there were newspapers published in said county of Washita at and prior to the filing of said action. At the trial, December 12, 1912, the parties entered into a stipulation that the members of the firm were W. C. Bolen and Park Bolen, and that they had never published any statement or filed any certificate in the office of the clerk of the district court as provided in §§ 5023, 5025, Comp. Laws 1909 (§§ 4469, 4471, Rev. Laws 1910). Defendant then moved to dismiss plaintiffs' actions because of such failure to comply with the statute, which motion was by the court sustained, and, from the judgment rendered in favor of defendant, plaintiffs bring error.

The sole question to be determined is whether it was incumbent upon W. C. Bolen and Park Bolen, doing business under the firm name of "Bolen Bros.," to comply with the statute above referred to before they could prosecute this cause of action against defendant; in other words, is "Bolen Bros." a fictitious name or designation within the meaning of § 5023, *supra*? The question has heretofore been before this court, with such conclusions reached that both parties to the present case are asserting their respective contentions under different decisions.

In Patterson v. Byers, 17 Okla. 633, 89 Pac. 1114, 10 Ann. Cas. 810, W. K. Patterson and N. H. Patterson were partners doing business as the Patterson Furniture Company, and, not having complied with the provisions of the statute, it was objected that they were doing business in violation of the statute, and could not prosecute the action. But the court said: "Now, we think the name Patterson, being the true surname of every member of the partnership known as the Patterson Furniture Company, can in no sense be said to be a fictitious name. And, under the ruling of the California supreme court in construing this statute, the word 'Patterson,' being the true surname of the members composing the Patterson Furniture Company, is a name that discloses the names of the members of the partnership, and that such a designation and doing business under such a title is not doing business under a fictitious name, or under a name which does not disclose the true names of the partners,

and that partners doing business under such an appellation are not within the provisions of the sections referred to, and are not required to file and publish the certificate therein required."

Our statute was taken from California, and the decision in the above case was rested upon the cases of *Pendleton v. Cline*, 85 Cal. 142, 24 Pac. 659; *McLean v. Crow*, 88 Cal. 644, 26 Pac. 596; and *Guiterman v. Wishon*, 21 Mont. 458, 54 Pac. 566, construing a statute the same as that of California. The question in both of the California cases was somewhat different from the one here, in that the partnership name was made up of the names of the two members thereof. However, the principle announced was that a partnership name showing the surname only of the partners was not a fictitious name or designation within the meaning of the statute, and it was not necessary that the partners file a certificate as provided in the statute. The facts in the *Guiterman Case* are very like those here presented. It was there held that *Guiterman Bros.*, a copartnership composed of A. Guiterman, S. A. Guiterman, and L. A. Guiterman, was not a fictitious name, nor a designation not showing the names of the persons interested as partners in such business, within any reasonable meaning of the statute.

The doctrine announced in the *Patterson Case* has never been overruled by this court, notwithstanding the decision in *Baker v. Van Ness*, 25 Okla. 34, 105 Pac. 680 (in which no reference was made to the *Patterson Case*), as appears from the opinion in *Bleecker v. Miller*, 40 Okla. 374, 138 Pac. 809, where, after citing the *Patterson Case* and the cases upon which it was predicated, it is said of the decision in the *Baker Case* that, the plaintiff having failed and neglected to file a reply to the special defense of failure to comply with §§ 5023, 5025, Comp. Laws 1909, the allegation of new matter in the answer being uncontroverted, and the same constituting a complete defense to the action, the court's action in rendering judgment in favor of plaintiff was contrary to law. It thus appears, in the view of the court in the latter case, the question in the *Baker Case* was one of pleading, and that there was no intention to depart from the earlier opinion of the court in the *Patterson Case*.

In *Carlock v. Cagnacci*, 88 Cal. 600, 26 Pac. 597, where the firm name of the plaintiff partnership was *Carlock & Robb*, it being composed of F. M. Carlock and H. D. Robb, the court held that such partnership name was not a fictitious name nor a designation not showing the names of the partners, within the provisions of the statute, and followed the decision in *Pendleton v. Cline*, L.R.A.1916D.

supra. In *Vaughan v. Kujath*, 44 Mont. 484, 120 Pac. 1121, the action was brought to recover on a promissory note signed by defendants and others in favor of "*McLaughlin Bros.*;" the note having been transferred by the latter to the plaintiff. The only defense interposed by defendants was that "*McLaughlin Bros.*," the payee in the note, was a designation not showing the names of the persons interested as partners in the business conducted by it, and that such partnership had not complied with the provisions of the statute as to filing and publishing certificate showing the names of the members in full. It was held that the name "*McLaughlin Bros.*" did not come within the statute. In *Walker v. Stimmel*, 15 N. D. 484, 107 N. W. 1081, the partnership name of the plaintiffs was *Walker & Korthof*, which the court held not to be a fictitious name, nor a designation failing to show the names of the two persons interested as partners. In *Bovee v. De Jong*, 22 S. D. 163, 116 N. W. 83, the partnership name considered was *Bovee & Norfitt*, and it was held that such name, being the surnames of the two men constituting the firm, was sufficient notice to enable all interested persons to easily ascertain the initials or Christian names of the respective partners with whom they may deal, and that such name was not fictitious. In *Czatt v. Case*, 61 Ohio St. 392, 55 N. E. 1004, the firm name, *Case & Taylor*, was composed of the surnames of the two members of the firm, and it was held that such name was not a fictitious name or designation not showing the names of the persons who constituted the firm, within the meaning of the statute of that state. In *Axe v. Tolbert*, 179 Mich. 556, 146 N. W. 418, the firm name of the plaintiffs was *William Axe & Son*, and it was held that there was nothing fictitious or misleading or uncertain in the name, but, on the other hand, it gave the full name of the head of the firm, and plainly disclosed the identity of the other member. In *Cross v. Leonard*, 181 Mich. 24, 147 N. W. 540, it was held that the adoption as a firm name by a partnership composed of two brothers of their surname, followed by the words "*Bros.*," was not an "assumed name" within the provisions of the Michigan statute prohibiting the carrying on of any business under an assumed name, unless a certificate showing the real names of the parties was filed. In *Castle Bros. v. Graham*, 87 App. Div. 97, 84 N. Y. Supp. 120, affirmed in 180 N. Y. 553, 73 N. E. 1120, the action was brought to recover the balance of the price of work done for defendant by the firm of *Castle Bros.*, which assigned its claim to the plaintiff, a corporation. The firm was composed of two brothers named *Castle*, and it was held that the name "*Castle Bros.*" was

not within the section of the Code providing that no person or persons should carry on business under an assumed name, or under any designation other than the real names of the individuals, unless they filed a certificate setting forth the name under which the business was to be conducted and the true names of the persons conducting it. In *Hale v. City Cab, Carriage & Transfer Co.* 66 Wash. 459, 119 Pac. 837, the name "Hale-Tindall Company," which name contained the names of all the partners, was held not to be an assumed name, within the statute requiring that a certificate be filed of the names of all the members of a partnership doing business under an assumed name.

From the above cases it must be concluded that a partnership doing business under the firm name and style of *Bolen Bros.* was not transacting business under a fictitious name or designation, when composed of persons whose names were *Bolen*, and who were brothers, as would make the doing of business by it without compliance with the statute, in violation of law, or preclude them as partners from recovering in the present action should they establish their claim. An excellent case supporting this conclusion is *Re Richards Bros.* (D. C.) 206 Fed. 932. There, after making special mention of the *Pendleton v. Cline* Case, it was said:

"The courts of Oklahoma, South Dakota, and North Dakota followed the reasoning of the California court in *Pendleton v. Cline*; *Patterson v. Byers*; *Bovee v. De Jong*; and *Walker v. Stimmel*,—*supra*. The Ohio court, after certain conflicting decisions between the inferior courts, finally decided this matter in *Cochran v. Hirsch*, 6 Ohio S. & C. P. Dec. 41, holding that the style '*Hirsch Bros.*' was not a fictitious name. In this case the Ohio court again cites with approval the California case of *Pendleton v.*

Cline, *supra*. After the courts of all these other states, with statutes similar to California, had followed the case of *Pendleton v. Cline*, and had assumed that, if a man by the name of *Pendleton* and a man by the name of *Williams* could do business under the name of '*Pendleton & Williams*' without violating the statute, two brothers could do business in their surname with the word '*Bros.*' added, then in 1902 came the decision in the California supreme court in *North v. Moore*, 135 Cal. 621, 67 Pac. 1037, holding that the name '*Abrams Bros.*' was a violation of the California statute, and that it did not show the names of the persons interested as partners. It is a very brief opinion. No argument nor reasons are given for the results reached. Absolutely no reference is made to their own opinion in *Pendleton v. Cline* and the other decisions of their own court, and in numerous other states which had followed *Pendleton v. Cline*. A careful reading of the case of *North v. Moore*, *supra*, indicates that no one appeared before the court to represent the appellant, and that the decision of the lower court was affirmed on the supposition that the appeal from the order of the lower court had been abandoned. There is nothing in this case to indicate that there was any intention on the part of the California court to change the rule laid down in *Pendleton v. Cline*, and there is nothing in this decision which should change the uniform holding of the courts that names like '*Richards Bros.*' are not assumed or fictitious."

It follows that the trial court erred in sustaining defendant's motion to dismiss plaintiffs' petition, for which the cause is reversed and remanded.

All the Justices concur.

Annotation—What names or designations are within statutes requiring the filing of a certificate giving certain information regarding a business conducted under an assumed or fictitious name or a designation not showing the names of the persons interested.

As to the validity of contracts made by an individual or a partnership under an assumed name in violation of statute, see note to *Hunter v. Patterson*, L.R.A. 1915D, 988.

As to the right of an individual to change his name or to transact business and make contracts under an assumed name, see note to *Robinovitz v. Hamill*, L.R.A. 1915D, 982.

As to the liability of one who sells a business, for supplies subsequently furnished therefor on credit, while it is being conducted under the same name, L.R.A. 1916D.

see note to *Hendley v. Bittinger*, L.R.A. 1915F, 711.

Statutes of the kind in question, with two or three variations in form, have been passed, and construed in the particular considered in this annotation, in at least ten states. In California, Montana, North Dakota, Ohio, Oklahoma, and South Dakota (and perhaps other states) the statute provides that every partnership transacting business in the state under a fictitious name, or a designation not showing the names of the persons interested as partners in such

business, must file a certificate stating the names, in full, of all members of the partnership, etc. In Michigan, New York, and Washington (and perhaps other states) the statute provides that no person or persons shall carry on or conduct or transact business in the state under any assumed name, or under any designation, name, or style other than the real name or names of the individual or individuals conducting such business, etc., unless such person or persons shall file a certificate setting forth the name under which the business is conducted and the true or full name or names of the persons owning or conducting it, etc. And in Washington, at least, a proviso is added, that the statute shall not be deemed to prevent the lawful use of a partnership name which includes the true and real name or names of all of the parties conducting such business or having an interest therein. In Vermont (and perhaps other states) the statute requires that a person doing business in the state under any name other than his own, and every copartnership doing business in the state under any name which does not contain the surnames of all copartners without any other descriptive or designating words, except the Christian names or initials of such copartners, shall make and file returns setting forth certain facts, etc. For other provisions of the respective statutes, which are not material to the subject of the present annotation, or which have not yet been construed in the particular here considered, see the laws of the respective states.

It is well settled that a firm or partnership name consisting of the surnames of the partners, joined by "&" or "and," is not an assumed or fictitious name, or a designation not showing the names of the persons interested as partners, or a designation, name, or style other than the real names of the persons conducting the business, within the meaning of any of the statutes. *Pendleton v. Cline* (1890) 85 Cal. 142, 24 Pac. 659; *Carlock v. Cagnacci* (1891) 88 Cal. 600, 26 Pac. 597; *McLean v. Crow* (1891) 88 Cal. 644, 26 Pac. 596; *Lamberson v. Bashore* (1914) 167 Cal. 387, 139 Pac. 817 (distinguishing *North v. Moore* (Cal.) *infra*); *Walker v. Stimmel* (1906) 15 N. D. 484, 107 N. W. 1081; *Czatt v. Case* (1899) 61 Ohio St. 392, 55 N. E. 1004; *Kinsey v. Ohio Southern R. Co.* (1895) 3 Ohio S. & C. P. Dec. 249; *Clark v. Doe* (1896) 8 Ohio S. & C. P. Dec. 685; *Bovee v. De Jong* (1908) 22 S. D. 163, 116 N. W. 83; *Bowman v. L.R.A.* 1916D.

Harrison (1910) 59 Wash. 56, 109 Pac. 192.

And the partnership name, "*Hale-Tindall Co.*," containing the surnames of all the partners, is sufficient as falling within the proviso to the Washington statute. *Hale v. City Cab, Carriage & Transfer Co.* (1912) 66 Wash. 459, 119 Pac. 837.

Similarly, *BOLEN v. LIGETT* is supported by the following cases, holding that a partnership or firm name, style, or designation consisting of the common surname of brothers who compose the partnership or firm, followed by the abbreviation "*Bros.*," is not an assumed or fictitious name, or a designation not showing the names of the persons interested, or a designation, name, or style other than the real name or names of the partners, within the meaning of any of the several statutes: *Re Richards Bros.* (1913) 206 Fed. 932 (under Michigan statute); *Cross v. Leonard* (1914) 181 Mich. 24, 147 N. W. 540; *Guiterman v. Wishon* (1898) 21 Mont. 458, 54 Pac. 566; *Vaughan v. Kujath* (1912) 44 Mont. 484, 120 Pac. 1121; *Castle Bros. v. Graham* (1903) 87 App. Div. 97, 84 N. Y. Supp. 120, affirmed without opinion in (1905) 180 N. Y. 553, 73 N. E. 1120; *Cochran v. Hirsch* (1896) 6 Ohio S. & C. P. Dec. 41.

But, on the other hand, in *North v. Moore* (1902) 135 Cal. 621, 67 Pac. 1037, the court, affirming a judgment which had been rendered against certain of the plaintiffs who were copartners under a firm name consisting of their common surname followed by the word "*Bros.*" ("*Abrams Bros.*"), on the ground that they had not filed any certificate as required by statute,—said: "Appellants offered no evidence in support of the alleged partnership, and they make no answer in their brief to this defense. They make no objection to the judgment, except as it affects their claim against defendant *Moore*. '*Abrams Bros.*' cannot be said to be a designation 'showing the names of the persons interested as partners.' The firm name might apply equally to a partnership composed of two or more, and might embrace all or only some of the brothers of the name of *Abrams*. The statute clearly defeats their right to maintain the action against *Moore*, and leaves them without any right to be heard on this appeal. We have, however, examined the record, and can discover no error."

And in *Doob v. Lovell Mfg. Co.* (1893) 4 Ohio S. & C. P. Dec. 189, it was held that the name, "*M. Doob & Bro.*," ap-

plied to a partnership composed of two brothers, M. & L. Doob, while not a fictitious name, was a designation not showing the names of the persons interested as partners within the meaning of the Ohio statute, the court saying: "M. Doob & Bro. doubtless means M. Doob & Brother. This designation may be interpreted, M. Doob & Doob. It might also include brother of the half-blood, or, by loose interpretation, a brother-in-law. There might also be several brothers. Hence it is not at all clear what the names of the persons are who compose the firm."

Regarding the case of *North v. Moore* (Cal.) supra, however, the court, in *Re Richards Bros.* (Fed.) supra, said: "After the courts of all these other states, with statutes similar to California, had followed the case of *Pendleton v. Cline* (1890) 85 Cal. 142, 24 Pac. 659, and had assumed that, if a man by the name of Pendleton and a man by the name of Williams could do business under the name of 'Pendleton & Williams' without violating the statute, two brothers could do business in their surname with the word 'Bros.' added, then in 1902 came the decision in the California supreme court in *North v. Moore* (Cal.) supra, holding that the name 'Abrams Bros.' was a violation of the California statute, and that it did not show the names of the persons interested as partners. It is a very brief opinion. No argument nor reasons are given for the results reached. Absolutely no reference is made to their own opinion in *Pendleton v. Cline* and the other decisions of their own court, and in numerous other states which had followed *Pendleton v. Cline*. A careful reading of the case of *North v. Moore* (Cal.) supra, indicates that no one appeared before the court to represent the appellant, and that the decision of the lower court was affirmed on the supposition that the appeal from the order of the lower court had been abandoned. There is nothing in this case to indicate that there was any intention on the part of the California court to change the rule laid down in *Pendleton v. Cline*, and there is nothing in this decision which should change the uniform holding of the courts that names like 'Richards Bros.' are not assumed or fictitious."

And in *Cochran v. Hirsch* (Ohio) supra, the court says, concerning the Doob Case: "The reasoning of the learned judge would have brought me to a different conclusion. He reasons that 'M. Doob & Bro.' means M. Doob & Doob, L.R.A.1916D.

and, if that be true, following the decision made in the California case [*Pendleton v. Cline* (Cal.) supra], it will be equivalent to saying 'Pendleton & Williams.'" But the court, in the Doob Case, also said, further, assuming that under the authority of the California cases cited, "partners doing business as Doob & Doob or M. Doob & Doob would not be required to register under the provisions of the act in question, yet I do not think their reasoning should be extended to a case such as the one under consideration."

And in *Lamberson v. Bashore* (1914) 167 Cal. 387, 139 Pac. 817, the supreme court of California further said: "The case of *North v. Moore* (1902) 135 Cal. 622, 67 Pac. 1037, is not in opposition to the other authorities cited above. From the designation 'Abrams Bros.' it would be impossible to determine how many persons were in the firm. But 'Lamberson & Lamberson' indicates that two persons of that name are engaged in business together."

And "there can be no doubt that" the firm name "Wilson Bros. Garage," although used by two brothers whose common surname is "Wilson," is a "name which does not contain the surnames of all copartners . . . without any other descriptive or designating words, except the Christian names or initials of such copartners," within the Vermont statute. *Wilson Bros. Garage v. Tudor* (1915) — Vt. —, 95 Atl. 794.

"The firm name of William Axe & Son," however, is not "an assumed or fictitious name in contemplation of the [Michigan] statute," as applied to a firm composed of the person named in full, and his son. "There is nothing fictitious or misleading or uncertain in the name. It gives the full name of the head of the firm, and plainly discloses the identity of the other member. Persons doing business with the firm would be advised who the members were and whom to hold responsible." *Axe v. Tolbert* (1914) 179 Mich. 556, 146 N. W. 418.

Nor is a partnership name consisting of the full name of one of the two partners composing the firm, followed by the words "& Co." either assumed or fictitious within the Michigan statute. *Zemon v. Trim* (1914) 181 Mich. 130, 147 N. W. 540.

But in *Byers v. Bourret* (1883) 64 Cal. 73, 28 Pac. 61, a name of this kind ("J. D. Byers & Co.," used by J. D. Byers and another, as copartners) was apparently assumed to be within the

California statute,—a judgment for the plaintiffs in a suit to recover on a note payable to "J. D. Byers & Co." having been reversed and the cause remanded with instructions to render judgment for the defendant on the ground that the plaintiffs had not filed and published the required certificate.

A name consisting of the common surname of two partners composing a firm, followed by the words "Furnace Co.," however, is neither a fictitious name nor a designation not showing the names of the partners interested as partners, within the Oklahoma statute. *Patterson v. Byers* (1907) 17 *Okla.* 633, 89 *Pac.* 1114, 10 *Ann. Cas.* 810.

And a name used by an individual, which consists of his full name followed by the words "Automobile Co.," is within the proviso to the Washington statute, so that he is not required to file the certificate. *Merrill v. Caro Invest. Co.* (1912) 70 *Wash.* 482, 127 *Pac.* 122.

And a statute requiring every partnership transacting business under a fictitious name or a designation not showing the names of the persons interested in the business, to file a certificate stating the facts, etc., does not apply to a single individual doing business under his surname followed by the words "Furniture and Carpet Co." (*Lander v. Sheehan* (1905) 32 *Mont.* 25, 79 *Pac.* 406); or under her surname followed by the word "Sisters" (*Oklahoma F. Ins. Co. v. Wagester* (1913) 38 *Okla.* 291, 132 *Pac.* 1071).

But "it is plain that" two partners doing business under the name and style of the "Elite Theatre" "were conducting business as partners under a fictitious name within the meaning of" the Oklahoma statute, "and were therefore required to publish the certificate prescribed" thereby. *Farquharson v. Wadkins* (1915) — *Okla.* —, 153 *Pac.* 1160.
A. C. W.

GEORGIA SUPREME COURT.

CENTRAL GEORGIA POWER COMPANY,
Plff. in Err.,
v.

W. C. POPE.

(141 Ga. 186, 80 S. E. 642.)

Venue — nuisance — loss of rent.

1. As to the question of venue, this case is controlled by the decision in *Central Georgia Power Co. v. Stubbs*, 141 Ga. 172. For other cases, see *Venue*, I. in *Dig.* 1-52 N. S.

Damages — nuisance — permanent injury.

2. In cases of nuisances which cause permanent injury to land, the ordinary rule is that the measure of damages is the depreciation in the market value; in regard to nuisances which are of a nonpermanent, abatable, or temporary nature, the depreciation in the usable or rental value ordinarily furnishes the measure. But, under some circumstances, there may also be a recovery for special damages.

For other cases, see *Damages*, III. k, 4, in *Dig.* 1-52 N. S.

Headnotes by LUMPKIN, J.

Note. — A careful search has failed to disclose any other case than *CENTRAL GEORGIA POWER CO. v. POPE* passing upon the question of the right to damages for injury to business from a nuisance resulting in the depopulation of a community or neighborhood. It would seem, as stated by the court, that damages of this kind are too remote to be recoverable.

In connection with this question, however, see note to *Liermann v. Milwaukee*, 1907, 13 L.R.A.(N.S.) 253, as to loss of customers as an element of damages from the obstruction of highway, and see also the case L.R.A.1916D.

Same — double.

3. An owner of land alleged to have been injured cannot have a recovery of such a character as to include double damages for the same injury.

(a) Under the demurrer in the present case, it is unnecessary to lay down any exact rule as to when a nuisance may be treated as permanent, and when as nonpermanent.

For other cases, see *Damages*, III. k, 4, in *Dig.* 1-52 N. S.

Same — interference with access.

4. If an actionable nuisance interferes with ingress to and egress from a store, or so injuriously affects the property as to render it wholly or partly unsuitable for use or rent, or deters customers from resorting thereto, and proximately causes a loss of custom in an established business, this will furnish a basis for recovery of damages.

For other cases, see *Nuisance*, II. a, in *Dig.* 1-52 N. S.

Same — loss of custom.

5. If a company, for the purpose of operating an electric plant, erected a dam in

of *Henderson v. Lexington*, 22 L.R.A.(N.S.) 20. The notes in 8 L.R.A.(N.S.) 227, and 21 L.R.A.(N.S.) 75, deal with the obstruction of the highway preventing access to property except by a circuitous route, as special injury entitling the owner to maintain an action for damages or to abate the nuisance. And as to whether the fact that one is prevented by an unlawful obstruction from using a highway causes him a special damage which will sustain an action by him against the wrongdoer, see notes in 28 L.R.A.(N.S.) 1053, and L.R.A.1915D, 142.

such manner as to create a nuisance by backing water from which mosquitoes were bred and miasma caused, so that many people in the vicinity were made sick, and some died, and others moved away, and thereby the custom of the plaintiff at his store was decreased, loss of custom thus resulting would not furnish a basis for recovery by him, at least unless the injury to others was alleged and shown to have been wilful, and for the purpose of injuring the plaintiff.

For other cases, see Nuisances, II. a, in Dig. 1-52 N. S.

Same — interference with dwelling.

6. The owner of a dwelling house which he occupies as a home may recover just compensation for the annoyance and discomfort occasioned by the maintenance by another of a nuisance on adjacent premises.

(a) The subject of treating depreciation in rental value, not as an independent basis of recovery, but as bearing on the amount to be recovered for annoyance and discomfort in the use of a dwelling house, is not now involved.

(b) The different means of measuring damages are not to be so applied as to give double damages for the same thing.

For other cases, see Nuisances, II. a; Damages, III. k, l, in Dig. 1-52 N. S.

Pleading — demurrer.

7. The other grounds of the demurrer to the petition as amended were without merit.

For other cases, see Pleading, VII. c, in Dig. 1-52 N. S.

(December 19, 1913.)

ERROR to the Superior Court for Newton County to review a judgment in plaintiff's favor in an action brought to recover damages for injury to plaintiff's business alleged to have been caused by the creation of a nuisance by defendant. Affirmed in part.

The facts are stated in the opinion.

Messrs. Hatcher & Smith and Greene F. Johnson for plaintiff in error.

Messrs. Rogers & Knox, for defendant in error:

The courts of Newton county have jurisdiction over the defendant in suits for torts committed in the county.

Atlanta, B. & A. R. Co. v. Atlantic Coast Line R. Co. 138 Ga. 356, 75 S. E. 468; Georgia R. & Bkg. Co. v. Bennefield, 138 Ga. 670, 75 S. E. 981; Davis v. Central R. & Bkg. Co. 17 Ga. 339.

If one's unlawful act is the efficient cause of an injury, his personal presence at the time of its beginning, its continuance, or its results is not essential, but he is responsible for the consequences thereof, even if he stands afar off, out of sight, or in another jurisdiction.

Brown, Jurisdiction of Courts, § 92.
L.R.A.1916D.

Lumpkin, J., delivered the opinion of the court:

The headnotes require no elaboration except in one or two particulars.

In applying different possible measures of damages, they should not be so used as to duplicate damages for the same injury. Thus, to illustrate, to allow a recovery on account of the loss of the rental value of a tract of land or part of a tract, the loss of its value for use, and the loss of crops upon the same tract or part for the same year, would be to permit the plaintiff to recover more than once for substantially the same item of damages. The rules for measuring damages should not be so applied as to work this result.

Again, the court, over objection, allowed an amendment to the petition, in one part of which damages to the extent of \$5,000 were claimed because of injury to the plaintiff's mercantile business. The amendment alleged that the plaintiff had a storehouse upon his property, where he conducted a profitable mercantile business; that prior to the erection of the dam he sold \$18,000 or \$20,000 worth of goods annually; that for the then current year he might probably be able to sell \$5,000 worth of goods; that he had established a trade and good will in his business, of the value of \$5,000 per year; and that he had been damaged in that sum. He then proceeded to allege the cause of this damage as follows: "On account of the nuisance created by defendant's dam, and the malaria and the mosquitoes therefrom arising and being in that community, the customers of plaintiff have been made sick, and some died, and many others moved away, so much so that a once happy and prosperous section of Newton county has become almost a waste and howling wilderness, and the common schools and Sunday schools and churches broken up, and, out of 124 plows before the dam was built, there are now left 14 plows in one community. The greater portion of plaintiff's trade was derived from customers who lived in that neighborhood, and plaintiff had built up a special trade in his line among the people living near his store, with an annual profit of \$5,000. Plaintiff alleges that, on account of the building of the dam by defendant and sickness and mosquitoes therefrom in that community, nearly all of his customers have moved away, and that part of his trade has been diverted into other channels, and has been lost to him; and, further, these customers have formed trade relations elsewhere with other parties, and will never return to the plaintiff. He further says that he lost in bad debts in 1911 \$2,000 for goods sold at said store, which he could not collect on account of

sickness caused by the defendant, and that he lost the profit on \$5,000 worth of goods, which he would have sold but for this sickness, and also profit on \$15,000 worth of goods in 1912; and for the damage of his business, the good will thereof, he sues for \$5,000, and asks judgment therefor."

Generally, a tort committed upon one person furnishes no cause of action in favor of another. In the complexity of human life, it is rarely the case that a homicide of one person, or a serious personal injury inflicted upon him, does not indirectly affect others. To maim a member of a firm, and thus disqualify him from the performance of his duties, may result in serious consequential loss to his partners. To kill or wound a debtor may lessen the chances of his creditors to obtain payment. To hurt an agent may incidentally affect his principal. But ordinarily these incidental damages arising from an injury committed, not upon the party so damaged, but upon a third person, furnish no right of action to the party thus indirectly affected. Numerous other illustrations might be given. We are not here concerned with the relations of husband and wife, parent and child, or master and servant, and the rights of action which may arise from them by statute or common law. Even where there was a contract relation between the person upon whom the tort was directly committed and the person who claimed to be damaged, it has been declared that, if the injury consists only in impairing the ability or inclination of the former to perform his part, or increasing the plaintiff's expense or labor of fulfilling such contract, this furnishes no right of recovery to the plaintiff unless the wrongful act was wilful, and for that purpose. 1 Sutherland, Damages, 3d ed. 99, § 33; Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265, 65 Am. Dec. 571; Brink v. Wabash R. Co. 160 Mo. 87, 53 L.R.A. 811, 83 Am. St. Rep. 459, 60 S. W. 1058.

In McNary v. Chamberlain, 34 Conn. 384, 91 Am. Dec. 732, a declaration alleged that the plaintiff had contracted with the town of H. to keep a highway in repair for three years, and that the defendant, intending to injure the plaintiff, deposited a quantity of stone and rubbish on the road, and obstructed a drain so that the water ran over and injured the road, by means of which the plaintiff was subjected to greater expense in keeping the road in repair. On demurrer, it was held that, if the acts mentioned were done with an actual intent to injure the plaintiff, the defendant was liable. The amendment in the present case does not measure up to the allegations there considered. It is alleged that, on L.R.A.1916D.

account of the malaria and mosquitoes arising from the pond caused by the defendant's dam, customers of the plaintiff were made sick, and some of them died, and others moved away from the vicinity. It is not pretended that the defendant killed some of the plaintiff's customers, and made others sick, for the purpose of destroying his business. The damages sought to be recovered on this account are too remote. If the plaintiff could recover on this basis, is it not readily perceived why a merchant might not bring an action against a railroad company for loss of custom arising from the death of a good customer caused by its negligence, or why, if one person should create a nuisance in a neighborhood which should cause one of the residents to move to another place, every merchant with whom such person dealt before his removal could not recover because his patronage had been lost after his change of residence? It will be readily seen that such claims for damages might be extended into almost limitless ramifications. They do not fall within the rules in cases where property has been physically injured, or there has been some interference with an easement or right connected with or appurtenant thereto.

Thus, in some cases there was an interference with the means of ingress and egress. Harvey v. Georgia Southern & F. R. Co. 90 Ga. 66, 15 S. E. 783; Brunswick & W. R. Co. v. Hardey, 112 Ga. 604, 52 L.R.A. 396, 37 S. E. 888. In another a city erected in a street a bridge which resulted in permanent injury to the business conducted by a lessee of abutting property. Pause v. Atlanta, 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489. In other cases there was a physical interruption of business. Sturgis v. Frost, 56 Ga. 188; Juchter v. Boehm, 67 Ga. 534. It may also be true that if, by means of a nuisance, one renders the place of business of another so unhealthy or unpleasant as to drive away customers or prevent their coming to it, the person creating the nuisance may be liable. Bonner v. Welborn, 7 Ga. 296; 4 Sutherland, Damages, 3d ed. 1050. And although a nuisance may also cause damage to others, this does not destroy the plaintiff's right of action for injury peculiar to his property. 4 Sutherland, Damages, 3d ed. § 1058. The facts in such cases are easily distinguishable from those alleged here. Injury to property or property rights causing loss of custom in an established business is not the same as injury to customers claimed to result in damage to the property owner.

In the original petition there was a statement that the defendant, "contriving and intending to injure, prejudice, and aggrieve

the plaintiff, and to incommode and annoy him in the possession, occupation, and enjoyment of his said lands, wrongfully, injuriously, and negligently, and improperly erected its dam, and constructed its plant," without acquiring, by purchase or condemnation, sufficient lands on the banks of certain rivers to enable it to back water in them without injuring him. But this had no relation to killing his customers, or making them sick, or causing them to move

from the community, with a specific intent to injure him, and such general allegations in the original petition are not sufficient to free the portion of the amendment under discussion from being subject to objection. It should have been stricken or rejected on the ground herein indicated.

Judgment affirmed in part, and reversed in part.

All the Justices concur.

KANSAS SUPREME COURT.

W. C. HALL

v.

KANSAS CITY TERRA COTTA COMPANY.

SOUTHWEST NATIONAL BANK OF KANSAS CITY, MISSOURI, Interpleader, Appt.

(97 Kan. 103, 154 Pac. 210.)

Garnishment — assigned proceeds of contract.

1. Where a defendant corporation assigned to a bank the proceeds of a contract due and to become due for furnishing materials and labor to a building contractor, such assignment is valid as against a garnishment of the funds in the hands of the building contractor.

For other cases, see Garnishment, II. c, in Dig. 1-52 N. S.

Assignment — proceeds of building contract.

2. Such an assignment is not a chattel mortgage requiring registration to be valid against the claim of another creditor proceeding by writ of garnishment.

For other cases, see Garnishment, II. c, in Dig. 1-52 N. S.

(January 8, 1916.)

APPPEAL by interpleader from an order of the District Court for Montgomery County denying its motion for a new trial of an action brought to recover the amount alleged to be due on a promissory note, and to garnish an amount owing to defendant to be applied upon plaintiff's claim, in which judgment was entered for plaintiff against the claim of the interpleader. Reversed.

The facts are stated in the opinion.

Messrs. W. E. Ziegler, Edgar C. Ellis, Hale H. Cook, and Raymond G. Barnett, for appellant:

The assignment and delivery to the ap-

Headnotes by DAWSON, J.

Note. — As to garnishment of money due or to become due on a contract the proceeds of which have been assigned by the debtor prior to the garnishment, see annotation following this case, post, 363.
L.R.A.1916D.

pellant bank of the Neville contract, to secure a valid debt and to secure a loan then made, gave the bank paramount right to the amount in controversy. The assignment was valid as against a subsequent attaching creditor, though no notice was given.

Clark v. Wiss, 34 Kan. 553, 9 Pac. 281; Corser v. Craig, 1 Wash. C. C. 424, Fed. Cas. No. 3,255; United States v. Vaughan, 3 Binn. 304, 5 Am. Dec. 375; Muir v. Schenck, 3 Hill, 228, 38 Am. Dec. 633; Beckwith v. Union Bank, 9 N. Y. 211; Columbia Finance & T. Co. v. First Nat. Bank, 116 Ky. 364, 76 S. W. 156; Whittredge v. Sweetzer, 189 Mass. 45, 75 N. E. 222; Thayer v. Daniels, 113 Mass. 129; Central Trust Co. v. West India Improv. Co. 169 N. Y. 314, 62 N. E. 387; Niles v. Mathusa, 162 N. Y. 546, 57 N. E. 184; Downer v. South Royalton Bank, 39 Vt. 25; Tingle v. Fisher, 20 W. Va. 497; 20 Cyc. 1012-1017.

The transfer and actual delivery of the Neville contract by defendant to the bank amounted in law to a pledge of that contract and of the beneficial interest therein and all moneys which might be derived therefrom. This, under the doctrine of pledges, gave the bank a superior right to the amount in controversy.

Citizens' Nat. Bank v. Bank of Commerce, 80 Kan. 205, 101 Pac. 1005; 22 Am. & Eng. Enc. Law, 2d ed. 842, 844, 851, 856, 867, 868, notes; First Nat. Bank v. Harkness, 42 W. Va. 156, 32 L.R.A. 408, 24 S. E. 548; 31 Cyc. 785, 787, 793, 796, 799; Cameron v. Marvin, 26 Kan. 612; Raper v. Harrison, 37 Kan. 243, 15 Pac. 219.

It was error for the court to find that the assignment and delivery of the contract were void as being in the nature of an unrecorded chattel mortgage.

Jones, Chat. Mortg. 2d ed. § 278; Preston Nat. Bank v. George T. Smith Middlings Purifier Co. 84 Mich. 364, 47 N. W. 502; Lawrence v. McKenzie, 88 Iowa, 432, 55 N. W. 505; Bacon v. Bonham, 27 N. J. Eq. 209; Marsh v. Woodbury, 1 Met. 436; Monroe v. Hamilton, 60 Ala. 226; Vanmeter v. McFaddin, 8 B. Mon. 435; Winsor v. McLellan, 2 Story, 492, Fed. Cas. No. 17,887; Newby v. Hill, 2 Met. (Ky.) 530; William-

son v. New Jersey Southern R. Co. 26 N. J. Eq. 398; Kirkland v. Brune, 31 Gratt. 126; Spalding v. Paine, 81 Ky. 416.

Messrs. J. H. Keith, A. R. Lamb, and W. S. Keith, for appellee:

Property not in existence is not subject to pledge or mortgage.

Long v. Hines, 40 Kan. 216, 10 Am. St. Rep. 189, 16 Pac. 339; 40 Kan. 220, 10 Am. St. Rep. 192, 19 Pac. 796; Cameron v. Marvin, 26 Kan. 612; T. B. Townsend Brick & Contracting Co. v. Allen, 62 Kan. 311, 52 L.R.A. 323, 84 Am. St. Rep. 388, 62 Pac. 1008; First Nat. Bank v. McIntosh & P. Live-Stock & Commission Co. 72 Kan. 603, 84 Pac. 535.

To preserve the lien of a pledgee or to retain the title as a mortgagee in possession, the pledgee or mortgagee must, after the delivery of the property, continue to have the actual possession, care, custody, and control of the property mortgaged or pledged, and this possession cannot be held by the mortgagor or pledgeor as agent of the mortgagee or pledgee.

Swiggett v. Dodson, 38 Kan. 702, 17 Pac. 594; Smith-Frazer Boot & Shoe Co. v. Ware, 47 Kan. 483, 28 Pac. 159; Moore v. Shaw, 1 Kan. App. 103, 40 Pac. 929; Geiser Mfg. Co. v. Murray, 84 Kan. 450, L.R.A.—, 114 Pac. 1046; Frankhouser v. Fisher, 54 Kan. 738, 39 Pac. 705.

To constitute a valid pledge, delivery of the thing pledged must be first made, and then the pledgee must continue in the actual possession and control of the property pledged.

Raper v. Harrison, 37 Kan. 245, 15 Pac. 219; Atkinson v. Bush, 91 Kan. 860, 139 Pac. 393; Cray v. Doty, 77 Kan. 448, 94 Pac. 1009.

Dawson, J., delivered the opinion of the court:

The plaintiff, W. C. Hall, commenced this action on October 12, 1912, against the Kansas City Terra Cotta Company to recover on the defendant's promissory note, and on the same day caused garnishment proceedings to be served on Albert Neville, a Coffeyville contractor. Neville, the garnishee, answered and alleged that on July 26, 1912, he had entered into a written contract with the defendant, the Kansas City Terra Cotta Company, for certain materials to be delivered to him at Coffeyville on or before September 20, 1912. Other allegations covered failure of the terra cotta company to comply in full with its contract, consequent damages to garnishee, including freight bills which he was compelled to pay for the defendant, etc. He also pleaded that on November 16, 1912, he had been notified by the Southwest National Bank of Kansas L.R.A.1916D.

City, Missouri, that the claim of the terra cotta company had been assigned to it on September 16, 1912, and advising him that all the proceeds of his contract should be paid to the bank. He also prayed that the bank should be impleaded and required to set up its rights, and that he be protected.

By leave of court, the bank filed its answer and cross petition, and by agreement of parties, and with the approval of the court, Neville, the garnishee, was permitted to pay into court a sum of money and was discharged. This action thereupon proceeded between the plaintiff and the interpleading bank.

Incorporated in the terms of the terra cotta company's note of September 16, 1912, to the bank, was the following: "Having deposited with said bank as collateral security (being the legal holder) for the payment thereof, and also for all other present or future demands or claims of any kind of the said bank against the undersigned, due or not due (give brief description or summary of collateral here), sundry contracts which the makers and indorsers hereof hereby authorize said bank, or its president or cashier, to sell without notice at public or private sale at option of said bank or its assigns (and with the right to said bank or its assigns to be the purchaser of all or any part of said collateral, at any such sale), in case of nonperformance of the promise, applying the net proceeds to the payment of the note, including interest, and accounting for the surplus, if any, and in case of deficiency, promise to pay said bank, or its order, the amount thereof forthwith after such sale, with interest as provided above; and in case of any exchange of, or additions to, the collaterals above named, the provision of this note shall extend to such new or additional collaterals. The margin of collaterals to be kept satisfactory to said bank, or in default thereof, the note to become due and payable."

The instrument purporting to assign the Neville contract to the bank professed on its face to be an "assignment of collateral, contracts for work and material." In substance it recited that the terra cotta company was a customer of the bank, indebted to it, and contemplated further indebtedness, and to secure the payment thereof the debtor set over to the bank certain items including the Neville contract, and continues thus:

"The purpose of this assignment is to transfer to assignee the net contract price, that is to say, the sums due and to accrue upon this contract to assignor over and above necessary expenditures of like nature at the point of construction,—no allowances for outlays or expenditures at point of

manufacture to be made except upon written consent of assignee.

"To avoid embarrassment to business of assignor and to relations of assignor with contracting parties, assignor is hereby made agent of assignee, to receive and receipt for sums due and payable and to become due and payable upon the above assigned items; however, same to be for account and use of assignee, and all sums so collected by said assignor to be forthwith turned over to assignee for credit in pursuance of the purpose above stated. Provided, however, that this agency is to be subject to revocation by assignee, and right of accounting at any and all times is expressly reserved."

The district court found that the terra cotta company was indebted to the bank, and that, for the purpose of securing the same and to procure a further loan which was then made, the contract between Neville and the terra cotta company was assigned and delivered to the bank on September 16, 1912; that the bank did not notify Neville until about a month after this action and garnishment were begun. The court's judgment, in part, proceeds thus: "The court further finds that said assignment, taken and considered in connection with a number of similar transactions between the said terra cotta company and the bank, and their method of doing business and course of dealing, as shown by the evidence, is and was a conveyance intended to operate as a mortgage of personal property, and that it was not accompanied by a delivery to the bank of the property, nor was it followed by any actual or continued change of possession of the property covered by the conveyance. The court further finds that neither said assignment from said terra cotta company to said bank, nor any copy thereof, was ever filed or made of record in the office of the register of deeds of Montgomery county, Kansas, or elsewhere, and that the said assignment is void as against the plaintiff, W. C. Hall."

From this judgment and its incidents the bank appeals.

The general rule is that garnishment, like other proceedings in invitum, only affects the actual property, money, credits, and effects of the debtor in the hands of the garnishee, and the rule relating to bona fide holders or purchasers without notice has no application. *Kansas Invest. Co. v. Jones*, 2 Kan. App. 638, 42 Pac. 935; *Bradley v. Byerley*, 3 Kan. App. 357, 42 Pac. 930; *Johnson v. Brant*, 38 Kan. 754, 17 Pac. 794; *Rock Island Lumber & Mfg. Co. v. Equitable Trust & Invest. Co.* 54 Kan. 124, 37 Pac. 983; *Citizens Nat. Bank v. Bank of Commerce*, 80 Kan. 205, 207, 101 Pac. 1005; *Mason v. Saunders*, 89 Kan. 300, 131 L.R.A.1916D.

Pac. 562. In 20 Cyc. 1012, it is said: "Where the principal defendant has made a valid assignment of the garnishee's indebtedness, or conveyance of the property in his possession belonging to such defendant, before the service of the summons upon the garnishee, the latter cannot be charged on account of such debt or property. The above rule is especially applicable to bills of exchange, promissory notes, and other evidences of indebtedness, and where such paper is assigned or transferred in good faith before the drawer, maker, or indorser thereof is served in garnishment proceedings by a creditor of the payee, or of the last holder thereof, the rights of the assignee or transferee are not affected by such proceedings." Page 1013.

"In the absence of statutory provision prescribing the mode of assignment, no particular mode or form is necessary to effect a valid assignment of property, claims, or debts so as to defeat garnishment proceedings by a creditor of the assignor. If the intent of the parties to effect an assignment be clearly established, that is sufficient, and the assignment may be in the form of an agreement or order or any other instrument which the parties may see fit to use for that purpose. . . . The rule is sometimes broadly stated that an assignment is not complete so as to defeat proceedings in garnishment until the garnishee is notified thereof; however, this rule seems to be subject to limitations; thus, as between assignor and assignee, it is not necessary to the validity of an assignment that the garnishee be notified thereof; and the assignment will likewise be complete as against creditors of the assignor instituting garnishment proceedings after assignment and before notice of the assignment to the garnishee, provided that notice of the assignment be given to the garnishee in time to permit him to disclose the assignment in his answer to the garnishee process." Pages 1014, 1016, 1017.

The district court treated the assignment of the contract between the terra cotta company and Neville as a chattel mortgage. If it were treated as a mortgage of the contract, then the possession of the contract by the bank would obviate all necessity for its registration. Nothing is more common than the advancement of funds to contractors and manufacturers, and while banks with proper prudence usually take more tangible security than the potential and possible future profits of the pending contracts of the borrowers, yet there is no impropriety in taking an assignment of the latter also; nor does the statute require such assignments to be recorded.

When the borrower thus assigns his contract or the possible profits of his contract

in good faith, such assignments should be respected. Nor can a later garnishing creditor justly complain. The garnishment process only reaches the property, assets, and credits of the debtor, and not that of which the debtor was formerly the owner, nor that which he has lawfully assigned to a third party.

This view seems to be amply sustained by the authorities. In *Clark v. Wiss*, 34 Kan. 553, 555, 9 Pac. 281, 283, it was held that "a debt due for goods sold and delivered, and resting for evidence on a book account, may be assigned, and such assignment is valid if made by mere delivery."

In the case at bar, the debt due from Neville to the terra cotta company for goods sold and delivered, and resting for evidence on a written contract, was assigned to the bank, and such assignment must likewise be valid though made only by mere delivery of the contract.

In *Citizens' Nat. Bank v. Bank of Commerce*, 80 Kan. 205, 207, 101 Pac. 1005, 1006, it was said: "We understand that when personal property is pledged the pledgee acquires a right thereto which is superior to any right that can thereafter be given by the pledgeor or be acquired by a subsequent attachment issued in an action against him. 22 Am. & Eng. Enc. Law, 867, 868, and notes; *First Nat. Bank v. Harkness*, 42 W. Va. 156, 32 L.R.A. 408, 24 S. E. 548. The assignment and delivery of the certificate constitute a delivery of the property represented thereby. 22 Am. & Eng. Enc. Law, 866. In the second edition of *Jones on Pledges and Collateral Security*, § 37, it is said: 'A delivery of a document of title, which serves to put the pledgee in possession of the goods, is equivalent to an actual delivery of them.' This question was discussed and authorities were collected in the case of *First Nat. Bank v. Harkness*, supra. See also *Continental Nat. Bank v. Eliot Nat. Bank* (C. C.) 7 Fed. 369. The great weight of authority seems to be that this kind of delivery is sufficient to constitute a pledge. A completed pledge has the effect of depriving the pledgeor of all control over the property, as far as the interest of the pledgee is concerned. He can neither sell nor encumber it so as to dispose of or impair the rights of the pledgee therein. It seems clear that what he cannot do personally cannot be done by a writ of attachment. Generally, the rule has been that an attachment takes only the interest which the owner has when the writ is levied."

The latter case is also pertinent on the question of the necessity for registration or other notice. It was said: "The fact that the attachment creditor acted in good faith and without notice of the pledge is not

important, as there is no law requiring pledges to be recorded."

It is urged that the assignment of this contract was only part of a larger transaction in which the terra cotta company mortgaged its entire plant and assets to the bank, and since such mortgage was unrecorded, it and all its incidents, including this assignment, are void against the plaintiff, armed with a writ of garnishment. This view did not meet the approval of this court in *Clark v. Wiss*, supra, where the assignee of the book accounts prevailed against the garnisheeing creditor, notwithstanding the defects in the mortgage under which the assignee also claimed. Again, it is urged that under the assignment, the bank was only to receive whatever net profit might result from the Neville contract, and there was none such at the time of the assignment, consequently nothing was conveyed to the bank. To this there appears to be two answers: (1) Neville has paid a sum of money into court, which seems to settle the question as to whether he owed the terra cotta company. (2) The instruments from the terra cotta company which we have set out above do not justify the interpretation that only the net profits of the Neville contract were assigned to the bank. The pertinent clause is: "The purpose of this assignment is to transfer to assignee the net contract price; that is to say, the sums due and to accrue upon this contract to assignor over and above necessary expenditures of like nature at the point of construction,—no allowances for outlays or expenditures at point of manufacture to be made except upon written consent of assignee."

The "point of construction" was Coffeyville, and the "point of manufacture" was Kansas City. The net proceeds thus included the cost of manufacture, so that the assignment fairly read covered much more than mere possible net profits. It virtually covered the value of the goods furnished, less possible charges at Coffeyville.

This brings us to the concluding question, and, indeed, to the only question which presents any serious difficulty in this case. We have said that if this conveyance were treated as a chattel mortgage, the physical possession of the contract by the bank would obviate the necessity of its registration. The law is equally well settled that if it were treated as a pledge, neither registration nor notice would be necessary to enforce it. But the appellee, with much force and show of authorities, insists that the appellant cannot rely on these settled principles because the bank did not have exclusive control over the contract and its pertinent incidents: that the bank left the terra

cotta company in control: that the bank disavowed any responsibility to carry out the contract assigned to it; that the terra cotta company afterwards changed and reduced the contract price with Neville without the knowledge and consent of the bank; that it adopted the assignor as its agent to receive and receipt for sums due and to become due under the contract, requiring it to account to the assignee for the moneys thus collected.

Does this situation create any distinction recognized by the precedents? As a chattel mortgage it undoubtedly would do so, for however binding such a mortgage would be between the parties, it would not affect third parties where the mortgage was not recorded and the mortgagee was not in exclusive possession. *Swiggett v. Dodson*, 38 Kan. 702, 17 Pac. 594; *Smith-Frazer Boot & Shoe Co. v. Ware*, 47 Kan. 483, 28 Pac. 159; *Geiser Mfg. Co. v. Murray*, 84 Kan. 450, L.R.A.—, 114 Pac. 1046. The same necessity as to possession applies to pledges; the pledgee must secure and maintain exclusive control of the thing pledged. *Raper v. Harrison*, 37 Kan. 243, 245, 15 Pac. 219; *Gray v. Doty*, 77 Kan. 446, 448, 94 Pac. 1008; *Atkinson v. Bush*, 91 Kan. 860, 139 Pac. 393; 5 R. C. L. 387.

But in our opinion the assignment was neither a chattel mortgage nor a pledge. It was simply what it purported to be,—an assignment of a sum or sums of money due and to become due. There was nothing about the transaction which was unusual or against public policy. This general sub-

ject is one which might well be regulated by statute, but so far it has been left free to develop in the usual course of modern business. *Cameron v. Marvin*, 26 Kan. 612 (Syl. ¶¶ 4, 5); *Columbia Finance & T. Co. v. First Nat. Bank*, 116 Ky. 364, 76 S. W. 156; *Thayer v. Daniels*, 113 Mass. 129; *Whittredge v. Sweetser*, 189 Mass. 45, 73 N. E. 222; *Muir v. Schenck*, 3 Hill, 228, 38 Am. Dec. 633; *Niles v. Mathusa*, 102 N. Y. 546, 57 N. E. 184; *Central Trust Co. v. West India Improv. Co.* 169 N. Y. 314, 62 N. E. 387; *United States v. Vaughan*, 3 Binn. 394, 5 Am. Dec. 375; *Downer v. South Royaltan Bank*, 39 Vt. 25; *Tingle v. Fisher*, 20 W. Va. 497; *First Nat. Bank v. Harkness*, 42 W. Va. 156, 32 L.R.A. 408, 24 S. E. 548; 4 Cyc. 17, 20.

We do not think the fact that the terra cotta company was made the agent of the bank to collect the proceeds of the contract can affect the validity of the assignment. Neither can the later modification of the contract by remitting \$330 of the contract price. That deduction in plain terms recognized that "this money is subject to the order of the court." Recurring to the proposition first laid down, that the garnisheeing creditor can reach only the property of the defendant in the hands of its debtor, the plaintiff could not reach or attach that which had already passed by lawful assignment, and this necessitates a reversal of the judgment with instructions to render judgment for the interpleader.

Annotation—Garnishment of money due or to become due on a contract the proceeds of which have been assigned by the debtor prior to the garnishment.

Generally, as to priority rights of different assignees of funds in the hands of third person, see note to *Phillips's Estate*, 66 L.R.A. 760; and as to garnishment of unliquidated claims, see note to *Waples-Platter Grocer Co. v. Texas & P. R. Co.* 59 L.R.A. 353.

It is intended in the present annotation to cover not only the question of the right to garnishee the proceeds of general contracts, but also of contracts of employment where the question is as to the right to garnishee salary, wages, or earnings. And included among the latter class of cases are some where, strictly speaking, no contract of employment existed. However, the annotation does not cover public officer cases, but for such cases see the note to *Roesch v. W. B. Worthen Co.* 31 L.R.A.(N.S.) 374, which treats the general question of the effect of assignments of unearned salary L.R.A.1916D.

or fees of public officers to put the same, when earned, beyond the reach of creditors.

General contract cases and employment contract cases are separately treated herein, because of the fact that some elements often enter into the decision of a case of the latter class which would be foreign to an adjudication falling within the first group, but as the general controlling principles are in the main similar, both groups should be consulted in practically all instances.

Proceeds of general contracts.

The general rule is that a creditor of a contractor cannot garnishee any proceeds of the contractor in the hands of the contractee which the contractor has previously assigned in good faith, for a valuable consideration, and with notice to or the assent of the garnishee, to a

third person.¹ This rule is an application of the general rule of law that the plaintiff cannot reach and subject to the payment of his debt by process of garnishment any funds, property, or demands that the defendant debtor himself could not recover in an action ex contractu against the garnishee.²

The general rule, however, is subject to an exception, which is that the plaintiff can so reach such assets in the hands of the garnishee where the assignment to the third person was fraudulent and therefore void in toto, although on account of such assignment the debtor himself could not recover them of the garnishee.³

And while some courts might hold that notice of the garnishment would have to be brought home to the contractee before service of the summons of garnishment, in order to entitle the assignee to prior-

ity, the better rule undoubtedly is that the assignee is entitled to priority over the garnisheeing creditor, if the garnishee has notice of the assignment in time to permit him to plead such assignment in his answer.⁴

And in the absence of a controlling statute, the general rule above outlined holds even though the amount assigned is in excess of what is sufficient to fully satisfy the obligation of the assignor to the assignee,⁵ the plaintiff's remedy in such case being to garnishee the assignee and thereby reach the excess sum that will come into his hands as a result of the assignment before such excess is paid over to the defendant,⁶ for to sustain a garnishment against the contractee would be to permit the plaintiff to obtain a judgment against him for a part of the sum assigned, which would result in the splitting up of a single cause of action

¹ The following cases support this rule: *American Trust & Sav. Bank v. O'Barr* (1915) — Ala. App. —, 67 So. 794 (contractor assigned all sums due and to become due on a contract to construct part of a railroad, as security for money advanced and for such future advances as might be made); *Hawley v. Bristol* (1872) 39 Conn. 26 (contractor assigned sums due and to become due on a contract to build a house); *Porter v. Title Guaranty & Surety Co.* (1912) 21 Idaho, 318, 121 Pac. 548 (contractor for the construction of canals and ditches assigned all payments to be made on the contract and all freight rebates recoverable thereunder, in consideration of advancements by assignee); *Gray v. Bever* (1905) 122 Ill. App. 1 (contractor assigned a part of the money to become due on a contract for digging a well); *HALL v. KANSAS CITY TERRA COTTA Co.*, ante, 361 (contractor assigned proceeds of a contract due and to become due for labor and materials furnished, as collateral security for advancements which were made or should be made); *Lutter v. Grosse* (1904) 26 Ky. L. Rep. 585, 82 S. W. 278 (contractor for construction of schoolhouse equitably assigned portions of contract price to subcontractor); *Millett v. Swift* (1910) 138 Ky. 408, 128 S. W. 312 (subcontractor for construction of part of a railroad assigned moneys to become due under his contract, for advances made, etc.); *Chester v. McDonald* (1904) 185 Mass. 54, 69 N. E. 1075 (contract for the making of a granite monument); *William Gilligan Co. v. Casey* (1910) 205 Mass. 26, 91 N. E. 124 (one contracting to furnish a city with sand, gravel, and crushed stone assigned the money to be received thereunder); *Mack Mfg. Co. v. Smoot* (1904) 102 Va. 724, 47 S. E. 859 (contractor for public improvement assigned proceeds due and to become due under contract); *Balliet v. Scott* (1873) 32 Wis. 174 (contractor for construction of portion of railroad assigned L.R.A.1916D.

such part of contract price as would be necessary to pay laborers hired by him). And see *H. A. Grimwood Co. v. Capital Hill Bldg. & Constr. Co.* (1906) 28 R. I. 32, 65 Atl. 304; and *South Texas Lumber Co. v. Concrete Constr. Co.* (1911) — Tex. Civ. App. —, 139 S. W. 913.

² *American Trust & Sav. Bank v. O'Barr* (Ala.) supra; *Walton v. Horkan* (1900) 112 Ga. 814, 81 Am. St. Rep. 77, 38 S. E. 105, wherein it was said that the plaintiff in garnishment stands in no better position than the defendant, there being no fraud; *HALL v. KANSAS CITY TERRA COTTA Co.*, wherein the court said that a garnisheeing creditor can reach only the property of the defendant in the hands of the debtor, and that property lawfully assigned is within the rules; *Millett v. Swift* (Ky.) supra, wherein it was said that the plaintiff acquired only such rights against the garnishee as the assignor had; *Balliet v. Scott* (Wis.) supra.

³ *American Trust & Sav. Bank v. O'Barr* (Ala.) supra.

⁴ *HALL v. KANSAS CITY TERRA COTTA Co.* And see *Walton v. Horkan* (Ga.) supra, holding that an assignment of a fund to become due under a contract for lumber, as security for advancements made to enable defendant "to get out the lumber," was entitled to priority over a subsequent garnisheeing creditor, even though the garnishee had not been notified of the assignment before the service of the summons of garnishment.

For a treatment of the general question of priority of garnishment over prior assignment as affected by notice or lack of notice, see annotation to *Market Nat. Bank v. Raspberry*, L.R.A. —, —.

⁵ *American Trust & Sav. Bank v. O'Barr* (Ala.) supra.

⁶ (Ala.) *Ibid.* But for a statute which subjects the surplus in the hands of the garnishee to garnishment, see *infra*, 24, text and note.

against the garnishee, who before the garnishment had, by accepting and assenting to the assignment, bound himself to pay the whole fund to the assignee, and to hold that the plaintiff may recover a part and the assignee a part would be to hold that one cause of action may be split into several.⁷ But an assignment, as security for advances, of the proceeds of an executory contract, which exceed in amount the assignee's claim, is void as against creditors of the assignor to the extent of the excess, under a statute providing that all assignments of goods, chattels, or things in action made in trust for the use of the person making the same are void against creditors existing and subsequent of such person, but the invalidity exists only to such excess, as that is the extent to which a trust is created for the use or benefit of the assignor.⁸

And a garnisheeing creditor cannot defeat prior assignments of the proceeds of a contract, upon the ground that a part only of the amount to become due under the contract was assigned, and that a contract is an entirety and cannot be split up to suit the convenience of the contractor, as this is an objection which could be raised by the contractee, if at all.⁹

With respect to the question whether or not the recording of an assignment of a contract due or to become due is essential to its validity as against the claim of another creditor subsequently proceeding by writ of garnishment, it seems that, in the absence of express statutory

provision to the contrary, recording is not necessary. At least, it has been held that the general registration statutes have no application to an assignment of the proceeds of a construction contract,¹⁰ and that such an assignment is neither a chattel mortgage nor a pledge,¹¹ within the meaning of the statutes requiring a recording of such instruments.

Wages, salary, and earnings—generally.

Generally, as to validity of assignment of wages or salary to be earned, see *Rodijkeit v. Andrews*, 5 L.R.A.(N.S.) 564, and the note appended thereto. As to effect of assignment of unearned salary or fees of public officers to put the same, when earned, beyond the reach of creditors, see note to *Roesch v. W. B. Worthen Co.* 31 L.R.A.(N.S.) 374. And as to effect of discharge in bankruptcy upon assignment of wages to be earned in the future under contract terminable at will, see notes to *Citizens' Loan Assn. v. Boston & M. R. Co.* 14 L.R.A.(N.S.) 1025, and *Levi v. Loevenhart & Co.* 30 L.R.A.(N.S.) 375.

The general rule, like that relating to the proceeds of general contracts, is that, in the absence of controlling statute to the contrary, an assignment of wages or salary earned or to be earned under an existing contract may be made, and that such an assignment, if for a valuable consideration, and with the assent of the employer, is valid as against, and entitled to priority over, a subsequent garnishment by a creditor of the assignor,¹² the theory being that a creditor can be

⁷ *American Trust & Sav. Bank v. O'Barr* (Ala.) supra.

⁸ (Ala.) *Ibid.*

⁹ *Gray v. Bever* (1905) 122 Ill. App. 1.

¹⁰ *American Trust & Sav. Bank v. O'Barr* (1915) — Ala. App. —, 67 So. 794 (contract to construct a part of a railroad).

¹¹ *HALL v. KANSAS CITY TERRA COTTA CO.*

¹² *Lewis v. San Miguel* (1890) 14 Colo. 371, 23 Pac. 338, holding that an assignment of wages to be earned under a contract for transcribing certain public records, made to secure certain advances or loans, was valid as against a subsequent garnishment, the assignment having been accepted by the garnishee; *Denver, T. & Ft. W. R. Co. v. Smeeton* (1892) 2 Colo. App. 126, 29 Pac. 815, holding that an assignment of wages accepted by the employer was valid as against a subsequent garnishment; *Augur v. New York Belting & Packing Co.* (1873) 39 Conn. 536, holding that an assignment of wages to be earned was valid as against a subsequent factorizing suit; *Harrop v. Landers, F. & C. Co.* (1878) 45 Conn. 561, holding that a recorded assignment of wages accepted by the employer

was valid as against a subsequent factorizing suit; *Adams v. Willimantic Linen Co.* (1878) 46 Conn. 320, holding that a written assignment of wages due and to become due under a contract accepted by the employer was valid as against factorizing proceedings; *Johnson v. Pace* (1875) 78 Ill. 143, holding that an equitable assignment of salary due a school-teacher accepted by the school officers was valid as against garnisheeing creditors; *Cairo & St. L. R. Co. v. Killenberg* (1876) 82 Ill. 295, holding that an equitable assignment of railroad time checks was valid as against a subsequent garnisheeing creditor of the defendant; *Wohlford v. Wabash Coal Co.* (1911) 164 Ill. App. 185, holding that an assignment of wages to the employer for supplies to be furnished was valid as against a subsequent garnisheeing creditor; *Steltzer v. Condon* (1908) 139 Iowa, 764, 118 N. W. 39, holding that an assignment of wages was valid as against a subsequent garnishment; *Bridgeford v. Keenehan* (1886) 8 Ky. L. Rep. 268, holding that an assignment of future salary was entitled to priority over a garnishment brought after the salary had been

placed in no better position than the defendant by reason of garnishment proceedings, and that property validly assigned no longer belongs to the assignor, wherefore the garnishee can answer that he has nothing of the defendant's in his possession or, as it is sometimes stated, is not indebted to the defendant.¹³ And application of this theory would of itself preclude the garnisheeing of previously assigned wages, where such wages are by the terms of the contract payable in advance.¹⁴

It is, of course, essential to the validity of an assignment of wages as

against a subsequent garnishment, that it be in good faith and for an adequate consideration.¹⁵ And it follows that an assignment of wages, salary, or earnings due or to become due is void as against subsequent garnisheeing creditors if the intention concurred in by both the parties thereto was to leave the fund wholly or in part in the after-control of the assignor.¹⁶

And in the absence of statute an assignment of future wages is valid although the contract is indefinite as to time or amount.¹⁷ But there must be an existing contract, for the mere expecta-

tion of future wages was valid as against a subsequent garnishment; *H. T. Chase & Son v. Duby* (1898) 20 R. I. 463, 40 Atl. 100, holding that an assignment of salary was valid as against a subsequent garnishment; *Worthington v. Jones* (1851) 23 Vt. 546, holding that an agreement whereby the employer agreed to support the employee's family out of his wages was valid as against a subsequent trustee process; *Traders' Bank v. McKay* (1909) 2 Alberta L. R. 31, holding that an equitable assignment of future wages by a civil servant (deputy clerk in telephone branch of provincial public works department, town but not a public officer within the meaning of the rules relating to the assignment of wages by such an officer) was valid as against a subsequent process by garnishment.

¹³ *Lewis v. San Miguel County* (1890) 14 Colo. 371, 23 Pac. 338; *Denver, T. & Ft. W. R. Co. v. Smeeton* (1892) 2 Colo. App. 126, 29 Pac. 815; *Johnson v. Pace* (1875) 78 Ill. 143; *Wohlford v. Wabash Coal Co.* (1911) 164 Ill. App. 185; *Steltzer v. Condon* (1908) 139 Iowa, 754, 118 N. W. 39.

¹⁴ *Callaghan v. Pocasset Mfg. Co.* (1875) 119 Mass. 173, holding that wages continually payable in advance, which had been assigned, could not be reached by subsequent trustee process.

¹⁵ See especially *Runnells v. Bosquet, N. I. & S. Co.* (1880) 60 N. H. 38, holding that an assignment of future wages not based upon an adequate consideration, and made to secure to the assignor the benefit of his wages, to the detriment of his creditors, was invalid as against a subsequent trustee process; and the cases set out *supra*, note 12.

¹⁶ *Kittredge v. Slack* (1896) 67 Ill. App. 128.

¹⁷ *Augur v. New York Belting & Packing Co.* (1873) 39 Conn. 536 (contract to work generally in the ordinary course of employment for an indefinite time); *Harrop v. Landers, F. & C. Co.* (1878) 45 Conn. 561, (contract for piecework to be done at such times as the employer desired); *Stinson v. Caswell* (1880) 71 Me. 510 (holding that an assignment of coupons representing work done by the piece in a shoe factory was valid as against subsequent trustee process, L.R.A.1916D).

earned; *Willard v. Butler* (1834) 14 Pick. (Mass.) 550, holding that an oral assignment of wages was valid as against a subsequent trustee process; *Gardner v. Hoeg* (1836) 18 Pick. (Mass.) 168, holding that an assignment of wages to be earned, which was given in consideration of advances, was valid as against an attachment served after the services were rendered and after the notice to the trustee of the assignment; *Weed v. Jewett* (1841) 2 Met. (Mass.) 608, 37 Am. Dec. 115, holding that an assignment of wages to be earned accepted by the employer was valid as against a subsequent trustee process; *Emery v. Lawrence* (1851) 8 Cush. (Mass.) 151, holding that an assignment of wages earned and to be earned, given in consideration of advancements made and to be made, accepted by the employer, was valid in toto as against a subsequent trustee process; *Hartley v. Tapley* (1854) 2 Gray (Mass.) 565, holding that an assignment of wages to be earned was valid as against a subsequent trustee process; *Taylor v. Lynch* (1855) 5 Gray (Mass.) 49, holding that an assignment of wages to be earned given in consideration of necessities furnished was valid as against a subsequent trustee process; *Lannan v. Smith* (1856) 7 Gray (Mass.) 150, holding that an assignment of wages accepted by the employer was valid as against a subsequent trustee process; *Macomber v. Doane* (1861) 2 Allen (Mass.) 541, holding that an equitable assignment of future wages by a watchman employed by a city was valid as against a subsequent trustee process; *Kane v. Clough* (1877) 36 Mich. 436, 24 Am. Rep. 599, holding that an assignment of wages to be earned in the future by doing piecework under an existing and continuing contract was valid as against a subsequent garnishment; *Hax v. Acme Cement Plaster Co.* (1900) 82 Mo. App. 447, rehearing denied in (1900) 3 Mo. App. Rep. 258, holding that an assignment of future wages to be earned under a continuing contract indefinite as to duration was entitled to priority over a subsequent garnishment; *White v. Richardson* (1841) 12 N. H. 93, holding that an assignment of future wages was valid as against a subsequent trustee process; *Tiernay v. McGarity* (1883) 14 R. I. 231, holding that an assign-

tion of earning money under a contract not yet in existence cannot be assigned so as to take priority over garnishment after a hiring and the earning of wages.¹⁸ And an assignment of wages to a firm becomes inoperative by a change of membership in the firm, so as to let in a garnisheeing creditor as against the successive firm, where no notice either of such change, or of a subsequent parol agreement between the assignor and the new firm that the order should continue in force, was given the garnishee.¹⁹

And as stated in the preceding subdivision,²⁰ the better rule is that the fact that the garnishee was not notified of a prior assignment of wages until after service of process does not entitle

the garnishment to priority, where knowledge of such assignment was obtained before judgment, so as to enable him to interpose the same as a defense.²¹

—under statutes.

In a number of jurisdictions statutes have been enacted which expressly prohibit or declare void assignments of unearned wages or salary,²² and, of course, assignments falling within the inhibition of such statutes would not be effective as against garnishment proceedings. And in a number of other jurisdictions assignments of future wages, salary, or earnings are declared invalid as against third persons, unless recorded.²³ In Massachusetts, however, the statute sub-

holding that the Alabama statute did not apply to an assignment of the proceeds of a contract to construct a part of a railroad; Central of Georgia R. Co. v. Dover (1907) 1 Ga. App. 240, 67 S. E. 1002, citing Georgia statute; Wells v. Vandalia R. Co. (1913) — Ind. App. —, 103 N. E. 360.

As to constitutionality of statutes restricting right to assign salary or wages, see notes to Massie v. Cessna, 28 L.R.A. (N.S.) 1108, and Mutual Loan Co. v. Martell, 43 L.R.A. (N.S.) 746.

²² See Wright v. Smith (1883) 74 Me. 496, holding that the Maine statute did not apply where wages were wholly earned and the work completed when the assignment was made, and therefore that an assignment of wages so earned was valid and entitled to priority over a subsequent trustee process; Pullen v. Monk (1890) 82 Me. 412, 19 Atl. 909, distinguishing Wright v. Smith (Me.) supra, and holding that the statute applied where the employment was continuing, even though the wages in question had been fully earned, but were not payable until a future day; Harlow v. Bartlett (1902) 96 Me. 294, 90 Am. St. Rep. 346, 52 Atl. 638, holding that a duly recorded equitable assignment of wages was valid as against a subsequent trustee process. Mace v. Richardson (1905) 100 Me. 70, 60 Atl. 701, holding that an equitable assignment of future wages was valid as against a subsequent trustee process; Knowlton v. Cooley (1869) 102 Mass. 233, holding that an unrecorded equitable assignment of future wages was invalid as against a subsequent trustee process; Jenks v. Dyer (1869) 102 Mass. 235, holding that money due for board and lodgings constituted earnings, and that an unrecorded assignment thereof was invalid as against a subsequent trustee process; Fuller v. Cunningham (1870) 105 Mass. 442, holding that a recorded assignment of wages was valid as against a subsequent trustee process; Sullivan v. Sweeney (1873) 111 Mass. 366, holding that a recorded assignment of wages given as security was valid as against a subsequent trustee process; Mansard v. Daley (1874) 114 Mass. 408,

the trustee having recognized the assignment; Hartley v. Tapley (1854) 2 Gray (Mass.) 565 (contract for piecework); Taylor v. Lynch (1855) 5 Gray (Mass.) 49 (contract of uncertain duration); Lannan v. Smith (1856) 7 Gray (Mass.) 150 (day laborer not hired for any specified time); Kane v. Clough (1877) 36 Mich. 436, 24 Am. Rep. 599 (contract for piecework for an indefinite period); Hax v. Acme Cement Plaster Co. (1900) 82 Mo. App. 447 (continuing contract of employment indefinite as to duration, but calling for a definite salary per year); Traders' Bank v. McKay (1909) 2 Alberta L. R. 31, (clerk appointed "during pleasure").

¹⁸ Wade v. Bessey (1884) 76 Me. 413; Mulhall v. Quinn (1854) 1 Gray (Mass.) 105, 61 Am. Dec. 414 (holding that an assignment of all money to be earned in laboring for a city was not valid as to moneys earned under a subsequent hiring, and therefore that such earnings were subject to trustee process); Herbert v. Bronson (1878) 125 Mass. 475 (holding that future wages to be earned under an engagement not existing at the time are not assignable, and that such an attempted assignment is not good as against a subsequent trustee process).

¹⁹ Adams v. Williamantic Linen Co. (1878) 46 Conn. 320, holding that a firm succeeding another firm to which an assignment of wages had been made by an employee of a third company which had accepted the assignment could not hold such wages as assignee as against a factorizing process, against the employer, the assignment not having been validly renewed prior to the service of such process. And see Card v. Alhearn (1895) 18 R. I. 765, 30 Atl. 850, which reaches the same conclusion as the Adams Case.

²⁰ See note 4, supra, and the text therefor.

²¹ Steltzer v. Condon (1908) 139 Iowa, 754, 118 N. W. 39; Tiernay v. McGarity (1883) 14 R. I. 231. And see the annotation referred to in note 4, supra.

²² See American Trust & Sav. Bank v. O'Barr (1915) — Ala. App. — 67 So. 794, L.R.A.1916D.

jects any amount in the hands of the employer in excess of the amount due to an assignee at the time of service of trustee process, to such process, where the assignment "is held only as a security for a debt," as if no assignment existed.²⁴

But statutes requiring that assignments of wages must be recorded in order to be valid against third persons do not apply to assignments of wages where the employment has been terminated and the wages wholly earned at the time of the assignment,²⁵ which assignment has been accepted by the employer prior to the garnishment, as in such case the employer owed the defendant nothing when the writ was served.²⁶ However, it has

been held that where the contract is a continuing one and the wages in question, while earned, are not due, the statute requiring the recording of an assignment is applicable.²⁷ And an assignment of future wages is valid, and takes priority over a subsequent trustee or garnishment process, even though unrecorded, where the statute requires that the assignment be recorded in the "town or plantation organized for any purpose, in which the assignor is commorant while earning such wages," and the wages in question were earned in an unorganized township.²⁸

But it has been held under the Massachusetts statute that an unrecorded assignment of wages is not binding upon

holding that an unrecorded assignment of future wages was invalid as against subsequent trustee process; *Somers v. Keliher* (1874) 115 Mass. 165, holding that money to become due under a contract to furnish labor and materials in building a house constituted "future earnings," and that an unrecorded assignment thereof was invalid as against subsequent trustee process; *Schofield v. McConnell* (1876) 119 Mass. 368, holding that a recorded assignment of wages to be earned in the future, made in good faith, was valid as against a subsequent trustee process; *Murphy v. Murphy* (1876) 121 Mass. 167, holding that an assignment of wages need not state what it was intended to secure, and that a duly recorded assignment of wages to be earned in the future, made to cover future advances, was valid as against a subsequent trustee process; *Ouimet v. Sirois* (1878) 124 Mass. 162, holding that a recorded assignment of wages made in good faith was valid as against a subsequent trustee process, although the assignor's name was so misspelled as to fail to give the contemplated notice to his other creditors; *O'Connor v. Cavan* (1879) 126 Mass. 117, holding that a duly recorded assignment of future wages signed "Johanna Kavanagh" was valid as against a subsequent trustee process, although the assignor's name was "Johanna Fitzgerald" and she worked and was generally known by the name of "Johanna Cavan;" *Hatheway v. Reed* (1879) 127 Mass. 136, holding that an assignment of wages duly recorded was valid as against a subsequent trustee process; *Allen v. Mayers* (1904) 184 Mass. 486, 69 N. E. 220, holding that the contract price for the construction of a stable did not represent "future earnings" where the contract had been substantially performed and the stable accepted by the contractee, so as to render the recording of an assignment of such contract price essential to the validity and priority of such assignment over a subsequent trustee process; *Chester v. McDonald* (1904) 185 Mass. 54, 69 N. E. 1075, holding that a contract to make and deliver a granite monument was not a contract for L.R.A.1916D.

"future earnings" where the personal service of the contractor was not required, and therefore that an assignment of the contract price was valid as against a subsequent trustee process, although unrecorded; *William Gilligan Co. v. Casey* (1910) 205 Mass. 26, 91 N. E. 124, holding that an assignment of the contract price for sand, gravel, and crushed stone to be furnished was neither an assignment of "future earnings" nor of "future wages," so as to necessitate recording in order to entitle it to priority over a subsequent trustee process; *Thompson v. Smith* (1876) 57 N. H. 306, holding that an unrecorded assignment of future wages was invalid as against a subsequent trustee process; *Allen v. Pickett* (1881) 61 N. H. 641, holding that a duly recorded assignment of future wages made in good faith for a valuable consideration, and accepted by the employer, was valid as against a subsequent trustee process; *Lewis v. Lougee* (1884) 63 N. H. 287, holding same as next preceding case.

²⁴ See *Warren v. Sullivan* (1877) 123 Mass. 283, holding that where a laborer assigned future wages as security for obligations incurred and to be incurred, trustee process would reach any surplus in the hands of the employer at the time of the service thereof over and above the amount of defendant's obligation to the assignee at such time; *Giles v. Ash* (1877) 123 Mass. 353, holding the same as *Warren v. Sullivan*.

But that in such a case the remedy is, in the absence of statute, against the assignee, see *supra* 6, text and note.

²⁵ *Wright v. Smith* (1883) 74 Me. 495, holding that an assignment of wages already earned was entitled to priority over a subsequent trustee process.

²⁶ *Stinson v. Caswell* (1880) 71 Me. 510.

²⁷ *Pullen v. Monk* (1890) 82 Me. 412, 19 Atl. 909.

²⁸ *Wade v. Bessey* (1884) 76 Me. 413, holding that an unrecorded assignment of future wages was valid and entitled to priority over a subsequent trustee process.

the employer unless he has notice thereof,²⁹ and that merely recording an assignment of wages in compliance with the statutory provision does not constitute notice thereof to the employer so

as to render him liable thereon to the assignee, where such employer has paid the wages under trustee process brought subsequently to the recording of the assignment.³⁰

²⁹ *Corbett v. Fitchburg R. Co.* (1872) 110 Mass. 204, holding that payment of wages upon trustee process was valid notwithstanding a prior assignment of which the employer had no notice.

³⁰ (Mass.) *Ibid.*

G. J. C.

MASSACHUSETTS SUPREME JUDICIAL COURT.

EFFIE A. CARTER

v.

ARTHUR B. PAPINEAU et al.

(Two Cases.)

(222 Mass. 464, 111 N. E. 358.)

Religious societies — enforcement of rights in court.

1. A member of a religious denomination cannot enforce his religious rights as a communicant of the denomination in the civil courts.

For other cases, see *Courts*, I. d, 2, in *Dig.* 1-52 N. S.

Libel — passing communicant in religious order — liability.

2. A clergyman is not liable for slander in passing a communicant without comment when administering the sacrament of the Lord's Supper, although the rules of the society permit such course with respect to evildoers or those who have wronged a neighbor.

For other cases, see *Libel and Slander*, II. a, in *Dig.* 1-52 N. S.

Religious society — exclusion of member — liability.

3. No action lies for the temporary exclusion of a communicant from the church building by the minister in charge.

For other cases, see *Religious Societies*, VI. in *Dig.* 1-52 N. S.

Evidence — letter — admissibility.

4. Evidence of a letter which a clergyman attempted to hand to a communicant before service is admissible in an action to recover damages because of his excluding her from participation in a sacrament at such service in which he forbade her to participate; at least where it could be found that she took the letter and became aware of its contents.

For other cases, see *Evidence*, IV. k, in *Dig.* 1-52 N. S.

(January 27, 1916.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of actions brought to recover damages for excluding her from a

religious service and for refusing to allow her to participate in a communion service, which resulted in verdicts for defendant. Overruled.

The facts are stated in the opinion.

Mr. William Reed Bigelow, for plaintiff:

Plaintiff was an undisputed member of the mission, and as such was entitled to the privileges of the mission, including entrance to the room paid for by the mission for use in religious services.

Canadian Religious Asso. v. Parmenter, 180 Mass. 415, 62 N. E. 740; *Gray v. Christian Soc.* 137 Mass. 329, 50 Am. Rep. 310; *Byam v. Bickford*, 140 Mass. 31, 2 N. E. 687.

Plaintiff may maintain this action as an action of trespass for ouster from the premises.

Byam v. Bickford, 140 Mass. 34, 2 N. E. 687; *Silloway v. Brown*, 12 Allen, 30.

An action on the case is an appropriate action for interference with the rights of a member of a religious society.

Taylor v. Edson, 4 Cush. 522; *Oakes v. Hill*, 10 Pick. 333; *Fisher v. Whitman*, 13 Pick. 350; *Aylward v. O'Brien*, 160 Mass. 118, 22 L.R.A. 206, 35 N. E. 313; *Canadian Religious Asso. v. Parmenter*, 180 Mass. 415, 62 N. E. 740.

The conduct of the constable, Mr. Hynes, was in law an assault.

Beach v. Hancock, 27 N. H. 223, 59 Am. Dec. 373; *Newell v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703; 1 Cooley, Torts, 3d ed. pp. 278-280; *People ex rel. Dilcher v. German United E. St. S. Church*, 53 N. Y. 103.

Plaintiff could not be deprived of her right of membership without a hearing in the nature of a judicial trial.

Remington v. Congdon, 2 Pick. 310, 13 Am. Dec. 431; *Murdock v. Phillips Academy*, 12 Pick. 244; *Farnsworth v. Storrs*, 5 Cush. 412; *Barrows v. Bell*, 7 Gray, 314, 66 Am. Dec. 479; *Gray v. Christian Soc.* 137 Mass. 329, 50 Am. Rep. 310; *Canadian Religious Asso. v. Parmenter*, 180 Mass. 415, 62 N. E. 740.

The exclusion of plaintiff from the place of worship was designed and wilful, and therefore agents and principals are alike and jointly liable.

Note. — As to liability for refusing the sacraments, see annotation following this case, post, 374.

L.R.A.1916D.

Parsons v. Winchell, 5 Cush. 592, 52 Am. Dec. 745; *Moore v. Fitchburg R. Corp.* 4 Gray, 465, 64 Am. Dec. 83; *Hewett v. Swift*, 3 Allen, 420; *Holmes v. Wakefield*, 12 Allen, 580, 90 Am. Dec. 171; *Ramsden v. Boston & A. R. Co.* 104 Mass. 117, 6 Am. Rep. 200, 8 Am. Neg. Cas. 372; *Shattuck v. Bill*, 142 Mass. 56, 7 N. E. 39; *Jackson v. Old Colony Street R. Co.* 206 Mass. 477, 30 L.R.A. (N.S.) 1046, 92 N. E. 725, 19 Am. Cas. 615; *Thayer v. Old Colony Street R. Co.* 214 Mass. 234, 44 L.R.A. (N.S.) 1125, 101 N. E. 368, Ann. Cas. 1914B, 865; *Dempsey v. Chambers*, 154 Mass. 330, 13 L.R.A. 219, 26 Am. St. Rep. 249, 38 N. E. 279.

Mental suffering is the chief element of damage in many cases analogous to this; and any insult or indignity may be considered in aggravation of the tort.

Meagher v. Driscoll, 99 Mass. 281, 96 Am. Dec. 759; *Smith v. Holcomb*, 99 Mass. 552; *Burns v. Jones*, 211 Mass. 475, 98 N. E. 29.

Also the impairment of the plaintiff's capacity to perform labor, caused from illness occasioned by the nervous and mental shock, is an element of damage.

Warren v. Boston & M. R. Co. 163 Mass. 484, 40 N. E. 895; *Cameron v. New England Teleph. & Teleg. Co.* 182 Mass. 310, 65 N. E. 385, 13 Am. Neg. Rep. 86; *Millmore v. Boston Elev. R. Co.* 198 Mass. 370, 84 N. E. 468.

At common law a member of the Church of England had a right of action on the case if repelled from receiving communion.

Jenkins v. Cook, L. R. 1 Prob. Div. 80, 45 L. J. P. C. N. S. 1, 34 L. T. N. S. 1, 24 Week. Rep. 439; *Rex v. Dibdin*, L. R. [1910] P. 107, 79 L. J. K. B. N. S. 517, 101 L. T. N. S. 722, 26 Times L. R. 150; *Harrie v. Hicks*, 2 Salk. 548.

The only authority under which the rector could act in refusing the communion to the plaintiff was under the Rubric in the order for the administration of the Lord's Supper.

Jenkins v. Cook, supra; *Banister v. Thompson* [1908] W. N. 190; *Rex v. Dibdin* L. R. [1910] P. 138, 79 L. J. K. B. N. S. 517, 101 L. T. N. S. 722, 26 Times L. R. 150; *Thompson v. Dibdin* [1912] A. C. 533, 81 L. J. K. B. N. S. 918, 107 L. T. N. S. 66, 28 Times L. R. 490, 56 Sol. Jo. 647.

The public refusal of the communion by the rector to the plaintiff was in effect a holding out to the world that she was "a notorious evil liver" or had done some wrong to her neighbors "by word or deed, so that the congregation be thereby offended."

Rutherford v. Paddock, 180 Mass. 289, 91 Am. St. Rep. 282, 62 N. E. 381; *Rex v. Dibdin*, L. R. [1910] P. 105, 79 L. J. K. B. N. S. 517, 101 L. T. N. S. 722, 20 Times L. R. 150; L.R.A.1916D.

Riddell v. Thayer, 127 Mass. 487; *Com. v. Foley*, 99 Mass. 497; *Odgers, Libel & Slander*, 5th ed. pp. 13, 14; *Wiley v. Bunker Hill Nat. Bank*, 183 Mass. 495, 67 N. E. 655; *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307; *Walker v. Cronin*, 107 Mass. 555; *Marsh v. Billings*, 7 Cush. 322, 54 Am. Dec. 723; *Thomson v. Winchester*, 19 Pick. 214, 31 Am. Dec. 135; *Newell, Slander & Libel*, 3d ed. p. 32, § 29; *Ellis v. Kimball*, 16 Pick. 132; *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212.

Messrs. Charles F. Choate, Jr., William H. King, Jr., and Robert Hale, for defendants:

No cause of action arose by reason of the refusal by the defendant Papineau to administer communion to the plaintiff.

Fitzgerald v. Robinson, 112 Mass. 371; *Farnsworth v. Storrs*, 5 Cush. 412; *Grosvenor v. United Soc.* 118 Mass. 78; *Spilman v. Supreme Council*, H. C. 157 Mass. 128, 31 N. E. 776.

No cause of action accrued to the plaintiff by reason of being refused admittance to the services.

Under English Church law, the rector is entitled to possession and control.

Lee v. Matthews, 3 Hagg. Eccl. Rep. 169; *Redhead v. Wait*, 6 L. T. N. S. 580; *Ritchings v. Cordingley*, L. R. 3 Adm. & Eccl. 113, 19 L. T. N. S. 26; *Hoffman, Church Law*, 266; *White, Church Law*, pp. 162, 256; *Lynd v. Menzies*, 33 N. J. L. 162; *Youngs v. Ransom*, 31 Barb. 49.

Braley, J., delivered the opinion of the court:

The evidence would have amply warranted the jury in finding that the defendant Papineau, as priest in charge, declined to administer to the plaintiff the rite of "Holy Communion" or to permit her to partake thereof, and that by his authority and order she had been refused admission on the Lord's Day to the building in which religious services were being held. It is contended that for these acts he and the defendant Lawrence, bishop of the diocese, are responsible in damages, and the verdicts in their favor were ordered wrongly. The record shows that the Protestant Episcopal Church of America, of which the parties are members, has a body of canons or ecclesiastical law of its own, by which the plaintiff upon baptism and confirmation agreed to be bound, and under which her rights of worship must be determined. *Fitzgerald v. Robinson*, 112 Mass. 371; *Grosvenor v. United Soc.* 118 Mass. 78. By the "Rubric in the Order for the Administration of the Lord's Supper or Holy Communion," the "minister" is given authority to refuse the rite to anyone whom he knows

"to be an open, notorious, evil liver, or to have done any wrong to his neighbors by word or deed." By "canon 40 of regulations respecting the laity." § 11: "When a person to whom the sacraments of the church have been refused, or who has been repelled from the Holy Communion under the Rubrics, shall lodge a complaint with the bishop, it shall be the duty of the bishop, unless he sees fit to require the person to be admitted or restored because of the insufficiency of the cause assigned by the minister, to institute such an inquiry as may be directed by the canons of the diocese or missionary district; and should no such canon exist the bishop shall proceed according to such principles of law and equity as will insure an impartial decision, but no minister of this church shall be required to admit to the sacraments a person so refused or repelled without the written direction of the bishop."

The plaintiff has not availed herself of this right of appeal to the only personage having the requisite ecclesiastical authority to review her standing as a member and communicant, or to pass upon her ceremonial rights in accordance with the principles of "law and equity." *Grosvenor v. United Soc.* 118 Mass. 78, 91. The letter of her counsel to the bishop, to which no reply appears to have been made, cannot be considered as an appeal which had been denied. It contains only recitals of all her grievances, for the rectification of which his friendly intercession is requested. But if an appeal had been taken properly and the decision had been adverse, the plaintiff would have been remediless, for in this commonwealth her religious rights as a communicant are not enforceable in the civil courts. *Fitzgerald v. Robinson*, 112 Mass. 371, 379; *Canadian Religious Asso. v. Parmeter*, 180 Mass. 415, 420, 421, 62 N. E. 740. For the same reason it is unnecessary to decide whether at common law, as the plaintiff contends, a member of the Church of England could sue if unjustifiably denied participation in the communion. See *Rex v. Dibdin*, L. R. [1910] P. 57, 79 L. J. K. B. N. S. 517, 101 L. T. N. S. 722, 20 Times L. R. 150; *Thompson v. Dibdin*, [1912] A. C. 533, 81 L. J. K. B. N. S. 918, 107 L. T. N. S. 66, 28 Times L. R. 490, 56 Sol. Jo. 647.

Nor can the action be maintained for defamation. Undoubtedly she suffered mental distress, and the omission was in the presence of the other communicants. The plaintiff, however, was not publicly declared to be "an open and notorious evil liver," or to be a person who had done wrong to her neighbors by word or deed. The act of "passing her by" without comment was within the discipline or ecclesiastical polity L.R.A.1916D.

of the church, and does not constitute actionable defamation of character. *Farnsworth v. Storrs*, 5 Cush. 412, 415; *Fitzgerald v. Robinson*, 112 Mass. 371; *Morasse v. Brochu*, 151 Mass. 567, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74. See Rev. Laws, chap. 36, §§ 2, 3.

The action for exclusion from the church building also must fail. It appears that upon being informed by the constable employed for the purpose that she could not enter, the plaintiff made no attempt to pass, but acquiesced and obeyed the order. The elements of an assault are absent. No intimidation was used, or unjustifiable coercion exercised. By canon 16, to which the plaintiff subjected herself, control of the worship and spiritual jurisdiction of the mission, including the use of the building for religious services, was in Papineau as the minister in charge, "subject to the authority of the bishop." We are not asked to review the action of an incorporated religious society owning property where a member has been expelled without being notified of the charges and given an opportunity to be heard, as in *Gray v. Christian Soc.* 137 Mass. 329, 50 Am. Rep. 310; nor is any question of a trust in which the plaintiff has a beneficial interest involved. It is not shown that she had any rights of property in the building, the furnishings, or in any contract relating thereto, or that Papineau was actuated by malice or illwill. The manner and time of admission having been within his control primarily, the acts of temporary exclusion are not reviewable at law or in equity. *Fitzgerald v. Robinson*, 112 Mass. 371; *Grosvenor v. United Soc.* 118 Mass. 78; *Canadian Religious Asso. v. Parmenter*, 180 Mass. 415, 421, 62 N. E. 740; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 686.

The remaining exception is to the admission in evidence of a letter of Papineau to the plaintiff which the jury could find he endeavored to hand to her before communion began, but which she refused to take. It forbade her to partake "until you satisfy me or my successor or superiors of your repentance and amendment." The letter was not in the nature of a self-serving declaration. The jury, from Papineau's testimony that he laid it on a seat in front of her with the request, "I want you to read that before the service goes on," and from the fact that after the service the letter was not found, could say that the plaintiff took it and became aware of the contents. Its admission furthermore could not have prejudiced the plaintiff, as the church canons did not require the giving of any notice. The relation of the defendant Lawrence to the proceedings may be noticed

briefly. It is contended that he approved what had been done, and as the acts of his subordinate were tortious he became a joint wrongdoer by ratification. *Dempsey v. Chambers*, 154 Mass. 330, 13 L.R.A. 219, 26

Am. St. Rep. 249, 28 N. E. 279. But as Papineau did not exceed or abuse his powers no tort had been committed. The result is that in each case the exceptions must be overruled.

Annotation—Liability for refusing the sacraments.

This note is limited to cases where there was a mere refusal of the sacrament as distinguished from excommunication or expulsion.

For review by civil courts of expulsion of member of a religious society, see the notes to *Nance v. Busby*, 15 L.R.A. 801, and *Hendryx v. People's United Church*, 4 L.R.A. (N.S.) 1154.

For review by civil court of dismissal or removal of priest or minister by an ecclesiastical tribunal, see the note to *St. Vincent's Parish v. Murphy*, 35 L.R.A. (N.S.) 919.

For power of civil court to compel restoration of member expelled by a religious society, see the note to *State ex rel. Hatfield v. Cummins*, 36 L.R.A. (N.S.) 945.

Generally, as to the grounds of the civil court's jurisdiction over ecclesiastical controversies, see the notes to *Baltimore & O. R. Co. v. Stankard*, 49 L.R.A. 384, and *Mack v. Kime*, 24 L.R.A. (N.S.) 692.

In *Dunnet v. Forneri* (1877) 25 Grant, Ch. (U. C.) 199, the plaintiff brought an action against a clergyman alleging that he had refused to allow the plaintiff to partake of the Lord's Supper; that the plaintiff had been elected a member of the synod and a lay delegate or representative for the church in the synod for three years; that by the rules of the synod lay representatives are required to commune annually on pain of forfeiture of their office; that by the canons of the church each member is required to partake of the Lord's Supper three times a year; that the defendant assumed to suspend plaintiff from his right of membership, and to excommunicate him from being a member, on a frivolous charge, and sought to injure the plaintiff by reading a libelous paper which he declared to be the ecclesiastical sentence against him, during divine service. The court, in dismissing the bill for lack of jurisdiction, said *inter alia*: "In all this I do not find the defendant charged with the invasion of any civil right of the plaintiff. There is not said to be any emolument attached to the position of lay representative; the status is not a

civil, but an ecclesiastical, one. The position of member of the church and the right to participate in the ordinances of the church are also purely ecclesiastical; and though there may be a remedy in England, as in *Jenkins v. Cook* (1875) L. R. 1 Prob. Div. (Eng.) 80, 45 L. J. P. C. N. S. 1, 34 L. T. N. S. 1, 24 Week. Rep. 439, where the church is established and ecclesiastical courts appointed to administer it, there is no such jurisdiction here. *Strong's Lect.* 38. If there be any civil remedy for reading the libelous paper, it could only be on the ground of damage to character or standing, and none such is alleged to have been sustained, and no relief is asked for in regard to it." As the defense failed upon the facts, the court declined to allow the defendant his costs.

While not strictly within the scope of this note, reference may be made in this connection to *Waller v. Howell* (1897) 20 Misc. 236, 45 N. Y. Supp. 790, where the plaintiffs sought to enjoin the pastor of a Protestant Episcopal Church from striking their names from the list of the communicants in the church register, and the court, in deciding for the defendant and in holding that the question was purely ecclesiastical and that no civil right was involved, said: "In their complaint they, allege that 'for reasons addressed to their own consciences, arising out of the known habits and conduct' of the rector, they could no longer accept his ministrations as a priest, and have therefore 'abstained from further attendance at the services of the church conducted by him.' He has informed them in effect that he will not count them as members during their absence, but will strike their names from the list of communicants. The controversy must be settled by the church. Whether or not the defendant is inspired by malice, whether or not the course he threatens is justified by the plaintiffs' conduct, or even whether he has jurisdiction in the premises, are all immaterial to the present inquiry. It is sufficient that the court is without jurisdiction, either to determine who are communicants, or to supervise or control the defendant in his

manner of keeping the parish register committed to him by the church, and that the subject-matter of this action and the remedy which the plaintiffs seek in it are beyond the pale of judicial cognizance."

In *Laggard v. Stewart* (1876) Ir. Rep. 10 C. L. 222, the court sustained a demurrer to a complaint against a Presbyterian clergyman for refusing the plaintiff the sacrament, on the ground that a duty was not properly alleged because the facts from which the duty could be inferred were not alleged; that no contract was alleged; and that an allegation of malice was useless, because it did not show that the defendant was not entitled to do what was complained of. The complaint alleged that the plaintiff was entitled to be allowed to participate in the sacraments when publicly administered by the defendant as minister to the congregation on the Lord's Day, etc.

In England, where the right of communion in the established church rests, at least to some extent, upon statute, the question, as is pointed out in *Dunnet v. Forneri* (U. C.) supra, is a very different one.

In *Clovell v. Cardinall* (1683) 1 Sid. (Eng.) 33, the plaintiff sued a parson alleging that on a certain Sunday the communion was to be administered to parishioners, but that the defendant, though often requested, refused to admit the plaintiff, and so on another Sunday, etc., to his damages £40, and the jury found for the plaintiff and assessed damages; but judgment was arrested on the ground that the plaintiff had declared for two Sundays, and had not shown that on the second occasion he had asked the parson to administer the communion to him, and the entire damages had been given for both Sundays. The report states that the court did not give any opinion as to whether the action lay, the defendant having claimed that no action lies in the temporal courts for what is merely ecclesiastical and punishable by censure, etc.

In *Banister v. Thompson*, L. R. [1908] P. (Eng.) 362, 24 Times L. R. 841, a clergyman of the Church of England, after the retroactive act of 1907 legalizing marriage with a deceased wife's sister, acting under the advice of his bishop, refused to admit to communion a man who had before the act married his deceased wife's sister in Canada, where the marriage was legal and also refused so to admit such wife; thereupon the husband and wife promoted a criminal

suit against the clergyman under the church discipline act of 1840, charging him with an offense against ecclesiastical law in refusing the sacrament without lawful cause, and asked that he be canonically punished and condemned in the costs of the suit, and the court of arches held that the clergyman must be admonished for having repelled the promoters from the sacrament, and admonished to refrain from similar action in the future, but made no order as to costs. The clergyman thereupon obtained a rule nisi from the King's bench, calling on the principal of the arches court to show cause why a writ should not issue to that court prohibiting it from proceeding in the matter. *Rex v. Dibdin* L. R. [1910] P. (Eng.) 57, 79 L. J. K. B. N. S. 517, 101 L. T. N. S. 722, 26 Times L. R. 150, where the court discharged the writ; and this decision was approved with costs by the court of appeal in L. R. [1910] P. 101 et seq. and an appeal to the House of Lords was dismissed. *Thompson v. Dibdin* [1912] A. C. (Eng.) 533, 81 L. J. K. B. N. S. 918, 107 L. T. N. S. 66, 28 Times L. R. 490, 56 Sol. Jo. 647. The promoters alleged that the reason given for the refusal was the knowing and wilful contracting of a union which was declared unlawful "both by the Church and by the law of the land," and that "by statute 1 Edw. VI. chap. 1, and by ecclesiastical law, the incumbent of a parish may not, without lawful cause, deny the holy sacrament to any parishioner that would devoutly and humbly desire it. The cause assigned by the defendant for his refusal was not a lawful cause, and the defendant in so refusing has offended against ecclesiastical law." The respondent placed his refusal on the ground that the promoters "were and are open and notorious evil livers," within the Rubric (which rested upon statute). There was considerable discussion in the courts as to the effect of a proviso in the said act of 1907, viz.: "Provided always that no clergyman in holy orders in the Church of England shall be liable to any suit, penalty, or censure, whether civil or ecclesiastical, for anything done or omitted to be done by him in the performance of the duties of his office, to which suit, penalty, or censure he would not have been liable if this act had not been passed." But it was held that the proviso was no defense, it being considered that it related simply to matters of marriage.

No cases have been found on the de-

famation feature of *CARTER v. PAPINEAU*, ante, 371, though there are cases as to the announcement of sentences of excommunication or expulsion (see, 4 example *Landis v. Campbell* (1883) 79 Mo. 433, 49 Am. Rep. 239; *Farnsworth v. Storrs* (1850) 5 Cush. (Mass.) 412; *Fitzgerald v. Robinson* (1873) 112 Mass. 371; see also in the same connection *Morassee v. Brochu* (1889) 151 Mass. 567, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74). And while it is not intended to include generally the subject of false statements of excommunication, reference may here be made to *Barnabas v. Traunter* (1641) 1 Vin. Abr. (Eng.) title, Action for words (D, a) 15, p. 396, also reported in *March on Slander*, London, 1674, p. 147, where it was held that an action lies by a parishioner against a vicar who falsely stated in church that the plaintiff had been excommunicated, and that he had received an instrument to this effect from the ordinary, when he had not received any such instrument and the plaintiff had not been excommunicated, it being further alleged that on another occasion he refused to celebrate divine service until the plaintiff had departed out of the church; the court held that this was sufficient although the plaintiff did not show that any man avoided his company or forbore to trade or deal with him or that he had any temporal or special loss on account of it.

It may be noted that in *Fitzgerald v. Robinson* (Mass) supra, the court in speaking of *Barnabas v. Traunter*, declared that "it is clear that the case is not law in this commonwealth."

While not within the scope of this note reference may be made to *M'Corkle v. Binns* (1912) 5 Binn. (Pa.) 340, 6 Am. Dec. 420, which was an action against the editor of a newspaper, one count being made on account of the following publication: "Certificates of religion. Of late we have had a display of certificates to prove that Wm. M'Corkle has been in full standing and communion with the church for some years. I deny the truth of the assertion, and affirm that the certificates he has produced do not prove it. And I further affirm that he has been deprived of his full standing, and of partaking in communion, because of his groundless and infamous assertions. I do not affirm that he has been thus deprived of partaking in communion by any regular act of the regular officers of the church of which he is a member; but do distinctly and decidedly L.R.A.1916D.

affirm that he has absented himself from the table, and thus prevented the session from being called to investigate his conduct." The court, in declining to arrest a judgment for the plaintiff, said inter alia: "The plaintiff is not charged merely with a voluntary abstinence from the principal sacrament of his church, or being deprived of that sacrament for any innocent or meritorious action, but with an expulsion from it on account of his infamous unfounded assertions. To say of a man in a newspaper that he is guilty of infamous falsehoods is clearly a libel; and is it less so because the elders of his church have found him guilty, or because, in order to evade the judgment of those elders, he has absented himself from the sacrament of the Lord's Supper, as is alleged in the paper of the 16th of September? All persons who become members of a religious society are subject to the discipline of that society. The law permits it, and very wisely, because it tends to the preservation of religion and morals. It is understood that according to the rules of the church to which the plaintiff belongs, if he had really been guilty of infamous falsehoods for which he refused or neglected to make atonement, he might after proper admonition have been excluded from the sacrament of the Lord's Supper. Now is it possible that, after such an exclusion for such a cause, any man could keep his standing either in the society to which he belongs, or in the world at large? In my opinion he must sink under the opprobrium. I can have no doubt, therefore, of the matter charged in the declaration being a libel."

Reference may also be made to *St. Pierre v. Beaulieu* (1906) Rap. Jud. Quebec, 33 C. S. 385, where the curé of the parish, at a meeting of commissioners of schools, threatened them that he would refuse the communion to those who voted to re-engage the holding secretary treasurer, and upon an action by such secretary treasurer against the curé the defendant was mulcted in damages by the appellate court in reversing a nonsuit. The defendant's expert evidence was that the curé might instruct members of his congregation in matters of conscience and if they disobeyed in the matter of a grave moral obligation, they would be unworthy of the sacraments, and so in case they voted for one declared incompetent by competent authority; but there was no proof of any such declaration. B. B. B.

OKLAHOMA SUPREME COURT.

MILTON BRUNER and Wife, Pliffs. in Err.,
v.

T. S. COBB et al.

(37 Okla. 228, 131 Pac. 165.)

Cancellation — deed — inadequacy of price.

1. Ordinarily mere inadequacy of consideration is not sufficient ground, in itself, to justify a court in canceling a deed, yet when the inadequacy is so gross as to amount to fraud, or in the absence of other circumstances to shock the conscience, and furnish satisfactory and decisive evidence of fraud, it will be sufficient ground for canceling a conveyance or contract, either executed or executory; the rule being based upon the theory that fraud, and not inadequacy of price, is the sole reason for the interposition of equity.

For other cases, see Contracts, V. c, 3, in Dig. 1-52 N. S.

Same — inference of fraud.

2. Whenever it appears that the parties to a trade have knowingly and deliberately fixed upon any price, however great or however small, there is no occasion nor reason for interference by courts, for owners have a right to sell property for what they please; but where there is no evidence of such knowledge, intention, or deliberation by the parties, the disproportion between the value of the subject-matter and the price may be so great as to warrant the court in inferring therefrom the fact of fraud.

For other cases, see Evidence, II. c, 7, in Dig. 1-52 N. S.

Same — sufficiency of facts.

3. Milton Bruner, and Katie, his wife, were ignorant Creek freedmen. Milton owned a certain 40-acre tract which he was desirous of selling. Katie owned an allotment of 160 acres, worth from \$2,400 to \$4,000. C., desiring to purchase land, through his agent, P., entered into negotiations with Milton to purchase the 40-acre tract, agreeing to give him \$150 in cash and a good note for the balance. The deed was drawn and acknowledged before P., who was a notary public, and which, after acknowledgment by Milton and his wife, proved to be a conveyance for Katie's allotment, instead of Milton's 40-acre tract. Both Milton and his wife testify positively that they sold the 40-acre tract, and never at any time sold, or intended to sell, Katie's allotment. Held, that the inadequacy of consideration, under the rule announced in the preceding paragraph of this syllabus, together with the other cumulative incidents and circumstances detailed in the record, amounts to

such constructive fraud as to require a cancellation of the deed.

For other cases, see Contracts, V. c, 3, in Dig. 1-52 N. S.

Indians — conveyance of allotment.

4. A Creek freedman under eighteen years of age, although a married woman, cannot make a valid conveyance of her allotment, except under the direction of the county court; and a deed made without such authority is void.

For other cases, see Indians, II. in Dig 1-52 N. S.

(February 11, 1913.)

ERROR to the District Court for Seminole County to review a judgment in defendants' favor in an action brought to cancel and set aside a certain warranty deed made by plaintiffs to defendant Cobb Reversed.

Statement by Robertson, C.:

On October 14, 1912, a motion to dismiss the appeal herein was sustained on the ground that the alleged errors of the trial court required the examination and consideration of the evidence introduced at the trial, and that, the referee before whom the cause was tried not having certified the evidence to the court, and no bill of exceptions having been allowed, this court could not consider the alleged errors relied upon by plaintiffs in error. This defect in the record was strenuously insisted upon by defendants in error in their brief, and was not denied in any manner by plaintiffs in error until after the order of dismissal had been entered and a petition for rehearing had been filed and oral argument had thereon, whereupon a certain agreement between counsel at the trial (which was embodied in the record) was, for the first time, called to the attention of the court by counsel for plaintiffs in error. The consideration given by the court to this agreement resulted in the granting of the petition for rehearing, and the former opinion, dismissing the appeal, is hereby recalled and set aside and the appeal reinstated, and the cause will now be considered on its merits.

Messrs. Taylor, Pruett, & Sniggs and J. A. Baker, for plaintiffs in error:

The deed was retained, taken, and acknowledged before George Paine, who was acting at the time as the agent of the grantee, and for that reason said deed is void.

Greve v. Echo Oil Co. 8 Cal. App. 275, 96 Pac. 904; *Ardmore Nat. Bank v. Briggs Machinery & Supply Co.* 20 Okla. 427, 23 L.R.A.(N.S.) 1074, 129 Am. St. Rep. 747, 94 Pac. 533, 16 Ann. Cas. 133.

Headnotes by ROBERTSON, C.

Note. — As to cancellation of a deed for inadequacy of consideration, see annotation following this case, post, 382.

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Where the inadequacy of price is great equity will seize upon small facts showing fraud, and grant relief.

Paulter v. Manuel, 25 Okla. 59, 108 Pac. 749; *Stephens v. Ozbourne*, 107 Tenn. 572, 89 Am. St. Rep. 959, 64 S. W. 902; 2 Pom. Eq. Jur. § 928; *Wright v. Wilson*, 2 Yerg. 204.

Katie Bruner, at the time of the execution of the deed in controversy, was under the age of eighteen (18) years, and under the law governing the alienation of Indian lands, said deed is absolutely void.

Jefferson v. Winkler, 26 Okla. 653, 110 Pac. 755.

The lawmaking power may prescribe new rules of evidence, provided it does not affect existing rights.

Maguiar v. Henry, 4 Am. St. Rep. 182, and note, 84 Ky. 1; *McCready v. Sexton*, 29 Iowa, 356, 4 Am. Rep. 214; *Larson v. Dickey*, 39 Neb. 463, 42 Am. St. Rep. 595, 58 N. W. 167; *People v. Cannon*, 36 Am. St. Rep. 688, note; *Little Rock & Ft. S. R. Co. v. Payne*, 33 Ark. 816, 34 Am. Rep. 55.

Messrs. Crump & Fowler, for defendants in error:

Mere inadequacy of price is never ground for avoiding a contract. It must be accompanied by some fraud.

2 Pom. Eq. Jur. § 926; *Cook v. Bagnell Timber Co.* 78 Ark. 47, 94 S. W. 695, 8 Ann. Cas. 251.

As between the parties to a deed it is immaterial whether it is acknowledged or not.

Hess v. Trigg, 8 Okla. 286, 57 Pac. 159; *Kee v. Ewing*, 17 Okla. 410, 87 Pac. 297; *Ardmore Nat. Bank v. Briggs Machinery & Supply Co.* 20 Okla. 427, 23 L.R.A.(N.S.) 1074, 129 Am. St. Rep. 747, 94 Pac. 533, 16 Ann. Cas. 133.

There was no fraud in this case.

Moore v. Adams, 26 Okla. 48, 108 Pac. 392.

Plaintiffs having plead infancy, the burden was on them to establish such infancy.

Moore v. Sawyer, 167 Fed. 831.

The determination of the age of an individual when that is the question in litigation is a judicial question solely.

8 Cyc. 820; *Vega S. S. Co. v. Consolidated Elevator Co.* 75 Minn. 308, 43 L.R.A. 843, 74 Am. St. Rep. 484, 77 N. W. 973; *Missouri, K. & T. R. Co. v. Simonson*, 64 Kan. 802, 57 L.R.A. 765, 91 Am. St. Rep. 248, 68 Pac. 653; *United States v. Klein*, 13 Wall. 128, 20 L. ed. 819.

Plaintiffs cannot recover in a court of equity, because they do not offer to do equity by tendering a conveyance of the land they claim to have sold, and because they have been guilty of inequitable conduct in falsely representing the plaintiff Katie Bruner to

be of full age, if it is a fact that she was not of age.

1 Pom. Eq. Jur. § 385; *International Land Co. v. Marshall*, 22 Okla. 693, 19 L.R.A.(N.S.) 1056, 98 Pac. 951.

Robertson, C., filed the following opinion:

This is an action by Milton Bruner and Katie Bruner, his wife, to cancel and set aside a certain warranty deed made by them on February 23, 1909, to T. S. Cobb, for 80 acres of land in Seminole, and 80 acres of land in Okfuskee county. Cobb three days later sold the land to James E. Foreman, who is joined as a party defendant, but Cobb alone defends; Foreman resting his title on Cobb's deed, which is good if the deed to Cobb from the Bruners is valid. The Bruners, who are husband and wife, are Creek freedmen, and the land in controversy is the allotment of Katie Bruner. Plaintiffs in error rely for reversal of the judgment appealed from on four separate assignments of error, viz.: First. Inadequacy of price. Second. The deed was taken and acknowledged by the grantee's agent, and is therefore void. Third. Deception and fraud in obtaining the signatures of plaintiffs to said deed. Fourth. Katie Bruner, at the time of executing said deed, was under the age of eighteen years, and any deed made by her while a minor was absolutely void.

It will be unnecessary to give separate consideration to the assignments above enumerated, for that the reasons advanced in behalf of each are so closely related one to the other as to be, in a measure, applicable to all; in other words, fraud and deceit being the gist of the complaint of plaintiffs in error, we will treat the assignments of error as above enumerated merely as subdivisions of one general charge of fraud, and will give to each subdivision of such charge such consideration as it merits.

It appears from the record that these plaintiffs in error, at the time this deed was taken, were ignorant negroes, the wife especially, being a mere girl, wholly devoid of business experience, and possessed of no judgment or knowledge of business affairs. The husband owned a certain 40-acre tract, which he was desirous of selling, and with that intention approached George B. Paine, who was a notary public and justice of the peace at Wewoka, in Seminole county, and who, from his own testimony, was acting as the agent of Cobb, who at the time was county judge of Seminole county. Milton Bruner told Paine that he wanted \$300 for his 40-acre tract. Paine, as agent for Cobb, finally agreed to give him \$300 for it, one half cash, the balance to be secured by good

note. This conversation took place in the Campbell abstract office at Wewoka on February 23, 1909. Katie Bruner was not present at the time the deal was made, but was sent for by Paine to sign the deed with her husband. Both Milton and Katie swear positively that they sold Milton's 40-acre tract to Paine for Cobb, and that they did not have one word of conversation with him or anyone else concerning Katie's allotment; that they had no intention of selling it, but supposed always that the deed they signed was for Milton's 40-acre tract. Paine paid Milton \$150 in cash and gave him in addition a memorandum, signed by himself, to the effect that they had coming to them a deferred payment of \$150 on the land sold by them. This memorandum did not describe the land in any way, nor did it bear any interest; no payor was named therein, and it was signed by Paine alone, without any reference to his capacity as agent for Cobb. The record affirmatively shows that Katie Bruner did not receive any part of the \$150, or derive, directly or indirectly, any benefit therefrom. Cobb, at the trial, offered to pay into court the balance of the purchase price, to wit, \$150. The undisputed testimony shows that the land was worth all the way from \$2,500 to \$4,000. The record also shows that the entire transaction was carried on between Milton Bruner and Paine; Katie Bruner at no time being consulted concerning the trade.

Plaintiffs allege that as soon as they discovered the deception practised upon them they brought suit to cancel the deed; the record showing the action to have been commenced on March 26, 1909, the deed having been executed February 23, 1909. Ordinarily mere inadequacy of consideration is not sufficient cause to justify interference by a court of equity in a case of rescission of contract or annulment of deed; but where, as in the case at bar, the consideration given is so grossly inadequate as to shock the conscience and force one's mind to the immediate conclusion that the deed to the land was procured by fraud, it not only is the right, but the positive duty, of a court to interfere and place the parties, especially the innocent and injured one, in the position he was in before the transaction occurred, and it is a matter of no moment whether the fraud was occasioned by the active, deceitful representations, connivance, and acts of him who receives the benefits of the fraudulent transaction, or whether the result was reached on account of the mental incapacity and want of business ability of the one defrauded. The result in either instance is L.R.A.1916D.

the same; the difference in the moral turpitude involved being only of degree.

The undisputed testimony in this case shows that Cobb first sent one Coodie Johnson (who, from the record, seems to be a handy sort of a fellow and a ready witness), a few days before the deed involved herein was executed, to the Bruners to procure a deed for the land; that Cobb gave Johnson \$150 with which to purchase the same; that Johnson offered Katie \$75 for a deed, but that she refused to take it. Three or four days later Paine, at Cobb's suggestion, put the deal through with Milton Bruner, and gave him \$150 and the purported duebill, hereinbefore mentioned, and which was worthless and of no binding effect on anybody. This is all that Cobb pretends to have given for the 160 acres, although the deed imports a consideration of \$800. None of the witnesses valued the land at less than \$2,400, and there is testimony to the effect that it was worth \$4,000; \$3,000 being the fair average value thereof.

When we consider all the facts and circumstances surrounding this transaction, the official position held by Cobb and his standing in the community, his superior intelligence and official influence, the fact that he was desirous of procuring this land, and had made other attempts to secure a deed thereto, the further fact that Paine, a justice of the peace and the notary who took the acknowledgment to the deed, and who was Cobb's agent, engineered the deal and paid the money and executed the so-called duebill, which, according to the uncontradicted evidence, was to have been a good note, but which, as we have seen, was a worthless piece of paper, not binding on anyone, and the further fact that the Bruners belonged to an inferior race, were ignorant and illiterate, possessed of no knowledge or experience in such matters, to say nothing of their contention that they had in mind only the sale of Milton's 40-acre tract, and not the allotment of Katie, we are forced to the conclusion that the consideration given for the land was so grossly inadequate as to amount to constructive fraud, and of such character and degree as to require the cancelation of the deed. We might content ourselves by saying, and the record would fully warrant such conclusion, that the inadequacy of the consideration, of itself, free from any other fact or circumstance, is sufficient to constitute constructive fraud of such magnitude as to require the cancelation of the conveyance; but in this case we are not required to base our judgment upon this lone conclusion, for the record is full of other inequitable facts and circumstances that, to our mind, are so cumulative in their

character and corroborative of the above conclusion as to leave no room for doubt in the mind of any fair-minded man.

In Pomeroy's Equity Jurisprudence, vol. 2, §§ 926 et seq., this subject is treated in an able and exhaustive manner, and the general rule there laid down for cases of this sort seems to be that, while mere inadequacy of consideration is not sufficient ground, in itself, for refusing the remedy of specific performance, yet when the inadequacy is so gross as to amount to fraud, or in the absence of other circumstances to shock the conscience and furnish satisfactory and decisive evidence of fraud, it will be a sufficient ground for canceling a conveyance or contract, either executed or executory. § 927. This rule is based upon the theory that fraud, and not inadequacy of price, is the sole and only reason for the interposition of equity. In the note to this section in the treatise above referred to, it is said: "The rule had its origin at a time when fraud was generally inferred by presumptions of law, and often by conclusive presumptions. In the present condition of the law on the subject of fraud, this mode of formulating the rule seems to be erroneous. The principle is now almost universally adopted that fraud is a fact inferred, like other conclusions of fact, from the evidence; no rule of law can therefore be laid down as to the amount of inadequacy necessary to produce the resulting fraud. Inadequacy of consideration may be evidence of fraud, slight or powerful, according to its amount and other circumstances. When it is satisfactory and decisive evidence, when from the proof of inadequacy the court or jury are convinced that fraud as a fact did exist, then the relief is granted. Instead, therefore, of repeating the usual formula which has been handed down for generations, that the inadequacy must be conclusive evidence of fraud, I have said in the text that it must be satisfactory and decisive evidence; the former mode represented fraud as the result of a conclusive legal presumption; the latter treats it as a conclusion of fact drawn from the evidence, and is therefore in perfect harmony with the theory which now prevails in most, if not all, of the states. The following seems to be the true rationale of the doctrines concerning inadequacy of price: Whenever it appears that the parties have knowingly and deliberately fixed upon any price, however great or however small, there is no occasion nor reason for interference by courts; for owners have a right to sell property for what they please, and buyers have a right to pay what they please. See *Harris v. Tyson*, 24 Pa. 347, 360, 64 Am. Dec. 661, 14 Mor. Min. Rep. L.R.A.1916D

634; *Davidson v. Little*, 22 Pa. 245, 247, 60 Am. Dec. 81. But where there is no evidence of such knowledge, intention, or deliberation by the parties, the disproportion between the value of the subject-matter and the price may be so great as to warrant the court in inferring therefrom the fact of fraud. Such a gross inadequacy or disproportion will call for explanation, and will shift the burden of proof upon the party seeking to enforce the contract, and will require him to show affirmatively that the price was the result of a deliberate and intentional action by the parties; and if the facts do prove such action the fact of fraud will be more readily and clearly inferred."

Ordinarily, if there is nothing but mere inadequacy of consideration, the case must be extreme in order to call for the interposition of equity. 2 Pom. Eq. Jur. § 928. As was said above, we would be fully justified in holding that the consideration given in this case, to wit, \$150 cash and a worthless duebill, for land worth \$3,000, would bring the case clearly within the rule hereinabove referred to; but we are not required to base our conclusion on this one item alone. The whole transaction is so intimately and completely charged with other inequitable instances, incidents, and circumstances as to absolutely preclude any other conclusion in the minds of honest men. Thus, the record shows that Paine, the notary public who drew the deed, and who took the acknowledgment of the grantors, was Cobb's agent for the purpose of purchasing the land; that he opened negotiations leading up to the execution and delivery of the deed with Milton Bruner, who testifies positively that he never talked with Paine about selling Katie's allotment; that after the deed had been drawn and the trade made, he (Paine) sent Milton to get Katie, who was at the company store in another part of the town, in order that she might sign it; that he caused Milton to sign the deed first, and Katie to sign after him; that he paid the money to Milton, and not to Katie; that Sanders Sancho was sent to the Bruners and talked with them of and concerning the sale of Milton's land, and not Katie's allotment. The fact that Milton did not know the description of the land by number, but relied upon Paine to examine the map and secure therefrom the proper description, is also a circumstance worthy of note. The uncontradicted evidence that the land was worth not less than \$2,400, and from that to \$4,000; the fact that the parties were not of kin, and there was no intent on the part of the Bruners to bestow on Cobb any bounty or gift,—these and many other cir-

cumstances, to our minds, bring this case clearly within the rule above referred to, and require the cancelation of the deeds complained of in the petition of plaintiffs in error. Aside from all this, the evidence clearly shows that Katie, at the time she executed the deed, was under the age of eighteen years, and therefore incapable of conveying her allotment. There is much positive and competent testimony in the record to the effect that she was under eighteen years of age, and not a single word of competent evidence that she was over that age. Coody Johnson (Cobb's man Friday) testified that when he went to the Bruners and negotiated a sale of the land, he offered them only \$75 of the \$150 which Cobb instructed him to give, for the reason that he wanted to wait a few days to get a census card from the Dawes Commission, in order to ascertain Katie's age (Record, p. 32), and yet (on page 44 of the record) he testified that he had known her for sixteen years, and that she was five or six years old when he first saw and knew her. It is on testimony such as this that the referee held that she was over eighteen years of age, notwithstanding the positive testimony of Katie's mother, her stepfather, and herself that she was born on March 11, 1891. Ordinarily, where there is a conflict in the testimony on any material fact, the finding of a referee will not be disturbed if there is any testimony reasonably tending to support the same. We do not think there is any testimony in the record reasonably tending to support the finding, and we conclude that Katie Bruner was not eighteen years of age on February 23, 1909, the day the deed was signed, and that therefore the same is void on that account. This question has been settled in this state by the decision in *Jefferson v. Winkler*, 26 Okla. 653, 110 Pac. 755. See also to the same effect, *Gill v. Haggerty*, 32 Okla. 407, 122 Pac. 641.

Katie Bruner, being a Creek freedman under eighteen years of age, could not make a valid conveyance on the date the deed herein complained of was executed, and, the sale not having been made under the direction of the county court, the deed is therefore necessarily void.

This last conclusion is not only corroborative evidence of the fraudulent intent of Cobb in the premises, but, in itself, is proof conclusive of the invalidity of the deed. It therefore becomes the plain duty of this court to give these plaintiffs in error the relief which they are clearly entitled to, but which was denied them by the referee and the trial court. It seems to be a common practice in the part of the state from L.R.A.1916D.

which this case comes, for unscrupulous and designing men to prey upon the ignorant and defenseless, and in many instances the helpless Indians and freedmen. These unfortunate classes have our undivided sympathy, for, with an intelligent and scheming white man, they have an unequal chance, even at the best; but when to this unequal chance is added the dishonesty of public officials, on whom these simple people have a right to rely implicitly for fair dealing and protection, and the duplicity and treachery of those of their own kith and kin, it is next to impossible to prevent them from being most shamefully mistreated and robbed. Ignorant freedmen (negroes), such as plaintiffs in error, have a right to rely upon honesty of purpose and fair dealing at the hands of white men, and this is doubly true as to those who hold official positions of trust and honor; they have been taught to depend upon the superior intelligence and integrity of the white race; and while the law recognizes no distinction of race or color, and is not, generally speaking, the guardian of the ignorant, yet it will at all times, especially in such cases as the one at bar, throw its protecting arms about the weak and defend their rights against the wicked designs of the strong, when the object of these designs is to take an unfair and undue advantage of their weakness and ignorance. We feel that the facts detailed in the record in the instant case are such as to demand at our hands the relief prayed for by plaintiffs in error. We cannot think that the motive which prompted the giving of \$150 cash and the worthless duebill to Milton and Katie Bruner for 160 acres of land worth \$3,000 (even if defendant's story be true) is of such character as will appeal very strongly to honest men; and when we take into consideration the probability of the truthfulness of Bruner's story, to the effect that they sold only Milton's 40-acre tract, and not the allotment of Katie, words fail us in adequate denunciation of the acts of these persons who are responsible for the present condition. Katie, not having received any of the consideration, is not required to return the same, or any part thereof. *Gill v. Haggerty*, supra, and cases therein cited.

Having reached these conclusions, it therefore necessarily follows that the judgment be reversed, set aside, and held for naught, and the cause remanded to the District Court of Seminole County, with instructions to enter a judgment canceling and setting aside, fully and completely, the deed executed by Milton Bruner and Katie Bruner to T. S. Cobb on February 23, 1909;

also the deed executed to J. E. Foreman on February 27, 1909, by T. S. Cobb and Lillian Cobb, as set out and described in the petition of plaintiffs in error in the court below.

Per Curiam:
Adopted in whole.

Petition for rehearing denied April 5, 1913.

Annotation—Cancellation of a deed for inadequacy of consideration.

In the present note it is sought to determine whether inadequacy of consideration is, of itself, a ground for the cancellation of a deed, and if so, when and under what circumstances equity will exercise its jurisdiction for that purpose. Inadequacy of consideration is an element present in a very large number of equitable action for the cancellation of deeds, in which other elements, such as misrepresentation and fraud, duress, undue influence, breach of confidential relations, form the basis of the action. This note, however, is confined to the single element of inadequacy of consideration as a ground for such cancellation. In the development of this subject it has been found necessary to include cases in which other inequitable incidents were present, but where the action was based on such other inequitable incidents the case has been excluded.

The note is also confined to inadequacy of consideration in deeds upon a consideration of money or other property; the question of inadequacy of consideration in conveyances upon consideration of care for the grantor has in general been excluded.¹ Sales by an heir of his interest in an estate have also been excluded.

The sale of expectancies and other contingent interests is not exhaustively

discussed, since the question is intimately connected with the validity of contracts with reference to such estates, and more logically belongs with a complete treatment of that subject.

Attempts by creditors to set aside a deed of their debtor have in general been excluded.

It is a well-recognized rule that the owner of property may do what he will therewith, assuming that no rights of creditors are involved. The owner may give it away if he so desires. If the gift is perfected, the transfer is valid. This assumes the owner is competent and fully informed as to what he is doing. But assuming that the owner does not desire to make a gift or take any less than the property is worth, what then are his rights when he has actually conveyed it for an inadequate consideration?

An adequate consideration, reduced to its last analysis, is simply what property will bring in the market. There is no absolute standard. The elements that determine it are numerous and varying. Its very nature sustains the uniform conclusion of the cases that mere inadequacy of consideration is not a ground for the cancellation of a deed.^{1a} In another form it is stated that in-

¹ As to specific performance of a contract to leave property in consideration of services or support, including the effect of inadequacy of consideration, see note to *Bennett v. Burkhalter*, 44 L.R.A.(N.S.) 733.

For undue influence in conveyance or transfer of property in consideration of support of the grantor, see note to *Boardman v. Lorentzen*, 52 L.R.A.(N.S.) 476.

For relief of grantor in conveyance in consideration of agreement to support, which is broken by grantee, see note to *Dixon v. Milling*, 43 L.R.A.(N.S.) 916.

^{1a} *Kline v. Kline* (1912) 14 Ariz. 369, 128 Pac. 805; *Barry v. St. Joseph's Hospital* (1897) 5 Cal. Unrep. 625, 48 Pac. 68; *Witherwax v. Riddle* (1887) 121 Ill. 140, 13 N. E. 545 (action to rescind a trade in which complainant claimed to have given land more valuable than he had received); *Wenegar v. Bollenbach* (1899) 180 Ill. 222, 54 N. E. 192; *Walker v. Shepard* (1904) 210 Ill. 100, 71 N. E. 422; *Schwartz v. Reznick* (1913) 257 Ill. 479, 100 N. E. 900; *Herron v. Herron* (1887) 71 Iowa, 428, 32 N. W. 407; *Robb v. Robb* (1893) 14 Ky. L. Rep. L.R.A.1916D.

747, 21 S. W. 580; *Wallace v. Marshall* (1848) 9 B. Mon. (Ky.) 148; *Matthis v. O'Brien* (1910) 137 Ky. 651, 126 S. W. 156 (sale and conveyance of interest in an estate); *McKinney v. Crady* (1886) 8 Ky. L. Rep. 259, 1 S. W. 402; *Morriso v. Philliber* (1860) 30 Mo. 145; *Franklin v. Osgood* (1817) 14 Johns. (N. Y.) 527; *Dunn v. Chambers* (1848) 4 Barb. (N. Y.) 376; *BRUNER v. COBB*, ante, 377; *Chandler v. Roe* (1915) — Okla. — 148 Pac. 1026; *Scovill v. Barney* (1872) 4 Or. 238; *Powers v. Powers* (1905) 46 Or. 479, 80 Pac. 1058, 17 Am. Neg. Rep. 120; *Harris v. Tyson* (1855) 24 Pa. 347, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634 (sale of mineral rights at about 1 per cent. of value); *Cummings's Appeal* (1817) 67 Pa. 404; *Stephens v. Ozbourne* (1901) 107 Tenn. 572, 89 Am. St. Rep. 957, 64 S. W. 902; *Jarrett v. Jarrett* (1877) 11 W. Va. 584 (action by heirs); *Pennybacker v. Laidley* (1890) 33 W. Va. 624, 11 S. E. 39; *Jenkins v. Einstein* (1811) 3 Biss. 128, Fed. Cas. No. 7,265 (action by assignee for benefit of creditors); *Hamblin v. Bishop* (1889) 41 Fed. 74.

adequacy of consideration is not a distinct ground for equitable relief.²

Again inadequacy of consideration is stated not to furnish ground for cancellation, where the parties are in a situation to form an independent judgment concerning the transaction,³ or understand fully the nature of the transaction.⁴

Notwithstanding this well-established

rule that inadequacy of consideration is not a ground for the cancellation of a deed, it is repeatedly stated in the cases that if the inadequacy of consideration is such as to shock the conscience, it does furnish ground for cancellation.⁵

If the inadequacy is not so great as to shock the conscience, the deed will not be canceled.⁶ But if the inadequacy

In *Jacobson v. Nealand* (1904) 122 Iowa, 372, 98 N. W. 158, a suit in equity to set aside a deed on the ground that the grantor was of unsound mind at the time the deed was executed; that it was without consideration, and was obtained by false and fraudulent representations, the deed reciting a consideration which was in fact paid, it is stated that whether the consideration was adequate or not is immaterial, save as such evidence may bear on the other issues of the case.

A consideration much less than the value of the property conveyed was sustained as an adequate consideration in *Lewis v. Allen* (1914) 42 Okla. 584, 142 Pac. 384, where the deed was executed by the grantor after she became of age, to pass title to property which she had sold to the grantee and deeded to him before she became of age, at which time she received a consideration equal to the full value of the property.

A sale of land on which a tax lien was claimed on consideration that the tax lien be discharged on that and other land sold by the grantor, and still others yet owned by him, will not be set aside for inadequacy of consideration where there is no evidence of a confidential relation nor of deceit, misrepresentation, or mistake, nor of duress or artifice to reduce the price. *Chance v. Chapman* (1915) — Ala. —, 70 So. 676. The real consideration moving to the grantor is stated to be satisfaction of the demands of the holder of the tax lien on these lands. Neither the value of the land nor the consideration appears.

² *Hardy v. Dyas* (1903) 203 Ill. 211, 67 N. E. 852; *Dunn v. Chambers* (1848) 4 Barb. (N. Y.) 376; *Eyre v. Potter* (1853) 15 How. (U. S.) 42, 14 L. ed. 592.

³ *Storthez v. Williams* (1908) 86 Ark. 460, 111 S. W. 804, citing from 2 Pom. Eq. Jur. 3d ed. § 926. There was fraud in this case for which the conveyance was set aside.

⁴ *Miller v. Folsom* (1915) — Okla. —, 149 Pac. 1185, approving of *BRUNER v. COBB*, ante, 377; *Stamper v. Venable* (1906) 117 Tenn. 557, 97 S. W. 812, see infra, note 15.

Davidson v. Little (1813) 22 Pa. 245, 60 Am. Dec. 81. It is stated that a conveyance of land for 5 per cent. of its value is very well calculated to fix upon the transaction a serious suspicion of its fairness, but if the vendor was thoroughly acquainted with every fact which it was necessary for him to know, if he was of legal age and of sound mind, if there were no circumstances which gave the vendee an improper control of him amounting to mental im-

prisonment, if in short the vendee behaved honestly and the vendor was able to act like a free man with his eyes open, the one had a right to sell, and the other to buy, on any terms they thought proper to agree upon.

And see *Harris v. Tyson* (1855) 24 Pa. 347, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634, infra, note 15.

It is stated in *Newman v. Newman* (1905) — Tex. Civ. App. —, 86 S. W. 635, that a voluntary deed cannot be set aside on the ground of inadequacy of consideration.

⁵ *Johnson v. Woodworth* (1909) 134 App. Div. 715, 119 N. Y. Supp. 146; *Eyre v. Potter* (1853) 15 How. (U. S.) 42, 14 L. ed. 592 (it then amounts to evidence of fraud).

Cases cited in notes 6-9.

The price must be so small as to strike the mind in the light of the testimony, at first flush, as grossly inadequate, and raise the conviction that the property was sacrificed in the market for a price less than its actual value. *Walker v. Derby* (1870) 5 Biss. 134, Fed. Cas. No. 17,068.

⁶ *Bevins v. Lowe* (1914) 159 Ky. 439, 167 S. W. 422; *Dotson v. Norman* (1914) 159 Ky. 786, 169 S. W. 527; *Walker v. Derby* (Fed.) supra. The property was sold for practically what it was worth in these cases.

A consideration of \$100 for land shown to be worth \$150 to \$200 was held not unreasonably low in *McKinley v. McKinley* (1902) 23 Ky. L. Rep. 2314, 66 S. W. 831.

A deed by a lodge of property worth about \$3,000 for a consideration of \$2,500 cannot be set aside on the ground of inadequacy of consideration. *Deepwater Council v. Renick* (1906) 59 W. Va. 343, 53 S. E. 552.

Where the conveyance was made years before the action is brought to set it aside, the court will inquire no further into the adequacy of consideration than to ascertain if the price paid is so grossly inadequate as to shock the conscience and necessarily imply fraud. *Somers v. Ferris* (1914) 182 Mich. 392, 148 N. W. 782. Such an inadequate compensation was not made out in this case, where the evidence established that the land was sold for approximately what it was worth.

A consideration of \$300 and the cost of a fence estimated to be worth from \$65 to \$140, for land worth between \$500 and \$600, is not so inadequate as to furnish convincing evidence of fraud. *McDonald v. Smith* (1910) 95 Ark. 523, 130 S. W. 515.

A consideration of \$8,000 for property

is so great as to shock the conscience, it is ground for cancellation. In the cases in which a conveyance is canceled, however, there is some other element, such as a confidential relation,⁷ disparity of mental ability between the contracting parties, or incompetency on the part of the grantor,⁸ ignorance of business mat-

ters on the part of the grantor, or misrepresentation or fraud on the part of the grantee.⁹

Again, it is stated that the inadequacy must be so gross as to strike the understanding with the conviction that the transaction was not fair and bona fide,¹⁰ and it is frequently stated that the in-

worth \$13,000 does not show so inadequate a consideration as to shock the conscience of the court or raise a presumption of fraud. *Talbott v. Manard* (1900) 106 Tenn. 60, 59 S. W. 340.

A consideration of \$1,000 for land worth from \$2,800 to \$3,000 was held not to be so grossly inadequate as to constitute ground for setting aside the sale in *Fagan v. Schultz* (1874) 73 Ill. 529, where the title was doubtful and the grantor, a reckless dissipated person, made the transfer after consultation with an attorney of his own choice, who informed him that he would obtain title to the entire tract for \$500.

A conveyance of land valued at \$230,000 for \$500, by one out of possession, who it is morally certain could not obtain the land without litigation, and whose title thereto is very doubtful, is not for a price so greatly inadequate as to shock the moral sense. *Pennybacker v. Laidley* (1890) 33 W. Va. 624, 11 S. E. 39.

A conveyance of dower worth \$25,000 by one who claimed to be the wife of the decedent, upon a consideration of \$1,000, was sustained in *Holmes v. Holmes* (1870) 1 Abb. (U. S.) 525, Fed. Cas. No. 6,638, where it was not shown that the grantor was actually the wife of the decedent.

A deed by ignorant negro girls of a two-thirds interest in land worth about \$800, for a consideration of \$300, is not upon a consideration so shockingly disproportionate to the value as to call for the interposition of equity. *Störthz v. Arnold* (1905) 74 Ark. 68, 84 S. W. 1036. The court states that fraud without damage or damage without fraud will not do, but it does not appear whether the theory of this case is that a cancellation will not be granted for inadequacy of consideration alone.

A consideration of \$1,425 and assistance and attention to the grantor, estimated to be worth \$500, were held not to be an inadequate consideration for land worth \$350 more. *Clearwater v. Kimler* (1867) 43 Ill. 272.

See *Stephens v. Ozbourne* (1901) 107 Tenn. 572, 89 Am. St. Rep. 957, 64 S. W. 902, *infra*, note 24.

⁷*German Corp. v. Negaunee German Aid Soc.* (1912) 172 Mich. 650, 158 N. W. 343. It is then evidence of fraud. Conveyance by corporation to its members of property worth \$500 for \$1.

⁸A consideration of \$32.05 for 84 acres of land was held so grossly inadequate as to shock the conscience of the court in *Perkins v. Scott* (1867) 23 Iowa, 237. The value of the land is not given. On this point it is stated the evidence was conflicting. *L.R.A.* 1916D.

ing, the court arrived at the conclusion that the consideration was so grossly inadequate as to shock the conscience. In addition to the inadequacy of price, however, there was incompetency of the grantor from mental disturbance which partially affected her reason and rendered her unfit for business.

In an action to rescind a deed on the ground of fraud, a consideration of \$75 for property worth \$1,000 is stated to be greatly disproportionate. In addition to this there was proof of old age on the part of the grantor, and also great mental weakness and imbecility. *Hodges v. Wilson* (1914) 165 N. C. 323, 81 S. E. 340.

A consideration of \$1,250, some worthless mining stock, and a house and lot encumbered for more than they were worth, for a farm worth \$12,500, was held to be so inadequate as to shock the conscience of a court of equity and stamp the whole transaction with fraud from its inception, where the grantor was a weak-minded individual. The deed was accordingly set aside. *Fecht v. Freeman* (1911) 251 Ill. 84, 95 N. E. 1043.

⁹*Sherman v. Glick* (1914) 71 Or. 451, 142 Pac. 606, rescinding a conveyance of property worth \$3,000 by a woman ignorant of business affairs, upon a consideration of \$500 and property worth \$750, but represented by the owner to be worth \$2,500.

A consideration of \$5 for property worth between \$200 and \$500 is so grossly inadequate as to shock the moral sense, and where it is obtained from an elderly woman ignorant of the facts in the matter, by men who are familiar with the facts and who represent to her that the land is in a "very bad way in regard to taxes," is worthless and of no value to her whatsoever, the transaction will be set aside. *Benter v. Patch* (1888) 7 Mackey (D. C.) 590.

The sale of land by a woman unfamiliar with the premises, through an agent acting for both parties, upon a consideration about one forty-fifth of the value of the land, is upon such an inadequate consideration that the deed will be set aside. *Morriso v. Philliber* (1860) 30 Mo. 145. The grantor could neither read nor write, and had no knowledge of the value of the property; this value was not disclosed to her before the sale, and her estimate of it was evidently influenced by the agent's representation that the property was about to be sold for taxes, a relation of confidence existing between her and the person acting as agent.

¹⁰*Wood v. Craft* (1887) 85 Ala. 260, 4 So. 469 (consideration of \$1,000 not sufficient to warrant setting aside a deed for land which did not exceed \$1,200 in value).

adequacy must be such as to amount to evidence of fraud.¹¹

The inadequacy which amounts to fraud for which a deed will be canceled depends upon circumstances. Examples are given in the note of inadequacy

which does not furnish a ground for rescission on this theory,¹² as are also examples of inadequacy which has been held sufficient to authorize the cancellation of a deed.¹³ As is true in the case of inadequacy which shocks the con-

¹¹ *Wenegar v. Bollenbach* (1899) 180 Ill. 222, 54 N. E. 192; *Robb v. Robb* (1893) 14 Ky. L. Rep. 747, 21 S. W. 580 (if it is not so inadequate as to furnish presumptive evidence of fraud, there is no ground for cancellation); *Bevins v. Lowe* (1914) 159 Ky. 439, 167 S. W. 422; *Dotson v. Norman* (1914) 159 Ky. 786, 169 S. W. 527; *Morriso v. Philliber* (Mo.) supra; *Franklin v. Osgood* (1817) 14 Johns. (N. Y.) 527 (no such inadequacy is shown in a conveyance of a large tract for one eighth its value, where title was in doubt); *BRUNER v. COBB*, ante, 377; *Wells v. Houston* (1902) 29 Tex. Civ. App. 619, 69 S. W. 183; *Jenkins v. Einstein* (1871) 3 Biss. 128, Fed. Cas. No. 7265 (action by assignee for benefit of creditors); *Follett v. Rose* (1844) 3 McLean, 332, Fed. Cas. No. 4,900 (action by heirs).

Where gross inadequacy of price is coupled with circumstances such as raise a strong suspicion of fraud, and pecuniary embarrassment of the grantor, a court of equity will rescind the transaction. *McKinney v. Crady* (1886) 8 Ky. L. Rep. 259, 1 S. W. 402. The land was sold in this case for practically what it was worth, consequently no rescission was granted.

A deed was canceled in *Chance v. Chapman* (1915) — Ala. —, 70 So. 676, because of inadequacy of consideration. Neither the value of the land nor the consideration appears. The court cites from *Pomeroy's Equity of Jurisprudence* to the effect that where the inadequacy of price is so gross that it shocks the conscience and furnishes satisfactory and decisive evidence of fraud, it will be a sufficient ground for cancellation.

See *Eyre v. Potter* (U. S.) supra, note 5; *Talbott v. Manard* (Tenn.); *McDonald v. Smith* (Ark.) and *Somers v. Ferris* (Mich.) supra, note 6; and *German Corp. v. Negau-nee German Aid Soc.* (Mich.) supra, note 7.

¹² Such a gross inadequacy of consideration as to furnish evidence of fraud is not shown by a conveyance from an elderly man, resident of another country, to the widow of his son, at from one fourth to one fifth of the actual value of the grantor's interest in the property. *Herron v. Herron* (1887) 71 Iowa, 428, 32 N. W. 407. It is stated that the presumption in such circumstances is that the grantor preferred to accept the comparatively small amount paid him for his interest rather than be cheated and overreached in the transaction.

A consideration of \$100 for property worth at least \$1,500, on which there were liens of \$800, is not so grossly inadequate as to call for the setting aside of the deed, where the sale took place in public and was held by auditors. *Weber v. Weitling* (1867) 18 N. J. Eq. 441.

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A deed to property upon consideration that the grantee establish the grantor's title and settle the estate, and give to the grantor one half of the net proceeds, is not upon so inadequate a consideration as to call for a rescission. *Hyer v. Little* (1870) 20 N. J. Eq. 443.

A deed of land worth between \$40,000 and \$44,000, subject to a mortgage of \$14,000, will not be set aside for inadequacy of consideration, where the consideration paid is \$6,000 in cash, personal property worth \$2,500, and land variously estimated at from \$20,000 to \$40,000, but subject to a mortgage of \$10,000. *Van Gundy v. Steele* (1913) 261 Ill. 206, 103 N. E. 754.

A conveyance by a negro of his interest in an estate for about one fourth its value is not upon a consideration so grossly inadequate as to shock the conscience. *Wilson v. Farquharson* (1853) 5 Md. 134. At least it will not be set aside for this cause where the grantor, who is shown to be a person of ordinary understanding, possessing an intelligence quite equal to the general run of colored persons, and fully competent to the transaction of business, is willing to abide by the bargain, the conveyance being attacked by a third person.

¹³ A deed by an ignorant freedman of property worth \$2,000, to a shrewd business man, upon a consideration of \$15 and a horse formerly sold or traded to the grantor, and which practically already belonged to her, was held to be such a consideration as to warrant an inference of fraud. *Barker v. Wiseman* (1915) — Okla. —, 151 Pac. 1047.

It is stated in *Wetherwax v. Riddle* (1887) 121 Ill. 140, 13 N. E. 545, an action to rescind a trade in real estate in which the complainant claims to have given property more valuable than he received, that mere inadequacy of price is not per se ground for setting aside a transfer of property; yet it may be so gross and palpable as to amount in itself to proof of fraud, and this, in connection with proof of imposition and misrepresentation on the part of the purchaser and his agents, will be sufficient to characterize the transaction as fraudulent in a court of equity.

A sale and conveyance of an interest in an estate for less than one third the value thereof, obtained by a nephew of the grantor, who was addicted to the use of intoxicating liquors and was under the influence of liquor at the time, was set aside in *Matthis v. O'Brien* (1910) 137 Ky. 651, 126 S. W. 156. The court, after stating that it was not necessary that the grantor be so intoxicated that he did not understand the nature and contents of the contract, continues: "It will be sufficient if his

science according to the theory above discussed, it is also true here that the inadequacy which furnishes a ground for cancellation on the theory that it amounts to fraud is always accompanied by some other inequitable incident. It is stated in one case¹⁴ that "no principle is better settled than that mere inadequacy does not form a distinct ground of equitable relief. And yet there are cases where there is no positive evidence of fraud, in which the inequality of the bargain is so gross that the mind cannot resist the inference that, though there be no direct evidence of fraud, such a bargain must have been in some way improperly obtained. In such cases, a court of equity will avoid a bargain,

weakness and necessities are taken advantage of, as in this case, and a contract obtained that no man in his sound and sober senses would have entered into."

See *Fecht v. Freeman* (1911) 251 Ill. 84, 95 N. E. 1043, supra, note 8.

¹⁴ *Dunn v. Chambers* (1848) 4 Barb. (N. Y.) 376, holding that a deed to a half interest in property worth about \$1,800, for \$100, would not be declared absolutely void, but would stand as security for what the grantee had paid, where so far as appears the grantor was fully informed of his rights and it appeared that, if he should die without issue, he had only a life estate to dispose of, and there was a strong probability arising from his dissolute habits and reckless course of life that he would not live long. The court states that, after all, the extenuating circumstances which the case presents do not wholly overcome the inequitable features of the transaction.

¹⁵ *Hardy v. Dyas* (1903) 203 Ill. 211, 67 N. E. 852.

Inadequacy of consideration is stated to be insufficient to show fraud in the absence of any other evidence, in *Emonds v. Termehr* (1882) 60 Iowa, 92, 14 N. W. 197.

Inadequacy of price is stated in *Crane v. Conklin* (1831) 1 N. J. Eq. 346, 22 Am. Dec. 519, not of itself to be evidence of fraud, and never to be the ground of setting aside the deed unless accompanied with fraud or misrepresentations, where the party is able to contract. In this case, however, the party was intoxicated and inadequacy of price was held to be direct evidence of fraud. See *Ashby v. Yetter* (N. J.) infra, note 16.

In *Powers v. Powers* (1905) 46 Or. 479, 80 Pac. 1058, mere inadequacy of consideration is stated not to be a ground for avoiding a deed, although it may be evidence of fraud in connection with other circumstances sufficient for that purpose.

In *Derby v. Donahoe* (1907) 208 Mo. 684, 106 S. W. 632, it is stated that while inadequacy of consideration is insufficient to warrant a court of equity in annulling a sale of real estate, yet in connection with other facts it may be considered in determining the question as to whether an actual L.R.A.1916D.

not merely on account of its gross inequality, but because that inequality furnishes 'the most vehement presumption of fraud.'" In this case the grantee stood in a relationship to the grantor, which the court states "should have prompted the defendant [grantee], instead of profiting by the recklessness and improvidence of his cousin, to take measures more effectually to secure the property for his benefit."

Standing alone, inadequacy of consideration is entitled to but little weight as evidence of fraud.¹⁵ On the contrary, it has been stated to be evidence of fraud,¹⁶ but in the cases containing such a statement, there were in evidence other inequitable incidents.

fraud has been committed on the rights of an individual.

In an action in ejectment in which it was claimed by the defendant that the plaintiff had obtained title by a deed upon an inadequate consideration, it was held that inadequacy of consideration is not sufficient to prove fraud without some additional evidence. *Davidson v. Little* (1853) 22 Pa. 245, 60 Am. Dec. 81. The grantor in this case was not complaining. The additional evidence of fraud which the court required seems to be that there be ignorance on the part of the grantor as to the facts in regard to the land, that he be of unsound mind, or that there be circumstances which give the grantee an improper control over him, or some other inequitable incident.

A sale of mineral rights by one ignorant of the value of such rights, to one with full knowledge of the value, at about 1 per cent of the value, will not be set aside for inadequacy of consideration. It is stated by the court that the sale of this privilege at a low price is explained by so many reasons that it is not necessary to account for it by supposing there was any foul play; it is enough to say that the vendor had a right to sell at what price he pleased or keep his property, and having chosen to do the former he cannot undo it by changing his own mind. *Harris v. Tyson* (1855) 24 Pa. 347, 64 Am. Dec. 661, 14 Mor. Min. Rep. 634.

The presumption of fraud arising from an inadequate consideration never prevails where it is clearly shown that the grantor intelligently and deliberately disposed of his property in a manner decided by himself. *Stamper v. Venable* (1906) 117 Tenn. 557, 97 S. W. 812. The attack upon the deed was made by heirs of the grantor.

¹⁶ In *Schwarz v. Reznick* (1913) 257 Ill. 479, 100 N. E. 900, it is stated that mere inadequacy of price may be so gross and palpable as to amount in itself to a proof of fraud. There were other circumstances of fraud in this case. See infra, note 22.

The obtaining of land worth at least \$10,000 for \$3,000 was held ground for the cancellation of the deed, the court stating that while it may not be actual fraud, it

It is the theory of some courts that relief is granted in such cases because of the fraud, and not because of the inadequacy of consideration.¹⁷ Consequently, in the absence of fraud no relief can be granted.¹⁸ Fraud as a basis for cancellation, however, is beyond the scope of the present note, which is confined to inadequacy of consideration as a distinct ground for cancellation.

It thus appears that, notwithstanding these statements by the courts, a deed will not be canceled for mere inadequacy of consideration, however great.¹⁹ It is only where there is some other inequitable incident, such as disparity in mental ability of the parties, fraudulent concealment, abuse of confidential relations, etc., combined with the inadequacy, that the "conscience is shocked," or that "it amounts to fraud." It doubtless is true that the other inequitable incidents in many of the cases are not

sufficient of themselves to set the deed aside, but combined with the inadequacy of consideration, they furnish a sufficient reason for the exercise of equitable jurisdiction for the setting aside of the deed.

As shown above, where cancellation of a deed is granted, some inequitable incident in addition to the inadequacy is essential. These inequitable incidents are of infinite variety and degrees. As the inequitable incidents become more palpable, relief on the ground of inadequacy of consideration is the more readily granted, that is, the inadequacy need not be so gross.²⁰ In a large number of cases there is a disparity of mental ability between the parties to the transaction, so that they cannot be said to be dealing on an equality. Where this condition exists, rescission will be granted for inadequacy of consideration.²¹ Rescission will also be granted

amounts to fraud in law. *Turner v. Washburn* (1904) 25 Ky. L. Rep. 2198, 80 S. W. 460. The grantor in this case was not informed as to the exact amount of land nor interest in the land which he was conveying.

A property worth between \$500 and \$900 given in exchange for property worth \$12,400 is stated in *Ashby v. Yetter* (1911) 79 N. J. Eq. 196, 81 Atl. 730, to be such a grossly inadequate consideration as of itself to be evidence of fraud. The grantor was mentally weak, and grantee took advantage of this weakness.

In *McPhaul v. Walters* (1914) 167 N. C. 182, 83 S. E. 321, it is stated that when an issue is raised upon the trial of an action involving fraud and undue influence in securing the execution of a deed, the consideration paid is an important and material fact, and is frequently controlling. If it is near the value of the land conveyed, it is natural and reasonable to conclude, in the absence of peculiar conditions and circumstances, that there is no fraud, but if, on the other hand, there is a gross inequality between the price paid and the value of the property, the inference of mistake or deception arises almost irresistibly. Approving of an earlier case in this jurisdiction, the court states that inadequacy of consideration is evidence of fraud, and when grossly so, may, standing alone, justify submitting the issue of fraud to the jury.

See *Witherwax v. Riddle* (1886) 121 Ill. 140, 13 N. E. 545, supra, note 13.

¹⁷ *Herron v. Herron* (1887) 71 Iowa, 428, 32 N. W. 407.

A conveyance of land in exchange for other land worth less than a third of the land conveyed was set aside in *Jordan v. Cathcart* (1905) 126 Iowa, 600, 102 N. W. 510, where the grantee occupied a confidential relation with reference to the grantor, and fraudulently obtained the conveyance.

¹⁸ *Brockway v. Harrington* (1891) 82 L.R.A.1916D.

Iowa, 23, 47 N. W. 1013. A deed of land containing about 100 acres and variously estimated to be worth from \$3,500 to \$5,000, by a husband to his wife, for a consideration of \$100, will not be set aside for inadequacy of consideration.

But in *Williams v. Longman* (1899) — *Iowa*, —, 78 N. W. 198, a deed of land worth \$2,400 upon a consideration of \$1,000 was set aside where the grantee called upon the grantor, who was an elderly man, at a time when he was ill, obtained an agreement of sale, and on the following day obtained a deed. The court states that the grantor's years, his illness, which to some extent affected his mind, and the gross inadequacy of the consideration are well established; that other circumstances appear, such as the unusual, and for the grantor very unfavorable, terms of payment of the purchase money.

¹⁹ A deed by a grantor who is mentally capable of making the deed, and understands the nature and effect of the transaction, will not be set aside for inadequacy of consideration, in the absence of some other ground for equitable relief. *Miller v. Folsom* (1915) — *Okla.* —, 149 Pac. 1185.

²⁰ *Wells v. Houston* (1900) 23 Tex. Civ. App. 629, 57 S. W. 584. See *Fecht v. Freeman* (1911) 251 Ill. 84, 95 N. E. 1043, supra, note 8.

See *Walker v. Shepard* (1904) 210 Ill. 100, 71 N. E. 422, infra, note 23, and *Crane v. Conklin* (1831) 1 N. J. Eq. 346, 22 Am. Dec. 519, supra, note 15.

²¹ *Scovill v. Barney* (1872) 4 Or. 288.

A conveyance of property worth at least \$500, upon a consideration of \$25, was set aside where it was obtained by an intelligent business man from an ignorant negro woman, unfamiliar with the value of the property or the business being transacted. *Yarbrough v. Harris* (1910) 168 Ala. 332, 52 So. 916, Ann. Cas. 1912A, 702.

A deed of a lot obtained by an intelligent

for inadequacy of consideration where there is a fraudulent conspiracy,²² or

business man from an ignorant negro woman upon an inadequate consideration, the grantor believing that she was conveying merely a strip of land for sidewalk purposes, will be set aside. *Kirby v. Arnold* (1915) — Ala. —, 68 So. 17. The exact value of the interest in the lot conveyed does not appear; the testimony placed it from \$200 to \$400, and was based upon the idea that the grantor had an undivided one-fourth interest in the lot, subject to a life estate, but it was shown that there was no life estate and none was reserved in the deed. The consideration named was \$12.50.

A conveyance of land by an ignorant and weak-minded old man to a purchaser of shrewdness and ability, upon a consideration of about half the value of the land, was set aside in *Wilson v. Oldham* (1851) 12 B. Mon. (Ky.) 55.

And in *Chisholm v. Schroeder* (1885) 40 N. S. 8, a sale of property at but little more than one half its value by a person of weak mind, unfit for any business transaction which required judgment and discretion, was set aside.

An exchange of property by a weak-minded visionary person, for other property worth less than one half its value, will be rescinded for inadequacy of consideration. *Holden v. Crawford* (1826) 1 Aik. (Vt.) 390, 15 Am. Dec. 700.

An exchange of property worth \$3,000 by an elderly woman without education, ignorant of business and of real estate values, and acting without competent disinterested advice, for other property and a money consideration totaling \$1,250, is upon such an inadequate consideration as to shock a conscientious person and to furnish ground for annulling the conveyance. *Sherman v. Glick* (1914) 71 Or. 451, 142 Pac. 606. The grantee in this case had represented to the grantor that the property taken in exchange was worth \$2,500 instead of \$750, as was the fact.

The incompetency of a grantor taken in connection with a sale of property worth \$3,000 for \$1,250 is sufficient to justify the setting aside of the deed. *Castle v. Dole* (1909) 54 Wash. 585, 103 Pac. 828.

A decree setting aside a deed will be sustained where the evidence shows that it was made by an aged woman unable to read or speak the English language, upon a consideration of a transfer of property to her which was mortgaged for practically its entire value, and a cash payment of \$2,000, of which she received only about one fourth, the balance being consumed in commission charged by one of the defendants and in the payment of judgments claimed to exist against her and in the satisfaction of an attachment proceeding which was secured to be issued against her by one of the defendants. *Shea v. Teufert* (1904) 207 Ill. L.R.A.1916D.

222, 69 N. E. 872. The property in question was worth about \$8,000.

A deed for property worth from \$3,500 to \$4,000, upon a consideration of \$2,500, was rescinded where the grantor was intoxicated and in such a mental condition as to be incapable of executing the deed. *Hardy v. Dyas* (1903) 203 Ill. 211, 67 N. E. 852. It is stated that while the consideration agreed to be paid would not, standing alone, authorize a court of chancery to set aside the sale for inadequacy of consideration, when taken in connection with the other facts of the case the fact that the property was purchased at that price is an important factor in determining whether the transaction should be set aside and the deed canceled.

The sale of an inheritance of £40 per annum, for an annuity of £20 per annum, by a weak man easily imposed upon, was set aside in *Clarkson v. Hanway* (1723) 2 P. Wms. (Eng.) 203.

A conveyance upon an inadequate consideration, by a grantor who was weak minded and did not comprehend the nature of the transaction, was relieved against in *Paulter v. Manuel* (1909) 25 Okla. 59, 108 Pac. 749, by granting the grantor judgment for the value in her land less the amount actually received by her from her grantee, the land having passed into the hands of a bona fide purchaser.

Under the Georgia Code, § 4033, great inadequacy of consideration joined with great disparity of mental ability in contracting a bargain may justify the setting aside of a sale or other contract. This was applied to a deed in *Pye v. Pye* (1909) 133 Ga. 246, 65 S. E. 424.

A deed obtained for a grossly inadequate consideration, by unfair advantage taken of great mental weakness, though not amounting to absolute incapacity, of the grantor, will be set aside on equitable terms. *Walling v. Thomas* (1901) 133 Ala. 426, 31 So. 982 (demurrer to a bill which alleged a conveyance at one fourth the value of the land overruled).

But the court in *Coghen y Garcia v. Llonin* (1909) 5 Porto Rico Fed. Rep. 18, refused to interfere in the case of a deed upon a consideration at about one half the value of the land, where the grantor was not mentally so weak minded that he did not understand the nature of the transaction.

²² In *Schwarz v. Reznick* (1913) 257 Ill. 479, 100 N. E. 900, rescission was granted of a deed of a farm worth about \$4,800 for property taken in exchange worth less than \$450, where the property taken in exchange was represented to be worth \$5,000, and a third party who was obtained by the vendee for the purpose of giving an appearance of value to the property offered to purchase it for \$4,800 and paid \$100 down for an option thereon.

where there is imposition in the case of a relation of confidence,²³ or misrepresentation and fraud.²⁴

The rule was established in England

²³ A consideration of \$4,000 for property worth upwards of \$14,000 is grossly inadequate, and a deed obtained by a father from his daughter at a time when she is under the influence of opiates and incapacitated from doing business will be set aside. *Neilson v. Laffin* (1893) 66 Hun, 636, 50 N. Y. S. R. 277, 21 N. Y. Supp. 731.

A conveyance of land worth from \$2,800 to \$3,200, upon a consideration of \$500, by a grantor of feeble mind, between whom and the grantee the relations are of such character that a threat made by the grantee to deprive her of her land by suit if she does not accept the sum offered by him would have undue weight; will be set aside. *Walker v. Shepard* (1904) 210 Ill. 100, 71 N. E. 422. In such a situation the gross inadequacy of the consideration is stated to become evidence of fraud which is of controlling importance and justifies the interference of a court of equity. The claim made by the grantee that the conveyance was made in a compromise was held not sustainable.

A consideration of \$125 for property worth \$600 or \$800 on which there was a mortgage for \$125 and a lien for street improvements for \$60 is stated in *Davis v. Yancy* (1907) 31 Ky. L. Rep. 1155, 104 S. W. 697, to be so inadequate as to raise a presumption that it must have been obtained by some means not appearing on the face of deed. The deed in this case was obtained by a son from his mother upon his representation that there was a lien of \$200 or \$300 for street improvements, and that if the mother did not make a deed to him for the lot she would get nothing for it.

See *Matthis v. O'Brien* (1910) 137 Ky. 651, 126 S. W. 156, supra, note 13, and *Chambers v. Chambers*, infra, note 33.

²⁴ A deed of land worth from \$3,000 to \$6,000, for a consideration of \$25, will be set aside where, in addition to the inadequacy of consideration, the grantee misrepresents conditions, conceals facts when he should speak, and makes misstatements preventing an inquiry which would disclose material circumstances and conditions unknown to the grantor. *Armstrong v. Randall* (1913) 93 Neb. 722, 141 N. W. 829.

A sale by an ignorant negro for \$5, of property worth \$1,000, is upon such a gross inadequacy of price as to shock the conscience and establish fraud, and the deed therefore will be rescinded where, in addition to this inadequacy, there is suppressive and misleading conduct on the part of the grantee's agent, which in itself amounts to fraud. *Stephens v. Ozbourn* (1901) 107 Tenn. 572, 89 Am. St. Rep. 957, 64 S. W. 902.

A deed obtained from a grantor ignorant of the value of the property, upon representations as to its value by the grantee's agent, and representations also that it is

that the sale of an expectancy or reversionary interest in real estate cannot stand unless it is upon an adequate consideration.²⁵ The purchaser must show

about to be sold for taxes and that the grantor will not realize anything therefrom, will be set aside where the consideration is only a third of the value, the rescission, however, being for fraudulent misrepresentations rather than inadequacy of consideration. *Stack v. Nolte* (1902) 29 Wash. 188, 69 Pac. 753.

A deed of property worth \$2,000 upon a consideration of \$500, to a stranger in blood of the grantor, to the exclusion of her son, will be set aside where, in addition to the inadequacy of consideration, the grantor believes that she is giving security merely. *Johnson v. Woodworth* (1909) 134 App. Div. 715, 119 N. Y. Supp. 146.

A consideration which, considering the evidence most favorable to the grantee, amounts to only half of the value of the property, when accompanied by misrepresentations to the grantor, who was without knowledge in regard to the property and was hurried into the execution of the deed without being given an opportunity to make appropriate investigation, is ground for setting aside the deed. *Wenegar v. Bollenbach* (1899) 180 Ill. 222, 54 N. E. 192.

A conveyance of land worth between \$10 and \$20 an acre, for less than \$2 an acre, by a grantor ignorant of the value of the land, the deed being delivered after oil is discovered thereon, which greatly increases the value, will be set aside. *Hyde v. McFaddin* (1905) 72 C. C. A. 655, 140 Fed. 443, certiorari denied in (1906) 203 U. S. 596, 51 L. ed. 333, 27 Sup. Ct. Rep. 784. The agent of the grantors in this case, who knew of the fact, violated his trust in not giving full information to the grantors.

A deed by an ignorant negro girl of a half interest in a lot worth \$3,000, upon a consideration of \$300, will be canceled where it is obtained upon false and fraudulent representations that the lot is worth only \$500, and that she may be forced to put down a sidewalk and the lot sold to pay expenses. The grantor desired to consult with her agent about the lot, but was persuaded not to do so. *Storthez v. Williams* (1908) 86 Ark. 460, 111 S. W. 804.

A deed of the grantor's interest in an estate of the value of \$7,000, upon a consideration of \$1,000, at a time when the grantor is wholly ignorant of the character, condition, and value of the estate, where the grantee purposely keeps him ignorant and makes false statements in regard to the amount and value thereof, will be set aside. *Lavette v. Sage* (1861) 29 Conn. 577.

²⁵ *Bawtree v. Watson* (1834) 3 Myl. & K. (Eng.) 339; *Twisleton v. Griffith* (1716) 1 P. Wms. (Eng.) 310; *Newton v. Hunt* (1833) 5 Sim. (Eng.) 511 (reversionary interest in stock set aside for inadequacy and unjust and oppressive conduct of purchaser); *Nott v. Hill* (1683) 1 Vern. (Eng.)

that it was adequate, and where he fails to show this the conveyance will be set aside.²⁶ The market value of the reversionary interest is the determinative test of its value, not the value calculated by the tables.²⁷

The rule of these cases was denied application in the case of a sale of a reversion at auction.²⁸ And also where there was a long delay in seeking to set the sale aside.²⁹ And the English court refused to set aside a sale of a reversion for mere inadequacy of consideration, where the inadequacy was the result of the death of the life tenant shortly after the sale.³⁰

A statute was subsequently enacted in England (sales of reversions act of 1867) providing that no purchase made bona fide and without fraud or unfair dealing, of any reversionary interest in

real or personal estate, shall hereafter be opened or set aside merely on the ground of undervalue. In order to bring a sale of a reversion within this act, it must be made bona fide and without fraud or unfair dealing. Consequently, in a case of unfair dealing a sale of a reversionary interest in a certain trust fund at about half its value was set aside.³¹

But this doctrine of the English courts has been quite generally repudiated in the courts of this country as to reversionary or remainder estates. Where there is no fraud or imposition, the sale will not be set aside for mere inadequacy of consideration.³² And this is true although the interest is contingent.³³ A sale of a vested interest in remainder will not be set aside because of the mere fact that vendor did not receive

167; *Peacock v. Evans* (1809) 16 Ves. Jr. (Eng.) 512, 10 Revised Rep. 218 (sale of expectancy at less than half its value); *Gowland v. De Faria* (1810) 17 Ves. Jr. (Eng.) 20, 11 Revised Rep. 9.

A sale by a tenant in tail in remainder of his reversionary interests worth at the lowest estimate nearly twice what he received therefor, will be set aside. *St. Albyn v. Harding* (1859) 27 Beav. (Eng.) 11.

A sale of a reversion worth £200 for £38 less than its value will be set aside. *Jones v. Ricketts* (1862) 31 Beav. (Eng.) 130, 8 Jur. N. S. 1198, 31 L. J. Ch. N. S. 753, 10 Week. Rep. 576.

A sale of a legacy worth £400 for £370 was set aside as upon an inadequate consideration in *Foster v. Roberts* (1861) 29 Beav. (Eng.) 467, 30 L. J. Ch. N. S. 666, 7 Jur. N. S. 400, 4 L. T. N. S. 760, 9 Week. Rep. 605.

The doctrine was extended to Canada.

Morey v. Totten (1857) 6 Grant, Ch. (U. C.) 176, sale of reversion in property worth £400 for £125. Life tenant eighty years of age.

An obiter statement in accord with this rule in the case of the sale of an expectancy is found in *Wells v. Houston* (1900) 23 Tex. Civ. App. 629, 57 S. W. 584, but it seems there was fraud in procuring the sale. S. c. second appeal (1902) 29 Tex. Civ. App. 619, 69 S. W. 183.

²⁶ *Salter v. Bradshaw* (1858) 26 Beav. (Eng.) 161, 23 L. J. Ch. N. S. 426, 5 Jur. N. S. 831. In this case the conveyance of a reversion nearly forty years before the suit was brought was set aside, the life estate having terminated.

Edwards v. Burt (1852) 2 De G. M. & G. (Eng.) 55, holding that a sale upon a consideration of £250, of a reversionary interest variously estimated at from £318 to £840 would be set aside, and that a sale upon a consideration of £500, of a reversionary interest valued at about twice that amount by the witnesses for the vendor, at about £80 more by the vendee himself, and L.R.A.1916D.

at about £500 by witnesses for the vendee, would be set aside, the court stating that the vendee had not sustained the burden that was upon him to show that the consideration was fair and adequate.

Nesbitt v. Berridge (1863) 32 Beav. (Eng.) 282, 9 Jur. N. S. 1044, 8 L. T. N. S. 76, 11 Week. Rep. 446, holding that a consideration of £75 for property which was within a few days sold for £125, and which was valued by witnesses at a very much higher sum, was an inadequate consideration and the sale would be set aside.

²⁷ *Aldborough v. Trye* (1840) 7 Clark & F. (Eng.) 436, West, 221.

²⁸ *Shelly v. Nash* (1818) 3 Madd. Ch. (Eng.) 232, 18 Revised Rep. 223.

²⁹ In *Moth v. Atwood* (1801) 5 Ves. Jr. (Eng.) 845, a bill to set aside a sale of a reversion on the ground of inadequacy of price was dismissed where it was not brought until twelve years after the sale and there was no fraud or circumvention.

³⁰ *Nichols v. Gould* (1752) 2 Ves. Sr. (Eng.) 422.

³¹ *Brenchley v. Higgins* (1900) 83 L. T. N. S. (Eng.) 751, 70 L. J. Ch. N. S. 788.

³² *Cribbins v. Markwood* (1856) 13 Gratt. (Va.) 495, 67 Am. Dec. 775; *Mayo v. Carrington* (1869) 19 Gratt. (Va.) 74.

³³ Thus, mere inadequacy of consideration does not afford a sufficient reason of setting aside a conveyance of the interest which a son acquires in consequence of the remarriage of his mother, under a statute which prohibits the widow, after her second marriage, from selling or conveying her interest in her prior husband's real estate, and provides that at her death the title should vest in her children by her former husband. *McAdams v. Bailey* (1907) 169 Ind. 518, 13 L.R.A.(N.S.) 1003, 124 Am. St. Rep. 240, 82 N. E. 1057. As to mere expectancies, however, the rule is stated to be different.

The contrary opinion expressed in *Chambers v. Chambers* (1894) 139 Ind. 111, 38 N. E. 334, must be regarded as overruled.

full market value.³⁴ And it has been held that mere inadequacy is not ground for canceling the sale of a mere expectancy.³⁵ The sale of an equity of redemption will not be set aside unless the consideration is grossly inadequate or such as to shock the conscience.³⁶

But in this country as in England the contracts generally of expectant heirs, reversioners, and holders of other expectant and contingent interests, with

reference to such interest, are guarded with great care in equity.³⁷ No attempt has been made, however, in this note, to discuss the rights upon the transfer of such interests. Neither does the note purport to be exhaustive of sales of remainders, where the peculiar rules applicable to expectancies and other contingent interests have been applied to the sale of remainder estates.

In the *Chambers Case*, however, the deed was made by an orphan boy who had been brought up in the grantee's family, immediately upon reaching his majority and in ignorance of his legal rights, so that there was an element of breach of confidential relations upon which the cancellation rested in addition to the inadequacy of consideration. The conveyance was of a remainder which had been contingent, but which was vested at the time of conveyance.

³⁴ *Hayes v. Huddleson* (1913) 40 App. D. C. 183, Ann. Cas. 1914B, 1037. See *Chambers v. Chambers* (Ind.) supra, note 33.

A sale of a vested interest in remainder by one in financial distress, for about one fourth its value, will not be set aside for

inadequacy of consideration. *Phillips's Estate* (1903) 205 Pa. 511, 55 Atl. 212.

³⁵ A sale by a son of his expectant interest in his father's estate for less than one third its value, but upon a full and fair transaction, and with the consent of the father, will not be set aside for inadequacy of consideration. *Lee v. Lee* (1865) 2 Duv. (Ky.) 134. But see Texas cases cited in note 25, supra.

³⁶ *Thornton v. Pinckard* (1908) 157 Ala. 206, 47 So. 289 (property worth about what was paid).

³⁷ See 2 Pom. Eq. Jur. § 953; *Perry, Trusts*, § 188.

As to the validity of conveyance of property in expectancy, see *McClure v. Raben*, 9 L.R.A. 477, and footnote. W. A. E.

TENNESSEE SUPREME COURT.

T. J. McKEE

v.

WILLIAM HUGHES et al., Plffs. in Certiorari.

(133 Tenn. 455, 181 S. W. 930.)

Conspiracy — petition to revoke business license — liability.

1. Persons who, in good faith, petition a village council to revoke the license of a merchant to carry on his business in the town, on the ground that it is so conducted as to constitute a nuisance, are not liable as for conspiracy, although the council acts upon the petition, and, in excess of its authority, revokes the license to the injury of the merchant.

For other cases, see *Conspiracy*, III. a, in Dig. 1-52 N. S.

Evidence — burden of proof — malice.

2. One injured by the closing of his business in response to a petition of citizens has the burden of showing malice on their part to hold them liable for the injury done.

For other cases, see *Evidence*, II. e, 6, in Dig. 1-52 N. S.

Case — petitioning for closing of store — liability for loss.

3. Citizens are not liable in damages for seeking summary action from the village

council having authority to declare and abate nuisances for the closing of a store as a nuisance because of the congregation of disorderly persons there, rather than resorting to the courts for relief, although the council acts upon the petition and closes the store in excess of its authority.

For other cases, see *Case*, I. in Dig. 1-52 N. S.

(January 8, 1916.)

CERTIORARI to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Maury County in defendants' favor in an action brought to recover damages for alleged unlawful conspiracy of defendants to destroy plaintiff's business. Reversed.

The facts are stated in the opinion.

Messrs. Holding & Garner and J. H. Denning for plaintiffs in certiorari:

Messrs. J. L. Jones, J. C. Voorhies, and R. S. Hopkins for defendant in certiorari.

Williams, J. delivered the opinion of the court:

McKee brought this suit against a large number of the residents of the village of Spring Hill, Maury county, to recover damages, his declaration containing several counts, all of which, save the fourth, have been eliminated by the verdict of the jury and the rulings of the court of civil appeals. In this fourth count it was averred that

Note — As to civil liability of persons who join in petition addressed to public authorities, see annotation following this case, post, 394.
L.R.A.1916D.

Spring Hill is incorporated, and has a board of mayor and aldermen, from which plaintiff had procured a license to do the business of a general merchant; that under this license he conducted a store for the sale of merchandise and had a prosperous business, when the defendants unlawfully conspired together to stop and destroy his business, and for that purpose signed and delivered to the board of mayor and aldermen the following petition addressed to that body:

"We, the undersigned citizens, do hereby petition your honorable body to declare the store conducted by T. J. McKee a public nuisance, and we further petition you to abate this nuisance by revoking his license and closing up his place of business.

"This 27th day of August, 1913."

This paper was signed by nineteen of the defendants.

It was further averred that the said board passed a resolution reciting that "numerous complaints have been made that T. J. McKee has been and is conducting a place of business which is a nuisance, and whereas a formal petition has been presented to us, numerous signed by citizens, be it resolved that we hereby revoke the license issued to T. J. McKee," and that the marshal of the town be authorized to deliver to McKee a check rebating him a part of the license sum prepaid, "and to notify him that he can no longer conduct his place of business under the penalty of the city laws."

It is averred also that, by reason of the above, plaintiff's business was stopped and destroyed, to his damage, etc.

The trial judge instructed the jury that the defendants had a right under the law to petition the village council for redress of grievances, and that they were not bound to see that the details of that council's action with reference to their petition were absolutely legal. Further, that there was no liability shown under the fourth count.

The court of civil appeals reversed the judgment of the circuit court because of the above ruling; and we are asked to grant the writ of certiorari and to review the judgment of reversal.

We have no difficulty in following the court of civil appeals to its conclusion that the action of the village council in undertaking to revoke the license and in notifying McKee that he could no longer conduct his business was unwarranted by law; but we are unable to follow that court in the ruling that the defendant petitioners must respond in damages on the ground that, in presenting said petition, they conspired to and did cause injury to plaintiff unlawfully.

There was proof adduced by plaintiff that

tended to show that he had been injured by the action taken by the city marshal under the resolution of the council. But are defendants liable as conspirators?

A "civil conspiracy" may be defined to be a combination between two or more persons to accomplish by concert of action an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means; the damage caused being the gist of any action. 5 R. C. L. 1061, 1091; 1 Words & Phrases, 2d series, 910.

The defendants, in assembling and petitioning the village council, were proceeding in the exercise of a high constitutional privilege. By the Declaration of Rights embodied in our Constitution (art. 1, § 23) it is provided: "That the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address or remonstrance."

In 8 Cyc. 894, citing *Citizens' Bank v. Board of Assessors* (C. C.) 54 Fed. 73, the rule is stated to be: "The right of assembly and petition is guaranteed by the Constitutions, which secure to every person, natural or artificial, the right to apply to any department of the government for the redress of grievances, or the bestowal of a right, and also guarantee the enjoyment of such redress [of the grievances] . . . when obtained, free from all penalty for having sought or obtained it."

We think that this, with modification to be noted below, is a correct statement of the law.

We have been cited to but a single case in which a court has dealt with liability for conspiracy predicated upon the defendants' signing a petition to those invested with governmental power for redress of grievances, or setting forth instructions by way of an expression of their wish or will. The court of civil appeals grounded its ruling upon the authority of that case, *Vanarsdale v. Lavery*, 69 Pa. 103, 109.

The petition in that case was addressed to the district school directors by defendants, who were patrons of the school which had been taught by Lavery. The petition expressed their wish that Lavery be not employed for the ensuing school term under any circumstances, and the willingness of the petitioners to accept any other competent teacher that the board might select. The action of Lavery was on the case for conspiracy, and malice was charged to have colored the effort made by defendants to prevent the directors from employing plaintiff. Referring to the petition, the court said: "It preferred no charges and

gave no reasons, and was a simple expression . . . of the wishes of the signers. It was the right of these citizens of the district thus to declare their desire. They had a right to express a preference or to declare their objection to anyone applying for appointment. They were deeply interested, and had therefore a right to speak out. But we cannot recognize the position to which the argument of the plaintiffs in error leads, that such a right of expression can be made a channel through which men may gratify their malice and enmity. This would be the actual result of the argument that the right of petition is so sacred that the private purposes and motives of the actors cannot be inquired into. If they cannot, and if the real purpose of the petition be the gratification of ill will and malice without cause, then men may be borne down by the power of their enemies, especially in numbers and by combination. . . . A groundless petition instigated only by malice cannot surely be the right of any citizen where it . . . results in harm to the object of its malicious purpose."

The court, moreover, approved a charge given by the trial judge to the effect that, if defendants acted honestly and were influenced by proper motives, the plaintiff could not recover.

We ourselves think that a true doctrine was enunciated by the Pennsylvania court in that case; but it fails of proper application in the case before us because here there was no malice and no intention to injure plaintiff. The purpose of defendants, as manifested by the only proof adduced, was to serve what was deemed to be the legitimate interests of the village,—not a selfish one springing out of trade rivalry, jealousy, or revenge.

The village of Spring Hill is the location of a large boys' training school; defendant Hughes being one of the principals of the school and mayor of the town. The proof demonstrates that the plaintiff's store was, what one of his own witnesses termed it, a rough house, frequented, as it was, by numbers of drinking and boisterous men, colored and white, and boys at times were seen in the store, full of drink. The store appears to have been the rendezvous of plaintiff and a woman, in daytime and at night. Vile communications between the two passed through the local telephone exchange. The woman resorted to the store, and was seen there more than once with plaintiff about midnight, the door being locked. Cursing in loud tones often was heard by the passers-by. Plaintiff himself was often in drink at the store, and was loudly profane. The citizens of the village L.R.A.1916D.

naturally were desirous of eliminating this condition, and in a public meeting, after discussion, petition to their village council was resorted to as a peaceable means of relief.

The same principle announced in the Pennsylvania case underlies those cases which involve the exercise of the right of petition where a suit for libel was based upon the contents of the instrument by the person affected thereby.

A number of courts hold that such petitions and all matters embraced therein, if pertinent and relevant, are absolutely privileged. But, by the weight of authority, they are only qualifiedly privileged; the privilege extending no further than the protection of the signers when they act without malice. Even if the complaint embodied in the petition be untrue, no action can be maintained if it was not maliciously made. *White v. Nicholls*, 3 How. 266, 11 L. ed. 591; *Kent v. Bongartz*, 15 R. I. 72, 2 Am. St. Rep. 870, 22 Atl. 1023; *Wieman v. Mabee*, 45 Mich. 484, 40 Am. Rep. 477, 8 N. W. 71. But proof of actual malice in respect of such a petition will render it libelous in character, and therefore, of course, an action would lie. *White v. Nicholls*, supra; *Dennehy v. O'Connell*, 66 Conn. 175, 33 Atl. 920, and cases cited above.

Such a petition is presumed not to be the product of the malice of its signers; they ought, in the exercise of such a constitutional privilege, to be presumed to act in the discharge of a social or public duty. The burden of proof to show malice was therefore on the plaintiff, *McKee*. *White v. Nicholls*, supra; *Ambrosius v. O'Farrell*, 119 Ill. App. 285; *Van Wyck v. Aspinwall*, 17 N. Y. 190. And, as seen, there was no evidence of malice that could have supported a verdict of the jury; and the trial judge was not in error in giving the instruction he did touching the fourth count of the declaration.

It may be that the petitioners misconceived the power of the council under the charter of the village, which granted the council authority to issue privilege licenses, to declare, prevent, or abate nuisances, and to prohibit or suppress disorderly houses of all kinds; further, that under such misconception they petitioned for an abatement of *McKee's* store as a public nuisance "by revoking his license and closing up his place of business." But malice or bad faith are not to be imputed to the petitioners because they could not discriminate between the power of summary abatement of a nuisance per se and the abatement of a condition such as that shown to have been in existence at *McKee's* store by a judicial proceeding. Can it be that ordinary lay-

men, in the exercise of such a right, may be thus caught on such a fine point of law, to their undoing, as is insisted in this case? The juster view is that these men but advanced the above mode of action as a suggestion for the consideration of the members of the council, deemed by them competent to judge and act as public officials, and that they are not liable if they acted in good faith or without malice. The right of petition guaranteed to the citizen in the Bill of Rights should not be allowed to become a trap for the petitioner, to be sprung by any such hairtrigger of technical law.

In *Harrison v. Bush*, 5 El. & Bl. 344, there was involved a memorial signed by defendant along with a large number of the inhabitants of his borough, complaining of the conduct of plaintiff as a justice of the peace, and the court was of opinion no action would lie for libel if the memorialist thought he was addressing an authority who might reasonably be, and was, supposed by him to have the duty and power to act in the premises. Lord Chief Justice Campbell, delivering the opinion, referred to an earlier case of *Fairman v. Ives*, 5 Barn. & Ald. 642, 1 Chitty, 85, 1 Dowl. & R. 252, 24 Revised Rep. 514, and to the opinion of Mr. Justice Holroyd therein, and said: "Mr. Justice Holroyd considered that it was

enough if the petition had been presented bona fide, 'for the purpose of obtaining redress,' without considering whether the functionary to whom it was presented had the power to grant redress; and he recognized the case of *Cleaver v. Sarraude*, cited in 1 Campb. 268, 10 Revised Rep. 680, which carries considerably further the doctrine of the occasion repelling the presumption of malice. The language of Best, J., in *Fairman v. Ives*, supra, is particularly applicable to the present case: 'The circumstances under which this letter was sent rendered it a privileged communication. It was an application for the redress of a grievance, made to one of the King's ministers, who, as the defendant honestly thought, had authority to afford him redress. And this may be done without hazard of an action or prosecution, if the application be made bona fide with a view to obtain redress for some injury received, or to prevent or punish some public abuse.'"

Satisfied, as we are, that the trial judge properly ruled this case, the writ of certiorari is granted, and the judgment of the Court of Civil Appeals is reversed. Judgment here in accord.

Petition for rehearing denied.

Annotation—Civil liability of persons who join in petition addressed to public authorities.

An extensive search, both from the point of view of conspiracy and of libel, has revealed but little authority on this question. The case of *Vanarsdale v. Lavery* (1871) 69 Pa. 103, is fully discussed in the opinion in *McKee v. Hughes*, ante, 391, and need not be further alluded to here.

In *Wieman v. Mabee* (1881) 45 Mich. 484, 40 Am. Rep. 477, 8 N. W. 71, to prevent a town superintendent of schools from licensing an applicant as teacher, persons interested in the school in question represented to the superintendent, in a petition and affidavit, that the applicant was a person of bad moral character and unfit to have charge of a school. In a suit for libel, it was decided that the communication was privileged. The court said: "The communication was fully privileged. It was made by persons interested in the school, to the person qualified to receive and act on the petition, for an honest purpose, and with an

honest belief in the justice of their action. In such cases no action can be maintained even if the complaint is untrue, if not maliciously made."

As to the privileged character of complaints to public officer against subordinate, see note in 27 L.R.A.(N.S.) 1041.

As to privilege as to proceedings for impeachment or removal of public officers, see note in 25 L.R.A.(N.S.) 455.

As to privilege of informal communications relating to criminal charge, see notes in 4 L.R.A.(N.S.) 149; 32 L.R.A.(N.S.) 740, and L.R.A.1915E, 413.

Various other questions as to privilege in respect of legal proceedings are treated in notes cited in the Index to L.R.A. Notes, under the title, "Libel and Slander."

Generally as to the effect of bad motive to make actionable what would otherwise not be, see note to *Passaic Print Works v. Ely & W. Dry Goods Co.* (1900) 62 L.R.A. 673. W. W. A.

WASHINGTON SUPREME COURT.
(Department No. 2.)

ANNA DAVIES, Resp't.,

v.

MARYLAND CASUALTY COMPANY,
App't.

(— Wash. —, 154 Pac. 1116.)

Insurance — employers' indemnity — satisfaction of judgments — giving of notes.

1. The mere giving of its notes by an insolvent employer to one who has recovered judgment against it for an injury, and their immediate return in consideration of an assignment of an indemnity insurance policy, is not such a satisfaction of the judgment, although it is in fact marked satisfied, as to make enforceable the liability on the insurance policy.

For other cases, see Insurance, VIII. in Dig. 1-52 N. S.

Same — estoppel to deny liability.

2. One who has undertaken to indemnify an employer against loss because of judgments paid for accidents to employees estops himself from insisting on prepayment of judgment as a condition to his own liability by assuming the defense of the employee's action, so that the policy may be enforced or assigned when the judgment is entered against the employer.

For other cases, see Estoppel, III. j. in Dig. 1-52 N. S.

Same — assignment — right to contest.

3. One who has insured a corporation against loss because of injury to employees cannot contest the validity of an assignment of the policy to one who has obtained a judgment against the corporation, on the theory that, prior to the assignment, the name of the corporation had been stricken from the public rolls, and its assets, under the statute, had passed to its trustees for disposition.

For other cases, see Action or Suit, I. c, in Dig. 1-52 N. S.

Appeal — misconduct of counsel — non-prejudicial error.

4. A case cannot be reversed for misconduct of counsel when it is clear that the verdict could not possibly have been affected by it.

For other cases, see Appeal and Error, VII. m, 5, in Dig. 1-52 N. S.

(February 9, 1916.)

A PPEAL by defendant from a judgment of the Superior Court for King County

Note. — For giving of note as loss or damage within condition of contract of indemnity, see notes to Kennedy v. Fidelity & C. Co. 9 L.R.A.(N.S.) 478, and West Riverside Coal Co. v. Maryland Casualty Co. 48 L.R.A.(N.S.) 195.

As to injured employee's right to reach fund under employers' liability policy, see L.R.A.1916D.

in plaintiff's favor in an action by her as assignee of an indemnity policy issued by defendant to a coal company, to recover the amount of the policy. **Affirmed.**

The facts are stated in the opinion.

Messrs. **John W. Roberts** and **George L. Spirk**, for appellant:

The policy was solely one of indemnity against loss, and indemnified only the coal company.

Ford v. Aetna L. Ins. Co. 70 Wash 29, 126 Pac. 69; *Sheard v. United States Fidelity & G. Co.* 58 Wash. 29, 107 Pac. 1024, 109 Pac. 276; *Puget Sound Improv. Co. v. Frankfort Marine, Acci. & Plate Glass Ins. Co.* 52 Wash. 124, 100 Pac. 190; *Fidelity & C. Co. v. Martin*, 163 Ky. 12, L.R.A. —, —, 173 S. W. 307; *American Employers' Liability Ins. Co. v. Fordyce*, 62 Ark. 562, 54 Am. St. Rep. 305, 36 S. W. 1051; *Finley v. United States Casualty Co.* 113 Tenn. 592, 83 S. W. 2, 3 Ann. Cas. 962; *Frye v. Bath Gas & E. Co.* 97 Me. 241, 59 L.R.A. 444, 94 Am. St. Rep. 500, 54 Atl. 395; *Travelers' Ins. Co. v. Moses*, 63 N. J. Eq. 260, 92 Am. St. Rep. 663, 49 Atl. 720; *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359; *Cushman v. Carbondale Fuel Co.* 122 Iowa, 656, 98 N. W. 509; *Carter v. Aetna L. Ins. Co.* 76 Kan. 275, 11 L.R.A.(N.S.) 1155, 91 Pac. 178; *Allen v. Gilman, McN. & Co.* 137 Fed. 136; *Allen v. Aetna L. Ins. Co.* 7 L.R.A.(N.S.) 958, 76 C. C. A. 265, 145 Fed. 881; *Saratoga Trap Rock Co. v. Standard Acci. Ins. Co.* 143 App. Div. 852, 128 N. Y. Supp. 822; *Conqueror Zinc & Lead Co. v. Aetna L. Ins. Co.* 152 Mo. App. 332, 133 S. W. 156; *Munro v. Maryland Casualty Co.* 48 Misc. 183, 96 N. Y. Supp. 705; *Appel v. People's Surety Co.* 148 App. Div. 70, 132 N. Y. Supp. 200; *Burke v. London Guarantee & Acci. Co.* 47 Misc. 171, 93 N. Y. Supp. 652, 199 N. Y. 557, 93 N. E. 1117; *Kennedy v. Fidelity & C. Co.* 100 Minn. 1, 9 L.R.A.(N.S.) 478, 117 Am. St. Rep. 658, 110 N. W. 97, 10 Ann. Cas. 1; *Connolly v. Bolster*, 187 Mass. 266, 72 N. E. 981; *Stenbom v. Brown-Oorliss Engine Co.* 137 Wis. 564, 20 L.R.A.(N.S.) 956, 119 N. W. 308; *Cayard v. Robertson*, 123 Tenn. 382, 30 L.R.A.(N.S.) 1224, 131 S. W. 864, Ann. Cas. 1912C, 152; *O'Connell v. New York, N. H. & H. R. Co.* 187 Mass. 272, 72 N. E. 979; *Maahs v. Antigo Lumber Co.* 156 Wis. 1, 145 N. W. 222; *Pfeiler v. Penn Allen Portland Cement Co.* 240 Pa. 468, 87

notes to *Allen v. Aetna L. Ins. Co.* 7 L.R.A.(N.S.) 958, and *Clark v. Bonsal*, 48 L.R.A.(N. S.) 191.

The general question whether insurance against liability for injury to property or person of third person is indemnity or liability insurance is discussed in the note to *Patterson v. Adan*, 48 L.R.A.(N.S.) 184.

Atl. 623; *Beyer v. International Aluminum Co.* 115 App. Div. 853, 101 N. Y. Supp. 83; *Texas Short Line R. Co. v. Waymire*, — Tex. Civ. App. —, 89 S. W. 452; *Brewster v. Empire State Surety Co.* 145 App. Div. 678, 130 N. Y. Supp. 439; *Poe v. Philadelphia Casualty Co.* 118 Md. 347, 84 Atl. 476; *Henderson Lighting & P. Co. v. Maryland Casualty Co.* 153 N. C. 275, 30 L.R.A.(N.S.) 1105, 69 S. E. 234; *Stephens v. Pennsylvania Casualty Co.* 3 Ann. Cas. 480, note; *Fuller, Employers' Liability Ins.* pp. 451-458; *Imperial F. Ins. Co. v. Coos County*, 151 U. S. 452, 38 L. ed. 231, 14 Sup. Ct. Rep. 379.

The coal company was insolvent prior to the judgment, and at no time suffered or sustained any loss.

First Nat. Bank v. Colby, 21 Wall. 609, 22 L. ed. 687; *United States v. Spokane Mill Co.* 206 Fed. 999.

The casualty company was in no way responsible for the insolvency of the coal company. It can in no manner be blamed for the insolvency, nor charged with any liability on account thereof.

Clark v. Bonsal, 157 N. C. 270, 72 S. E. 954; *Campbell v. Maryland Casualty Co.* 52 Ind. App. 228, 97 N. E. 1026; *Stenbom v. Brown-Corliss Engine Co.* 137 Wis. 564, 20 L.R.A.(N.S.) 956, 119 N. W. 309.

When a corporation has been stricken from the roll by the secretary, it loses its corporation franchise, and an action pending against it abates by failure to pay the license fee.

Hawley v. Bonanza Queen Min. Co. 61 Wash. 90, 111 Pac. 1073.

The judgment should be reversed because of misconduct of plaintiff's counsel.

Fernandis v. Great Northern R. Co. 41 Wash. 486, 5 L.R.A.(N.S.) 1086, 111 Am. St. Rep. 1027, 84 Pac. 18; *Spencer v. Arlington*, 49 Wash. 121, 94 Pac. 904; *Bean v. Kinseader*, — Kan. —, 135 Pac. 1181; *Zimmerle v. Childers*, 67 Or. 465, 136 Pac. 349; *Stratton v. C. H. Nichols Lumber Co.* 39 Wash. 323, 109 Am. St. Rep. 881, 81 Pac. 831; *Rogers v. Kangley Timber Co.* 74 Wash. 48, 132 Pac. 731; *Cranford v. O'Shea*, 75 Wash. 33, 134 Pac. 486; *Ford v. Aetna L. Ins. Co.* 70 Wash. 29, 126 Pac. 69; *Hanstad v. Canadian P. R. Co.* 44 Wash. 505, 87 Pac. 832; *Sullivan v. Seattle Electric Co.* 51 Wash. 71, 130 Am. St. Rep. 1082, 97 Pac. 1109.

Messrs. Brady & Rummens for respondent.

Bausman, J., delivered the opinion of the court:

Plaintiff's husband was killed in a mine of the Rose-Marshall Coal Company, when that company had a policy of indemnity L.R.A.1916D.

from the casualty company. After prolonged litigation, including an appeal to this court (*Davies v. Rose-Marshall Coal Co.* 74 Wash. 565, 134 Pac. 180), judgments for \$15,000 were obtained by the widow and her son in consolidated actions against the coal company. The present suit against the casualty company alone was brought by the widow as the coal company's assignee of the policy. Judgment being given against the casualty company for \$5,000, its full amount, the casualty company appeals.

In addition to alleged trial errors, which will be discussed later, the appellant contends: That the coal company had never paid the loss, and thus put itself in a position where, by the policy, it could ask reimbursement; second, that there was nothing assignable in this policy before that; third, that the assignment was not only without consideration, but in bad faith.

The coal company was incorporated in 1910, the policy issued in September of that year, and the death of Davies occurred in December following. That the coal company is utterly insolvent is clear. The Davies judgment was first recovered in June, 1912, and, after the appeal here, was made final below in November, 1913. A receiver of the coal company, appointed in March, 1914, before the present action, but after the assignment of the policy, found no assets. The only other asset of the company had between the date of the Davies judgment and the commencement of this action was a leasehold interest in coal lands, forfeited at some uncertain date after the accident. The policy we shall construe as intended to reimburse, and not to prepay, the assured. It resembles the generality of these contracts, but does lack some features that are common in them. Thus, the insurer, while engaging to defend suits, did not in terms exclude the assured itself from defending. Neither did it forbid an assignment of the policy. It permitted cancellation by the insurer at any time on five days' notice, with partial refund of premium. The suit of Davies against the coal company was defended from the beginning by the insurer, with whom there is no evidence that the coal company in any way interfered.

Plaintiff admits that the policy is one solely of reimbursement, and that nobody could sue the insurer until the employer had paid the judgment; but the employer, she argues, had in fact paid the judgment, after which it assigned to her the then actionable policy for a valuable consideration.

The facts are that the insolvent coal company executed notes of \$17,000 to Mrs. Davies; that she, on the same day, gave them all back, satisfied the judgment, and took a written assignment of the policy. In

our opinion, this transaction was but a subterfuge. We have, of course, held, in *Seattle & S. F. R. & Nav. Co. v. Maryland Casualty Co.* 50 Wash. 44, 18 L.R.A. (N.S.) 121, 96 Pac. 509, that an employer may make by notes such a payment to a creditor employee as will sustain a suit for reimbursement from one of these insurers before the notes are paid. In that case, though, the assured employer was not insolvent. When it gave notes, it gave something valuable. Here insolvency made the notes presumptively worthless. But other facts here are still stronger. The notes were hardly issued until they were handed back. Not only were they given back immediately, but they were actually issued with an ill-concealed understanding that this should be done immediately. The maker practically never took its hands off them. It never expected to pay them. The payee's own testimony leaves it clear that she expected to return them immediately, satisfy the judgment, and get the policy. Moreover, what she gave back was not \$5,000 of these notes, but all of them. She satisfied a judgment for \$17,000 in exchange for a right to sue the casualty company in not to exceed \$5,000; all this in a few hours. The transaction cannot be sustained as a payment by the coal company.

If, then, plaintiff's right to sue the casualty company were to depend on plaintiff's own theory, her case must fail. But other facts require our consideration, and we must enter on a discussion beyond, to be sure, the scope of the briefs on either side, but indispensable to justice in this case, as well as to a proper view of these contracts in the future.

The Davies claim against the coal company was long resisted by the casualty company. To reimburse for such a claim when established by judgment and paid was the purpose of its contract. The judgment has established that claim. Nothing remains except a form. The casualty company, in effect, says to Mrs. Davies that, if the coal company will pay her at one end of the desk, the casualty company will repay the coal company at the other end. Not one thing besides, does it argue, is wanting to its liability except this formula. On that process it insists, not because, when the coal company shall have first paid and the casualty company shall then have given reimbursement there will result to it a right, claim, or even a salvage interest against the coal company or its assets, but because it wishes the thing done in just that way. It will pay a moment after, not a moment before, the coal company pays. If the latter will but get a loan for a few moments from someone else and pay the

judgment, then the casualty company will hand it a check perhaps long previously prepared.

Such mummeries are ill favored by the law. Technicality, indeed, is not only respectable, but is to be enforced by courts when even a remote right is exposed to danger. When technicality is invoked, however, to avoid an obligation morally established, the common law usually finds in its arsenal some weapon with which to confront it, and to make that a legal which is already a moral debt. The actuary of the casualty company undoubtedly reckoned on paying a loss thus earned. It must be assumed that reserves are not calculated upon an escape through the chance of the assured's insolvency after liability to the employee. It is the executive branch of the insurer that, looking to the precise words of contract, may feel itself justified in adding casual gains from situations like these, where some claims will be perfectly established, be morally complete in every respect, but where the employer, not allowed by the insurer to pledge or assign the policy one minute in advance, will be unable to get so much as a temporary loan.

Employers' policies are of two sorts. One, called a liability contract, obliges the insurer to pay the loss without first requiring the assured to do so. The other type, of which the present is one, is called an indemnity policy, and imposes only reimbursement after the employer has paid the debt. This last being found better for the insurer, the liability policy has gradually been displaced by the other.

Tracing now the growth of the indemnity policy up to its present phraseology, its basic principle was that the assured would not only first pay the loss, but that he would attend to his own defense. The indemnifier, standing aloof, would pay the final bill, providing the defense had been honestly conducted by the employer. Generally speaking, the practice as well as the contract of the indemnifier to take over the defense came later. To do that under the old liability policy was natural, but under the pure indemnity policy was not natural. The insurer desired to defend through his own agent, because he could do so more cheaply than the employer, who would charge the expenses to him, and because he could be more certain of the good faith of that defense. He accordingly wished to become a mere reimbursing in law while a defender in fact. But in taking over the defense the insurer assumes a feature of a liability contract, as distinguished from an indemnifying contract. When an accident occurs, he hurries to protect the assured and himself from liability by defeating the

claimant in advance. But, when the claimant has been successful, the insurer, falling back on the other theory, argues that he is not a liability insurer, only a reimbursement insurer. This shifting subjects him to the familiar doctrine of estoppel by election in inconsistent positions. The law does permit him to have the exemptions of a reimbursement engagement, but he cannot have the benefits of a liability engagement at the same time. If he wishes to rely upon the former, he may continue to do so under the words of his contract and leave the defense to the assured. When he takes over the defense himself, he will not be heard to say that he has not assumed the position of a liability insurer. Accordingly we hold that, by conducting the defense, the employer's insurer waived the right to exact prepayment by the assured, and that on the final judgment of Davies against the coal company "loss" matured. The policy as one of reimbursement could then be either sued on by the assured or be assigned.

Such a consequence of the insurer's acts would seem, aside from any justice to the employee, to be but fair to the employer also; for the latter, whose solvency and protection are supposed to be promoted by these policies, is, as this feature is now taken advantage of, exposed to a willingness and even a desire in the insurer to see him, not succeed, but fail. In fact, they do sometimes fail because they are left unassisted by their insurer in just such a juncture, for the employee's judgment often ruins embarrassed employers, notwithstanding they hold in their hands the very contract that was supposed to save them. They are told by the maker of that contract that he will save them when they have saved themselves. If that is to remain permissible in these insurers, it will not remain such in this state when they take over the defense and costs of a suit. Such a privilege in their contracts involves a question of public policy. It is a privilege that would be grudgingly extended, if ever extended at all, to any private individual, since it increases the temptations to prolong litigation and puts in the hands of a stranger, who may gain by harshness, a controversy that ought to be left to those whose previous relations invite reconciliation and concord.

This brings us to the assignment that was made. It is clear that, before this was done, the coal company's name had been stricken by the secretary of state from the public rolls for want of paying its annual licenses during the prescribed period. In consequence of this, the assets of the corporation passed to its trustees to be dis-

posed of, as the statute expresses it, under the order of the court in appropriate proceedings. Just what proceedings would be appropriate are not specified by the statute. The receiver appointed after the assignment of the policy acquiesced in that transaction, of which he was plainly cognizant, and in which he appeared to assist.

Whether the act of assigning the policy in exchange for a satisfaction of the judgment was *ultra vires* under our statutes, which, though intended to be revenue measures, must necessarily be enforced with some rigor to produce the desired revenue, is a question not necessary to be determined. The assignment, we are confident, was not void, but voidable, and, if it was voidable, it was not the casualty company that could complain of it. *Voltz v. National Bank*, 158 Ill. 532, 30 L.R.A. 155, 42 N. E. 69. To the latter it should be unimportant which it pays when the loss is due; and the corporate acts that are in excess of corporate power and yet unassailable by third parties are too numerous to mention. Neither creditors, if any such exist (which the record does not show), nor the receiver, have sought to disturb this transaction.

In view of the foregoing, the judgment of the lower court must be affirmed. Nor can we reverse it for misconduct of plaintiff's counsel either as witnesses or as advocates before the jury. The misconduct complained of is, indeed, such as the lower court should have reprehended, for defendant's counsel made to this misconduct timely and proper objection. But no case can be reversed for misconduct of counsel when it is clear that the verdict of the jury could not possibly have been affected by it. Such is the present instance. The jury had to bring in a verdict of the \$5,000 sued for or no verdict for plaintiff at all. Under the undisputed testimony in this case plaintiff was, in fact, entitled to an instructed verdict in her favor for the amount of the policy. It is in that sum that the jury, though the case was tried by both parties under a mistaken theory, have given their verdict.

Morris, Ch. J., and Holcomb and Main, JJ., concur. Parker, J., concurs in the result.

A petition for rehearing having been filed, the following *Per Curiam* response was handed down on March 17, 1916 (— Wash. —, 155 Pac. 1035):

In a petition for rehearing, counsel complains that we have not adverted to *Ford v. Ætna L. Ins. Co.* 70 Wash. 29, 126 Pac. 69. There the injured person, after judgment against the employer, sued the insurance

company without assignment of the policy, arguing privity with the insurer on the theory that the contract was really for his benefit, or had been made so by the insurer's conducting the defense. We denied that privity of contract there, and have not, by any expression whatever, allowed it to Mrs. Davies here. The difference is that Mrs. Davies sues as assignee of the policy. We have simply made the policy an asset of the employer after defense by the insurer and judgment against the employer. To shake the soundness of our conclusions the petitioner offers no argument, largely citing cases where, as in our *Ætna Case*, the injured plaintiff sought unsuccessfully to establish privity. From our views on this subject we see no evil results, but, on the

contrary, relief both to employers and to employees in a class of cases small but of downright injustice, in which, when insolvency happens to the employer, the insurer escapes a liability actually earned by premium and covered by reserves.

While the *Ætna Case* chiefly discussed privity, it closed with another feature in which our present decision is not consistent with it. The plaintiff there had also garnished the insurance company as his employer's debtor, and, as to this indebtedness, we did say that there could be none notwithstanding defense by the insurer. In that feature we are content to modify the *Ætna Case*.

The petition is denied.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN EX REL. DANIEL
F. CONWAY et al., Appts.,
v.
DISTRICT BOARD OF JOINT SCHOOL
DISTRICT NO. 6, OF PLYMOUTH, et al.,
Respt.

(— Wis. —, 156 N. W. 477.)

Mandamus — to prevent future act — applicability.

1. Mandamus will not lie to prevent holding the graduating exercises of a public school in churches in the future.

For other cases, see Mandamus, I. g, in Dig. 1-52 N. S.

School — graduating exercises in church — sectarian instruction.

2. Holding the graduating exercises of a public school in a church, and permitting a clergyman to deliver a nonsectarian prayer in connection therewith, does not violate a constitutional provision against sectarian instruction in schools.

For other cases, see Schools, V. in Dig. 1-52 N. S.

Constitutional law — religious liberty — graduating exercises in church.

3. The constitutional prohibition against compelling attendance at a place of worship

and interference with the rights of conscience is not infringed by holding the graduating exercises of a public school in a church, and permitting a clergyman to deliver a nonsectarian invocation in connection with them.

For other cases, see Constitutional Law, II. d, in Dig. 1-52 N. S.

(February 22, 1916.)

APPEAL by relators from a judgment of Circuit Court for Juneau County, quashing a writ of mandamus compelling defendants to discontinue the practice of holding school graduating exercises in churches and allowing any minister or person to offer an invocation or prayer at such exercises. Affirmed.

Statement by Barnes, J.:

The plaintiffs filed a petition in the circuit court, praying that a writ of mandamus issue from said court to the defendants, commanding that they discontinue the practice of holding graduating exercises in any of the churches of the city of Elroy or churches elsewhere, or permitting or suffering any minister or person to offer an invocation or prayer at the graduating exercises of such school district, and commanding the defend-

Note. — The question of what constitutes religious instruction in public schools was considered in the note to *Church v. Bullock*, 16 L.R.A.(N.S.) 860, supplemented by the note to *Herold v. Parish Board*, L.R.A.1915D, 941. *Dorner v. School Dist.*, cited by the court in *STATE EX REL. CONWAY v. DISTRICT BOARD*, is reported in 19 L.R.A.(N.S.) 171, where the right to recover public money that has been appropriated to sectarian institutions is discussed. The question whether or not conducting a public school in rooms in a parochial school building near a Roman Catholic Church, a parochial school being conducted at the same time in other rooms L.R.A.1916D.

in the same building, is a violation of any constitutional provision, was not considered upon the merits in that case.

The court, in *STATE EX REL. CONWAY v. DISTRICT BOARD*, passes upon the question of holding public school functions in a house dedicated to religious purposes. The converse of this, i. e., using school buildings for religious meetings, is discussed in note in 31 L.R.A.(N.S.) 593. Also, see note in 50 L.R.A.(N.S.) 1182.

On question of wearing religious garb or uniforms in public schools, see note to *Connell v. Gray*, 42 L.R.A.(N.S.) 337, and note to which reference is there made.

ants to hold the graduating exercises in other places than in any of the churches of the city of Elroy, or churches elsewhere, and for such further order or relief as might be proper. The petition set forth that the petitioners were residents and taxpayers of joint school district No. 6 in the towns of Plymouth, Wonewoc, and the city of Elroy, in Juneau county, Wisconsin; that they were taxed for the support of said school, and were entitled to the benefits thereof by having their children instructed therein according to law; that they are parents of children whom they desire to have educated in said school; and that children of the petitioners are in fact attending the same for the purpose of receiving instruction.

The petition then recites that for many years it has been the practice of the defendant board to hold graduating exercises for high school graduates, and that the practice still prevails and is part of the school requirements of the district board before pupils are granted diplomas; that it has been the practice of the board to conduct a part of the graduating exercises in the different churches of the city of Elroy, and a part of such exercises in the opera house, and to invite and engage certain ministers and priests to officiate at such graduating exercises, their duty, while so officiating, being to give a so-called invocation, which consisted of a religious service, prayer, blessing, or religious exercises; that by reason of the practice followed by said board in engaging Protestant ministers and inviting Catholic priests to officiate at said graduating exercises, it has wounded the sensibilities of both Protestant and Catholic patrons of said schools alike, and subjected those patrons, and others similarly situated, to humiliation, and forced upon them "the offense of conscience" by reason of these religious exercises; and that by reason of such acts said board has allowed and encouraged sectarian instruction in the public school in question.

The petition further recites that since the establishment of the district the practice complained of has been pursued against the ineffectual protests of taxpayers, parents, and patrons of the school, and that the board threatens to continue such practice; that by reason of the practice followed certain citizens and taxpayers of Elroy belonging to the Catholic Church and living in the school district refuse to allow their children, who are about to graduate, as well as other children of theirs, to attend the graduating exercises, and also refuse to attend themselves on account of the religious functions that are made a part of such exercises; that although such practice has been followed for more than six years, the school board has taken no steps to correct the abuse, and such

practice still continues, and threatens to continue in the future; that by reason of the school board refusing to omit the practice set forth, and by reason of the believers in the Catholic faith refusing to allow their children to attend graduating exercises, such children did not receive their diplomas at such exercises, but were granted them privately afterward by special request; that such a situation produces a bad state of affairs, both to the parents, patrons, and graduates of the school, and causes young men and women who desire to participate in the honors of graduation much chagrin and mortification at not being able to participate in the exercises with their fellow graduates; that because of conscientious scruples Catholic parents and citizens have refrained from taking part in what they believe to be distinctly Protestant religious worship, and that the practice of having prayers offered by Protestant ministers is contrary to the right of conscience, and in violation of law; that petitioners have requested said board to discontinue the practice complained of to the extent of not holding the graduating exercises in churches and in not permitting prayers to be offered by denominational clergymen, and that said board has neglected and refused to comply with such request, and refused to interfere with the matter in any way; that such graduating exercises are an integral part of the curriculum of our public schools; that permitting religious service to take place in a public school, and permitting a minister to offer an invocation or prayer at such time, amounts to a sanction of the minister of one sect and an invitation to lend his personal influence and prestige to the particular sect in preference to all others, and that this action amounts to the teaching of certain religious doctrines of the particular sect so favored.

The petition further shows that permitting ministers of different denominations to offer prayers to the graduates and patrons assembled, irrespective of their religious creeds, and regardless of the wording of the prayer, amounts to giving sectarian instruction; that such prayers must necessarily be clothed with external form for delivery and reception, and held with internal significance; that it is these various forms, together with their various significances, which constitute the various sectarian churches, and that prayer in the Protestant service is delivered standing and received sitting, and in the Catholic service it is offered and received kneeling; that Protestants worship a Supreme Being by prayer alone, and hold that prayer is supreme worship; that Catholics worship the Supreme Being by official sacrifice and prayer, and teach that official sacrifice is supreme wor-

ship; that prayer, therefore, as well in external form as doctrine, differs with the different services and is sectarian, and is therefore in violation of § 3, art. 10, of the Constitution; that by permitting the acts complained of in a public school, the board has permitted and suffered the practice of religious and sectarian instruction to become part of the public school curriculum which is conducted by those who are allied by profession to sectarianism, and who teach the same by suggestion; that such practice interferes with religious liberty and subjects the pupils to slight, insult, and contempt because of their religious faith.

The petition then recites that the petitioners enjoined the school board in the year 1912 from carrying on any religious services in connection with the graduating exercises, and that thereupon said board refused to hold any graduating exercises at all; that such action tends to engender strife and to perpetuate in a public school curriculum religious and sectarian doctrines, and to impress upon the pupils that they can expect no honors or favors at the hands of the school board unless it is permitted to hold graduating exercises in accordance with certain religious and sectarian forms.

Upon this petition an alternative writ of mandamus was issued. The defendants made a motion to quash such writ because neither the petition nor the writ stated facts showing that the petitioners, or either of them, were entitled to such writ. The issue joined by the motion to quash was heard before the court, and such motion was granted. From a judgment entered in accordance with the decision of the court, the plaintiffs appeal.

Mr. James P. Riley, for appellants:

Mandamus will lie to prevent the holding of school graduating exercises in a church.

State ex rel. Weiss v. District Board, 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; State ex rel. Lloyd v. Rotwitt, 15 Mont. 29, 37 Pac. 845; 26 Cyc. 165; State ex rel. Treat v. Richter, 37 Wis. 275; Rex. v. Barker, 3 Burr. 1267, 1 W. Bl. 300; Com. v. Justices of Ct. of Sessions, 2 Pick. 414; Mendon v. Worcester County, 10 Pick. 235; Johnson v. Randall, 7 Mass. 340; Life & F. Ins. Co. v. Wilson, 8 Pet. 291, 8 L. ed. 949; Kendall v. United States, 12 Pet. 524, 9 L. ed. 1181; People ex rel. Dikeman v. Brooklyn, 1 Wend. 318, 19 Am. Dec. 502; 26 Cyc. 176; Dorner v. School Dist. 137 Wis. 147, 19 L.R.A. (N.S.) 171, 118 N. W. 353; Frederick v. Douglas County, 96 Wis. 411, 71 N. W. 798; Webster v. Douglas County, 102 Wis. 181, 72 Am. St. Rep. 870, 77 N. W. L.R.A. 1916D.

885, 78 N. W. 451; State ex rel. Weiss v. District Board, 76 Wis. 177.

Messrs. Grotophorst, Evans, & Thomas, for respondent:

Mandamus does not lie to compel the performance of an act by a public officer, unless the act be one that is actually due from the officer at the time of the application.

State ex rel. Board of Education v. Hunter, 111 Wis. 582, 87 N. W. 485; State ex rel. Cook v. Houser, 122 Wis. 534, 100 N. W. 964; 26 Cyc. 182; Pierce v. Executive Council, 165 Iowa, 465, 146 N. W. 85; State ex rel. Lord v. Washington County, 2 Pinney (Wis.) 555; State ex rel. Kane v. Larrabee, 3 Pinney (Wis.) 166; State ex rel. Carpenter v. Hastings, 10 Wis. 518; State ex rel. Pfister v. Manitowoc, 52 Wis. 423, 9 N. W. 607; State ex rel. Spaulding v. Elwood, 11 Wis. 17; 26 Cyc. 182, 183.

The court should not by mandamus compel the board of education of the city of Elroy to eliminate the opening prayer or invocation at the graduating exercises.

Cooley, Const. Lim. p. 470; State ex rel. Weiss v. District Board, 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; Billard v. Board of Education, 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 148, 76 Pac. 422, 2 Ann. Cas. 521; Spiller v. Woburn, 12 Allen, 127; Hackett v. Brookville Graded School Dist. 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 Ann. Cas. 36; Moore v. Monroe, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; Pfeiffer v. Board of Education, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250.

Barnes, J., delivered the opinion of the court:

It is fortunate that the present hapless controversy is of a genus that seldom makes its appearance in this court. Our population is made up of many people, divided into many religious sects, as well as many people who belong to no sect, all of whom contribute to the maintenance of our state school system in proportion to their ability to pay. The number of our people who do not believe in the existence of a Supreme Being and in life hereafter is almost negligible. Of the vast majority who do, some think eternal bliss can be most safely insured by pursuing one route, and others by pursuing other routes, and hence the number of sects into which we are divided. There is no subject on which people are more touchy than on that of religion. We may think that there is small reason for such a state of mind, but it is a "condition and not a theory" which confronts us. It may well be said that the grievance here complained of is trifling, but human nature is much the same whether the individual be Catholic or

Protestant. Reverse conditions, and let a Catholic school board select a church or building devoted to Catholic services in which to hold graduating exercises, and engage a Catholic clergyman to deliver a non-sectarian prayer or invocation, and the devout Lutheran, Presbyterian, Methodist, Baptist, or other member of a Protestant communion would be just as likely to take umbrage at what was done as were the petitioners in the present case. Our Constitution makers wisely sought to prevent, as far as they could, the injection into the affairs of state of anything that would tend to germinate or foster religious rancor or bitterness. It is wise and just that its provisions be adhered to in spirit as well as in letter. For reasons that will be stated later, we conclude that the petitioners are not entitled to relief on the facts stated. Nevertheless, we think it would be a wise exercise of official discretion to discontinue such practices as are here complained of when objection thereto is made by any substantial number of school patrons. We do not underrate the efficacy of prayer. Neither are we prepared to say that the average high school graduate may not need it. But whenever it is likely to do more harm than good, it might well be dispensed with. It is not at all times wise or politic to do certain things, although no legal rights would be invaded by doing them.

Turning aside from ethical considerations and taking up the legal questions involved, it is clear that if the plaintiffs have a cause of action, they did not pursue the proper remedy. It was here sought to use the writ of mandamus to compel the school board to do away with the practices complained of at the graduation exercises to be held for that year. The writ is not granted to take effect prospectively. *Spelling, Inj. & Extr. Rem.* § 1385; *High, Extr. Legal Rem.* 3d ed. §§ 12, 30; *Tapping, Mandamus*, 10th Am. ed. p. 63; *Wood, Mandamus*, 2d ed. 51. In *State ex rel. Board of Education v. Hunter*, 111 Wis. 582, 588, 87 N. W. 485, this court said: "The general principle is frequently stated that mandamus will not lie to compel performance of an act by a public officer unless the act be one that is actually due from the officer at the time of the application. Until the time arrives when the duty should be performed, there is no default of duty; and mere threats not to perform the duty will not take the place of default."

This rule was again announced in *State ex rel. Cook v. Houser*, 122 Wis. 534, 100 N. W. 964. It is in accordance with the well-nigh uniform current of authority, and may well be said to be elementary.

Counsel on both sides expressed the de-
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sire that the court should take up the case on the merits and dispose of it if possible. The request is a commendable one. If the plaintiffs have a cause of action, but have mistaken their remedy, it is a better administration of justice to permit them to amend their pleading than it is to turn them out of court and compel them to begin anew. Ample power has been conferred on the court to pursue such practice by § 2336b, Stat. 1915 (chapter 219, Laws of 1915), if such power did not exist independently of statute.

The plaintiffs' contentions are two-fold: (1) That the acts complained of violate the constitutional rights guaranteed to them by § 3, article 10 of our Constitution; and (2) that they violate the rights guaranteed by § 18, of article 1 of that instrument. The provision first referred to reads as follows: "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition, to all children between the ages of four and twenty years; and no sectarian instruction shall be allowed therein."

Section 18 of article 1 provides: "The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent. Nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship. Nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries."

The two things complained of are the use of a church building in which to hold graduation exercises and the delivery of an invocation or prayer thereat by a denominational clergyman. The holding of graduation exercises in a church is not in itself the giving of sectarian instruction, within the meaning of § 3 of article 10, above quoted. This is obvious, and presently eliminates from consideration the constitutional provision first quoted. Neither is it shown that the taxpayers were called upon to pay for the use of the churches in which the exercises were held, nor that the clergymen who gave the invocations were paid for doing so. Such being the case, no one has been called upon against his will to erect or support any place of worship or maintain any ministry, nor has any money been drawn from the treasury for the benefit of a religious society. A man may feel constrained to enter a house of worship belonging to a different sect from the one with which he

affiliates, but if no sectarian services are carried on, he is not compelled to worship God contrary to the dictates of his conscience, and is not obliged to do so at all. The only clauses of § 18 of article 1 that are at all applicable to the question under discussion are those which provide that no person shall be compelled to attend any place of worship against his consent, and which forbid interference with the rights of conscience. Obviously, graduation exercises are a part of the school curriculum, and are under the direction and control of school boards. They may be dispensed with, but, so long as they are not, school boards cannot escape responsibility for them. Parents and pupils of all denominations have a right to attend such exercises without their legal rights being invaded. It would be far-fetched, however, to say that by so doing they are compelled to attend a place of worship. "True, the building is one ordinarily used for conducting religious services. Other buildings that are not churches are often used for like purposes. So are our public streets. Indeed, at the present day, churches are largely used for social gatherings of various kinds at which no religious services of any kind are carried on. The kind of a building is hardly the significant thing from the legal standpoint, but the fact that worship is carried on when there is actual or moral compulsion. Graduation exercises take place but once a year. Often in smaller places church auditoriums are more commodious and better calculated to take care of the overflow crowds that congregate at such times than any other building that is available. To say that a person attending such place once a year is compelled to attend a place of worship would be giving prominence to form rather than to substance. When the Constitution protects the individual from being compelled to attend a place of worship, it undoubtedly means that he shall not be required to attend a place where religious instruction is being given at the time he is required to be present. It protects a man from being obliged to attend the services of the Salvation Army in our public streets, or from being compelled to enter a hall or opera house while such services are being carried on, just as much as it does against being forced to enter a church. It is what is done, not the name of the place where it is done, that is significant.

The fact that certain persons desire to attend graduation exercises with their children, and that they say that being compelled to enter a church of a different denomination from that to which they belong is violative of their assured rights of conscience, does not make it so. If it is clear that the thing complained of does not violate any

right guaranteed by the Constitution, then the courts cannot interfere in their behalf, because the final decision on this question must necessarily rest with the courts, and not with the individual. The individual must decide for himself whether his conscience tells him that he must not frequent a certain place. If it does, he should punctiliously regard its behests and stay away. But the court cannot turn casuist further than to determine whether a legal right has been invaded in any given case. Neither can it say that a thing offends against conscience when there is no substantial reason why it should. It is not sufficient for a person to say: "This thing is contrary to what my conscience tells me to be right, therefore it must be stopped." The individual cannot foreclose inquiry into the reasonableness of his request by his bare assertion. Some consciences are very tender and very highly developed, so much so that the possessor regards as being wrong many things that the law regards as harmless. Some refrain from playing cards for amusement, some from dancing, some from attending places of amusement, and some from all these things, because they consider it wrong to participate in or countenance them. The law regards none of these things as being essentially wrong in itself. At the same time it recognizes the right of anyone to stay away from them where the promptings of conscience indicate that it would be wrong to attend.

To the lay mind there is very little difference in principle between the case before us and *Dorner v. School Dist.* 137 Wis. 147, 19 L.R.A. (N.S.) 171, 118 N. W. 353. There a Catholic parochial school was built adjacent to a Catholic church, and some of the school rooms were rented and used for the purposes of a public school. The Catholic school children attended church services before school hours in the morning, and prayers were recited and hymns were sung during school hours in the portion of the school building used for parochial school purposes, and in rooms either adjoining or adjacent to those rented by the public school authorities. The parochial school was taught by Sisters clad in the conventional garb of the order to which they belonged. The lower court found that the public school conducted in the parochial school building had, at times, been pervaded and characterized by sectarian instruction, and very properly enjoined the continuance of such practices. It held, however, that the school board was acting within its legal rights in renting and using a part of the parochial school building for the purposes of a public school, and such decision was affirmed in this court. There are points of dissimilarity

between the two cases, but it would be difficult to say that those who felt aggrieved in the *Dorner Case* did not have at least as strong a ground for complaint as did the plaintiffs in the present case. It is true that the public school was not conducted in the church building, and that certain rooms in the parochial school were exclusively devoted to the use of the public school. But it is also true that the school building was one in which sectarian instruction was given, and was within the shadow of a church which was attended daily by the children attending the parochial school; that the teachers in such school were clad in a religious garb, and that the public school attendants, or many of them, were within the hearing of prayers recited aloud in the parochial school rooms, as well as within the hearing of sectarian hymns sung in such rooms. We conclude that the holding of graduation exercises in a church building is not, in and of itself, contrary to either of the constitutional provisions relied on by the plaintiffs.

A somewhat different question is raised by the complaint about prayers being offered at graduation exercises by denominational clergymen. A prayer may be either sectarian or nonsectarian in character. The sessions of our national Congress, of our state legislature, and of our great party conventions, are customarily opened with prayer. These prayers are almost invariably nonsectarian in character, so much so that a person reading them or listening to them would be entirely at a loss to discover to what denomination the clergyman belonged. The enthusiast who places his desire to make proselytes to the faith he professes above his sense of propriety may occasionally "slop over," but it is only just to say that our clergy rarely offend in this regard. To be sure, offense may be very adroitly given if the clergyman is so minded, but there is no claim that any such thing has occurred in this case.

The court decided in the *Edgerton Bible Case* that the giving of a nonsectarian prayer was not sectarian instruction. We quote from the opinion: "The term 'sectarian instruction,' in the Constitution, manifestly refers exclusively to instruction in religious doctrines, and the prohibition is only aimed at such instruction as is sectarian; that is to say, instruction in religious doctrines which are believed by some religious sects and rejected by others. Hence, to teach the existence of a Supreme Being, of infinite wisdom, power, and goodness, and that it is the highest duty of all men to adore, obey, and love Him, is not sectarian, because all religious sects so believe and teach. The L.R.A.1916D.

instruction becomes sectarian when it goes further, and inculcates doctrine or dogma concerning which the religious sects are in conflict. This we understand to be the meaning of the constitutional prohibition." *State ex rel. Weiss v. District Board*, 76 Wis. 177, 192, 193, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967, 973.

In the case before us it appears from the allegations of the petition that both Catholic priests and Protestant ministers had at different times been selected to deliver the invocation at graduation exercises. There is no claim that on any of these occasions any unseemly hint or suggestion was made by any of the reverend gentlemen who were so honored. In fact, the contrary appears, by inference at least. So it is clear that no showing was made that "sectarian instruction" was given, as that term is defined in the case last cited. Had it appeared that the invocations given were sectarian in character, and that the school board threatened to continue or permit such practices in the future, we do not wish to be understood as intimating that a court of equity would not enjoin the continuance of such practice.

We think it would be difficult to pick out any clause of § 18, art. 1, of the Constitution which by any fair or reasonable construction could be said to be violated by the delivery of a nonsectarian prayer at a graduation exercise. No man is compelled to worship, nor compelled to attend a place of worship, nor does he, as before stated, attend such a place, except in the most technical sense, when he attends graduation exercises. Pupils do not congregate on such an occasion for the purpose of worship, and the short nonsectarian invocation that is usually given is a mere incident, which occupies but a few moments of the two hours or more that are usually occupied with the program prepared for such occasions. If the prayer be nonsectarian, it does not interfere with any right of conscience that the law recognizes, and neither is the matter of permitting it the giving of any preference to any religious establishment or religious mode of worship in a constitutional sense. A very different question would arise if an attempt were made to introduce the practice of having prayer as part of the daily routine in our public schools. Considering what has been done here and the rare occasions on which it has been or can be done, the matter complained of seems to be too inconsequential to furnish the subject of a lawsuit. It follows from what has been said that the judgment of the lower court was right.

Judgment affirmed.

MICHIGAN SUPREME COURT.

JOHN LAHTI

v.

TAMARACK MINING COMPANY, Plff. in Err.

(— Mich. —, 152 N. W. 907.)

Master and servant — failure to have light on car in mine — liability for injury.

A mine owner is not liable for injury to an employee by failure of the one operating the ore cars in the mine to place a lamp on the front car when starting on a trip in accordance with his duty, where the master furnished a sufficient supply of lamps and the failure was due to breaking of the one he was using just prior to starting, since the negligence is that of a fellow servant of the injured employee.

For other cases, see *Master and Servant*, II. e, 5, a, (1) in *Dig. 1-52 N. S.*

(Bird, Moore, and Kuhn, JJ., dissent.)

(June 7, 1915.)

ERROR to the Circuit Court for Houghton County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. D. L. Robinson and Albert E. Petermann, with Mr. Allen F. Rees, for plaintiff in error:

The negligence, if any, which plaintiff alleges was the cause of his injury, was the negligence of a fellow servant.

Smith v. Potter, 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273; Miller v. Chicago & G. T. R. Co. 90 Mich. 230, 51 N. W. 370; Baron v. Detroit & C. Steam Nav. Co. 91 Mich. 585, 52 N. W. 22; Greenwald v. Marquette, H. & O. R. Co. 49 Mich. 197, 13 N. W. 513; Henry v. Lake Shore & M. S. R. Co. 49 Mich. 495, 13 N. W. 832; Peterson v. Chicago & N. W. R. Co. 67 Mich. 102, 11 Am. St. Rep. 564, 34 N. W. 260; Jarman v. Chicago & G. T. R. Co. 98 Mich. 135, 57 N. W. 32; Dewey v. Detroit, G. H. & M. R. Co. 97 Mich. 329, 22 L.R.A. 292, 37 Am. St. Rep. 348, 56 N. W. 756; Schroeder v.

Flint & P. M. R. Co. 103 Mich. 213, 29 L.R.A. 321, 50 Am. St. Rep. 354, 61 N. W. 663; Loranger v. Lake Shore & M. S. R. Co. 104 Mich. 87, 62 N. W. 137; Hennig v. Globe Foundry Co. 112 Mich. 616, 71 N. W. 156, 3 Am. Neg. Rep. 48; Frazee v. Stott, 120 Mich. 627, 79 N. W. 896, 6 Am. Neg. Rep. 297; Miller v. Michigan C. R. Co. 123 Mich. 374, 82 N. W. 58; Lellis v. Michigan C. R. Co. 124 Mich. 37, 70 L.R.A. 598, 82 N. W. 828; Bergstrom v. Staples, 82 Mich. 654, 46 N. W. 1035; Jurkiewicz v. American Car & Foundry Co. 147 Mich. 622, 111 N. W. 183; Wickham v. Detroit United R. Co. 160 Mich. 277, 52 L.R.A. 1082, 136 Am. St. Rep. 436, 125 N. W. 22, Ann. Cas. 1913E, 1069; Dixon v. Grand Trunk Western R. Co. 147 Mich. 667, 111 N. W. 220, and 155 Mich. 169, 118 N. W. 946; Stever v. Ann Arbor R. Co. 160 Mich. 207, 52 L.R.A.(N.S.) 1139, 125 N. W. 47; Haskell & B. Co. v. Przedziankowski, 170 Ind. 1, 14 L.R.A.(N.S.) 972, 127 Am. St. Rep. 352, 83 N. E. 626; Jones v. Granite Mills, 126 Mass. 84, 30 Am. Rep. 661; Meehan v. Speirs Mfg. Co. 172 Mass. 375, 52 N. E. 518, 5 Am. Neg. Rep. 363; Whittaker v. Bent, 167 Mass. 588, 46 N. E. 121, 1 Am. Neg. Rep. 455; Fraser v. Red River Lumber Co. 45 Minn. 235, 47 N. W. 785; Fowler v. Chicago & N. W. R. Co. 61 Wis. 159, 21 N. W. 40; Jenkins v. Richmond & D. R. Co. 39 S. C. 507, 39 Am. St. Rep. 750, 18 S. E. 182; Hoover v. Beech Creek R. Co. 154 Pa. 362, 26 Atl. 315; Wheatley v. Philadelphia, B. & W. R. Co. 1 Marv. (Del.) 303, 30 Atl. 660; Lundquist v. Duluth Street R. Co. 65 Minn. 387, 67 N. W. 1006; Lockwood v. Tennant, 137 Mich. 308, 100 N. W. 562, 16 Am. Neg. Rep. 413; Kleinfelt v. J. H. Somers Coal Co. 156 Mich. 473, 132 Am. St. Rep. 532, 121 N. W. 118.

Plaintiff was guilty of contributory negligence.

Carlson v. Cincinnati, S. & M. R. Co. 120 Mich. 484, 79 N. W. 688; Schaible v. Lake Shore & M. S. R. Co. 97 Mich. 318, 21 L.R.A. 660, 56 N. W. 565; Tobias v. Michigan C. R. Co. 110 Mich. 440, 68 N. W. 234; State Trust Co. v. Kansas City, P. & G. R. Co. 49 C. C. A. 598, 111 Fed. 769.

Messrs. Le Gendre & Driscoll for defendant in error.

Note.—The applicability of the fellow-servant rule between train men and other railway employees is discussed in the note to Wickham v. Detroit United R. Co. 52 L.R.A.(N.S.) 1082. Although the employer in LAHTI v. TAMARACK MIN. Co. was a mining company, the negligent employee was in charge of a train of cars, and the liability of the employer for injuries caused by his negligent act would seem to depend upon the same considerations as if the em-

ployer had been in fact a railroad company. It will be noted that a great majority of the cases cited by the court in support of its conclusion are cases in which the employer was a railroad company.

As to the master's liability for injuries caused by the failure of an employee to use the instrumentalities furnished by the master, see the note appended to Lafayette Bridge Co. v. Olsen, 54 L.R.A. 122.

Stone, J., delivered the opinion of the court:

Action for damages by reason of the injury of the plaintiff in a mine of defendant on the morning of March 19, 1910, on the fifteenth level of No. 3 North Tamarack shaft. This was a perpendicular shaft. In order to reach the vein from the shaft a crosscut was driven in barren ground west from the shaft until the vein was reached. At the time of the accident the crosscut from the shaft to the vein was somewhere between 700 and 1,000 feet long. At the point where the crosscut started from the shaft there was a room or opening, which was called the plat. At this point the crosscut was wider, and it was about 50 feet or more from the shaft before the crosscut narrowed down to its average size. The crosscut was about 5 feet high on the average, and about the same in width. It is straight, so that one could see a light through it from one end to the other. When the crosscut reached the vein there was a drift along the vein south of about 1,000 feet long. The copper rock was mined and brought down to the drift, and along the floor of the drift, and continuing into the crosscut and to the shaft was a track built similar to a railroad track, save that the rails were a great deal smaller in size. On this track cars called tramcars were run to carry the rock from the drifts to the shaft. These cars were 4 feet high from the track and 3 feet 8 inches wide. The motive power to pull the cars was furnished by means of an endless cable which ran through the drift and crosscut, and which was run by means of a compressed air engine and a drum located at the junction of the drift and the crosscut. The cable coming from the crosscut into the drift went in a straight line on the drum of the engine. There were four or five rounds of cable around the drum, so as to give the cable a grip on the engine. The cable then left the drum and was carried along the floor of the drift to the end of the drift and onto a wheel at that point, and returned on rollers situated between the rails of the track on the floor of the drift and through the crosscut to the plat at the shaft, where it went onto another wheel and back on the rollers on top of the crosscut. The rails of the track were about 3 feet apart, and the rollers on the floor were about halfway between the rails. These rollers were about 5 or 6 inches in diameter. The shaft on which the rollers were fastened turned with the rollers, and the cable would be 2½ inches from the floor of the drift when it was running on the rollers on the floor. The tops of the rollers in the roof of the crosscut were about 6 inches from the roof. The L.R.A.1916D.

rollers on the floor of the crosscut were about 20 feet apart, and those on the roof about the same distance.

The cars were iron cars. They were filled in the drift, attached to the cable, drawn to the plat at the shaft, where they were taken off the cable, and run onto the cages which elevated them to the surface. They were fastened to the cable in the following manner: There was a ring on the cable with a short piece of chain leading from it. This chain was fastened to the front end of the front car, whichever way the cars were going, by means of an iron bolt. The cars were then fastened together. There was a slight grade in the crosscut toward the shaft. The cars, being fastened to the endless cable, had no brakes upon them. The moment the cable stopped the cars stopped. If the cars were being run through the drift or crosscut at their ordinary rate, they would be stopped instantly when the power was shut off at the engine, or would stop within a few inches. These cars were ordinarily run at a speed somewhat faster than a man walks. When there was more than one party of trammers they used four cars; if there was only one they used two cars in a train.

The man or boy who operated the engine was stationed at the junction of the crosscut and drift, where he could see in both directions. He is referred to in the record as the "puffer boy," and the engine used is ordinarily called a puffer engine. When a train of cars was running through the drift, generally a man was with the cars. That man was called a conductor. He rode back and forth on the cars through the drifts and crosscuts. He was on the rear while going to the shaft. There was a signaling apparatus running through the drift and crosscut to notify the puffer boy when to start and stop his engine. The signal wire ran to the engine and was located in the roof of the crosscut, more on the right side going in from the shaft. This signal cord was within easy reach of persons in the crosscut, and was like the bell signal in a train or street car. All that was necessary was to reach the bell rope and pull it down. The signal to stop was one bell. The conductor could reach out from his position on the train and pull the cord at any time going through the crosscut. It was customary for the men to go into the crosscut on their way to and from work. In fact this was the only way to reach their work in the drift or drifts.

The crosscut was not lighted except by the miner's lamps, which they carried in their hats in going through the crosscut. When the cars were being run through the crosscut, it was customary to have a light

placed on the front end of the front car. This light was placed on the car by the man called the conductor when he had his train made up and was ready to take it out, and he was the only man whose duty it was to place the light there. The light or lamp that was used for this purpose was an ordinary miner's lamp that burns "Sunshine" grease,—the same kind of lamp that the men wear on their hats. There was a little hole on the end of the car and a hook on the lamp, and he placed the hook in the hole. In addition to the light that the conductor placed on the front of the first car, he also carried a lamp of his own on his hat.

Before entering the crosscut from the shaft the men could ascertain whether or not the cars were running by looking at the wheel at the plat around which the cable went. They could tell whether the cars were running, and in which direction they were running, by feeling the rope back of the timbers and where the wheel was, and by watching the light. The custom was to put their foot on the rope passing the post where the wheel was.

The plaintiff was employed by the defendant as a miner, and on the day of the accident his working place was the fifteenth level of No. 3 shaft, where he was to work in a stope. In company with two other men, at about 8 o'clock in the morning, he went down in the cage and got off at the fifteenth level at the plat. Quoting plaintiff's own words, he testified:

"When I got to the mouth of the crosscut first I looked for the lights on the cars; and then Arfman, who was ahead of me, he felt the rope with his hand, and I felt with my foot. The rope was not moving then. I had two bars on my shoulders, one was 6 or 7 feet long, the other 10 feet or thereabouts, and their weight was about 30 or 40 pounds. After I felt the rope and found it not moving we started to walk in. Arfman was ahead. He might have been 10 feet or more ahead of me. I think it was somewhere around 300 feet from the shaft in the crosscut where I was injured."

As the plaintiff and Arfman were walking through the crosscut they were met and run down by a loaded train of cars, and the plaintiff was injured. On that morning the conductor had taken a train of cars in from the plat to the drift, and had taken them to a place between 900 and 1,000 feet south of the crosscut. At that point he got the loaded cars and attached them to the cable. At this point the lamp, which he ordinarily placed on the front of the head car, got broken, and on this trip, which was the first one for the day, he ran the cars out from the drift and into the crosscut without

putting a light at the front of the car. The train had run a distance of 1,800 or 1,900 feet from the place where the lamp was broken to the place where the plaintiff was injured.

The following uncontradicted testimony was given by the conductor, who was called by the plaintiff for cross-examination under the statute:

Q. You are the conductor that was on the train which caused the injury to Lahti?

A. Yes.

Q. You are the one whom the company appointed to look after the headlights on the train for the safety of the men?

A. Yes.

Q. You are the only one upon whom that duty was imposed?

A. Yes.

Q. You were supposed to keep a headlight on the train at all times for the men's safety?

A. Yes.

Q. Now, at the time the plaintiff was hurt, you were on the train, were you not?

A. Yes.

Q. And there was no headlight on the train?

A. No.

Q. There hadn't been any headlight on the train from the time you left the south end of the drift, about 1,000 feet from the place where the plaintiff was hurt?

A. No.

Q. And you knew that all the time, didn't you?

A. Yes.

Q. And didn't you put any headlight on there?

A. No.

Q. You ran the train without a headlight?

A. Yes.

Q. Now, the only thing that that headlight was on the train for was for the men's protection, to warn them that the train was coming, wasn't it?

A. Yes.

Q. And it was the custom of the company to at all times keep a headlight upon the trains for the safety of the men?

A. Yes.

Q. And they imposed that duty upon you for the safety of the men, the company did?

A. Yes.

Q. Now, why didn't you put a headlight upon the train that morning while running the train in from the south end of that drift?

A. Because she was broke inside.

Q. The headlight was broken inside?

A. Yes.

Q. And by inside, you mean at the south end of the drift, do you?

A. Yes.

Q. And weren't you furnished with any extra headlights to use in case one got out of order?

A. No.

Q. You are the one whose duty it was there, under the customs and rules of the company, to keep the headlights in repair and lighted?

A. Yes.

Q. And you didn't have any extra one to replace the broken one at that time?

A. No.

Q. The defendant didn't furnish you any?

A. No.

Q. While you were riding in on the cars on that train you were on the hind car, weren't you?

A. Yes.

Q. On the back end of it?

A. Yes.

Q. How many cars were in the train?

A. Two.

Q. And there was no light of any kind on the front car?

A. No.

Q. And you hung onto the back car, stooping down low, didn't you?

A. All that was above the car was my head.

Q. And the cars were loaded with rock, were they not?

A. Yes, with rock.

Q. And the rock was heaped up over the top of the car?

A. Yes.

Q. And you had to keep your head down from the top so as not to strike the rollers on top?

A. I did when I came close to a roller, I just ducked.

Q. You didn't do anything else but just run that train and take care of those lights?

A. That is all I did do.

Q. Did you see the lights of the plaintiff or Arfman as you came through the crosscut?

A. No.

Q. Did you know they were in the crosscut before you heard them holler?

A. No.

Q. I assumed that you heard them holler; did you hear them holler?

A. I did when the cars came right by them.

Q. How long would it take to stop that train, after you gave a signal to stop it?

A. I think about 30 feet.

Q. How fast was the train going as you went through the crosscut there that morning?

A. Like a man on a fast walk. Like a man would walk fast.

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The undisputed evidence shows that the plaintiff, stepping to the south side of the crosscut, sought to protect himself from the on-coming train of cars, but was hit by the cars, and suffered serious injuries, which were the foundation of this action.

At the close of the plaintiff's case, and again at the close of all the evidence, the defendant moved the court for a directed verdict upon the grounds: (1) That the evidence showed no negligence on the part of defendant, which was attributable to the defendant; (2) that the negligence, if any, in the case was the negligence of a fellow servant of the plaintiff, namely, the conductor on the car; (3) that the evidence showed beyond any dispute that, as a matter of law, the plaintiff was guilty of contributory negligence; (4) that the conditions, as shown by the testimony, established conclusively, as matter of law, that the plaintiff assumed the risk; (5) that if there was any negligence in this case in not putting a light on the car, the testimony showed that the lamp was broken so recently before the accident that notice of that fact could not be brought home to the defendant, and until such time, or such lapse of time, was shown to have existed, the defendant would not be responsible for the failure to place the light on the car. Said motions were overruled, and defendant excepted. There was a verdict and judgment for the plaintiff in the sum of \$3,000, and defendant has brought the case here upon writ of error; and, while there are many assignments of error, it relies, mainly, for reversal, upon the claim, under appropriate assignments of error, that the court should have directed a verdict for the defendant because the negligence, if any, which the plaintiff alleges was the cause of his injury, was the negligence of a fellow servant.

Although the declaration in the case alleges numerous acts of negligence on the part of the defendant, it appears from the record that the act of negligence upon which the plaintiff relied at the trial was the failure of the defendant to keep the crosscut, through which plaintiff was passing, reasonably safe, in that on this occasion a train of cars was run through the crosscut without a light on the front car. Aside from that one circumstance, we find no evidence or claim in the record that the place was unsafe.

Under the custom and the rule of the defendant, it was the duty of the conductor to run the cars through the drift and crosscut, with a miner's lamp stuck on the front end of the front car. On this occasion he ran the train through without a lamp. Reduced to its simplest terms, therefore, the primary question is whether the conductor was, or was not, the fellow servant of the

plaintiff in handling his train as he did on this occasion. Defendant maintains that, under established principles, he was such a fellow servant. The learned trial court, basing its opinion apparently upon the case of *McDonald v. Michigan C. R. Co.* 108 Mich. 7, 65 N. W. 597, submitted the question to the jury. It is contended by the defendant that the McDonald Case does not warrant the ruling of the trial court, and it is urged that in that case the defect, viz., that of a cracked push bar, was a defect in a permanent part of defendant's locomotive, while in the case at bar there was no defective machinery whatever, but the negligence consisted solely in the failure of the conductor, in properly making up and equipping his train before taking it through the crosscut. In other words, it is a case of the disobedience of the conductor in not complying with his instructions and the rules of the company. It is urged on behalf of defendant, as distinguishing the instant case from the McDonald Case, that the trains which were run through the crosscut were not made up in any particular or special manner; that there were a great many tramcars in use, all being alike; that the lamp was an ordinary miner's lamp such as the men wore in their hats, and was not fastened permanently to any car, but was temporarily stuck in whichever car happened to be in front of the train; that the cars that were taken to the plat filled with rock were not taken right back, but the conductor took in whatever empty cars that were there; that similarly when he arrived at the drift he left his empty cars there, and took out such as were filled; that consequently he had to change the position of this lamp a great many times a day, and on each trip, whether in or out, had to place his lamp on a different car; that there were a great many similar lamps in the drift at the time he left it, and each man had one, and there were many men there, and that the conductor had another lamp like it on the way out on the cars, but he carried it on his hat; that the headlight or lamp on the front end of this train of cars was therefore not an appliance of a permanent nature, fastened to the car, which could be kept in condition by the inspection which the master ordinarily owes, in order to keep appliances in a reasonably safe condition, and that the placing of the lamp on the front car before taking the train through the crosscut was one of the duties incident to the making up of the train, and was a mere detail of its operation; that to require an independent inspector to see that this servant did his duty of attaching the cars to the cable, putting the lamp on the front car, and giving the

proper signals, would be carrying the rule far beyond the limits contemplated by the decisions, and that it is well established that an employer who furnishes a safe place, proper machinery and appliances, and competent men to perform the work, is not required to personally superintend all the details of the work, and cannot be held liable for every negligent act of his employee in the use of such machinery and appliances.

It is also urged by the defendant that the instant case cannot be distinguished from numerous cases decided by this and other courts of last resort, holding, under facts similar to those in this case, that the injured party and the man in charge of the machinery or appliances were fellow servants. We have read with great care the opinions in the McDonald Case. Even the opinion of Justice Montgomery deals with the matter of inspection and the discovery of defects in machinery. It is well that we should note that in that case there was also an additional cause of the injury in the failure of a brake and reverse gear to work, which caused an extra strain to be put upon the defective push bar; and the opinion of Justice Hooker approves the holdings of this court in *Smith v. Potter*, 46 Mich. 258, 41 Am. Rep. 161, 9 N. W. 273, where the failure of the yard inspector to detect a defect in a car received from another road was held to be the negligence of a fellow servant, and of *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 333, 22 L.R.A. 292, 37 Am. St. Rep. 348, 56 N. W. 756, where a similar ruling was made, and also *Miller v. Chicago & G. T. R. Co.* 90 Mich. 230, 51 N. W. 370, and *Jarman v. Chicago & G. T. R. Co.* 98 Mich. 135, 57 N. W. 32, both of which latter cases were in line with the first-mentioned cases, and Justice Hooker there said: "It was the duty of the defendant to furnish machinery in a reasonably sound and safe condition, and to use ordinary care in keeping the same in repair. This is an absolute duty, which the master cannot relieve himself from by imposing it upon another. There is no claim that defendant did not furnish a reasonably safe push bar. If there is liability, it must be based upon a failure to use proper care in discovering and remedying the defect. If there was negligence in this, it was either a failure to prudently inspect, or by reason of the use of the defective push bar after inspection. The record shows that there was no provision for inspection other than inspection by the engineer operating the train. He was expected to inspect his engine at all practicable times, and to report defects. This was no more than common prudence dictates should be required of all operatives of railway trains, and it is to be considered as a

part of their duties in and about the operation of their trains; and this is as true when the railroad company makes no other provision for inspection as when it has another regular inspector. Such inspection, in the ordinary operation of the road, is the act of a fellow servant, as between the engineer and brakeman, and, as between them, does not constitute the engineer a representative of the master. To say that an engineer who should err in attempting to make the next station, after his engine became broken, acted as the representative of his master, thus holding the latter liable to the fireman, who was injured, would be carrying the rule too far. An unreported injury of the brakes known to the brakeman would be another illustration. The duty that the master owes to his patrons requires vigilance and care upon the part of the crew, and the master should be permitted to require it without subjecting himself to all the consequences following negligence by an inspector proper. The duty of such inspection should not be imposed upon operators of trains or machinery at the master's peril. If he provides for the discovery of defects and repair of his machines with reasonable diligence, it should be enough, and he should be allowed to provide additional precautions and safeguards, through the vigilance of operatives. To hold otherwise would put a premium upon carelessness."

Then follows the reference to the cases cited above.

Attention is also called to the later language of Justice Hooker, in the opinion, calling attention to the proper submittal to the jury of the question of concurrent negligence of the engineer and that of the defendant. It seems to us that there was no failure of inspection in the instant case; that the duty of placing a miner's lamp on the front car of the train, before making a trip through the crosscut, was one which, by its very nature, had to be performed a great many times during the day, and one which required from the servant no skill, but merely obedience to the orders of the employer. His failure to so place the lamp was purely a failure to perform a detail of his work in preparing the cars, and, as such, was the act, it seems to us, of a fellow servant of the plaintiff, for whose negligence the defendant should not be held liable. It is hard to conceive how this case can be distinguished from the case where the engineer, or servant, fails to light the headlight on a locomotive before starting on a trip, or a brakeman who fails to give a proper signal of warning, or a yardman who sends out a car improperly loaded, all of whom have been repeatedly held to be acting in a purely ministerial manner, and *L.R.A.* 1016D.

not in a representative capacity. There is no evidence in the case that the lamp was liable to be broken that day, or ever had broken before, or that it was necessary, in the operation of the trains, to provide at the plat in the crosscut, or in the drift, duplicate parts for the very simple machinery operated by the conductor. In fact there is no claim of negligence on the part of the defendant in failing to keep duplicate parts, alleged in the declaration, nor was any such claim set up or relied upon at the trial. The evidence in the case shows affirmatively that the train had never been run before without the light in front, and therefore the defendant had no notice that such a thing was likely to occur. Unless notice to the conductor was notice to the defendant, the latter cannot be charged with notice of the breaking of the lamp before the accident occurred. The defendant had furnished a safe place, safe machinery and appliances, and a competent servant to operate them. It is difficult to say in what respect it failed in any duty toward the plaintiff. In the light of the following decisions of this court, we are constrained to hold that the learned trial judge should have directed a verdict for the defendant, upon the ground that the conductor was the fellow servant of the plaintiff. We think this view of the case is fully sustained by the following decisions of this court. We shall quote from two only. *Smith v. Potter*, supra; *Greenwald v. Marquette H. & O. R. Co.* 49 Mich. 197, 13 N. W. 513; *Henry v. Lake Shore & M. S. R. Co.* 49 Mich. 495, 13 N. W. 832; *Peterson v. Chicago & N. W. R. Co.* 67 Mich. 102, 11 Am. St. Rep. 564, 34 N. W. 260; *Bergstrom v. Staples*, 82 Mich. 654, 46 N. W. 1035; *Miller v. Chicago & G. T. R. Co.* supra; *Baron v. Detroit & C. Steam Nav. Co.* 91 Mich. 585, 52 N. W. 22; *Dewey v. Detroit, G. H. & M. R. Co.* and *Jarman v. Chicago & G. T. R. Co.* supra; *Schroeder v. Flint & P. M. R. Co.* 103 Mich. 213, 29 L.R.A. 321, 50 Am. St. Rep. 354, 61 N. W. 663; *Loranger v. Lake Shore & M. S. R. Co.* 104 Mich. 80-87, 62 N. W. 137; *Hennig v. Globe Foundry Co.* 112 Mich. 616, 71 N. W. 156; *Frazee v. Stott*, 120 Mich. 624, 79 N. W. 896, 6 Am. Neg. Rep. 297; *Miller v. Michigan C. R. Co.* 123 Mich. 374, 82 N. W. 58; *Lellis v. Michigan C. R. Co.* 124 Mich. 37, 70 L.R.A. 598, 82 N. W. 828; *Jurkiewicz v. American Car & Foundry Co.* 147 Mich. 622, 111 N. W. 183; *Dixon v. Grand Trunk Western R. Co.* 147 Mich. 667, 111 N. W. 200, and 155 Mich. 169, 118 N. W. 946; *Wickham v. Detroit United R. Co.* 160 Mich. 277, 52 L.R.A. (N.S.) 1082, 136 Am. St. Rep. 436, 125 N. W. 22, Ann. Cas. 1913E, 1069; *Stever v.*

Ann Arbor R. Co. 160 Mich. 207, 52 L.R.A. (N.S.) 1139, 125 N. W. 47.

In *Dixon v. Grand Trunk Western R. Co.* 147 Mich. 667, 111 N. W. 200, and 155 Mich. 169, 118 N. W. 946, the plaintiff, a crossing tender in defendant's employ, alleged that he was injured through the negligence of defendant in not keeping a certain switch east of the crossing, at which plaintiff was assigned, securely locked and fastened when not in use, and by reason of which a part of a train passing the crossing ran off the track and struck him. When the case was first here Justice Blair, speaking for the court, said: "We think that the court erred in holding that the doctrine of safe place applied to this case. The duty of keeping switches closed and locked while not in use was not one of the absolute duties of the defendant, but an assignable duty, relating to a detail of operation which could properly be delegated to an employee" (citing cases).

When the case was here the second time, the following language was used by Justice Hooker: "As we said in our former opinion, if the accident was due to negligence, it was that of a fellow servant, for which the master is not liable."

In *Miller v. Michigan C. R. Co.* 123 Mich. 374, 82 N. W. 58, the plaintiff was the foreman of a section gang, and was struck and injured by a piece of timber projecting from a flat car. The conductor and the brakeman of the train crew placed the timbers on the flat car, but failed to comply with the rules prescribed by the defendant, with which they were familiar, for the proper loading of cars, in that they did not use a sufficient number of stakes to secure the timbers properly upon the car. In an opinion reversing a judgment for the plaintiff this court, speaking through Justice Moore, said: "The trial judge was in doubt as to whether he ought to have charged the jury that the conductor and the station agent, who were responsible for the loading of the timber, were fellow servants with the plaintiff or not. He expressed himself as of the opinion that the cases decided in this court were not harmonious, and that under the later cases he ought to allow the case to go to the jury. He doubtless referred to the cases of *Balhoff v. Michigan C. R. Co.* 106 Mich. 606, 65 N. W. 592; *Anderson v. Michigan C. R. Co.* 107 Mich. 591, 65 N. W. 585, 16 Am. Neg. Cas. 98; *McDonald v. Michigan C. R. Co.* 108 Mich. 7, 65 N. W. 597. A reference to these cases will show that each of them announced the doctrine that it was the duty of the master to provide a reasonably safe place to work, and machinery, tools, or appliances in a reasonably safe condition with which to work, and that this was a duty

which could not be delegated by the master so as to escape liability. If the master has provided a safe place to work, or tools, machinery, and appliances reasonably safe with which to work, these cases do not indicate that the negligent use of these things by a fellow employee would make the master liable. These cases, as applied to the testimony in the case at bar, restricted as it was by the court to the third count in the declaration, did not justify a submission of the case to the jury upon the theory that the station agent and conductor were not fellow servants. In that respect the case is controlled by *Dewey v. Detroit, G. H. & M. R. Co.* 97 Mich. 329, 22 L.R.A. 292, 37 Am. St. Rep. 348, 56 N. W. 756; *Jarman v. Chicago & G. T. R. Co.* 98 Mich. 135, 57 N. W. 32; *Loranger v. Lake Shore & M. S. R. Co.* 104 Mich. 80, 62 N. W. 137; and *Frazer v. Stott*, 120 Mich. 624, 79 N. W. 896, 6 Am. Neg. Rep. 297. The last-named cases all relate to the negligent use by fellow servants of cars, machinery, or appliances which were reasonably safe for the purposes for which they were intended. Under such circumstances it is held that the negligence of the fellow servant does not make the master liable. If the distinction we have pointed out is borne in mind, we think it will be found the decisions are not inharmonious."

We have not omitted to examine the cases cited by plaintiff's counsel. In our opinion *Murphy v. Great Lakes Dredge & Dock Co.* 175 Mich. 216, 141 N. W. 564, can readily be distinguished from the instant case. In that case the defendant had not provided such a reasonably sufficient lighting system as to render the operations safe for its employees. Manifestly that is not this case. Here the conductor had been instructed, and it is undisputed, that it was his duty to put a lighted lamp upon the front of every train. He violated his instructions and moved his train without a light.

The case of *Kaukola v. Oliver Iron Min. Co.* 159 Mich. 689, 124 N. W. 591, is also cited. There we applied the rule of safe place, and held that it was the duty of the company to provide a safe passageway for its employees, to prevent their falling into a trap or excavation while going to their work. Here no complaint is made of the safety of the passageway, had the conductor followed his instructions and placed the simple appliance of a lamp in front of the train. We do not think that anything that was said by us in the *Kaukola* Case is controlling of the instant case.

We have examined the other cases cited by counsel, and think they are readily distinguished. Counsel for both parties have

cited many cases outside this state. While we have examined some of them, we are of opinion that the subject under consideration has been covered by our own decisions, and deem it unnecessary to cite the numerous authorities from other jurisdictions.

We are of opinion that by the undisputed testimony and for the reasons stated, the trial court should have directed a verdict for the defendant. This disposition of the case renders it unnecessary to consider the other questions discussed by counsel.

For the reasons pointed out, the judgment of the Circuit Court is reversed, and no new trial granted.

Brooke, Ch. J., and McAlvay and Steere, JJ., concur with Stone, J.

Bird, J., dissenting:

I am unable to agree with the conclusion reached by Mr. Justice Stone, that this case should be reversed. The place in which the plaintiff was injured was not one which was in the process of making. It was a permanent place, provided with a railway and cars, and was also used as a passageway for the employees going to and from their work. When the defendant put the passageway to this joint use, it was bound to keep it reasonably safe for the passage of the employees, and to keep it reasonably safe for them it was necessary to light it. Of the many ways in which this might have been accomplished, the defendant chose to light it by a lamp carried on the front end of the train. If the burden was on the conductor to keep the light on the car, in this respect he was acting for the master, and as to such duty was not a fellow servant of the

plaintiff. It will not do to dispose of the question by saying that the passageway became unsafe by reason of negligent operation. If the place had been made safe in the first instance by the master, and had subsequently become unsafe by reason of operation, of course the master would not be liable, but the difficulty of applying this rule is the fact that the place was never safe for the joint use of the cars and employees unless it was lighted. The lighting was a necessity which preceded operation, and operation could not be carried on in a reasonably safe manner until it was accomplished. As was said in *Kaukola v. Oliver Iron Min. Co.* 159 Mich. 689, 124 N. W. 591, where a like question was very ably discussed: "The lighting of this passageway or thoroughfare of the mine, far distant from the working places of most of those who passed through them,—it being always dark in the mine,—was just as necessary for the safety of the men as it was to have the walls and floors in a proper condition. It was one of the 'instrumentalities' which it was necessary to provide to enable the men to do their work, and to get to and from their work safely. It was a thing which it was necessary to keep permanently in condition."

I am unable to distinguish this case from *Kaukola v. Oliver Iron Min. Co.* supra, and *Murphy v. Great Lakes Dredge & Dock Co.* 175 Mich. 216, 141 N. W. 564, recently decided by this court, and I think this case should follow them, and the judgment should be affirmed.

Moore and Kuhn, JJ., concur with Bird, J.

MINNESOTA SUPREME COURT.

OLE MATHISON, Appt.,
v.

MINNEAPOLIS STREET RAILWAY COMPANY, Resp't.

(126 Minn. 286, 148 N. W. 71.)

Statute — constitutionality — presumption.

1. Laws enacted by the legislature are presumed to be valid, and will not be declared invalid by the courts unless they clearly transgress some constitutional limitation. For other cases, see *Evidence*, II. a, in *Dig.* 1-52 N. S.

Headnotes by TAYLOR, C.

Note. — As to the constitutionality of workmen's compensation and industrial insurance acts, see note attached to *Jensen v. Southern P. Co.* L.R.A.1916A, 409. L.R.A.1916D.

Constitutional law — equal protection — classification.

2. The constitutional requirement that all persons shall receive the equal protection of the laws is not infringed by legislation which applies only to those persons falling within a specified class, if it applies alike to all persons within such class, and reasonable grounds exist for making a distinction between those who fall within such class and those who do not.

For other cases, see *Constitutional Law*, II. a, 1, in *Dig.* 1-52 N. S.

Same — conclusiveness of legislative decision.

3. When the legislature has determined that a sufficient distinction exists between two classes of persons to justify applying rules to one class which do not apply to

As to the applicability and effect of workmen's compensation acts generally, see note attached to *Rayner v. Sligh Furniture Co.* L.R.A.1916A, 23.

the other, such determination is binding upon the courts, unless they can point out that the distinction is purely fanciful and arbitrary, and that no substantial or logical basis exists therefor.

For other cases, see Courts, I. c. 2, in Dig. 1-52 N. S.

Same — workmen's compensation act — exclusion of employees.

4. Excluding domestic servants, farm laborers, casual employees, and such railroads and railroad employees as are engaged in interstate commerce, from the provisions of the workmen's compensation act, does not render it unconstitutional as class legislation.

For other cases, see Constitutional Law, II. a, 5, c, in Dig. 1-52 N. S.

Master and servant — workmen's compensation act — abrogation of defenses.

5. The legislature may place employers, who become subject to part 2 of the act, in a different class from those who do not, and may also place employees who become subject thereto in a different class from those who do not; and abrogating the defenses of contributory negligence, assumption of risk, and negligence of a coemployee, in actions against employers who do not accept such part 2, and permitting such defenses in actions against employers who do accept such part 2, does not render the act invalid as class legislation.

For other cases, see Constitutional Law, II. a, 5, c, in Dig. 1-52 N. S.

Same — change of remedies.

6. Part 2 of the act substitutes the rights, remedies, and liabilities therein provided for those previously existing, and employers and employees subject thereto are limited to such rights and remedies; but such provisions impair no constitutional rights, as they apply only to those who have voluntarily chosen to become subject thereto, and such choice is no less optional because part 2 is presumed to have been accepted by all employers and employees who have not given notice to the contrary.

For other cases, see Master and Servant, II. in Dig. 1-52 N. S.

Statute — constitutionality.

7. The act contains no provision prohibited by the state or Federal Constitution, and is valid.

For other cases, see Master and Servant, II. in Dig. 1-52 N. S.

(July 3, 1914.)

APPEAL by plaintiff from an order of A District Court for Hennepin County overruling a demurrer to the answer, in an action brought to recover damages for personal injuries for which defendant was alleged to have been responsible. Affirmed.

The facts are stated in the Commissioner's opinion.
L.R.A.1916D.

Messrs. Duxbury, Conzett, & Petti-John, for appellant:

The law does not accord to all persons within the jurisdiction of Minnesota the equal protection of the law.

27 Harvard, L. Rev. pp. 235, 344; Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; Vandalia R. Co. v. Stillwell, 181 Ind. 267, 104 N. E. 289, 5 N. C. C. A. 483.

Messrs. Koon, Whelan, & Hempstead, for respondent:

The subject-matter of the act is within the limits of legislative power to make laws regulating matters of internal police.

Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 570, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259; McLean v. Arkansas, 211 U. S. 539, 547, 548, 53 L. ed. 315, 319, 320, 29 Sup. Ct. Rep. 206.

The power of our legislature to enact laws is "practically absolute," except as limited by Federal and state Constitutions.

Ramsey County v. Heenan, 2 Minn. 330, Gil. 281; State v. Corbett, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; Lommen v. Minneapolis Gas-light Co. 65 Minn. 196, 33 L.R.A. 437, 60 Am. St. Rep. 450, 68 N. W. 53; Powell v. Pennsylvania, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257.

The question whether the public interests or public necessity requires the enactment of certain legislation by the legislature, in the exercise of its police power, is a legislative, and not a judicial, question.

Butler v. Chambers, 36 Minn. 69, 1 Am. St. Rep. 38, 30 N. W. 308; State v. Corbett, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; State v. Great Northern R. Co. 68 Minn. 381, 38 L.R.A. 672, 71 N. W. 400; State v. Smith, 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545; Rippe v. Becker, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 569, 55 L. ed. 328, 339, 31 Sup. Ct. Rep. 259.

Only those whose rights would be prejudiced by the enforcement of an unconstitutional act will be heard by a court to question its validity.

Cooley, Const. Lim. 7th ed. p. 232; Clark v. Kansas City, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284; 6 Am. & Eng. Enc. Law, 1090; Sexton v. Newark Dist. Teleg. Co. 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569.

The provisions of the act do not violate the constitutional provision as to due process of law.

Second Employers' Liability Cases (Mon-dou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44,

32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; *Re Opinion of Justices*, 209 Mass. 607, 94 N. E. 848; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A. (N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401.

The persons whose rights are interfered with being both subject to part 2, they, by their acceptance of it, become bound by its provisions, including those of § 33, and waive all right of objection to such interference, and to any of the provisions of the section, on constitutional grounds.

Cooley, Const. Lim. 7th ed. p. 250; 8 Cyc. 791; *Pierce v. Somerset R. Co.* 171 U. S. 641, 648, 43 L. ed. 316, 319, 19 Sup. St. Rep. 64; *William Deering & Co. v. Peterson*, 75 Minn. 118, 77 N. W. 568; *Field v. Barber Asphalt Pav. Co.* 117 Fed. 925; *Eustis v. Bolles*, 146 Mass. 413, 4 Am. St. Rep. 327, 16 N. E. 286, appeal dismissed in 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *St. Louis v. St. Louis, I. M. & S. R. Co.* 248 Mo. 10, 154 S. W. 55; *Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; *Mellen Lumber Co. v. Industrial Commission*, 154 Wis. 114, L.R.A. 1916A, 374, 142 N. W. 187, Ann. Cas. 1915B, 997; *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569.

No one has a vested right in the continuance of the rules of the common law.

Munn v. Illinois, 94 U. S. 113, 134, 24 L. ed. 77, 87; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Martin v. Pittsburgh & L. E. R. Co.* 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 50, 56 L. ed. 327, 346, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Western U. Teleg. Co. v. Commercial Mill. Co.* 218 U. S. 406, 417, 54 L. ed. 1088, 36 L.R.A. (N.S.) 220, 31 Sup. Ct. Rep. 59, 21 Ann. Cas. 815; *West v. Louisiana*, 194 U. S. 258, 262, 48 L. ed. 965, 969, 24 Sup. Ct. Rep. 650; *Hulett v. Carey*, 66 Minn. 327, 34 L.R.A. 1916D.

L.R.A. 384, 61 Am. St. Rep. 419, 69 N. W. 31.

There is no constitutional right to pecuniary damages for personal injuries which may happen in the future.

Martin v. Pittsburgh & L. E. R. Co. 203 U. S. 284, 295, 51 L. ed. 184, 191, 27 Sup. Ct. Rep. 100, 8 Ann. Cas. 87; *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 71, 53 L. ed. 695, 702, 29 Sup. Ct. Rep. 397; *Williams v. Galveston*, 41 Tex. (iv. App. 63, 90 S. W. 505; *Sawyer v. El Paso & N. E. R. Co.* 49 Tex. Civ. App. 106, 108 S. W. 719; *Quackenbush v. Wisconsin & M. R. Co.* 62 Wis. 416, 22 N. W. 510; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Louisville & N. R. Co. v. Mottley*, 219 U. S. 467, 55 L. ed. 297, 34 L.R.A. (N.S.) 671, 31 Sup. Ct. Rep. 265; *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; *Re Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557.

The provisions of the act do not violate that clause of § 8, article 1, of our state Constitution, as to a certain remedy in the laws for all injuries or wrongs.

Allen v. Pioneer-Press Co. 40 Minn. 117, 3 L.R.A. 532, 12 Am. St. Rep. 707, 41 N. W. 936; *Kipp v. Johnson*, 31 Minn. 360, 17 N. W. 957; *Straw & E. Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co.* 80 Minn. 125, 83 N. W. 36; *Grimes v. Bryne*, 2 Minn. 89, Gil. 72; *West v. Louisiana*, 194 U. S. 258, 263, 48 L. ed. 965, 24 Sup. Ct. Rep. 650; *Heyward v. Judd*, 4 Minn. 483, Gil. 375; *Cooley*, Const. Lim. 7th ed. 615; *Allen v. Pioneer-Press Co.* 40 Minn. 117, 3 L.R.A. 532, 12 Am. St. Rep. 707, 41 N. W. 936.

The provisions of the act do not violate that clause of § 4, article 1, of our state Constitution, as to right of trial by jury. (*Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; *Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L.R.A. (N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599); nor the provisions as to the equal protection of the laws (*Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; *Re Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Second Employers' Liability Cases* [*Mondou v. New York, N. H. & H. R. Co.*] 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Deibeikis*

v. Link-Belt Co. 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; Ives v. South Buffalo R. Co. 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; State ex rel. Yapple v. Creamer, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Herrick v. Minneapolis & St. L. R. Co. 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Lavalley v. St. Paul, M. & M. R. Co. 40 Minn. 249, 41 N. W. 974).

Messrs. Davis, Kellogg, & Severance, amici curiæ:

These acts are a valid exercise of the police power of the state.

State ex rel. Yapple v. Creamer, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30; Com. v. Alger, 7 Cush. 84; Noble State Bank v. Haskell, 219 U. S. 104, 55 L. ed. 112, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487; Webber v. Virginia, 103 U. S. 348, 26 L. ed. 566; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 683, 27 L. ed. 445, 2 Sup. Ct. Rep. 185; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Butler v. Chambers, 36 Minn. 71, 1 Am. St. Rep. 638, 30 N. W. 308; State ex rel. Minneapolis v. St. Paul, M. & M. R. Co. 98 Minn. 389, 28 L.R.A.(N.S.) 298, 120 Am. St. Rep. 581, 108 N. W. 261, 8 Ann. Cas. 1047; State v. Mountain Timber Co. 75 Wash. 581, L.R.A. —, 135 Pac. 645, 4 N. C. C. A. 811; State v. Chicago, M. & St. P. R. Co. 68 Minn. 385, 38 L.R.A. 672, 64 Am. St. Rep. 482, 71 N. W. 400; Winona & St. P. R. Co. v. Waldron, 11 Minn. 515, Gil. 392, 88 Am. Dec. 100; Rippe v. Becker, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331; State ex rel. Beek v. Wagener, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; State v. Boehm, 92 Minn. 374, 100 N. W. 95; Northwestern Teleph. Exch. Co. v. Minneapolis, 81 Minn. 140, 53 L.R.A. 175, 83 N. W. 527, 86 N. W. 69; Joyce v. Great Northern R. Co. 100 Minn. 225, 8 L.R.A.(N.S.) 756, 100 N. W. 975.

They do not violate the "due process of law clause."

Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; Re Opinion of Justices, 209 L.R.A.1916D.

Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; Sexton v. Newark Dist. Telegr. Co. 84 N. J. L. 85, 86 Atl. 455, 3 N. C. C. A. 569; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Minneapolis & St. L. R. Co. v. Herrick, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 54 L.R.A. 787, 60 N. E. 943; Quackenbush v. Wisconsin & M. R. Co. 62 Wis. 411, 22 N. W. 519; Davidson v. Farrell, 8 Minn. 264, Gil. 225; Hutado v. California, 110 U. S. 516, 536, 28 L. ed. 232, 238, 4 Sup. Ct. Rep. 111, 292; Bardwell v. Collins (Bardwell v. Anderson) 44 Minn. 97, 9 L.R.A. 152, 20 Am. St. Rep. 547, 46 N. W. 315; State ex rel. Blaisdell v. Billings, 55 Minn. 467, 43 Am. St. Rep. 524, 57 N. W. 206, 794; Noble State Bank v. Haskell, 219 U. S. 110, 55 L. ed. 116, 32 L.R.A.(N.S.) 1062, 31 Sup. Ct. Rep. 186; Reno Smelting, Mill, & Reduction Works v. Stevenson, 20 Nev. 269, 4 L.R.A. 60, 19 Am. St. Rep. 364, 21 Pac. 317.

An ulterior public advantage may justify a comparatively insignificant taking of private property without fault being necessarily involved.

Fire Dept. v. Noble, 3 E. D. Smith, 440; Exempt Firemen's Benev. Fund v. Roome, 29 Hun. 391; Firemen's Benev. Asso. v. Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; Fire Dept. v. Helfenstein, 16 Wis. 136; Peterson v. The Chandos, 4 Fed. 645; Reed v. Canfield, 1 Sumn. 195, Fed. Cas. No. 11,641; Buckley v. Brown, 3 Wall. Jr. 199, Fed. Cas. No. 2,092; Missouri P. R. Co. v. Mackey, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; Chicago, R. I. & P. R. Co. v. Zerneck, 183 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229; Chicago, R. I. & P. R. Co. v. Eaton, 183 U. S. 589, 46 L. ed. 341, 22 Sup. Ct. Rep. 228; Chicago, B. & Q. R. Co. v. Wolfe, 187 U. S. 638, 47 L. ed. 344, 23 Sup. Ct. Rep. 847; St. Louis & S. F. R. Co. v. Mathews, 165 U. S. 1, 41 L. ed. 611, 17 Sup. Ct. Rep. 243; Pierce v. Worcester & N. R. Co. 105 Mass. 199; Rodemacher v. Milwaukee & St. P. R. Co. 41 Iowa, 297, 20 Am. Rep. 592; Jensen v. South Dakota C. R. Co. 25 S. D. 506, 35 L.R.A.(N.S.) 1015, 127 N. W. 650, Ann. Cas. 1912C, 700; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616, 21 Am. Neg. Rep. 464;

Atlantic Coast Line R. Co. v. Riverside Mills, 219 U. S. 186, 55 L. ed. 167, 31 L.R.A.(N.S.) 7, 31 Sup. Ct. Rep. 164; Twining v. New Jersey, 211 U. S. 78, 53 L. ed. 97, 29 Sup. Ct. Rep. 14; Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 465, 55 L. ed. 296, 31 Sup. Ct. Rep. 275.

They do not violate the right of trial by jury.

State v. Woodling, 53 Minn. 144, 54 N. W. 1068; State v. Bannock, 53 Minn. 419, 55 N. W. 558; Marsh v. Brown, 57 N. H. 173; Shaw v. Kent, 11 Ind. 80; Com. v. Whitney, 108 Mass. 5; Jacobs v. People, 218 Ill. 500, 75 N. E. 1034; State v. Packenhan, 40 Wash. 403, 82 Pac. 597; United States v. Praeger, 149 Fed. 474; Schick v. United States, 195 U. S. 65, 49 L. ed. 99, 24 Sup. Ct. Rep. 826, 1 Ann. Cas. 585; Haythorn v. Van Keuren & Son, 79 N. J. L. 101, 74 Atl. 502; Humphrey v. Eakeley, 72 N. J. L. 424, 60 Atl. 1097, 5 Ann. Cas. 929; State, Joy & S. Co., Prosecutor, v. Blum, 55 N. J. L. 518, 26 Atl. 86; Sexton v. Newark Dist. Teleg. Co. 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; Mellen Lumber Co. v. Industrial Commission, 154 Wis. 114, L.R.A.1916A, 374, 142 N. W. 187, Ann. Cas. 1915B, 997; Twitchell v. Pennsylvania, 7 Wall. 321, 19 L. ed. 223; Livingston v. New York, 8 Wend. 85, 22 Am. Dec. 622; Lee v. Tillotson, 35 Am. Dec. 624, and note, 24 Wend. 337; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; Mille Lacs County v. Morrison, 22 Minn. 178; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 117 Pac. 1101, 2 N. C. C. A. 823, 3 N. C. C. A. 599; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323.

They do not deny to persons the equal protection of the laws.

Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 31 L.R.A. 553, 65 N. W. 652; Merritt v. Knife Falls Boom Corp. 34 Minn. 245, 25 N. W. 403; Johnson v. Chicago, M. & St. P. R. Co. 29 Minn. 425, 13 N. W. 673; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 19 Sup. Ct. Rep. 594; St. John v. New York, 201 U. S. 633, 636, 50 L. ed. 896, 898, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 103, 43 L. ed. 909, 912, 19 Sup. Ct. Rep. 609; Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; Soon Hing v. Crowley, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; State ex rel. Mudeking v. Parr, 109 Minn. 147, 134 Am. St. Rep. 759, 123 N. W. 408; Hjelm v. Patterson, 105 Minn. 256, 127 Am. St. Rep. 560, 117 N. W. 610; State ex rel. Board of Education v. Brown, 97 Minn. 402, 5 L.R.A.(N.S.) 327, 106 N. W. 477; L.R.A.1916D.

State ex rel. Fitz v. Jensen, 86 Minn. 19, 89 N. W. 1126; Duluth Bkg. Co. v. Koon, 81 Minn. 486, 84 N. W. 335; State ex rel. Douglas v. Ritt, 76 Minn. 531, 79 N. W. 535; Cobb v. Bord, 40 Minn. 479, 42 N. W. 396; Nichols v. Walter, 37 Minn. 264, 33 N. W. 800; State v. Moore, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143; Ex parte Swann, 96 Mo. 44, 9 S. W. 10; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; Tinsley v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Western U. Teleg. Co. v. Indiana, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Chicago, K. & W. R. Co. v. Pontius, 157 U. S. 209, 39 L. ed. 675, 15 Sup. Ct. Rep. 585.

Mr. H. V. Mercer also amicus curiæ.

Taylor, C., filed the following opinion:

Plaintiff, an employee of the city of Minneapolis, while engaged in laying paving along and near the railway track of defendant in one of the streets of that city, was struck by one of defendant's street cars and received injuries which necessitated the amputation of his leg. Alleging that the injury was caused by the negligence of the defendant, he brought this action to recover damages. Defendant, in its answer, among other things, alleged that plaintiff, the city, and defendant had all accepted, were acting under, and were governed by, the provisions of part 2 of chapter 467, p. 677, Laws of 1913 (§§ 8195-8230, Gen. Stat. 1913), commonly known as the workmen's compensation act; and that plaintiff's rights were limited and confined to, and were measured and determined by, the relief provided for in part 2 of that act. Plaintiff demurred to this portion of the answer, and appealed from an order overruling the demurrer.

Plaintiff contends that the act violates §§ 2, 4, 8, and 13 of article 1 of the Constitution of the state of Minnesota, and the 5th and 14th Amendments to the Constitution to the United States, and is therefore unconstitutional and void. Whether this contention be well founded is the sole question for decision. The able arguments and exhaustive briefs presented have received attentive consideration and have been of much assistance.

We shall not stop to discuss the shortcomings and unsatisfactory results of the law of negligence as applied to present-day industrial conditions; nor the desirability of providing more certain, effective, and

inexpensive relief for injured workmen than the present common-law actions afford; nor the economic reasons for imposing upon an employer, not because he is at fault but as a burden incident to his business, the obligation to contribute to the support of employees disabled through injuries received in the course of their employment. Much consideration has been given to these questions by publicists and students of industrial, economic, and social problems; and it has become generally recognized that the common law fails to make adequate or equitable provision for the economic loss resulting from a disability which deprives the workman of his earning power. But changes in the laws, and in the public policies recognized in the laws, must emanate from the lawmaking power and not from the courts. The courts must administer the law as they find it, not as they may think it ought to be. Hence arguments showing the need for a change in the laws governing the relations of master and servant should be addressed to the legislative, and not to the judicial, branch of the government. The briefs have given considerable attention to these legislative questions, but it is sufficient, for present purposes, to say that the arguments advanced furnish ample basis for legislative action under the police power of the state; and that laws enacted for the purpose of adjusting and determining the respective rights and obligations of employer and employee may make radical innovations in pre-existing policies and rules of law, so long as they do not infringe some constitutional guaranty.

In considering the questions now before the court, it is proper to say, at the outset, that all laws enacted by the legislature are presumed to be valid; and that it is the duty of the courts to declare them valid, unless they clearly transgress some limitation upon the power of the legislature imposed by the state or Federal Constitution. *Roos v. State*, 67 Minn. 428, Gil. 291; *State v. Corbett*, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L.R.A. 437, 60 Am. St. Rep. 450, 68 N. W. 53; *Union P. R. Co. v. United States*, 99 U. S. 700, 25 L. ed. 496; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

The act in question provides that compensation shall be made by the employer to the employee, or in case of his death to his dependents, for injuries sustained in the course of the employment, "provided the employee was himself not wilfully negligent;" but the act does not apply to those railroads, or those employees of railroads, that are subject to the laws of the United

L.R.A.1916D. States enacted pursuant to the power to regulate commerce, nor to domestic servants, farm laborers, or persons whose employment is only casual. The act is separated into two divisions, designated as part 1 and part 2. The provisions of part 2 apply only in the event that both employer and employee elect to become subject thereto. If either or both elect not to become subject to part 2, the provisions of part 1 apply. If the employer has elected not to become subject to part 2, he cannot interpose as a defense, in an action brought under part 1, that the employee was negligent, unless such negligence was wilful; nor that he had assumed the risk; nor that the injury was caused by the negligence of a coemployee. Depriving the employer of the three defenses named, in case he elects not to become subject to part 2 of the act, is the only substantial change made by part 1 in the previously existing law. If the employer declines to accept the provisions of part 2, he loses the benefit of these three defenses; if he accepts the provisions of part 2, but the employee declines to accept such provisions, the employer retains the benefit of such defenses.

It is claimed that the act violates the equality provisions of the state and Federal Constitutions for the reason that it abrogates these three defenses, in actions under part 1, brought against employers who elect not to accept the provisions of part 2, but permits such defenses to be interposed, in actions under part 1, brought against other employers, and also for the reason that the act excludes from its provisions domestic servants, farm laborers, casual employees, and such railroads and railroad employees as are within the legislative domain of the United States. That the defenses mentioned may be entirely abolished, or abolished as to certain classes of employments only, is too well settled to require argument. *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co. v. Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Missouri P. R. Co. v. Castle*, 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606; *Vindicator Consol. Gold Min. Co. v. Firstbrook*, 36 Colo. 498, 86 Pac. 313, 10 Ann. Cas. 1108; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 183 N. W. 209, 3 N. C. C. A. 648; *Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; *Re Opinion of Jus-*

tices, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Ives v. South Buffalo R. Co.* 201 N. Y. 271, 34 L.R.A.(N.S.) 162, 94 N. E. 431, Ann. Cas. 1912B, 156, 1 N. C. C. A. 517; *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 455, 3 N. C. C. A. 569; *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30. The power to abolish such defenses rests upon the principle that no person has any property right or vested interest in a rule of law, and that the legislature may change such rules at its pleasure. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Sawyer v. El Paso & N. E. R. Co.* 49 Tex. Civ. App. 106, 108 S. W. 718; *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401. Plaintiff contends, however, that the classifications made by the act are unwarranted, and that the constitutional requirement that all persons shall receive the equal protection of the laws is infringed unless such defenses are abrogated as to all employers, or remain available to all employers, and unless the act applies to the classes excepted from its operation as well as to those included therein.

It is universally recognized that such constitutional provisions do not prohibit the legislature from prescribing valid rules and regulations, nor from imposing valid duties and obligations, nor from conferring valid rights and privileges, which apply only to those persons falling within a specified class, and not to the general public. Legislation which applies alike to all persons within the designated class, but does not apply to persons outside such class, is well within the constitutional requirement, if there be reasonable grounds for making a distinction between those who fall within such class and those who do not. *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. St. Rep. 609; *St. John v. New York*, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 Ann. Cas. 909; *Louisville & N. R. Co. v. Melton*, 218 U. S. 36, 54 L. ed. L.R.A.1916D.

921, 47 L.R.A.(N.S.) 84, 30 Sup. Ct. Rep. 676; *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U. S. 35, 55 L. ed. 78, 32 L.R.A.(N.S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 24; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Merritt v. Knife Falls Boom Corp.* 34 Minn. 245, 25 N. W. 403; *Cameron v. Chicago, M. & St. P. R. Co.* 63 Minn. 384, 31 L.R.A. 553, 65 N. W. 652; *Nichols v. Walter*, 37 Minn. 264, 33 N. W. 800; *State ex rel. Scheffer v. Justus*, 85 Minn. 279, 56 L.R.A. 757, 89 Am. St. Rep. 550, 88 N. W. 759; *Pfaender v. Chicago & N. W. R. Co.* 86 Minn. 218, 90 N. W. 393; *State ex rel. Young v. Standard Oil Co.* 111 Minn. 85, 126 N. W. 527.

A classification for purposes of legislation, to be valid, "must be based upon some reason of public policy, growing out of the condition or business of the class to which the legislation is limited." But it is the province of the legislature to determine what differences or peculiarities, of condition or of business, furnish a sufficient basis for applying a different rule to those engaged in such business or those affected by such condition, than is applied to the remainder of the community. It is also the province of the legislature to draw the line marking the boundary between one class and another, and between the several classes and the general public. When such questions have been determined by the legislature, the legislative judgment is binding upon the courts, unless they can point out that the classification adopted is purely fanciful and arbitrary, and that no substantial or logical basis exists therefor. *Cameron v. Chicago, M. & St. P. R. Co.* 63 Minn. 384, 31 L.R.A. 553, 65 N. W. 652; *Lommen v. Minneapolis Gaslight Co.* 65 Minn. 196, 33 L.R.A. 437, 60 Am. St. Rep. 450, 68 N. W. 53; *State v. Corbett*, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; *Joyce v. Great Northern R. Co.* 100 Minn. 225, 8 L.R.A.(N.S.) 750, 110 N. W. 975; *State ex rel. Young v. Standard Oil Co.* 111 Minn. 85, 126 N. W. 527; *State ex rel. Beek v. Wagener*, 77 Minn. 483, 46 L.R.A. 442, 77 Am. St. Rep. 681, 80 N. W. 633, 778, 1134; *State ex rel. Douglas v. Westfall*, 85 Minn. 437, 57 L.R.A. 297, 89 Am. St. Rep. 571, 89 N. W. 175; *State ex rel. Board of Education v. Brown*, 97 Minn. 402, 5 L.R.A.(N.S.) 327, 106 N. W. 477; *Hunter v. Tracy*, 104 Minn. 378, 116 N. W. 922; *Quong Wing v. Kirkendall*, 39 Mont. 64, 101 Pac. 250; *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720; *State ex rel. Oregon R. & Nav. Co. v. Clausen*, 63

Wash. 535, 116 Pac. 7; Id., 65 Wash. 156, 37 L.R.A.(N.S.) 466, 2 N. C. C. A. 823, 3 N. C. C. A. 599, 117 Pac. 1101.

We think it is within the discretion of the legislature to place in a class by themselves those employers and those employees who, for the reason that they are engaged in interstate commerce, are subject to the laws which have been, or may be, passed by Congress. Within the domain of interstate and foreign commerce, the power of Congress is supreme; and the legislature may well refrain from including, within the operation of the state laws, those persons as to whom such laws are, or may be, rendered nugatory by the laws of the United States. *Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401. The suggestion that the present law does not exclude from its operation all who are engaged in interstate commerce, but only those who are engaged in such commerce by railroad, is sufficiently answered by the decisions affirming the validity of laws which apply only to those engaged in interstate commerce by railroad. *Second Employers' Liability Cases* (*Mondou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875.

Other courts have held, and we think for sufficient reasons, that the exclusion of domestic servants, farm laborers, and persons whose employment is casual only, from the operation of laws providing compensation for injured workmen, is within the proper discretion of the legislature. *Re Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; *Dirkin v. Great Northern Paper Co.* 110 Me. 374, 86 Atl. 320, Ann. Cas. 1914D, 396.

We also think that the legislature is well within its prerogative when it places in one class employers who become subject to the provisions of part 2 of the act, and in another class employers who do not become subject to such provisions; also when it places in one class employees who become subject to such provisions, and in another class employees who do not become subject thereto. Employers who become subject to part 2 thereby tender to their employees, as a consideration for exemption from common-law liabilities, rights and privileges which did not previously exist, and offer to assume the burden of duties and obligations which were not previously imposed upon them. Employees who become subject to part 2 thereby tender to L.R.A.1916D.

their employers immunity from common-law actions as a consideration for the rights and remedies provided for by part 2. These propositions become binding contracts in respect to all who accept them, and remain as continuing offers to those who have not accepted them. An employer or employee who, at his option, may secure all the advantages possessed by any other, is hardly in a position to claim that he is discriminated against. The legislature has the power to determine the public policy of the state, and, in furtherance of any policy adopted by it, may enact proper laws tending to induce conformance therewith. The defenses of contributory negligence, assumption of risk, and negligence of a fellow servant, were doubtless abrogated in the cases specified, and not abrogated in other cases, to induce an acceptance of the provisions of part 2 of the act. But notwithstanding this purpose, the act permits any employer to place himself within either class of employers at his election, and to change from one to the other if he so desires; it also permits any employee to place himself within either class of employees at his election, and to change from one to the other if he so desires. Such legislation is not discriminatory and is not inhibited by the Constitution. Furthermore, if its validity rested upon the distinction between the two classes of employers and the distinction between the two classes of employees, we could not say that such distinction is so fanciful and arbitrary, or so wanting in substance, that the legislature is prohibited from applying rules to one class which it does not apply to the other. This is in harmony with the holding of other courts. *State ex rel. Yaple v. Creamer*, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A.(N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; *Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401.

The act provides that every employer and every employee shall be presumed to have accepted and become subject to part 2 of the act, "unless otherwise expressly stated in the contract, in writing, or unless written or printed notice has been given," in the manner prescribed in the act, that he has elected not to become subject thereto. It is beyond question that the legislature has power to create this presumption, and to require those who elect not to come under the provisions of part 2, to give notice thereof in the manner prescribed. The act also provides the manner in which one who is subject to the pro-

visions of part 2 may thereafter change and become not subject thereto, and the manner in which one who is not subject to such provisions may thereafter change and accept them. The choice is no less voluntary and optional because a party is deemed to have accepted these provisions, unless he give notice to the contrary, than it would be if he were deemed not to have accepted them until he gave notice to that effect.

The act provides that, if both employer and employee become subject to part 2 thereof, the employer shall make compensation according to the schedules contained in the act, "in every case of personal injury or death of his employee, caused by accident, arising out of and in the course of employment, without regard to the question of negligence, except accidents which are intentionally self-inflicted or when the intoxication of such employee is the natural or proximate cause of the injury." Gen. Stat. 1913, § 8203. It also provides that, in case both employer and employee become subject to part 2, such election "shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in part 2 of this act, and an acceptance of all the provisions of part 2 of this act" [§ 8204]. The rights, remedies, and liabilities provided by part 2 are substituted for those previously existing, and the parties are limited thereto. It is competent for the parties to enter into such an agreement, especially if they are authorized by law so to do; and, so long as the privilege is given them to elect whether they will or will not become bound by the provisions thereof, the agreement is voluntary, and none of the constitutional rights of the parties are infringed by requiring that the terms of the agreement, if entered into, shall be those prescribed by the act. *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; *Deibeikis v. Link-Belt Co.* 261 Ill. 454, 104 N. E. 211, Ann. Cas. 1915A, 241, 5 N. C. C. A. 401; *State ex rel. Yapple v. Creamer*, 85 Ohio St. 349, 39 L.R.A. (N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30; *Re Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720.

The section of the act most vigorously assailed is § 33 (§ 8229, Gen. Stat. 1913), which provides for cases in which the employee is entitled to compensation from his employer under part 2, for injuries which occurred under circumstances also creating

a liability against a third party. In case such third party is also subject to the provisions of part 2, the employee may either recover from his employer the relief prescribed by the act, or may bring an action against such third party, but cannot proceed against both. If he proceed against the third party, his recovery is limited to the relief prescribed by the act. If he takes compensation from his employer under the act, the employer becomes subrogated to his right of action against the third party, and may recover the aggregate amount payable to the employee, with costs, disbursements, and reasonable attorneys' fees. In case such third party is not subject to the provisions of part 2, the employee may maintain an action against him, without waiving any rights against the employer, and the damages recoverable are not limited to the relief prescribed by the act; but, if the employee recover from such third party, the employer is entitled to deduct, from the compensation payable by him under the act, whatever amount is actually received by the employee from the third party. In other words, if a sum equal to, or exceeding, the compensation payable under the act, is actually collected from the third party, the employer is relieved from liability, but, if the sum actually collected be less than the amount payable under the act, he must make good the deficiency. If, instead of prosecuting an action against such third party, the employee collects compensation from his employer, the employer becomes subrogated to the rights of the employee against the third party, and may maintain an action against him for the recovery of the damages sustained by the employee, but, after reimbursing himself for the compensation payable to the employee, and for the costs, attorneys' fees, and expenses of collecting the damages, the employer must pay over to the employee any surplus remaining of the amount collected. We find nothing in these provisions contravening any of the provisions of the Constitution. They apply to and bind only those who have voluntarily accepted and agreed to them.

A careful examination of the entire act satisfies us that it contains nothing prohibited by either the state or Federal Constitution. The 5th Amendment to the Federal Constitution applies only to proceedings under the Federal laws, and has no bearing upon the instant case. Section 4 of article 1 of the state Constitution, securing the right of trial by jury in all cases at law, expressly provides that such right may be waived. Where employer and employee both become subject to the provisions of part 2 of the act, they thereby waive a jury trial as to matters governed by such provisions.

Such right remains unchanged, however, as to all other matters and all other persons. The rights set forth and declared in § 8 of article 1 of the Constitution do not appear to have been infringed. The prohibition contained in § 13 of article 1 has no bearing upon the case whatever. The fact that the provisions of part 2 of the act apply

to those only who elect to be governed thereby obviates the objections to the act, not hereinbefore considered, which are based upon the provisions contained in the 14th Amendment to the Federal Constitution and § 2 of article 1 of the state Constitution.

Order affirmed.

MINNESOTA SUPREME COURT.

SENA ODENBREIT, Appt.,

v.

ANNE UTHEIM, Respnt.

(— Minn. —, 154 N. W. 741.)

Specific performance — contract to adopt.

1. Where, under an oral contract to adopt an infant and to give her a specified portion of the property of her foster parents at their death in consideration of the relinquishment of all parental rights by her natural parents, the child is reared as the child of her foster parents, and renders to them all the duties and services of a daughter until she attains her majority, and such foster parents die without having legally adopted her and without making any provision for her by will or otherwise, the property rights provided for in such contract may be enforced in equity; and where the property consists of real estate, or such rights have not been submitted to the probate court for determination, they are not barred by a final decree of the probate court assigning the property to others.

For other cases, see Specific Performance, I. c, in Dig. 1-52 N. S.

Adoption — rights under contract.

2. If the contract merely provided that she should be adopted, and contained no express provision in respect to property rights, she became entitled to the property rights given by statute to an adopted child. *For other cases, see Descent and Distribution, I. d, in Dig. 1-52 N. S.*

Parent and child — rights of adopted child.

3. The property rights of an adopted child are now the same as those of a natural child.

For other cases, see Descent and Distribution, I. d, in Dig. 1-52 N. S.

Will — disinheritance of child.

4. A parent may, by will, entirely disinherit a child.

For other cases, see Wills, III. c, in Dig. 1-52 N. S.

Courts — probate — rights of pretermitted child.

5. The rights given by § 7260, Gen Stat.

Headnotes by TAYLOR, C.

Note.—As to right of adopting parent to disinherit adopted child, see annotation following this case, post, 424.
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1913, to a pretermitted child, must be enforced in the probate court, and if not so enforced are barred by the final decree of that court.

For other cases, see Judgment, II. d, 5, in Dig. 1-52 N. S.

Judgment — distributing estate — rights of adopted child.

6. The allegations of the complaint failed to show that the contract in controversy contained any express provision to give plaintiff a portion of the property of her foster parents. Consequently she has no greater rights in such property than are given by statute to an adopted child, and such rights were barred by the final decree of the probate court assigning the property to the devisee named in the will.

For other cases, see Judgment, II. d, 5, in Dig. 1-52 N. S.

(November 5, 1915.)

A PPEAL by plaintiff from an order of the District Court for Lac Qui Parle County sustaining a demurrer to the complaint in an action brought to enforce specific performance of a contract of adoption. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. G. H. Smith, for appellant:

The amended complaint states a cause of action.

1 C. J. pp. 1376-1397; *Fiske v. Lawton*, 124 Minn. 89, 144 N. W. 455; *Crawford v. Wilson*, 139 Ga. 654, 44 L.R.A.(N.S.) 776, 78 S. E. 30; *Laird v. Vila*, 93 Minn. 48, 106 Am. St. Rep. 420, 100 N. W. 656; *Coulam v. Doull*, 133 U. S. 228, 33 L. ed. 599, 10 Sup. Ct. Rep. 253; *Thomas v. Maloney*, 142 Mo. App. 193, 126 S. W. 523; *Bray v. Miles*, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510; *Svanburg v. Fosseen*, 75 Minn. 350, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4; *Smith v. Olmstead*, 88 Cal. 582, 12 L.R.A. 46, 22 Am. St. Rep. 336, 26 Pac. 521; *McIntire v. McIntire*, 64 N. H. 609, 15 Atl. 218.

The district court has, and the probate court has not, jurisdiction where real estate is involved and the contract is oral.

Laird v. Vila, 93 Minn. 45, 106 Am. St. Rep. 420, 100 N. W. 656; *Mousseau v. Mousseau*, 40 Minn. 238, 41 N. W. 977; *Farnham v. Thompson*, 34 Minn. 335, 57 Am. Rep. 59, 26 N. W. 9; *Svanburg v. Fos-*

seen, 75 Minn. 350, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4; State ex rel. Union Nat. Bank v. Probate Ct. 103 Minn. 328, 115 N. W. 173.

Mr. N. F. Soderberg, for respondent:

The complaint herein does not state facts sufficient to constitute a cause of action.

Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455; Albring v. Ward, 137 Mich. 352, 100 N. W. 609; Burns v. Smith, 21 Mont. 251, 69 Am. St. Rep. 653, 53 Pac. 742; Brantingham v. Huff, 174 N. Y. 53, 95 Am. St. Rep. 545, 66 N. E. 620; Jordan v. Abney, 97 Tex. 296, 78 S. W. 486; Kirk v. Middlebrook, 201 Mo. 245, 100 S. W. 450; Sorenson v. Rasmussen, 114 Minn. 324, 35 L.R.A.(N.S.) 216, 131 N. W. 325; Sharkey v. McDermott, 91 Mo. 647, 60 Am. Rep. 270, 4 S. W. 107; Stellmacher v. Bruder, 89 Minn. 507, 99 Am. St. Rep. 609, 95 N. W. 324; Lowe v. Lowe, 83 Minn. 206, 86 N. W. 11; Haubrich v. Haubrich, 118 Minn. 394, 136 N. W. 1025; Laird v. Villa, 93 Minn. 45, 106 Am. St. Rep. 420, 100 N. W. 656; Whitby v. Motz, 125 Minn. 43, 51 L.R.A.(N.S.) 645, 145 N. W. 623; Bengtson v. Johnson, 75 Minn. 321, 78 N. W. 3; Hadley v. Bourdeaux, 90 Minn. 177, 95 N. W. 1109.

The district court has not jurisdiction over the subject of the action.

Brown v. Strom, 113 Minn. 1, 129 N. W. 136; Appleby v. Watkins, 95 Minn. 455, 104 N. W. 301, 5 Ann. Cas. 471.

Taylor, C., filed the following opinion:

Appeal by plaintiff from an order sustaining a demurrer to the complaint. The complaint contains allegations to the effect that plaintiff's mother, in 1880 and while on her deathbed, requested Anfin Utheim and Marith Utheim, his wife, who were childless, to adopt plaintiff, who was then one and one half years of age; that they consented on condition that plaintiff's father renounce all claims and parental rights to plaintiff; that plaintiff's father made the required promise, and thereupon the Utheims took plaintiff into their home, gave her the name of Sena Utheim, and cared for and reared her as their child; that plaintiff believed that the Utheims were her parents until she was ten years of age, when she was told of her true parentage by a neighbor; that she reported to the Utheims what she had been informed, and was told by them "that she had once had other parents, but that they had adopted her, and that she was now their child and heir, and had no other parents, but belonged to them, and she believed them;" that frequently thereafter they informed plaintiff "that she was their child and that their property would go to her on their death;" that the church record of the L.R.A.1916D.

church of which Anfin Utheim was pastor contains a statement in his handwriting and signed by him and his wife that plaintiff was their adopted child and their heir; that Marith Utheim died in January, 1897, and at her instance while on her deathbed Anfin Utheim again promised to "continue to treat plaintiff as his child and make her his heir;" that plaintiff lived with said Anfin and Marith Utheim until the death of Marith and thereafter with said Anfin until she was in her twentieth year, and at all times treated and regarded them as her parents, and gave them the love, and rendered to them all the services and duties, of a daughter; that after the death of said Marith, said Anfin married the defendant; that in August, 1913, said Anfin died leaving a will, executed in 1910, by which he gave all his property to defendant; that the property consisted principally of the real estate described in the complaint; and that the will was duly probated and the entire estate assigned to defendant.

Anfin and Marith Utheim were childless. They took plaintiff into their home and family at the age of one and one half years, and she lived with them as a member of their family until after she had attained her majority. During all this time they treated and regarded her the same as if she had been their own natural child; and she treated and regarded them the same as if they had been her natural parents, and at all times performed the duties and services and gave them the companionship and affection of a daughter. If in doing so plaintiff fully performed on her part the terms of an oral contract, made by her natural parents for her benefit, which provided that in consideration for such performance she should receive the property of Anfin Utheim, or a specified portion thereof, at his death, she had the right at his death to enforce specific performance of such contract. Svanburg v. Fosseen, 75 Minn. 350, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4; Stellmacher v. Bruder, 89 Minn. 507, 99 Am. St. Rep. 609, 95 N. W. 324; Laird v. Vila, 93 Minn. 45, 106 Am. St. Rep. 420, 100 N. W. 656; Richardson v. Richardson, 114 Minn. 12, 130 N. W. 4; Haubrich v. Haubrich, 118 Minn. 394, 136 N. W. 1025; Fiske v. Lawton, 124 Minn. 85, 144 N. W. 455; Brasch v. Reeves, 124 Minn. 114, 144 N. W. 744; Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812. If the contract provided merely that they should adopt her as their child, and did not contain any express provision that she should receive the property of the Utheims, or a specified portion thereof, she has no other or greater rights than would have been given her by the statute in case she had been legally

adopted. Had she been legally adopted, she would have precisely the same rights, under the statute as it now exists, that are given by statute to a natural child.

Unless a parent has bound himself by contract, based upon a sufficient consideration, to give his property, or a specified portion thereof, to his child, he may by will dispose of all the property that would otherwise descend to the child in any manner that he sees fit. He may entirely disinherit the child. The statute provides however: "If a testator omits to provide in his will for any of his children or the issue of a deceased child, they shall take the same share of his estate which they would have taken if he had died intestate, unless it appears that such omission was intentional, and not occasioned by accident or mistake." Gen. Stat. 1913, § 7260.

The power and duty to determine to whom property passes by will or descends by inheritance is vested in the probate court; and it is the province of that court to determine, in the first instance, whether a pretermitted child is entitled to inherit under the statute above quoted. A child claiming under that statute must enforce such claim in the probate proceedings; and if he fails to do so and the probate court makes a final decree assigning the property to others, such decree becomes binding and conclusive and operates to bar his claim unless an appeal be taken therefrom in the manner provided by statute.

In the present case the probate court allowed the will and made a decree assigning all the property to defendant thereunder. No appeal was taken from this decree. Assuming that plaintiff, by virtue of the contract, possessed the same rights as a natural child, and no others, she is concluded by the judgment rendered by the probate court, and cannot enforce, in this action, the rights of a pretermitted child.

But if the contract with the Utheims expressly provided not only that plaintiff should be adopted by them, but also that she should receive their property, or a child's share thereof, at their death, a different question is presented. Under such a contract, the rights of plaintiff would not depend upon the will, nor upon the laws of descent, but would be fixed and determined by the contract. Such rights attach to the property of the decedent by virtue of the express contract made by him in his lifetime; and create, or at least may create, a claim of title to the property adverse to the title thereto given by will or by the laws of descent. The determination and enforcement of such rights is ordinarily beyond the jurisdiction of the probate court; and they are unaffected by a decree of the probate L.R.A.1916D.

court determining the devolution of the property of the decedent, at least unless they have been submitted to that court for determination. *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977; *Haataja v. Saarenpaa*, 118 Minn. 255, 136 N. W. 871; *Svanburg v. Fosseen*, 75 Minn. 350, 43 L.R.A. 427, 74 Am. St. Rep. 490, 78 N. W. 4; *Laird v. Vila*, 93 Minn. 45, 106 Am. St. Rep. 420, 100 N. W. 656.

It is true that such contracts were established and enforced in probate proceedings in *Kleeberg v. Schrader*, 69 Minn. 136, 72 N. W. 59, and *Fiske v. Lawton*, 124 Minn. 85, 144 N. W. 455; but in each of these cases the claimant voluntarily presented his claim to the probate court, and the property involved consisted wholly of personal property in the hands of the administrator over whom that court had full control. Where the property involved consists of real estate, the probate court has no jurisdiction to determine contested adverse claims thereto, asserted by one whose rights do not rest upon a will or the laws of descent, against those in whom a will or the laws of descent have vested the title to such property. See the cases above cited, and also *Caron v. Old Reliable Gold Min. Co.* 12 N. M. 211, 78 Pac. 63, 6 Ann. Cas. 874, and cases cited in note appended thereto. The following excerpt from *Haataja v. Saarenpaa*, 118 Minn. 255, 136 N. W. 871, applies with equal force to the present case: "While it is true, as insisted by the defendants, that the probate courts have exclusive original jurisdiction over the estates of decedents, and decrees within their jurisdiction are binding until set aside by such courts themselves or reversed on appeal, and are not subject to collateral attack for want of jurisdiction not appearing on the face of the record, it is equally true that these rules do not apply to the instant case; such jurisdiction being purely for the purpose of administration. The legal title to the land in controversy was in Herman Hardy at the time of his death, and, he dying intestate, the jurisdiction of the probate court extended to the determination of who were his creditors and to whom the estate passed under the statute upon his death. Claims of parties against the land, not depending upon the law of descent, were not involved in the administration of the estate, and the probate court did not and could not determine the question as to whether the deceased had or had not forfeited his title as to this plaintiff. The decrees of the probate court in no wise determined the rights or duties of the deceased or the defendants towards this plaintiff, growing out of the contract under which the legal title to the land was acquired. State ex rel.

Union Nat. Bank v. Probate Ct. 103 Minn. 325, 115 N. W. 173, and cases cited; 2 Durnell, Minn. Dig. § 7779."

If it appears from the complaint that, at the death of Anfin Utheim, plaintiff was entitled to receive his property, or a child's portion thereof, by virtue of the contract, independent of the laws of descent, she has the right to enforce such contract in the present action notwithstanding the final decree rendered by the probate court.

The remaining question is whether it appears from the complaint that the Utheims contracted to give plaintiff a specified portion of their property. The allegations contained in the complaint consist largely of statements of evidentiary facts rather than statements of ultimate, issuable facts. It nowhere states that either of the Utheims agreed, as a part of the contract, to give plaintiff their property or a specified portion thereof. It alleges that after plaintiff learned that the Utheims were not her parents, they repeatedly made statements to her to the effect that she was their adopted child and heir and "that their property would go to her on their death;" that they made and signed a writing in the church record that she was their adopted child and heir; and that, while Marith Utheim was on her deathbed, Anfin Utheim promised to "continue to treat plaintiff as his child and make her his heir." It would seem to be a fair inference from these statements and from all the other facts and circumstances that the Utheims understood and intended that plaintiff should occupy the

same position in their family, and have the same right to inherit, as a natural child. Alleging the making of these statements cannot fairly be construed as alleging that the Utheims had made an irrevocable contract to give plaintiff other and greater rights in their property than a natural child would possess, and had deprived themselves of the power to dispose of their property by will. So far as the complaint discloses, the agreement between plaintiff's parents and the Utheims contemplated only that plaintiff should be adopted by the Utheims, and contained no provision whatever in respect to property rights. The Utheims took plaintiff into their family and reared her as their own child pursuant to such agreement; and we think the subsequent statements made by them had reference to this original agreement and the status to which plaintiff was entitled thereunder, and cannot be construed as establishing contractual rights in their property. Especially so in view of the rule that a claim for such contractual rights can be given effect only when clearly and satisfactorily established. To contract to give an adopted child greater rights than the law gives a natural child is contrary to common experience; and if a litigant bases his claim upon such a contract, he should allege such contract, and not leave it to be spelled out from allegations of the making of scattered statements which, in view of the ordinary course of human conduct, are more consistent with a different theory.

Order affirmed.

Annotation—Right of adopting parent to disinherit adopted child.

In general.

Since adoption was unknown to the common law, the rights of an adopted child are statutory, and vary as the statutes vary in the different jurisdictions. But, speaking generally, adoption means "to take into one's family the child of another and give him or her the rights, privileges, and duties of a child and heir." (Black's Law Dict.) No cases have been found in which the statute confers upon the adopted child greater rights than a child born in lawful wedlock would have. So, the right of an adopting parent to cut off the adopted child by will cannot be denied if he could cut off his own natural child. On the other hand, some statutes make exceptions to the rule that the adopted child has the same rights as a natural child, in which case the right to cut off the former under certain circumstances or by certain means is not measured by L.R.A.1916D.

the inability to cut off a natural child under the same circumstances or by the same means. What has been said thus far is upon the assumption that there was no contract, express or implied, which obligated the adopting parent to leave property to the child by will or to permit him to inherit. The question of the rights of an adopted child under such contract is covered in the note to *Baumann v. Kusian*, 44 L.R.A.(N.S.) 756, and is not considered here. There are many cases there cited in which it is indirectly held or assumed that an adopting parent may, in the absence of a contract, cut off the adopted child by will, but those cases are not cited here. That note covers in a practical way the most important questions decided in *ODENBREIT v. UTHEIM*, ante, 421.

Where natural heir may be cut off.

Because of the fact that an adopted child's right to inherit from the adopting

parent is the same as it would be if he were the natural child of the same person, he can be cut off from his share by the will of the adopting parent the same as if he were the natural child of the adopting parent. *Steele v. Steele* (1901) 161 Mo. 566, 61 S. W. 815; *Grantham v. Gossett* (1904) 182 Mo. 651, 81 S. W. 895 (an indirect holding); *Fugat v. Allen* (1906) 119 Mo. App. 183, 95 S. W. 980; *Horton v. Troll* (1914) 183 Mo. App. 677, 167 S. W. 1081; *Gatch v. Burnes* (1905) 132 Fed. 485 (the question was not directly before the court, and the statement refers to the law in Missouri. The decision was affirmed in (1905) 70 C. C. A. 357, 137 Fed. 781, and certiorari denied in (1905) 199 U. S. 605, 50 L. ed. 330, 26 Sup. Ct. Rep. 746; *Pemberton v. Perrin* (1913) 94 Neb. 718, 144 N. W. 164, Ann. Cas. 1915B, 68 (an incidental holding); *Wright's Estate* (1890) 11 Pa. Co. Ct. 492; *Clark v. West* (1903) 96 Tex. 437, 73 S. W. 797; *Logan v. Lennix* (1905) 40 Tex. Civ. App. 62, 88 S. W. 364; *Masterson v. Harris* (1915) — Tex. —, 174 S. W. 570. And see reference, *supra*, to note in which many cases are cited wherein this proposition is assumed, or held to be correct by necessary implication.

In *Bowdlear v. Bowdlear* (1873) 112 Mass. 184, the testator had provided for a later adopted child, referring to her by name as it was before the adoption. The suit was to permit her to take against the will the share that she would have taken if no will had been made. By necessary inference the court held that the adopting parent may cut off the adopted child with less than she would inherit in case of intestacy.

Where natural heir may not be cut off—where rights are same as those of natural heir.

If the parent does not have the power to cut off the share of a natural child, and the right of inheritance of an adopted child is the same as that of a natural child, of course, the adopted child cannot be cut off. *Hosser's Succession* (1885) 37 La. Ann. 839.

If the rights of inheritance from the parent are the same between natural and adopted children, anything that prevents the one from being cut off will likewise prevent the other. So, it has been held that the adoption of a child after the making of a will in which no provision has been made for the child operates as a revocation of the will. (*Hilpire v. Claude* (1899) 109 Iowa, 159, 46 L.R.A. 171, 77 Am. St. Rep. 524, 80 N. L.R.A. 1916D

W. 332; *Glascott v. Bragg* (1901) 111 Wis. 605, 56 L.R.A. 258, 87 N. W. 853.) In these cases the statute was interpreted as giving the adopted child the same rights as those of a natural child. There are some cases cited under the next heading in which the statutes were interpreted as not making the adopted child equal in this respect to a natural child. So the opposite result is reached. But it will be noted that those cases, as well as these, support the principle here stated. The question of revocation of a will by the adoption of a child is not within the scope of this note, and its consideration is merely an incident to the question here considered.

Likewise it has been held that "the adoption of a child after the making of a will brings it within the provisions of a statute providing that on the birth of a child after making of a will, unless an intention to disinherit it shall appear from the will, the devises and legacies shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of testator had he died intestate, where, by statute, an adopted child, for the purpose of inheritance, is declared to be in law the child of the parents the same as if he had been born to them in lawful wedlock." *Flannigan v. Howard* (1902) 200 Ill. 396, 59 L.R.A. 664, 93 Am. St. Rep. 201, 65 N. E. 782.

And it has also been held that failure to mention an adopted child in the will gives the child all the rights of a pretermitted heir (the same as if she were the natural child), so that she may obtain her share of the estate if a natural child could under like circumstances. *Thomas v. Maloney* (1910) 142 Mo. App. 193, 126 S. W. 522.

—where rights are less than those of natural child.

If the rights of the adopted child are in some respects less than those of a natural child, then this line of argument is not applicable, and the adopted child may be cut off, even though a natural child could not, under the same circumstances or by the same means, be cut off. For example, it has been held that the adopted child is cut off by the will, of the adopting parent made before the adoption, in which no provision is made for it (see cases cited under preceding heading, where a different result is reached under almost identical statutes, which were interpreted as giving the adopted child the same rights as those

of a natural heir; observe that the question of revocation of a will by the subsequent adoption of a child is not the question that is here annotated),

—where a statute provides that “if, after the making of a will, the testator shall have born to him legitimate issue, who shall survive him, or shall have posthumous issue, then such will shall be deemed revoked, unless provision shall have been made in such will for such issue,” even though by the general statutes the right of an adopted child to inherit would be, in the absence of the statute just quoted, the same as that of a natural child, *Davis v. Fogle* (1890) 124 Ind. 41, 7 L.R.A. 485, 23 N. E. 860;

—where a statute provides that marriage and issue shall operate as a revocation of a will made prior thereto, there being in this case a marriage and adoption, but no birth of issue, *Re Comassi* (1895) 107 Cal. 1, 28 L.R.A. 414, 40 Pac. 15;

—whereby statute the birth of a child, after the parent's will is made in which no provision is made for the child, revokes the will, and the general statutes give to the adopted child the same rights as a natural child except in certain events having no reference to the revocation of wills, *Re Gregory* (1893) 15 Misc. 407, 37 N. Y. Supp. 925;

—where the statute provided that “any person desirous to adopt a child, so as to make it capable of inheriting his estate, real and personal, or to change the name of one previously adopted, may make a declaration in writing; . . . which, being acknowledged by the declarant before the probate judge of the county of his residence, . . . has the effect to make such child capable of inheriting such estate of the declarant, and of changing its name to the one stated in the declaration,” *Russell v. Russell*

(1887) 84 Ala. 48, 3 So. 900. (The question of revocation of the will by the birth of a child later was not before the court, as two thirds of the estate was left to testator's children; and it was held that the later adopted child was not included in the term “children”);

—where a statute provides that, “when any person shall make his last will and testament and afterwards shall marry or have a child or children not provided for in such will, and die, leaving a widow and child, or either a widow or child or children, although such child or children be born after the death of their father, every such person so far as shall regard the widow or child or children after-born, shall be deemed and construed to die intestate and such widow, child or children shall be entitled to such purparts, shares and dividends of the estate real and personal of the deceased, as if he had actually died without any will.” *Goldstein v. Hammell* (1912) 236 Pa. 305, 84 Atl. 772, affirming (1912) 49 Pa. Super. Ct. 39.

Remedy as pretermitted heir.

Assuming that there was a legal adoption and that there was no contract in addition thereto, as the court in *ODENBREIT v. UTHEIM*, ante, 421, assumes or holds, the remedy of an adopted child as a pretermitted heir would be, generally speaking, the same as that of a natural child. So the court held. What the remedies of a pretermitted heir are, is discussed in note to *Lowery v. Hawker*, 37 L.R.A.(N.S.) 1143; and some cases, on right of children omitted by testator, are cited in note in 34 L.R.A.(N.S.) 966. These questions are not within the scope of the present note, but they are decisive on remedy of an adopted child as a pretermitted heir after a concession that the remedies are the same as those of a natural heir. J. W. M.

MINNESOTA SUPREME COURT.

JAMES JOYCE, Appt.,

v.

VILLAGE OF JANESVILLE et al., Respts.

(— Minn. —, 155 N. W. 1067.)

Injunction — nuisance — discharge of sewage.

1. In this action to enjoin the defendant village and its officers from discharging sewage upon plaintiff's land, the court found that a ditch maintained by the village for

surface drainage collected the overflow from cesspools, sinks, and septic tanks, and, through a tile drain constructed by the village, discharged the same together with surface waters upon and over plaintiff's land to its detriment and injury. It was also found that the village officers had no knowledge of the discharge of sewage into the ditch, and that the village was not responsible therefor. It is held:

The invasion of plaintiff's lands as found by the court constituted a nuisance entitled

Note. — As to right of municipality to create a nuisance by pollution at point where its sewers discharge, see notes to *Platt Bros. & Co. v. Waterbury*, 48 L.R.A.

Headnotes by *HOLT, J.*
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ling plaintiff to an injunction against its continuance by the village.

For other cases, see Nuisances, II. c, in Dig. 1-52 N. S.

Same — notice.

2. That, if notice was necessary before suit, the officers of the village had knowledge and notice thereof, and the finding to the contrary is not sustained by the evidence, nor was the defense of want of notice made.

For other cases, see Nuisances, II. c, in Dig. 1-52 N. S.

Municipal corporation — creation of nuisance — relief.

3. If a municipality invades private property and creates a nuisance thereon, the injured party is entitled to relief, and it is immaterial how or by what means the municipality or its officers caused the injury.

For other cases, see Municipal Corporations, III. g, 1, in Dig. 1-52 N. S.

Same — notice of nuisance — service.

4. When the main purpose of a suit is to enjoin a city or village from maintaining a private nuisance, the written notice prescribed by § 1786, Gen. Stat. 1913, need not be served before suit. Such action is not predicated upon negligence of the municipality or its officers.

For other cases, see Municipal Corporations, III. g, 5, in Dig. 1-52 N. S.

Nuisance — remedy.

5. For a continuing nuisance there is no adequate remedy at law.

For other cases, see Nuisances, II. c, in Dig. 1-52 N. S.

(January 21, 1916.)

APPEAL by plaintiff from an order of the District Court for Waseca County denying new trial of an action brought to enjoin defendants from discharging sewage and filth upon plaintiff's lands. Reversed.

The facts are stated in the opinion.

Mr. Henry M. Gallagher, for appellant:

The defendant village maintains in one of its public streets a drain or sewer, and the act of emptying the contents of said drain or sewer, consisting of sewage, decomposed matter, filth, offal, and other matters complained of, constitutes a nuisance, of which it had notice both constructive and actual.

29 Cyc. 1171, 1180, 1233-1235; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Price v. Oakfield Highland Creamery Co. 87 Wis.

691; Georgetown v. Com. 61 L.R.A. 694; State v. Concordia, 20 L.R.A.(N.S.) 1050; and McLaughlin v. Hope, 47 L.R.A.(N.S.) 137; and later cases, McDaniel v. Cherryvale, 50 L.R.A.(N.S.) 389; Bird v. Grand Rapids, 50 L.R.A.(N.S.) 473; and Parish v. Yorkville, L.R.A.1915A, 232. As to prescriptive right of municipality or individual to pollute stream, see note to Miles L.R.A.1916D.

536, 24 L.R.A. 333, 58 N. W. 1039; Exley v. Southern Cotton Oil Co. 151 Fed. 101; Dierks v. Highway Comrs. 142 Ill. 197, 31 N. E. 406; Reid v. Atlanta, 73 Ga. 523; Batcher v. Staples, 120 Minn. 86, 139 N. W. 140; 28 Cyc. 1293, 1323, 1331, 1334, 1335; O'Brien v. St. Paul, 18 Minn. 176, Gil. 163; Dyer v. St. Paul, 27 Minn. 457, 8 N. W. 272; McClure v. Red Wing, 28 Minn. 186, 9 N. W. 767; Winchell v. Waukesha, 110 Wis. 101, 84 Am. St. Rep. 902, 85 N. W. 668; Carmichael v. Texarkana, 94 Fed. 561; Tate v. St. Paul, 56 Minn. 527, 45 Am. Rep. 501, 58 N. W. 158; Seifert v. Brooklyn, 101 N. Y. 136, 54 Am. Rep. 664, 4 N. E. 321; Seymour v. Cummins, 119 Ind. 148, 5 L.R.A. 126, 21 N. E. 549; Manning v. Lowell, 130 Mass. 21; Demby v. Kingston, 60 Hun, 294, 14 N. Y. Supp. 601, affirmed in 133 N. Y. 538, 30 N. E. 1148; Mansfield v. Bristol, 76 Ohio St. 270, 10 L.R.A.(N.S.) 806, 118 Am. St. Rep. 852, 81 N. E. 631, 10 Ann. Cas. 767; Stoddard v. Saratoga Springs, 22 N. Y. S. R. 215, 4 N. Y. Supp. 745; Gould v. Rochester, 106 N. Y. 46, 12 N. E. 275; Bonner v. Welborn, 7 Ga. 312; Southern R. Co. v. Cook, 106 Ga. 453, 32 S. E. 585; Isham v. Broderick, 89 Minn. 397, 95 N. W. 224, 14 Am. Neg. Rep. 112; Aldrich v. Wetmore, 56 Minn. 20, 57 N. W. 221; Bartlett v. Siman, 24 Minn. 448; Barton v. Syracuse, 36 N. Y. 54; Howe v. Plainfield, 41 N. H. 134; District of Columbia v. Gray, 6 App. D. C. 314; McCarthy v. Syracuse, 46 N. Y. 194; Arndt v. Cullman, 132 Ala. 540, 90 Am. St. Rep. 922, 31 So. 478; Rowe v. Portsmouth, 56 N. H. 292, 22 Am. Rep. 464; Vanderslice v. Philadelphia, 103 Pa. 102; Nichols v. Boston, 98 Mass. 39, 93 Am. Dec. 132; Whipple v. Fair Haven, 93 Vt. 221, 21 Atl. 533; Blake v. Bedford, — Iowa, —, 151 N. W. 74; Willis v. St. Joseph, 184 Mo. App. 428, 171 S. W. 27; Cunningham v. Thief River Falls, 84 Minn. 21, 86 N. W. 763, 1 Am. Neg. Rep. 106.

The natural drainage and the natural flow of the surface waters would not carry all of the water to plaintiff's property that is deposited there by the drain in question, and the village is liable for depositing surface water upon plaintiff's property which would not otherwise have gone there.

O'Neill v. St. Paul, 104 Minn. 494, 116 N. W. 114; O'Brien v. St. Paul, 25 Minn.

City v. Board of Health, 25 L.R.A.(N.S.) 589.

As to character of claims within statute or ordinance requiring notice or presentation as a condition of municipal liability, see note to Henry v. Lincoln, 50 L.R.A.(N.S.) 174, and see especially page 186 of that note as to suits to enjoin a nuisance.

331, 33 Am. Rep. 470; *Pye v. Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671, 31 N. W. 863; *Robbins v. Willmar*, 71 Minn. 407, 73 N. W. 1097; *Chapman v. Rochester*, 110 N. Y. 273, 1 L.R.A. 296, 6 Am. St. Rep. 366, 18 N. E. 88.

Plaintiff has no adequate remedy at law, and injunctive relief should be granted.

United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 470, 61 U. S. App. 13, 89 Fed. 773; *Beach, Inj.* 1129-1146; *Tallman v. Metropolitan Elev. R. Co.* 121 N. Y. 119, 8 L.R.A. 173, 23 N. E. 1134; *Uline v. New York C. & H. R. R. Co.* 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536; *Galway v. Metropolitan Elev. R. Co.* 128 N. Y. 132, 13 L.R.A. 788, 28 N. E. 479; *Evans v. Ross*, 2 Cal. Unrep. 543, 8 Pac. 88; *Barrett v. Mt. Greenwood Cemetery Assn.* 159 Ill. 385, 31 L.R.A. 109, 50 Am. St. Rep. 168, 42 N. E. 891; *People v. St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *Whipple v. Fair Haven*, 63 Vt. 221, 21 Atl. 533; *Wahle v. Reinbach*, 76 Ill. 322; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; *Dwight v. Hayes*, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218; *Robb v. LaGrange*, 158 Ill. 21, 42 N. E. 77; *Wood, Nuisances*, 778; *Bischof v. Merchants Nat. Bank*, 75 Neb. 838, 5 L.R.A.(N.S.) 486, 106 N. W. 996.

Messrs. L. D. Rogers and Moonan & Moonan, for respondents:

Plaintiff is not entitled to recover, because of the failure to give the notice required by law.

Frasch v. New Ulm, 130 Minn. 41, L.R.A. 1915E, 749, 153 N. W. 121; *Diamond Iron Works v. Minneapolis*, 129 Minn. 267, 152 N. W. 647.

Respondent is not liable for surface water carried by the drain.

Rieck v. Schamanski, 117 Minn. 25, 134 N. W. 298; *Sheechan v. Flynn*, 59 Minn. 436, 26 L.R.A. 632, 61 N. W. 462; *Flesner v. Steinbruck*, 89 Neb. 129, 34 L.R.A.(N.S.) 1055, 130 N. W. 1040; *Miller v. Newport News*, 101 Va. 432, 44 S. E. 712; *St. Paul & D. R. Co. v. Duluth*, 56 Minn. 494, 23 L.R.A. 88, 45 Am. St. Rep. 491, 58 N. W. 159; *Valparaiso v. Hagen*, 153 Ind. 337, 48 L.R.A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062; *Barnard v. Sherley*, 135 Ind. 547, 24 L.R.A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117.

Failure to abate a nuisance created by private parties gives no cause of action.

4 Dill. Mun. Corp. 1628; *Davis v. Montgomery*, 51 Ala. 139, 23 Am. Rep. 545; *Cain v. Syracuse*, 95 N. Y. 83.

Respondent was not liable for acts of private individuals.

28 Cyc. 1331, 1332; *Noble v. St. Albans*, 56 Vt. 522; *Chipman v. Palmer*, 77 N. Y. L.R.A.1916D.

51, 33 Am. Rep. 566; *Warden v. South Pasadena*, 168 Cal. 612, 143 Pac. 776; *Batcher v. Staples*, 120 Minn. 86, 139 N. W. 140.

Plaintiff has an adequate remedy at law and an injunction will not be granted where there is a speedy and adequate remedy at law.

Vanderburgh v. Minneapolis, 93 Minn. 81, 100 N. W. 668; *Bolton v. McShane*, 67 Iowa, 207, 25 N. W. 135; *Goodrich v. Moore*, 2 Minn. 61, Gil. 49, 72 Am. Dec. 74; *Cooper v. Detroit*, 42 Mich. 584, 4 N. W. 262; *Hopkins v. Keller*, 16 Neb. 569, 20 N. W. 874; *Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628.

Holt, J., delivered the opinion of the court:

The action is brought to enjoin the defendant village and its officers from discharging sewage and filth upon plaintiff's lands. Some damages are also claimed. The court made findings and directed judgment in favor of defendant. The appeal is from the order denying a new trial.

It appears that the village of Janesville contains about 1,200 inhabitants, and is located on high ground east of the valley which serves as an outlet to Lake Elysian. This valley used to be an extensive bog often submerged, but the whole is now in a fair way of being reclaimed because of the public drainage put through there a few years ago, and the land is now adapted for pasturage, hay, and even for field crops. Some six months before this suit was brought plaintiff bought 1½ acres of land on the edge of the bog. This piece of land adjoins a highway on the westerly boundary line of the village. When plaintiff made the purchase he knew that the drain herein referred to discharged offensive matters upon the land.

The complaint proceeds on the theory that the village commits a continuous trespass by discharging, through and by means of a ditch and tile drain, sewage and filth upon plaintiff's property. At the trial plaintiff admitted that it was not claimed that any injury resulted from the mere surface water cast upon his land by means of this drainage system of the village. From the court's findings it appears that in 1910 the village constructed a tile drain from block 13 in a northwesterly direction, thence west along First street, thence across such street down to Second street, and westerly on said street to within a few feet of plaintiff's land; that prior to the construction of the drain large quantities of surface water accumulated on block 13 and adjacent blocks; that the natural drainage from the village and these blocks west toward and upon plaintiff's land; and that this tile drain

does not increase, but merely accelerates, the flow of such surface water. We now quote the part from the findings which will adequately disclose the matters which must control this decision, viz.:

"That said tile drain connects at its place of beginning with an open ditch, and that in blocks 11 and 14 of the said original town some private individuals have constructed cesspools, and that the overflow from said cesspools is conducted by natural and artificial drains, and empties into the said open ditch, and thence into said tile drain, and that in blocks 11, 14, and 32 some private individuals allow and permit considerable filth to discharge from said blocks to the alleys and streets adjacent, and to be conducted by natural and artificial drains into said open ditch, and thence into said tile drain. The said open ditch and said tile drain were constructed solely for the purpose of taking care of the surface waters, and are necessary for the protection of the health and well-being of the inhabitants of the defendant village, and that the said acts of said private individuals in permitting their cesspools to overflow and said filth to discharge from said blocks 11, 14, and 32 into said open ditch and tile drain were wholly without the knowledge, consent, or permission of these defendants or any of them.

"That the overflow from said cesspools and said filth from said blocks 11, 14, and 32 pass through said tile drain and to and upon the plaintiff's said lands, but the same does so without the knowledge, consent, sanction, or permission of these defendants or any of them.

"That the flow of the surface waters upon the plaintiff's said land has not in any manner been increased by said tile drain, but has only been accelerated, and the plaintiff's said land has not in any manner been damaged by the flow of said surface waters or by any acts of these defendants or any of them.

"That the overflow from said cesspools and the discharge of said filth upon the plaintiff's said land through said tile drain are injurious and detrimental to said lands and are damaging to the plaintiff, but that said defendants are not responsible therefor.

"That the said lands and premises of said plaintiff are valuable, but that said defendant village is solvent and amply able to pay for any damages done to the plaintiff's said property."

It is thus seen that the open ditch is permitted to collect a quantity of filth and sewage which with the surface water is discharged upon plaintiff's land to its detriment; in fact, a nuisance is created there-

on within the definition of § 8085, Gen. Stat. 1913. True, the court finds that this is not done with the knowledge, sanction, or permission of the village or its officers, and that neither the village nor its officers are responsible therefor; but the assignments of error challenge the correctness of these findings. The conclusion of law denying relief to plaintiff is also questioned.

We are unable to reconcile the finding that there was discharged from the tile drain upon plaintiff's property to its detriment a quantity of polluted matter, with the finding that this occurred without the knowledge or sanction of defendants. The evidence is conclusive that upon plaintiff's complaint all the officers of the defendant village did investigate the matter; some of them going repeatedly for that purpose to the outlet of the drain. It is apparent that the village furnishes its inhabitants with a water supply; for the evidence discloses that several homes and business buildings are equipped with modern water and toilet conveniences, and that the overflow or discharge from sinks, cesspools, and septic tanks necessarily must reach and gather in the open ditch dug and kept in repair by the village. Indeed, the men who cleaned it out testified to tile drains from these private cesspools or septic tanks opening directly into the ditch. We think it clear that prior to the institution of this action the village, through its officers, had full knowledge of the situation; knew that the filth from the private cesspools collected in the ditch, as found by the court, and that the same was cast by means of the tile drain upon plaintiff's land, there creating a nuisance. However that may be, we do not think that a municipality which, by some construction or means under its control, invades the premises of a person or creates a nuisance thereon, can defeat an action to enjoin or abate the trespass or nuisance by allegation or proof that it or its officers had no knowledge thereof. This may not always hold true in actions at law for damages. But in this case a complete answer to defendant's contention is that no attempt was made by pleading or proof to oppose the injunction sought on the ground that there had been no notice or request to abate the nuisance prior to suit. Even a continuer of a nuisance waives the defense of want of notice to abate if he bases his defense upon other grounds than want of notice. *Bartlett v. Siman*, 24 Minn. 448. Defendant's counsel contends that no nuisance was created. It is undoubtedly true that the court could properly have so found, but the finding is to the contrary. This court can neither disregard a material finding of the trial

court nor substitute another for the one made.

If by means of this drain a nuisance was cast upon plaintiff's land, he is entitled to injunctive relief, unless the village is not to be held responsible for the filth and waste discharged from private septic tanks, cesspools, sinks, or outhouses into its ditch and drain. On the proposition of responsibility for a nuisance created upon another's property, it does not seem to us material whether it be done by means of an ordinary city sewer, or by means of an open ditch and drain like the present. To the knowledge of the defendant the ditch collects sewage. It was so located that of necessity it must gather all discharges from cesspools and all offal from the village. The counsel for respondents relies upon *Noble v. St. Albans*, 58 Vt. 522, where it was held that the village was not liable in damages by reason of sewage discharged upon the plaintiff's property from a culvert designed to carry the surface water from one side of the street to the other, where it did not appear that the village knew that a private owner had connected his toilet with the culvert. No relief against a continuance of the pollution was asked. Here, as we have stated, the finding that the village had no knowledge is not warranted by the evidence. *Valparaiso v. Hagen*, 153 Ind. 337, 48 L.R.A. 707, 74 Am. St. Rep. 305, 54 N. E. 1062, is not an authority here; for there the sewer emptied into a water course, and the question was whether there was an unnecessary fouling of a stream which was the only means for getting rid of the sewage. Here the objection is that the sewage is not carried to the stream which ought to be the proper outlet. *Chipman v. Palmer*, 77 N. Y. 51, 33 Am. Rep. 566, and *Warden v. South Pasadena*, 168 Cal. 612, 143 Pac. 776, cited by defendants, do not seem to be in point.

As to the overflow from the cesspools, septic tanks, etc.—that is, matters other than surface waters—gathered up by defendant's ditch and drain and cast upon plaintiff's land in injurious quantities, the same must be regarded as amounting to acts of positive trespass, coming under the fifth division of principles governing the liability of municipal corporations for injuries to private property, as laid down by *Justice Mitchell in Pye v. Mankato*, 36 Minn. 373, 1 Am. St. Rep. 671, 31 N. W. 863, and as applied in *Batcher v. Staples*, 120 Minn. 86, 139 N. W. 140. A case very similar upon the facts is that of *Ulmen v. Mt. Angel*, 57 Or. 547, 36 L.R.A.(N.S.) 140, 112 Pac. 529, where the syllabus reads: "A municipal corporation may be enjoined from emptying a drain which collects sur-

face water from the streets and sink drainage from houses, into a dry gully bordering on the property of a citizen, where it creates an offensive odor and percolates to some extent into his well, and pollutes the water therein; and the fact that the water in the well was polluted to some extent from other sources is immaterial."

The following authorities sustain the right to relief of the owner of premises upon which a municipality deposits sewage under circumstances somewhat similar to those in the instant case: *Robb v. La Grange*, 158 Ill. 21, 42 N. E. 77; *Chapman v. Rochester*, 110 N. Y. 273, 1 L.R.A. 296, 6 Am. St. Rep. 366, 18 N. E. 88; *Demby v. Kingston*, 60 Hun, 294, 14 N. Y. Supp. 601, affirmed in 133 N. Y. 538, 30 N. E. 1148. In the last-named case the offending sewer was a storm-water sewer intended to take care of surface water only. But, after the city obtained a water supply, private owners connected their closets and waste pipes with the storm sewer. There, as here, no formal leave of the city was obtained to connect. There the court refused to hold that plaintiff was not entitled to recover damages for injuries prior to the knowledge by the city of the condition causing the injury. The appellate court said: "We think it may be presumed, in support of the verdict, that the city, upon the introduction of water, consented to the connection by private parties of their waste pipes with the sewer."

There, as here, it was shown that one of the aldermen of the municipality connected a waste pipe with the sewer. There also it was urged that the injunction was improper because the city could not lawfully enter upon the premises of the parties who discharged the filth into the sewer and stop it, but the court suggested the city could extend the sewer to the open stream.

Defendants now claim that plaintiff cannot prevail for failure to serve a notice upon the village prior to suit, as provided by § 1786, Gen. Stat. 1913, and which under *Diamond Iron Works v. Minneapolis*, 129 Minn. 267, 152 N. W. 647, and *Frasch v. New Ulm*, 130 Minn. 41, L.R.A.1915E, 749, 153 N. W. 121, is a condition precedent to maintenance of a suit. Neither by demurrer nor answer did the village attempt to raise this defense, nor does it appear to have been suggested to the trial court. But, as already stated, the basis for relief is not negligence of the village or any of its officers. As said in *Price v. Oakfield Highland Creamery Co.* 87 Wis. 536, 24 L.R.A. 333, 58 N. W. 1039: "It is the invasion of the plaintiff's premises with an offensive foreign substance by means of artificial

appliances,"—the open ditch and tile drain of the village.

That the offensive sewage would not have reached plaintiff's land but for the drain is quite apparent; for the evidence shows that to drain the open ditch and low land in block 13 the tile, in going through the higher ground or the ridge which prevented the flow to the west, had to be laid as deep as 4 feet below the surface. Nor is this action one for damages, and that seems to be the sort of action referred to in the section mentioned. The damages here asked are merely an incident to the main purpose of the suit, which is to prohibit a continuing nuisance upon plaintiff's property. To the maintenance in equity of such a suit against a municipal corporation, we do not think it essential that a written notice be first given. Where a written notice is re-

quired, no suit can be begun until ten days after the notice is given, and it is unreasonable to suppose that the legislature intended to withhold for any time whatever the ordinary and proper remedy where a city or village is causing irreparable injury to private property, or is unlawfully imposing a nuisance thereon.

Upon the findings it cannot be said that plaintiff has an adequate remedy at law. The nuisance found is a continuing one. Upon this record we are not concerned with the amount of damages or the proper assessment thereof.

We feel constrained to grant a new trial. Since the findings of fact are somewhat conflicting, the case is not one wherein this court should direct a modification of the conclusions of law.

Order reversed, and a new trial granted.

NEVADA SUPREME COURT.

ELY WATER COMPANY, Appt.,
v.
WHITE PINE COUNTY, Respt.
(— Nev. —, 151 Pac. 335.)

Water — franchise — water for sprinkling lawn.

1. A provision in the franchise of a water company requiring it to furnish water free of charge for sprinkling streets and for the courthouse and other public buildings does not include the duty to furnish water to sprinkle the courthouse lawn free of charge. *For other cases, see Waters, III. b, 3, in Dig. 1-52 N. S.*

Same — absence of provision for charge — effect.

2. Absence of a provision in the franchise of a water company of a rate to be charged for water furnished the public in excess of what is required to be furnished free of charge does not prevent the recovery by the water company of the fair value of the water so furnished.

For other cases, see Waters, III. b, 3, in Dig. 1-52 N. S.

(August 31, 1915.)

APPEAL by plaintiff from a judgment of the District Court for White Pine County in defendant's favor in an action to recover compensation for water furnished for defendant's use in accordance with certain provisions of a water franchise granted to plaintiff. Modified and affirmed.

The facts are stated in the opinion.

Note.—As to what are city or public purposes within contract requiring water company to furnish water for such purposes, see note to *Water Supply Co. v. Albuquerque*. 43 L.R.A.(N.S.) 439. L.R.A.1916D.

Messrs. Brown & Belford and J. M. Lockhart for appellant.

Mr. Anthony Jurich for respondent.

Norcross, Ch. J., delivered the opinion of the court:

This appeal presents the question of the liability of White Pine county to the appellant for water furnished the respondent county during the year 1913 for sprinkling the lawn surrounding the courthouse building in the town of Ely. The question involves the construction of certain provisions of the franchise granted to the appellant corporation by the legislature of 1907, under an act approved February 26, 1907 (Stat. 1907, chap. 25), entitled: "An Act Entitled 'An Act Granting to the Ely Water Company the Right, Privilege, and Franchise to Supply the Towns of Ely and Ely City, in White Pine County, State of Nevada, and the Additions of Said Towns, with Water for Domestic, Municipal, Fire Protection, Irrigation and Other Purposes, and to Charge Rental Therefor, and Ratifying and Confirming a Certain Grant of a Water Franchise Made to the Said Ely Water Company on the Sixteenth Day of February, 1907, by the Board of County Commissioners of Said County and by the Said Town of Ely, and Other Matters Relating Thereto.'"

By the terms of the third provision of the franchise the appellant corporation was required to furnish "free of cost to the said town" 12 fire hydrants for fire purposes, and for other hydrants required, "over the aforesaid twelve free hydrants, the said town of Ely shall pay a rental of \$5 per month." By the terms of the seventh provision it was provided: That the appellant corporation "shall furnish and supply

water to said town for sprinkling wagons during the dry season of the year for the purpose of sprinkling the streets of said town, free of any cost to said town. . . ."

By the eighth provision it is provided: That the appellant corporation "shall furnish and supply water to the courthouse, hospitals, city hall, and schoolhouses in said town and its additions free of any cost to said town, or its additions, or to said county of White Pine, state of Nevada, during the life of this instrument; Provided, that the cost of all taps, pipes, and plumbing necessary to connect said public buildings with mains or pipes . . . shall be borne by said town, or its additions, or by said county, as the case may be."

The sixth provision of the charter provides: That the appellant corporation "shall charge not more than \$6 per season for sprinkling one lot of the dimensions of 100 feet by 25 feet or less, and for the sprinkling of each adjacent lot or portion thereof owned by the same person, not more than \$5 per season."

The amount of the claim for sprinkling the courthouse grounds, which covered an entire block of about 4 acres, was determined by estimating the number of lots said grounds, exclusive of the area covered by the building itself, would make of the dimensions referred to in the sixth provision of the franchise, supra, and applying thereto the rate in force in the town of Ely for sprinkling in accordance with the said sixth provision.

The lower court held, and we think correctly, that "the clause providing for free water for the courthouse does not carry with it free water for the grounds. . . . On the other hand, the act provides that the water company may furnish water for municipal and irrigation purposes and to charge rental therefor."

Counsel upon either side of this case have been able to find but few authorities that might be considered in point upon the question whether a provision in a franchise requiring the furnishing of free water to a courthouse, schoolhouse, or other municipal public building, would also include the furnishing of free water for the grounds thereof. The only two cases cited that are analogous to the one here presented are the following: *Birmingham v. Waterworks Co.* — Ala. —, 42 So. 10; *Henderson Water Co. v. Henderson Graded Schools*, 151 N. C. 171, 65 S. E. 927. These cases support the construction placed upon the provision of the charter by the court below. Whatever doubt might have existed in case the proviso of the eighth provision of the charter had not been included is, we think, removed by the language of such proviso, which refers to

the courthouse, hospital, etc., as "said public buildings."

While the court held that the appellant was not required to furnish free water for sprinkling the courthouse grounds, it was held that it was not entitled to recover, for the reason that no basis of charge for water so furnished was prescribed in the charter. The court construed the sixth provision of the charter, supra, as applying to town lots as platted on the official town plat, the blocks of the town being platted generally in lots of 25 by 100 feet, and not applicable to a block not so divided into lots—the block upon which the courthouse was located being not so platted. We need not, we think, determine whether this construction of the charter was correct.

Authority exists in support of the view taken by the court below, that where the charter fails to fix a rate applicable to the municipality no recovery can be had. Were the question entirely new in this state, we might be disposed to adopt the view of the learned trial judge. We think, however, that this court in the case of *Virginia City Gas Co. v. Virginia*, 3 Nev. 320, in which this court held that the gas company was entitled to recover from the city of Virginia "the fair value" of all gas furnished "in excess of that which the law made it incumbent on it to furnish," laid down a rule applicable to the case at bar. We think the rule applied in the *Virginia City Case*, supra, more just and equitable, both to the owner of the franchise and to the municipality, than that laid down by the authorities in support of the decision of the lower court. The municipality ought not to be put in the position of being deprived of water because of no specific provision in the charter specifying the rate the municipality should pay, and, upon the other hand, it would be equally unfair in many cases to expect a holder of a franchise to supply free water for the sprinkling of several acres of land in a region where water is scarce.

The *Virginia City Case*, supra, was not called to the attention of the court below, which would have undoubtedly followed the rule therein laid down, had its attention been directed to that case. The court found as a fact that the water furnished was of the value charged therefor, and it was stipulated in the court below that, if the appellant was entitled to recover at all, it was entitled to recover for the full amount alleged in the complaint.

The judgment is modified by allowing plaintiff and appellant also the amount sued for in its first cause of action, and, as so modified, the judgment is affirmed.

McCarran, J., concurs.

L.R.A.1916D

OHIO SUPREME COURT.

ELYRIA SAVINGS & BANKING COMPANY, Plff. in Err.,

v.

WALKER BIN COMPANY.

(92 Ohio St. 406, 111 N. E. 147.)

Bank — liability on check.

1. By force of the provisions of § 8294, General Code, there is no liability on the part of a bank to the holder of a check unless and until it accepts or certifies the check.

For other cases, see Banks, IV. a, 3, in Dig. 1-52 N. E.

Same — effect of payment.

2. Where a check is paid by a bank, which is the drawee thereof, on a forged indorsement, and there is stamped upon the check "paid," together with the date of the payment and the name of the bank, and the check is charged to the account of the drawer, this is not an acceptance of the check within the meaning of § 8294, and does not create a liability against the bank in favor of the true holder or payee.

For other cases, see Banks, IV. a, 3, b, (3), in Dig. 1-52 N. E.

(July 2, 1915.)

ERROR to the Court of Appeals for Lorain County to review a judgment reversing a judgment of the Court of Common Pleas in defendant's favor in an action brought to recover the amount alleged to be due on two bank checks. Reversed.

Statement by Newman, J.:

Defendant in error is the successor of the Walker Patent Pivoted Bin Company, and became the owner of all contracts, property, and rights of action of that company. One C. W. Smalley purchased from the Walker Patent Pivoted Bin Company certain store fixtures at the agreed price of \$893, and in part payment thereof issued two checks of \$155 each, payable to the order of R. W. McKain, manager of the company, and delivered them to one W. P. Sutherin, a salesman under McKain. These checks were received by plaintiff in error in the regular course of business through other banks, and were paid by it and charged to the account of Smalley. One check was paid September 10, 1909, and there

Headnotes by the Court.

Note. — The question whether the payment of a check on a forged indorsement amounts to an acceptance entitling the true holder to maintain an action against the drawee thereon is discussed in the annotation following *Ballard v. Home Nat. Bank*, L.R.A.1916C, 161.

L.R.A.1916D.

was stamped on the face thereof with a rubber stamp the following: "The Elyria Savings & Banking Co. Paid Sep. 10 1909 E. M. Rice, Cashier." The other check was paid September 21st, and the stamping on this check is the same, with the exception of the date. The balance of the \$893 was paid to the defendant in error, but it received no part of the proceeds of the two checks above mentioned: the indorsement of R. W. McKain, manager, thereon having been forged. Defendant in error brought an action against Smalley to recover this balance of \$310 claimed to be due on account of the purchase of the store fixtures, and upon a hearing of this case on its merits judgment was rendered in favor of Smalley, the court holding that Sutherin had authority to receive the two checks, and that the delivery thereof to him canceled Smalley's obligation to the amount of the checks. Thereupon defendant in error brought this action against the banking company to recover the sum of \$310, and interest, on account of the payment of these two checks upon a forged indorsement. The case was tried to a jury, and at the conclusion of the plaintiff's evidence a directed verdict was rendered in favor of plaintiff in error, and judgment was entered on this verdict. This judgment was reversed by the court of appeals upon the ground that the court of common pleas erred in directing a verdict for the banking company.

Messrs. Ingersoll & Vandemark, for plaintiff in error:

There is no privity of contract between the drawee bank and the payee of a check until there is a signification on the part of the drawee bank to become liable to the payee of the check.

Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank, 54 Ohio St. 60, 31 L.R.A. 653, 56 Am. St. Rep. 700, 42 N. E. 700; *Covert v. Rhodes*, 48 Ohio St. 66, 27 N. E. 94; *Baltimore & O. R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837; *First Nat. Bank v. Whitman*, 94 U. S. 343, 24 L. ed. 229; *National Bank v. Berrall*, 70 N. J. L. 757, 66 L.R.A. 599, 103 Am. St. Rep. 821, 58 Atl. 189, 1 Ann. Cas. 630; *J. M. Houston Grocer Co. v. Farmers' Bank*, 71 Mo. App. 132; *Grammel v. Carmer*, 55 Mich. 201, 54 Am. Rep. 363, 21 N. W. 418; *Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805; *Thompson v. Bank of British N. A.* 82 N. Y. 1; *Merchants' Nat. Bank v. Coates*, 79 Mo. 168; *Dickinson v. Coates*, 79 Mo. 250, 49 Am. Rep. 228; *National Bank v. Millard*, 10 Wall. 152, 19 L. ed. 897.

Although the drawee bank pays the check upon a forged indorsement, such

drawee bank is not liable as an acceptor under the negotiable instruments code.

Howard H. Clark & Co. v. Warren Sav. Bank, 31 Pa. Super. Ct. 647; Rauch v. Bankers' Nat. Bank, 143 Ill. App. 625; John M. C. Marble Co. v. Merchants' Nat. Bank, 15 Cal. App. 347, 115 Pac. 59; Ballen v. Bank of Kremlin, 37 Okla. 112, 44 L.R.A. (N.S.) 621, 130 Pac. 539; Van Buskirk v. State Bank, 35 Colo. 142, 117 Am. St. Rep. 182, 83 Pac. 778; Cincinnati, H. & D. R. Co. v. Metropolitan Nat. Bank, 54 Ohio St. 60, 31 L.R.A. 653, 56 Am. St. Rep. 700, 42 N. E. 700; New York Brick & Paving Co. v. Bronx Borough Bank, 42 Misc. 31, 85 N. Y. Supp. 557.

Messrs. D. B. Symons and F. M. Stevens, for defendant in error:

The fact that defendant received the checks through other banks, and never saw the person who originally cashed them, does not in the least degree lessen its duty to pay to the real payee or his order on his valid indorsement.

Dodge v. National Exch. Bank, 30 Ohio St. 8; Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; Merrick v. Merchants' Nat. Bank, 11 Ohio S. & C. P. Dec. 301, 8 Ohio N. P. 411, affirmed by Circuit Court, no report, March 9, 1901; Harmon v. Old Detroit Nat. Bank, 153 Mich. 73, 17 L.R.A. (N.S.) 514, 126 Am. St. Rep. 467, 116 N. W. 617; Graves v. American Exch. Bank, 17 N. Y. 205.

The mere right to receive a check, drawn to another, conveys no authority to indorse it.

Dodge v. National Exch. Bank, 30 Ohio St. 1, 20 Ohio St. 234, 5 Am. Rep. 648; State ex rel. Boston Woven Hose Co. v. Lewis, 6 Ohio S. & C. P. Dec. 221.

Plaintiff had the right to bring this action against defendant.

Dodge v. National Exch. Bank, *supra*; Pickle v. Muse (Pickle v. People's Nat. Bank) 88 Tenn. 390, 7 L.R.A. 93, 17 Am. St. Rep. 900, 12 S. W. 919; Chism v. First Nat. Bank, 96 Tenn. 644, 32 L.R.A. 778, 54 Am. St. Rep. 863, 36 S. W. 387; Seventh Nat. Bank v. Cook, 73 Pa. 483, 13 Am. Rep. 751; Saylor v. Bushong, 100 Pa. 23, 45 Am. Rep. 353; Merrick v. Merchants' Nat. Bank, 8 Ohio N. P. 411.

Newman, J., delivered the opinion of the court:

The checks in question, bearing the forged signature of McKain, manager, were cashed at Franklin, Pennsylvania, and were transmitted by a bank in that city through several other banks whose indorsements the checks bore when they were paid by plaintiff in error. For the purpose of this case, L.R.A.1916D.

however, the indorsements of the several banks may be disregarded, and the checks treated as though they were presented directly to plaintiff in error by the person who forged the signature of McKain, manager.

In 1902 the legislature of Ohio passed the negotiable instruments act. It follows generally the English bills of exchange act, and is substantially like the act adopted by practically all the states of the Union. It is entitled, "An Act to Establish a Law Uniform with the Laws of Other States on Negotiable Instruments." It is carried into the General Code, §§ 8106-8302. The courts of the country being in conflict in their decisions respecting negotiable instruments, the purpose of the passage of the act was to establish certain fixed rules governing negotiable instruments, and to bring about a uniform system of laws on the subject and thereby do away with the confusion that had existed. In the adoption of the act the legislature intended to form a complete system of laws relating to negotiable instruments, and to cover the whole subject so far as it could be done by statute. In any case not provided for in the act, the rules of the law merchant govern. Section 8300. It follows, then, that, where a case is provided for, the statute must govern.

In the case here there is involved the right of the holder of a check to maintain an action against the drawee. If this point is specifically dealt with in the negotiable instruments act, the law on the subject should be ascertained by interpreting the language used in its provisions relating thereto. What the state of the law was previous to the adoption of the act need not be considered. Nor should earlier decisions of the court be resorted to if the provisions of the act are not of doubtful meaning. In fact, the act does not purport to be, nor is it, in every instance, a codification of the then existing law. Some of its provisions are declaratory of the existing law, while others alter and change the law as theretofore declared. In *Rockfield v. First Nat. Bank*, 77 Ohio St. 311, 14 L.R.A. 842, 83 N. E. 392, it was held that by force of certain provisions of the negotiable instruments act the law on the subject there under consideration was changed.

Section 8294 reads as follows: "A check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

This, we think, is intended to cover the liability of a bank to the holder of a check, and he can recover from the bank only when he brings himself within the provisions of

this statute. If a check is neither accepted nor certified, there is no liability on the part of the bank to the holder. There is no claim made that the checks in question here were certified. But it is insisted by counsel for defendant in error, and it was the holding of the court of appeals, that when the bank stamped, "The Elyria Savings & Banking Co. Paid Sep 10 1909 E. M. Rice, Cashier," and charged the same to the account of the drawer, there was an acceptance, and the banking company thereby became liable to the rightful holder. It is the settled law that a bank is obliged to pay on the order of the drawer to the person named in the check. It must follow the order with the utmost strictness. If it pay upon a forged indorsement, the check cannot be charged against the drawer, unless the bank, upon some principle of estoppel, or on account of some negligence chargeable to the drawer, might claim protection. So that, as between these two parties, the drawer and drawee, there was no payment. In the negotiable instruments act it is provided that the provisions applicable to a bill of exchange payable on demand apply to a check. Section 8290. Section 8237 provides that the acceptance of a bill of exchange is the signification of the drawee of his assent to the order of the drawer, but it further provides that the acceptance must be in writing and signed by the drawee, and it must not express that the drawee will perform his promise by any other means than the payment of the money. Under the negotiable instruments act acceptance means an acceptance completed by delivery or notification. Section 8295. Did the stamping of the checks in question amount to an acceptance as contemplated by this statute? Payment is the natural and legitimate end of a check. Acceptance is essentially different. As has been said, it is the beginning of the active career of the instrument, and there is added to its original vitality a new element of force and strength calculated to prolong its existence and widen its sphere of usefulness. Acceptance contemplates a promise on the part of the drawee to do something. Where there is an acceptance, a contractual relation arises between the drawee and the holder. The stamping of these two checks by the bank, and the charging of them to the account of the drawer, was certainly not an acceptance within the meaning of these provisions.

Counsel for defendant in error rely upon the case of *Dodge v. National Exch. Bank*, 20 Ohio St. 234, 5 Am. Rep. 648, and 30 Ohio St. 1, as decisive of the case at bar. In the *Dodge Case*, 30 Ohio St. 5, this language is used: "The paymaster, by draw-

ing and delivering the check in question, in payment of plaintiff's voucher, set apart and appropriated for the plaintiff's use so much of his funds in defendant's hands as would be necessary for its payment. This act of appropriation the plaintiff conclusively ratified by bringing this action. The defendant also assented to this appropriation by accepting his check, by assuming to pay it, and by claiming and receiving credit from the drawer for its payment."

It was upon the theory that the drawing and delivering of the check operated as an assignment pro tanto of the funds of the drawer in the bank that the *Dodge Case* was decided. This doctrine was not recognized in a later Ohio case, *Covert v. Rhodes*, 48 Ohio St. 66, 27 N. E. 94, where it was held that a check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank. But whether or not that was the law in Ohio prior to the adoption of the negotiable instruments act is unimportant. It is not the law now. The rule announced in the *Dodge Case* has been discarded, and it is expressly provided in § 8294 that a check does not of itself operate as an assignment of any part of the funds to the credit of the drawer with the bank. In view of the provisions of the negotiable instruments act we cannot adhere to the rule announced in the *Dodge Case*.

Seventh Nat. Bank v. Cook, 73 Pa. 483, 13 Am. Rep. 751, and *Pickle v. Muse* (*Pickle v. People's Nat. Bank*) 88 Tenn. 380, 7 L.R.A. 93, 17 Am. St. Rep. 900, 12 S. W. 919, are cited by counsel for defendant in error in support of their contention. In these cases it was held that, where a bank pays on a forged indorsement, the true payee can maintain an action against the bank. At the time these cases were decided the negotiable instruments act had not been adopted by Pennsylvania or Tennessee, and we doubt very much whether the courts of those two states would follow this holding in the face of its provisions.

In *Baltimore & O. R. Co. v. First Nat. Bank*, 102 Va. 753, 47 S. E. 837, the facts were very similar to those in the case here. The court interpreted certain sections of the Virginia Code which are identical with §§ 8237, 8290, and 8294, *supra*. The court used this language, which is in point here: "Now, if there be any virtue in that law, the checks in question did not assign to the holder the funds, or any part thereof, of their respective drawers on deposit with the defendant; nor could it have that effect unless and until the checks were certified, and § 185 expressly declares that the provisions of that act, with respect to bills of exchange payable on demand, shall apply

with equal force to checks; and turning to § 132, already quoted, we find that the acceptance must be in writing and signed by the drawee in order to constitute a cause of action by the holder against the bank.

"This opinion might be greatly prolonged by citation of conflicting cases, and a discussion of the discordant views entertained by courts and text-writers of the greatest ability upon these questions; but the object, as we understand it, of the codification of the law with respect to negotiable instruments, was to relieve the courts of this duty, and to render certain and unambiguous that which had theretofore been doubtful and obscure, so that the business of the commercial world, largely transacted through the agency of negotiable paper, might be conducted in obedience to a written law emanating from a source whose authority admits of no question."

Counsel for defendant in error say that in the Virginia case it does not appear that the checks there were stamped as they were in the case at bar, and, had they been, a different conclusion might have been reached by the court. It does appear, however, that the amounts of the checks were charged to the account of the drawers, and the same returned on settlement of their accounts with the bank. The stamping of the two checks in the present case was simply a method adopted by the bank for canceling or extinguishing the checks. See also *Howard H. Clark & Co. v. Warren Sav. Bank*, 31 Pa. Super. Ct. 647.

We call attention to § 11225—1, Gen-

eral Code. This section was passed in 1911, several years after the adoption of the negotiable instruments act. It fixes the time within which an action may be brought against a bank on account of the payment on a forged or raised check. This language is used: "No bank which has paid and charged to the account of a depositor any money on a forged or raised check issued in the name of said depositor shall be liable to said depositor for the amount paid thereon unless," etc.

It is to be observed that the only liability mentioned is the liability of the bank to the depositor. No mention is made of the holder or payee of the forged check.

We are of the opinion that, when the legislature enacted § 8294, it intended to cover the subject of the liability of a bank to the holder of a check. It prescribed when and when only there is a liability to the holder. In the absence of the conditions therein prescribed, no right of action exists in favor of the holder. In the present case, the checks in question not having been certified or accepted within the meaning of § 8294, there was no right of action on the part of the defendant in error against the banking company, and the court of common pleas was correct in directing a verdict in favor of the latter company.

Judgment of the Court of Appeals reversed, and that of the Common Pleas affirmed.

Johnson, Donahue, and Matthias, JJ., concur.

OKLAHOMA SUPREME COURT.

R. W. FREEMAN, Plff. in Err.,
v.

STATE BOARD OF MEDICAL EXAMINERS.

(— Okla. —, 154 Pac. 56.)

Parties — revocation of physician's license — state.

1. The state is not a necessary party to a proceeding before the state board of medi-

Headnotes by RUMMONS, C.

Note. — As to grounds for revoking physician's license, see notes to *Macomber v. State Bd. of Health*, 8 L.R.A. (N.S.) 585; *Munk v. Frink*, 17 L.R.A. (N.S.) 439; *State Medical Board v. McCrary*, 30 L.R.A. (N.S.) 783; *Richardson v. Simpson*, 43 L.R.A. (N.S.) 911; and *Chenoweth v. State Bd. of Medical Examiners*, 51 L.R.A. (N.S.) 958; and later case *Aiton v. Board of Medical Examiners*, L.R.A.1915A, 691. L.R.A.1916D.

cal examiners to revoke the license of a physician.

For other cases, see Parties, II. a, 2, in Dig. 1-52 N. S.

Physician — incurable disease.

2. In the second clause of § 6905, Rev. Laws 1910, defining "unprofessional conduct" of a physician as "... the obtaining of any fee on the assurance that an incurable disease can be permanently cured," the words, "incurable disease," mean any disease which has reached an incurable stage in the patient afflicted therewith, according to the then general state of knowledge of the medical profession.

For other cases, see Physicians and Surgeons, I. a, in Dig. 1-52 N. S.

Same — validity of statute.

3. The second clause of § 6905, Rev. Laws 1910, is valid, and defines an offense against professional conduct on the part of physicians.

For other cases, see Physicians and Surgeons, I. a, in Dig. 1-52 N. S.

Same — revocation of license — procedure.

4. The state board of medical examiners

in a proceeding before it to revoke the license of a physician acts in an administrative, and not a judicial, capacity, and the same strictness in pleadings and practice is not required before it as before a judicial tribunal. It is sufficient if the accused is informed by the complaint of the wrong charged against him and the particular instances of its perpetration charged, and has an opportunity to defend against proof of such charges, and the proceedings are free from prejudice, fraud, or oppression.

For other cases, see Pleading, II. p. in Dig. 1-52 N. 8.

Evidence — advertisement by physician.

5. An advertisement published by a physician held properly admitted in evidence against him upon a charge of obtaining a fee on the assurance that an incurable disease can be permanently cured by him, as tending to prove the assurance of permanent cure, where such assurance is denied by the physician.

For other cases, see Evidence, XI. l. in Dig. 1-52 N. 8.

Appeal — finding without evidence.

6. It is error for the court to make a finding of fact upon a matter upon which all evidence was excluded, but, where the other findings of the court are supported by the evidence, and are sufficient to sustain the judgment of the court, such error is not so prejudicial as to warrant a reversal. *For other cases, see Appeal and Error, VII. m, 8, in Dig. 1-52 N. 8.*

Evidence — sufficiency.

7. Evidence considered, and held to sustain the judgment of the court.

For other cases, see Evidence, XII. k, in Dig. 1-52 N. 8.

(December 7, 1915.)

ERROR to the District Court for Bryan County to review a judgment quashing a writ of certiorari to review the action of the State Board of Medical Examiners revoking petitioner's license as a physician. Affirmed.

The facts are stated in the opinion.

Messrs. Hatchett & Ferguson, for plaintiff in error:

Section 4254 of the Revised Laws of 1909, making it a ground of the revocation of the certificate of a physician if he advertises his business with the use of grossly improbable statements calculated to mislead the public, is so indefinite and uncertain as to be void.

Hewitt v. State Medical Examiners, 148 Cal. 590, 3 L.R.A.(N.S.) 896, 113 Am. St. Rep. 315, 84 Pac. 39, 7 Ann. Cas. 750; Czarra v. Medical Supers. 25 App. D. C. 443; Matthews v. Murphy, 23 Ky. L. Rep. 750, 54 L.R.A. 415, 63 S. W. 785.

If there was anything in the advertisement of petitioner that was of an improbable nature calculated to deceive the public, L.R.A.1916D.

such should have been proved, even if the allegation had been properly made and the statute were constitutional.

Macomber v. State Bd. of Health, 28 R. I. 3, 8 L.R.A.(N.S.) 585, 65 Atl. 263.

There is no ground for revocation of a physician's license in the statute because he improperly hires a man to work for him in a medical way who is not licensed, and the court cannot say that such facts constitute ground for revocation of the license.

State ex rel. Spriggs v. Robinson, 253 Mo. 271, 161 S. W. 1169.

Since there is no such thing as a manifestly incurable disease, the legislature cannot authorize the revocation of the license of a physician for obtaining a fee "on the representation that a manifestly incurable disease can be cured."

Graeb v. State Bd. of Medical Examiners, 55 Colo. 523, 47 L.R.A.(N.S.) 1063, 139 Pac. 1099.

Testimony of individual cases was not admissible.

Chicago, R. I. & P. R. Co. v. Spears, 31 Okla. 469, 122 Pac. 228; Chambers v. Van Wagner, 32 Okla. 774, 123 Pac. 1117.

The action was not properly prosecuted.

Gulley v. Territory, 19 Okla. 187, 91 Pac. 1037; State ex rel. Beckman v. Estes, 34 Or. 196, 52 Pac. 571, 55 Pac. 25.

Messrs. S. P. Freeling, Attorney General, and C. W. King, Assistant Attorney General, for defendant in error:

The statement that petitioner has accepted fees for and guaranteed to cure incurable cases of tuberculosis, in the absence of a motion to make more definite and certain, was sufficient to warrant the court in admitting evidence of individual cases.

Wey v. City Bank, 29 Okla. 313, 116 Pac. 943; Armstrong, B. & Co. v. Crump, 25 Okla. 452, 106 Pac. 855.

Rummons, C., filed the following opinion:

The questions involved in this appeal raised in the brief of plaintiff in error necessary to be considered consist of four propositions: First, Is the state a necessary party to this proceeding? Second, Is the clause in § 6905, Revised Laws 1910, defining "unprofessional" conduct of a physician as follows: "Second. The obtaining of any fee on the assurance that an incurable disease can be permanently cured,"—void and of no effect? Third, whether or not the proceedings before the state board of medical examiners and the district court were regular and free from prejudicial error. Fourth, Was the evidence sufficient to support the judgment of the trial court?

The plaintiff in error, a duly licensed physician, was informed against before the

state board of medical examiners upon a charge of being guilty of unprofessional conduct. He was thereafter duly cited to answer the complaint, and did answer the same, denying specifically the acts complained of. Thereafter, at one of its regular quarterly meetings, the state board heard the complaint, and, after plaintiff in error had unsuccessfully moved to dismiss the complaint, demurred thereto, and moved to strike, proceeded to take testimony upon the complaint. The state board found against plaintiff in error, and ordered that his license as a physician be revoked. Thereupon plaintiff in error filed his petition in the district court of Bryan county, praying a writ of certiorari to issue to the state board of medical examiners to review their action upon the complaint aforesaid. The writ was issued, and thereafter the cause came on before the district court of Bryan county, and a trial was had to the court, without the intervention of a jury, upon the complaint filed with the state board of medical examiners and the answer of plaintiff in error thereto. The trial court found against plaintiff in error, and quashed the writ of certiorari, and affirmed the action of the state board of medical examiners.

Plaintiff in error insists that this proceeding should have been dismissed for the reason that the state of Oklahoma is a necessary party to a proceeding like this. We cannot agree with this contention of plaintiff in error. The case of *Gulley v. Territory*, 19 Okla. 187, 91 Pac. 1037, does not sustain the contention of the plaintiff in error, because that case was begun and tried under the laws then in force in the territory of Oklahoma, providing that the district court shall, upon the complaint of any member of the territorial board of health, have power to cancel the license of any physician found guilty, etc. Under this statute the proceedings to revoke the license of a physician were judicial, had to be commenced upon the complaint of a member of the territorial board of health, and were thus officially controlled, and the court rightfully held the state to be a proper party in such a proceeding. The case of *State ex rel. Beckman v. Estes*, 34 Or. 196, 51 Pac. 77, 52 Pac. 571, 55 Pac. 25, cited by plaintiff in error, also fails to sustain the contention of plaintiff in error. In that case it was held that the state was a proper party in a proceeding to revoke the license of a physician, and that notice of appeal having been served upon the state, it need not be served upon the state board.

Our statutes (§§ 6901, 6903, and 6904, Revised Laws 1910) provide the procedure for revoking the license of a physician. The L.R.A.1916D.

proceeding to revoke the license may be commenced by anyone upon a sworn complaint; and thereupon it is the duty of the state board of medical examiners to issue citation to the party complained of to answer within twenty days after the filing of the complaint, and to proceed thereafter to try and determine the issues raised.

Section 6913, Revised Laws 1910, further provides: "Any person who has been aggrieved by any act, rule, or regulation of said board shall have his right of action to have such issue tried in the district court of the county in which some member of the board shall reside."

It will be seen that under no provision of the statute does the state of Oklahoma or any official thereof have exclusive authority to institute proceedings for the revocation of the license of a physician, nor is there any authority in the statute by which the state of Oklahoma can control such proceedings. The proceedings may be instituted by anyone, and the state of Oklahoma or the attorney general would be wholly without authority to dismiss such proceeding or cause it to be discontinued. Therefore we are of the opinion that, while the state of Oklahoma, through its attorney general, might appropriately institute such a proceeding, yet it is not such a necessary party to the proceedings as to require it to be in court before the matter could be proceeded with.

Is the provision of § 6905, Revised Laws 1910, above quoted, void and of no effect? Upon this proposition counsel for plaintiff in error cite the case of *Graeb v. State Bd. of Medical Examiners*, 55 Colo. 523, 47 L.R.A.(N.S.) 1063, 139 Pac. 1099. The Colorado statute provides as a ground for revoking the license of a physician: ". . . The obtaining of a fee on the representation that a manifestly incurable disease can be permanently cured." Rev. Stat. 1908, § 6068. Our own statute makes the ground for the revocation of license: ". . . the obtaining of any fee on the assurance that an incurable disease can be permanently cured." The two statutes are identical, except for the word "manifestly" used in the Colorado statute. A majority of the Colorado supreme court in the case cited held that the statute quoted was too indefinite and uncertain to be valid. The court, in passing upon this question, uses the following language: "The position of the board is very clearly stated in this respect in their brief in *Hamilton v. State Bd. of Medical Examiners*, — Colo. —, 148 Pac. 1145, to which brief we are referred and asked to consider in connection with this case. This is as follows: 'If the question were in controversy in this case as to whether the

words, "manifestly incurable diseases" is so indefinite as to be unenforceable, we would welcome the issue, but we hesitate to burden this court with a vast number of authorities on a point not in issue. Suffice it to say that the words last quoted do not refer to any diseases per se, but to a condition of the patient suffering from almost any disease. It is true that consumption is not "a manifestly incurable disease" in itself, but an invalid suffering from consumption may have reached a stage in which the disease is "manifestly incurable." Under our statute, a physician might lawfully take money for representing that he could cure one case of consumption and at the same time be committing an offense for taking money under a similar representation as to another case of the same disease which had manifestly gone beyond the curable stage.' This argument is also advanced in this case, but not so clearly stated as in the above quotation. This position is not tenable. If the statute had intended a manifestly incurable person, or a manifestly incurable diseased condition, it would doubtless have so recited. But the language is a 'manifestly incurable disease.' Clearly the descriptive words manifestly and incurable apply to the disease, and not to the person or the condition of the person afflicted with the disease. This is likewise the charge in the complaint; for it alleges 'that a manifestly incurable disease could be cured . . . the disease known as consumption.' Counsel for the board have cited no authority justifying such construction of the language used in the statute as that for which they contend, and we do not see how language so clear and explicit can be so tortured. If there is no disease known and understood to be manifestly incurable, then the statute states no offense in that particular, and the board was without jurisdiction in the premises."

Mr. Justice Gabbert, writing the dissenting opinion for the minority of the court, uses the following language: "When is a disease manifestly incurable? Clearly when it is evident it has reached the stage that it cannot be made to yield to medical treatment. That is what laymen, as well as the medical profession, understand from the expression 'a manifestly incurable disease.' The intent of the law is to be considered in its interpretation, and, in ascertaining such intent, the evil against which it is directed must be considered. It is common knowledge that one suffering from disease can easily and readily be imposed upon by those who, by reason of the fact that they have obtained a license to practise medicine, are presumed to possess that degree of skill in the treatment of disease which will en-

able them to accomplish that which they represent they can. The object of the statute is to prevent what would be nothing less than extortion by members of the medical profession, obtaining money from persons or the relatives and friends of those suffering from disease by promising a cure when it is apparent that the patient is beyond the reach of medical science. Such being the object of the statute, the words employed to express it should not be given such a narrow construction as will result in destroying its beneficent purpose, when from such language, and the general understanding of what it means, it is apparent that the legislature intended to prevent the helpless ill being imposed upon by the promises of a cure when it was evident their condition was such that it could not be accomplished."

This case is the only one cited by counsel, and the only one which we have been able to find, which passes directly upon the point raised by plaintiff in error. The majority opinion undoubtedly sustains the contention of plaintiff in error. While the Colorado statute uses the words, "manifestly incurable," instead of the word "incurable" as in our statute, we do not regard this as affecting the applicability of the majority opinion of the Colorado court, since the court there holds that the words "manifestly" and "incurable" must be taken as applicable to the disease per se, and not to the condition of the patient suffering with the disease at the time his treatment is undertaken by the physician. The record in the case at bar discloses that the diseases which the plaintiff in error is charged with having undertaken to treat upon assurance of effecting a permanent cure were not considered by the witnesses for the complainant to be incurable per se; in fact, it may be doubted if the medical profession recognizes any disease as incurable per se,—that is, beyond the reach of medical skill at any stage in the progress of the disease. We think, however, that the majority opinion of the Colorado court does not rightly construe the statute, and we prefer to follow the dissenting opinion in that case, as we think the dissenting opinion correctly interprets the statute in question, and that such interpretation is equally applicable to our own statute.

To sustain the contention of the plaintiff in error upon this proposition would be to nullify that section of our statute, and to hold that the legislature, adopting it, did a vain and useless thing. The universal rule of statutory construction is that, when the intent of the legislature can be determined from the statute, it is the duty of the courts to follow and enforce such intent. In con-

struing statutes consideration is always given to the mischief to be corrected and the remedy to be afforded. As we regard this section of our statute, we think that it is not aimed at any unethical practices of physicians as interpreted by the medical fraternity, but was aimed to prevent acts on the part of physicians which are universally regarded as immoral and against good conscience, not only by the medical profession, but by laymen as well, and for which under the style of obtaining money under false pretenses our Criminal Code has provided the penalties of the law. The gist of the offense of which it is claimed plaintiff in error was guilty is duping the credulous and taking advantage of the afflicted by taking money from them with an assurance that they can be permanently cured when, in fact, their condition is incurable according to the general state of knowledge of the medical profession at that time. The word "incurable" is defined: "Not curable; beyond the power or skill of medicine." 22 Cyc. 74. "Not susceptible of cure; applied to both patients and disease." Dunglison's Medical Dictionary.

Section 2914, Revised Laws 1910, provides: "Words used in any statute are to be understood in their ordinary sense, except when a contrary intention plainly appears."

Section 4642, Revised Laws 1910, provides: ". . . But the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any . . . statute of Oklahoma; but all such statutes shall be liberally construed to promote their object."

Under these definitions and under the rules of construction laid down as above in our statutes we must conclude that the word "incurable," in the section of the statute in question, is to be interpreted in its ordinary acceptation, and that the legislature, in adopting that section, did not intend to do a useless thing, but intended the statute to be enforced in accordance with an interpretation based upon the ordinary understanding of the words used, both by laymen and physicians. In that view of the case we are clearly of the opinion that the words, "incurable disease," in the section of the statute in question, apply to the state of the disease which a patient may have at the time the treatment of it is undertaken by the physician; and that, if a physician undertakes to treat a patient who is suffering from a disease which has in its progress reached an incurable state according to the then general state of knowledge of the medical profession, and accepts a fee from the patient upon the assurance that he can effect a permanent cure of such dis-

ease, he would be guilty of unprofessional conduct as defined in that section of our statute.

Plaintiff in error complains of irregularity and error in the proceedings before the state board of medical examiners and in the trial before the district court. He particularly complains of the sufficiency of the complaint filed before the state board. It is practically held unanimously by all the courts that such boards, in proceedings similar to the one at bar, do not act judicially, and are not judicial bodies, but that their action is merely administrative. It is also held that it is within the police power of the state to grant powers such as are sought to be exercised in this case to such boards as a part of the administrative arm of the government, and to provide for summary proceedings to be taken by such boards in cases similar to the one at bar. It is also held that it is not necessary in a trial under such complaint that the proceedings shall be conducted with that degree of exactness which is required in trials before ordinary tribunals of justice, and that a complaint filed before a state board of health for the purpose of revoking the license of a physician is sufficient if it informs the accused not only of the nature of the wrong charged, but of the particular instances of its alleged perpetration. *Munk v. Frink*, 81 Neb. 631, 17 L.R.A.(N.S.) 439, 116 N. W. 525; *Meffert v. State Bd. of Medical Registration* (*Meffert v. Packer*) 66 Kan. 710, 1 L.R.A.(N.S.) 811, 72 Pac. 247, affirmed in 195 U. S. 625, 49 L. ed. 350, 25 Sup. Ct. Rep. 790; *State Medical Board v. McCrary*, 95 Ark. 511, 30 L.R.A.(N.S.) 783, 130 S. W. 544, Ann. Cas. 1912A, 631; *State Bd. of Health v. Roy*, 22 R. I. 538, 48 Atl. 802; *State ex rel. Chapman v. State Medical Examiners*, 34 Minn. 387, 26 N. W. 123; *State ex rel. Feller v. State Medical Examiners*, 34 Minn. 391, 26 N. W. 125.

In view of the fact that the controversy is narrowed down to the one charge that plaintiff in error accepted a fee for the treatment of an incurable disease with the assurance that he could effect a permanent cure, we are of the opinion that the paragraph of the complaint which charges plaintiff in error with that offense against professional conduct is sufficient, since it advises him of the particular diseases the treatment of which he is charged with having undertaken, especially as plaintiff in error did not seek to have these charges made more definite and certain.

The plaintiff in error complains of the admission in evidence by the trial court of an advertisement which is admitted to have been published by plaintiff in error. Plain-

tiff in error says that he was not charged with making grossly improbable statements, calculated to mislead the public, in advertising his business. While this is true, we do not think the court erred in the admission of this advertisement, since it tended in some degree to throw light upon a question properly before the court; i. e., whether or not plaintiff in error gave assurances of effecting permanent cures of incurable diseases.

Plaintiff further complains that the trial court in its findings in this cause found plaintiff in error guilty of a charge upon which the trial court, upon the objection of plaintiff in error, had excluded all evidence. The record seems to bear out the contention of plaintiff in error in this particular. While this is error, yet, as we have concluded that the judgment of the trial court was right, the fact that he may have included in his findings a conclusion which was not supported by the evidence, since he did make findings that are supported by the evidence and which sustain the judgment, we will not disturb the judgment of the court therefor.

Plaintiff in error further contends that the findings of the court are not supported by sufficient evidence. We have examined the record upon the propositions complained of by plaintiff in error, and we find sufficient evidence to sustain the findings of the court as to the incurable nature of the diseases undertaken to be treated by plaintiff in error, as to his assurances of effecting a permanent cure, and as to his accepting a fee therefor. It is urged by plaintiff in error that the written guaranty which was introduced in evidence, and which is as follows:

Absolute Guaranty.
_____, Okla., _____, 191—.

I, R. W. Freeman, M. D., party of the

first part, do hereby agree to refund all moneys paid to me by H. S. Hawkins, party of the second part, should he fail to receive a complete cure by my treatment.

R. W. Freeman.

I, H. S. Hawkins, party of the second part, do hereby agree to follow the directions given by R. W. Freeman, M. D., party of the first part, through a period of time sufficient as deemed by him to effect a complete cure. Should I fail to follow the directions as given by him, then I agree that this agreement becomes null and void.

H. S. Hawkins.

—is not a guaranty of a cure, but only a guaranty to refund the fee in the event the treatment prove unsuccessful. We consider this contract to be a mere subterfuge, and have no doubt that it was drawn for the very purpose of protecting plaintiff in error in a case like this. But a reading of the entire contract shows that it holds out to the patient an assurance of a permanent cure. And, aside from this contract, the record contains evidence of assurances made by plaintiff in error of effecting a permanent cure to his patients orally. This evidence was perfectly competent, since this action is not based upon the contract above quoted, and oral evidence tending to prove or disprove the matter at issue was admissible.

We conclude that there is no prejudicial or reversible error in the record, and that the judgment of the court below was right, and should be affirmed.

Per Curiam:
Adopted in whole.

Petition for rehearing denied January 11, 1916.

RHODE ISLAND SUPREME COURT.

STATE OF RHODE ISLAND

v.

FRANCIS J. BARTLEY.

(— R. I. —, 96 Atl. 305.)

Husband and wife — failure to support — “means.”

A man's ability to earn money by working at his trade is “means” within the meaning of a statute requiring him to sup-

port his family according to his means, although he is not shown to possess property.

For other cases, see *Husband and Wife*, IV. in *Dig. 1-52 N. S.*

(January 19, 1916.)

EXCEPTIONS by defendant to rulings of the Superior Court for Providence and Bristol Counties made during the trial of

Note. — The question of what amounts to nonsupport by husband within criminal statutes like that under consideration in *STATE v. BARTLEY* is considered in the note to *State v. Waller*, 49 L.R.A.(N.S.) 588. That one's ability to work or earn a wage L.R.A.1916D.

materially affects his responsibility for his failure or neglect to support his family is disclosed by the cases referred to in that note as well as the decision in the *BARTLEY CASE*.

a complaint charging him with neglecting to support his family according to his means, which resulted in his conviction. Overruled.

The facts are stated in the opinion.

Mr. Clarence N. Woolley, for defendant:

In prosecutions for nonsupport the means or ability of the defendant is a constituent element of the offense and must be proved beyond a reasonable doubt.

State v. Peabody, 25 R. I. 544, 56 Atl. 1028; State v. Tillinghast, 25 R. I. 391, 56 Atl. 181; Goddard v. State, 73 Neb. 739, 103 N. W. 443; Hammond v. Hammond, 15 R. I. 40, 2 Am. St. Rep. 867, 23 Atl. 143; Battey v. Battey, 1 R. I. 212.

Mr. Abbott Phillips, Assistant Attorney General, for the State.

Vincent, J., delivered the opinion of the court:

This is a complaint and warrant brought under § 39, chap. 347, of the General Laws of 1909, and charges the defendant with neglecting to support his wife and child according to his means. The case was tried in the superior court, where the defendant was found guilty, and is now before us on the defendant's exceptions: (1) To the refusal of the trial court to direct a verdict for the defendant; and (2) to the refusal of the trial court to charge that the jury must be satisfied that the state has proved beyond a reasonable doubt that the defendant neglected to provide for his wife and child according to his means. There must be evidence of means.

The defendant's wife testified that the defendant was a carpenter; that he went away and left her and their child, four years old, on May 13, 1913; that from that time he had not contributed anything to the support of either of them; that she did not know where the defendant went, but had been informed that he went to New York; that she did not see him from May, 1913, to December, 1914, when she met him on the street in Pawtucket; that she did not know of her own knowledge whether or not the defendant had worked while away, but that he had told her sister that he had been working; and that she and her child had been supported by her own work and the help of her father. The father of the defendant's wife testified that the defendant had contributed nothing to the support of his wife and child for about two years, and that the defendant was a first-class carpenter and was working then. The defendant offered no evidence. Upon this testimony the defendant asked the court to direct the jury to find a verdict of not L.R.A.1916D.

guilty. We think this request was rightly refused.

Our attention has been called, during the argument of counsel for the defendant, to the hearsay character of that portion of the testimony of the defendant's wife wherein she states that the defendant had told her sister that he had been working while he was away. No exception was taken to this testimony at the trial. It is not essential, however, to the disposition of the case, as we view it, and therefore it need not be discussed. Without this there is sufficient testimony to show that the defendant had a good trade in which he was a skilful worker. The jury saw him, and was thereby able to form some judgment as to his health, age, and general physical condition. It is not necessary for the complainant to show that the defendant had actually been in receipt of money during the period in which he had failed to support his wife and child. It is sufficient if it be shown that he had the means of earning money had he been so disposed. To be versed in the technicalities of a good trade, like that of carpentry, and to have the ability and skill to meet its requirements, is to possess a "means" by which a man may be enabled to contribute to the support of his family. We think that the words of the statute, "according to his means," refer to capacity to earn money, as well as to property actually owned and possessed, and that where a man has the physical and mental power to acquire means, he comes within the intent of the law. State v. Witham, 70 Wis. 473, 35 N. W. 934. Applying these principles to the matter in hand, we think that the complainant has made out a prima facie case. The defendant did not offer any testimony. While his failure to do so should not, perhaps, be allowed to militate against him, yet the complainant having made a prima facie case, the way was open to him to show that, by reason of ill health or inability to obtain employment, he had been unable to earn money and contribute to the support of his wife and child. The complainant having made a prima facie case and the defendant having failed to offer any testimony to rebut it, we think that the denial of the defendant's request for the direction of a verdict was proper.

An examination of the charge of the trial court, as appears from the transcript of testimony, shows that the request of the defendant to charge, as set forth in his second exception, was fully covered. The court charged with distinctness that the guilt of the defendant must be proved be-

yond a reasonable doubt in order to convict him, and that the jury must find beyond a reasonable doubt that the defendant neglected to provide for his wife and child according to his means, and later in the charge

the same language was substantially repeated.

The defendant's exceptions are overruled, and the case is remitted to the Superior Court for sentence.

WASHINGTON SUPREME COURT.
(Department No. 2.)

FRED BARNHART, Resp.,

v.

CHICAGO, MILWAUKEE, & ST. PAUL
RAILWAY COMPANY, Appt.

(— Wash. —, 154 Pac. 441.)

Negligence — pond — attractive nuisance.

A pond formed by surface water impounded by a fill for a railroad right of way deep enough to drown a child, and about which children are accustomed to play, is not an agency so likely to result in injury to those attracted to it as to render the railroad company liable for the death of a boy drowned there because of absence of protection, on the theory that it was an attractive nuisance.

For other cases, see *Negligence*, I. c. 2, b, in Dig. 1-52 N. S.

(January 15, 1916.)

APPEAL by defendant from a judgment of the Superior Court for Snohomish County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's son alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. George W. Korte for appellant.

Mr. M. J. McGuinness, for respondent:

Defendant was liable for the death of plaintiff's son.

Bjork v. Tacoma, 76 Wash. 225, 48 L.R.A. (N.S.) 331, 135 Pac. 1005; *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; 1 Thomp.

Note.—The general doctrine of attractive nuisance is discussed at length in the note to *Cahill v. Stone*, 19 L.R.A. (N.S.) 1094; its applicability as to ponds, reservoirs, etc., being specifically treated at page 1143 of that note, and in a supplementary note to *Thompson v. Illinois C. R. Co.* 47 L.R.A. (N.S.) 1101; and see also later cases as to ponds, reservoirs, etc., *Riggle v. Lens*, L.R.A.1915A, 150; *Cœur d'Alene Lumber Co. v. Thompson*, L.R.A.1915A, 731; and *Starling v. Selma Cotton Mills*, L.R.A. 1915D, 850.

Supplementary notes on various other concrete phases of the doctrine of attractive nuisance may be found by consulting the Index to L.R.A. Notes, under the title "Negligence." The same title in the L.R.A. Digest may also be profitably consulted. L.R.A.1916D.

Neg. 2d ed. § 1031; 3 Shearm. & Redf. Neg. 6th ed. § 705; *Haynes v. Seattle*, 69 Wash. 419, 125 Pac. 147.

Main, J., delivered the opinion of the court:

The plaintiff brought this action for the purpose of recovering damages for the death of his son, a child eight years of age. The cause was tried to a jury. At the conclusion of all the evidence the defendant challenged the sufficiency thereof, and moved for a directed verdict. This motion was denied. The jury returned a verdict for the plaintiff in the sum of \$650. Judgment being entered upon the verdict, the defendant appeals.

The facts, briefly stated, are: During the latter part of the year 1911, the appellant railway company was completing the construction of its branch line from Cedar Falls to Everett. This line passed through the city of Snohomish. Where the line passed through this city it was upon low lands adjacent to the Snohomish river, and a considerable embankment or fill was made upon which the rails and ties were laid. About 1,200 feet from the west boundary of the city the railroad grade met a hill which was to the north of the grade. The hill had an elevation of approximately 25 feet, upon the side of which grew brush or small trees. The meeting of the grade and the hill at this point left a depression between the two in which either surface water, or flood waters of the river, were impounded and created a pond. The pond was entirely upon the right of way of the railway company. On the bank or hill to the north there was an old picket fence through which there were a number of openings. Above this hill was what is known as Second avenue. Before the embankment was constructed the flood waters from the river would at times form a pond in the same vicinity as the pond in question, but a little further south, to which boys would resort for the purposes of play, as they did upon this pond. After the pond in question had been formed, the boys of the neighborhood were accustomed to gather for play, and had constructed a raft out of old railroad ties or other timbers. The water in the pond was from 8 to 10 feet deep at the deepest point. In reaching the pond it was necessary for the boys to go upon and across the private

property of the railway company. On February 3, 1912, the two sons of the respondent, respectively eight and six years old, were upon the raft upon the pond, at play, when the older of the two fell into the water and was drowned. This action, as already indicated, was brought by his father.

It is claimed that the railway company was negligent in failing to drain the pond. The controlling question in the case is whether the owner of the property upon which a pond is formed, where the boys of the neighborhood resort for play, is guilty of negligence in failing, either to drain the pond, or fence his property against such intrusion. The general rule, of course, is that the private owner of land is not liable to strangers who come thereon without any invitation, express or implied, and receive an injury from some agency upon the premises.

An exception to this general rule is made by what is known as the doctrine of the turntable cases. According to this doctrine damages may be recovered from the owner for the death or injury of a child of tender years even though technically a trespasser, and who has been attracted to the place of the accident by a dangerous agency which is in the nature of an attractive nuisance. *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Clark v. Northern P. R. Co.* 29 Wash. 139, 59 L.R.A. 508, 69 Pac. 636; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619. The turntable doctrine has been adopted by the courts of last resort in a considerable number of states, and rejected by almost an equal number. There is a tendency generally on the part of courts which have approved the doctrine to limit, rather than extend, its application. *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537; *Bottum v. Hawks*, 84 Vt. 370, 35 L.R.A. (N.S.) 440, 79 Atl. 858, Ann. Cas. 1913A, 1025, 3 N. C. C. A. 186. In the case last cited will be found a review of the cases which support the statement as to the tendency to limit the doctrine.

The question here presented is not whether the owner of property may be liable (a) by reason of a trap or pitfall upon his property which may produce the death or injury; (b) a hidden or concealed danger; or (c) a dangerous agency in close proximity or so near a highway that in the use of the highway an accident may occur—but is whether a pond of water is a dangerous agency such as will subject the owner of the property to liability for damages for the death of a child of tender years, attracted to the pond for the purpose of play. The turntable doctrine makes the

owner liable because the dangerous agency was attractive to children of tender years, and in playing about or with such agency accident or injury would probably result. That a pond of water is attractive to boys for the purposes of play, swimming, and fishing no one will deny. But its being an attractive agency is not sufficient to subject the owner to liability. It must be an agency such as is likely, or will probably, result in injury to those attracted to it. That many boys every year lose their lives by drowning is a matter of common knowledge. But the number of deaths in comparison to the total number of boys that visit ponds, lakes, or streams for purposes of play, swimming, and fishing is comparatively small. It would be extending the doctrine too far to hold that a pond of water is an attractive nuisance, and therefore comes within the turntable cases. There are a number of analogous cases which would support the holding that an owner is not liable for the death of a child drowned in a pond. But in this case it is not necessary to support the holding by analogous cases when there is ample direct authority upon which it may be rested. *Emond v. Kimberly-Clark Co.* 159 Wis. 83, 149 N. W. 760; *Sullivan v. Huidekoper*, 27 App. D. C. 154, 5 L.R.A. (N.S.) 263, 7 Ann. Cas. 196; *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598, 1 Am. Neg. Rep. 4; *Thompson v. Illinois C. R. Co.* 105 Miss. 636, 47 L.R.A. (N.S.) 1101, 63 So. 185; *Stendal v. Boyd*, 73 Minn. 53, 42 L.R.A. 288, 72 Am. St. Rep. 597, 75 N. W. 735. Those cases are all from courts that approve the turntable doctrine. In each of them a boy had lost his life by drowning, the youngest of which was four and the oldest eleven, years; and in each of them it was held that there was no liability for the death of a child that occurred in an artificial pond. In the *Peters Case* it was said: "It is not contended by appellant that the rule of the turntable cases has ever been applied to facts like those in the case at bar; his contention is that the reasoning and philosophy of the rule ought to extend it to a case like the one at bar. But the same reasoning does not apply to both sets of cases. A body of water—either standing as in ponds and lakes, or running as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays—is a natural object incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land, the danger of drowning in it is an apparent open danger, the knowledge of which is common to all, and there is no just view consistent

with recognized rights of property owners which would compel one owning land upon which such water, or part of it, stands or flows, to fill it up, or surround it with an impenetrable wall."

In the Sullivan Case, after reviewing the authorities, it was said: "Without citing other authorities, we are persuaded that the conclusions in the cases cited and the reasoning upon which they are based are correct, and that in a case such as the one at bar it would be unjust to hold the landowner liable for the death of, or injury to, a child of ten years of age. We do not consider that the appellee was negligent in not taking steps to prevent the trespassing upon her land by boys of such age as plaintiff's intestate. To hold landowners responsible under such circumstances would be to impose upon them an oppressive burden, and shift the care of children from their parents to strangers. Every man who has been brought up with the freedom allowed to American boys knows that you might as well try to dam the Nile with bulrushes as to keep boys away from ponds, pools, and other bodies of water."

The case of *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484, in its reasoning is out of harmony with the cases above cited; and it is the only case, so far as our information goes, which would sustain liability. That

case could have been rested upon a different ground and brought within one of the classes in which it is well recognized that liability exists. It is not, however, so rested.

The respondent relies upon the case of *Bjork v. Tacoma*, 76 Wash. 225, 48 L.R.A. (N.S.) 331, 135 Pac. 1005. That case, however, is distinguishable from this. There a child three years old was drowned by falling into an opening in a flume which was 24 inches square. The flume, other than this particular opening, was covered. This was a dangerous agency which was attractive to children, and in the event a child should fall into the flume, death by drowning was inevitable. It was not of the same nature as a pond where children are accustomed to play, and where comparatively few lose their lives by drowning. In the *Bjork Case*, *Pekin v. McMahon*, supra, was cited as analogous; but in citing that case, it was not the intention of the court to adopt all of the reasoning contained in the opinion. To hold that a pond is an attractive nuisance within the doctrine of the turntable cases would be an extension of that rule beyond its proper limitations.

The judgment will be reversed, and the cause remanded, with directions to dismiss.

Morris, Ch. J., and Bausman, Parker, and Holcomb, JJ., concur.

KENTUCKY COURT OF APPEALS.

SANDY VALLEY & ELKHORN RAILWAY COMPANY, Appt.,

v.

WILLIE TACKITT.

(167 Ky. 756, 181 S. W. 349.)

Master and servant — liability of master for hernia.

A laborer cannot hold his master liable for a rupture caused by his attempt alone to operate a lifting jack which is beyond his strength, although commanded to do so by his foreman, if he could have desisted without danger when he found he was not equal to the task.

For other cases, see *Master and Servant*, II. b, 6, in *Dig. 1-52 N. S.*

(January 14, 1916.)

A PPEAL by defendant from a judgment of the Circuit Court for Pike County

in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. **Auxier, Harman, & Francis and Hager & Stewart**, for appellant:

Plaintiff cannot hold defendant liable, as he knew the strength required to do the work as he did it, as it was simply a matter of lifting or straining, and he knew when his capacity for that was reached better than anyone else could know, and when he reached the limit of his capacity it was his duty to quit the employment rather than to endanger himself.

Duncan v. Gernert Bros. Lumber Co. 27 Ky. L. Rep. 1039, 87 S. W. 762; *Kirby v. Hillside Coal Co.* 32 Ky. L. Rep. 519, 106 S. W. 278; 3 *Labatt, Mast. & S.* § 1166; *Stenvog v. Minnesota Transfer R. Co.* 108 Minn. 199, 25 L.R.A. (N.S.) 362, 121 N. W. 903, 17 Ann. Cas. 240; *Ferguson v. Phoenix*

Note. — As to servant's right of action for injuries received in obeying a direct command, see notes to *Dallemand v. Saalfeldt*, 48 L.R.A. 753, and *Lowe Mfg. Co. v. Payne*, 30 L.R.A. (N.S.) 436; and see later cases, *Pigford v. Norfolk Southern R. Co.* L.R.A.1916D.

44 L.R.A. (N.S.) 865; *Chicago, B. & Q. R. Co. v. Shalstrom*, 45 L.R.A. (N.S.) 387; *Maloney v. Winston Bros. Co.* 47 L.R.A. (N.S.) 634; and *Philip Carey Roofing & Mfg. Co. v. Black*, 51 L.R.A. (N.S.) 340.

Cotton Mills, 106 Tenn. 236, 61 S. W. 53; Roberts v. Indianapolis Street R. Co. 158 Ind. 634, 64 N. E. 217; Worlds v. Georgia R. Co. 99 Ga. 283, 25 S. E. 646; Leitner v. Grieb, 104 Mo. App. 173, 77 S. W. 764; Texas & P. R. Co. v. Miller, 36 Tex. Civ. App. 240, 81 S. W. 535; International & G. N. R. Co. v. Figures, 40 Tex. Civ. App. 255, 89 S. W. 780; American Mill. Co. v. Bell, 146 Ky. 68, 141 S. W. 1191; Louisville & N. R. Co. v. Crowe, — Ky. —, 118 S. W. 365; Louisville & N. R. Co. v. Grimes, 150 Ky. 219, 150 S. W. 346; Waxahachie v. Connor, — Tex. Civ. App. —, 35 S. W. 692; Texas & P. R. Co. v. White, 62 L.R.A. 90, 42 C. C. A. 86, 101 Fed. 928.

Messrs. Staton & Pinson for appellee.

Clay, C., filed the following opinion:

Claiming to have been ruptured while operating a lifting jack, and that his injuries were due to the negligence of defendant in ordering him to operate the jack alone and in failing to furnish a sufficient force to operate the jack, plaintiff, Willie Tackitt, brought this action against defendant, Sandy Valley & Elkhorn Railway Company, to recover damages. A trial before a jury resulted in a verdict and judgment in favor of plaintiff for \$2,780. Defendant appeals.

The evidence for plaintiff tends to show the following facts: Plaintiff was a laborer in defendant's employ. He had been at work for about three months, and was engaged in dressing track, tamping ties, and operating the jack. In the work of operating the jack he had had only about three weeks' experience. At the time of his alleged injury the company was using two jacks. Tom Harman was in charge of the rear jack, while plaintiff, with the assistance of William George Tackitt, was operating the jack in front. There were seven or eight men in the crew, and John Keaton was the foreman. Addressing plaintiff and William George Tackitt, Keaton said:

"By G——, it looks like if Tom Harman could pull this jack, looks like one of you fellows ought to pull that."

He also remarked that it was a one man's job, and that he had pulled a jack for three months by himself. Thereupon William George Tackitt dropped back and left plaintiff on the jack. After working ten or fifteen minutes plaintiff felt something tear about his groin. He then went down the road and came back and mentioned it to Keen Harman. After that he worked a little over three days, when it began hurting him so badly he quit. Later on he went to Keaton's house and told him that he was ruptured. He further says that when the accident occurred he was working on the inside of the curve, and that the ballast

was very heavy where they were at work. Later on he consulted a physician, and since that time he has not been able to do heavy work. Sam Ray, plaintiff's brother-in-law, testified that plaintiff called for help, and William George Tackitt started to help him. Thereupon John Keaton stated that if Tom Harman could pull his jack, it looked like one of them could pull the other jack. Thereupon William George Tackitt went back to tamping ties. He saw the place where plaintiff was injured. Plaintiff afterwards went to Keaton, and Keaton told him that if he was hurt, he had better lay off a few days. In describing the accident this witness said:

"He [plaintiff] went to pull on it and tried to move it and couldn't, and he got down on the end of the bar to try to get it to go, and when he did that, I saw him get off the lever and go down the road. He stayed down there a while and then came back."

Several witnesses testified that when the ballast was heavy three or four men were required to operate the jack, but when the ballast was light two or three men could operate it.

For the defendant John Keaton testified that plaintiff worked for four days and four hours after he claimed that he was hurt. After plaintiff quit work he never heard of any complaint that he was ruptured. Plaintiff, however, told him on November 23d that he believed he was going to be ruptured. He denied using the language attributed to him by plaintiff and his witnesses. He heard plaintiff and Tom Harman discussing their abilities to run the jacks. One bet the other \$5 that he could run it. Witness told the person making the bet that he would lose the money, as he himself had run a jack many a time. William George Tackitt testified that on the occasion in question John Keaton said something about the operation of the jack being a one man's job. While Keaton did not direct him to quit, yet what Keaton said was the cause of his quitting. There was further evidence to the effect that on several occasions plaintiff and other workmen engaged in a test of their strength by lifting rails, hand cars, etc.

Defendant insists that a peremptory instruction should have gone in its favor. On the other hand, plaintiff contends that the facts bring it within the rule laid down in *Illinois C. R. Co. v. Langan*, 116 Ky. 318, 76 S. W. 32, and *Louisville & N. R. Co. v. Mahan*, — Ky. —, 113 S. W. 887. In the first-mentioned case plaintiff and three others were engaged in moving steel shafts, weighing from 200 to 460 pounds each, from the company's cars to the freight

platform. They were working under the direction of a freight clerk. After moving several of the smaller shafts they requested the freight clerk to obtain assistance for the removal of the larger shafts which weighed 460 pounds each. They stated that it would be dangerous for them to attempt to move the larger shafts, which were round, and had been oiled or greased, and which were about 20 feet long and from 4 to 6 inches in diameter. After failing to get additional men, the freight clerk told plaintiff and the others to go on. In handling one of the larger shafts it slipped or was dropped from the hands of the men, and fell on plaintiff's foot, severely injuring him. There was evidence to the effect that the force was inadequate. It was held that, as the master insisted, after objection, that plaintiff proceed with the work, plaintiff did not assume the risk incident to the master's employing an inadequate force to assist in the work, where the probability of injury was such that the judgment of prudent men might differ as to the certainty of its happening, or with reference to whether the force was reasonably adequate to perform the work. In the last-mentioned case plaintiff was ordered by the foreman to shoulder a hydraulic jack which was on the car and carry it a short distance therefrom. The jack weighed from 150 to 200 pounds. It had handles on each side, and the usual way of carrying it was for two men to take hold of the handles. When told to shoulder the jack, plaintiff demurred on the ground that he thought it was too heavy. The foreman insisted that as he and other men had carried it, plaintiff could carry it. Thereupon the foreman placed the jack on plaintiff's shoulder. Plaintiff could not stand the weight, and undertook to throw the jack to the ground. Failing to do this, he was crushed to the earth by the jack and seriously injured. It was held that the defendant was liable. Clearly the facts in the case at bar present an entirely different question from that involved in either of the above cases. In the Langan Case plaintiff, together with others, was handling steel shafts, and was injured because the force was inadequate. The peril was not obvious, since he could not know of the danger until actually subjected to the strain. In the Mahan Case plaintiff not only acted in obedience to the order of his superior, but had no opportunity to know of the real danger until the jack was placed on his shoulder, and it was then too late to escape injury. In the case at bar, however, plaintiff was not placed in a position where he was required to sustain an unexpected weight. The jack was stationary and was

operated by means of a lever which plaintiff could release at any time without danger. It is simply a case where the servant, with knowledge of the fact that he was not equal to the task, overstrained himself. It is the general rule that a servant is the best judge of his own physical strength, and the duty is on him not to overtax it. Therefore, if he misconceives the amount of strength required to accomplish the task and overstrains himself, the master is not liable. It may be doubted if the remarks of the foreman in this case amounted to anything more than the mere expression of an opinion, but, even if it be conceded that they amount to an expressed command to plaintiff to operate the jack alone, that fact does not alter the rule. Such remarks did not authorize plaintiff, when he found that he was not equal to the task, to persist in the attempt until he was injured by overtaxing his own strength, of which he was the best judge. *Worlds v. Georgia R. Co.* 99 Ga. 283, 25 S. E. 646; *Leitner v. Grieb*, 104 Mo. App. 173, 77 S. W. 764; *Ferguson v. Phoenix Cotton Mills*, 106 Tenn. 236, 61 S. W. 53; *Roberts v. Indianapolis Street R. Co.* 158 Ind. 634, 64 N. E. 217; *Stenvog v. Minnesota Transfer R. Co.* 108 Minn. 199, 25 L.R.A.(N.S.) 362, 121 N. W. 903, 17 Ann. Cas. 240; *Louisville & N. R. Co. v. Williams*, 165 Ky. 386, L.R.A.1915E, 613, 176 S. W. 1186, 9 N. C. C. A. 368. It therefore follows that the trial court erred in refusing the peremptory instruction asked for by defendant.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

MINNESOTA SUPREME COURT.

FRANK A. MULLEN, Resp't.,

v.

OTTER TAIL POWER COMPANY, Appt.

GLEN FALLS INSURANCE COMPANY et al., Interveners, Respts.

(130 Minn. 386, 153 N. W. 746.)

Electricity — cutting off current — loss — liability.

1. Defendant, under contract with plaintiff, a merchant, supplied electric current to his store. A fire broke out in a restaurant in the rear of the store and separated from it by a solid partition. Defendant

Headnotes by BUNN, J.

Note. — As to liability of electric power or light company for cutting off, or failure of, electric current, see annotation following this case, post, 451.

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severed the wires supplying the store with electric current, and plaintiff, by reason of the darkness, was unable to remove his stock and fixtures. In this action to recover the value of such stock and fixtures, which were ultimately destroyed by the fire, it is held defendant had the right to sever the wires that supplied electricity to the store, providing it was reasonably necessary to do so in order to save loss or damage to its property, but it had no such right until such act became so reasonably necessary. It owed plaintiff a legal duty not to deprive him of light unless and until protection of its own interests, or safety to the public, made it reasonably necessary to do so. In this case the wires were severed forty minutes before there was any such necessity, and defendant knew that plaintiff would need light to save his property. The evidence sustains a finding that cutting the wires at this time was a breach of defendant's duty to plaintiff.

For other cases, see Electric Lights, in Dig. 1-52 N. S.

Proximate cause — fire — cutting off light — loss.

2. The court was justified in finding that the act of defendant in cutting the wires was the proximate cause of plaintiff's loss, unless plaintiff, after discovering that the wires had been cut, could have averted the loss by reasonable diligence.

For other cases, see Proximate Cause, II. a, in Dig. 1-52 N. S.

Evidence — avoiding loss — sufficiency.

3. The evidence does not sustain a finding that plaintiff could not have averted the loss, or at least made it less, by reasonable care and diligence after discovering that the wires had been cut.

For other cases, see Evidence, XII. d, in Dig. 1-52 N. S.

(July 16, 1915.)

APPEAL by defendant from a judgment of the District Court for Stevens County in favor of plaintiff and interveners, in an action brought to recover the value of a stock of merchandise and fixtures destroyed by fire alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. N. F. Field and Spooner & Spooner, for appellant:

To say that it was the duty of the company to furnish lights in the case of a fire in the building would be a forced and strained construction to place upon the contract, and would be injecting into it an element which is not in express terms covered by the contract, and could not have been within the contemplation of the parties at the time it was made.

Landquist v. Swanson, 78 Minn. 444, 81 N. W. 1; New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89, 17 Am. Neg. Rep. 601. L.R.A.1916D.

The cutting of the wires was not the proximate cause of the destruction of plaintiff's stock of goods and fixtures.

Nelson v. Chicago, M. & St. P. R. Co. 30 Minn. 74, 14 N. W. 360; Strobeck v. Bren, 93 Minn. 428, 101 N. W. 795; Fitzgerald v. International Flax Twine Co. 104 Minn. 138, 116 N. W. 475; Lebanon, L. & L. Teleph. Co. v. Lanham Lumber Co. 131 Ky. 718, 21 L.R.A.(N.S.) 115, 115 S. W. 824, 18 Ann. Cas. 1066; Smith v. Western U. Teleg. Co. 83 Ky. 104, 4 Am. St. Rep. 126; Volquardsen v. Iowa Teleph. Co. 148 Iowa, 77, 28 L.R.A.(N.S.) 554, 126 N. W. 928, 3 N. C. C. A. 355; Franke v. Head, 19 Ky. L. Rep. 1128, 42 S. W. 913, 3 Am. Neg. Rep. 402.

Messrs. James B. Ormond and F. W. Murphy, for respondents:

The words used in this contract are to be taken in the ordinary and popular sense, and, taken in this sense, it is impossible to discover anything which may be construed as relieving the defendant from furnishing a supply of current to a burning building where the apparatus or equipment of the company is not in danger.

Shore v. Wilson, 9 Clark & F. 565; Dwight v. Germania L. Ins. Co. 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; 9 Cyc. 578; Pennebaker v. San Joaquin Light & P. Co. 158 Cal. 579, 31 L.R.A.(N.S.) 1099, 139 Am. St. Rep. 202, 112 Pac. 459, 1 N. C. C. A. 3:9; New Omaha Thomson-Houston Electric Light Co. v. Anderson, 73 Neb. 84, 102 N. W. 89, 17 Am. Neg. Rep. 601.

The acts of the defendant in the case at bar amount to wilful negligence.

Anderson v. Minneapolis, St. P. & S. Ste. M. R. Co. 103 Minn. 224, 14 L.R.A.(N.S.) 886, 114 N. W. 1123.

The destruction of plaintiff's goods and fixtures by said fire was the direct and proximate result of said acts of negligence of the defendant, its servants and agents.

Campbell v. Stillwater, 32 Minn. 308, 50 Am. Rep. 567, 20 N. W. 320; Deming v. Merchants' Cotton-Press & S. Co. 90 Tenn. 306, 13 L.R.A. 518, 17 S. W. 89; Burk v. Creamery Package Mfg. Co. 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793, 18 Am. Neg. Rep. 62; Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co. 94 Minn. 269, 69 L.R.A. 509, 110 Am. St. Rep. 361, 3 Ann. Cas. 450, 17 Am. Neg. Rep. 590; Moore v. Townsends, 76 Minn. 64, 78 N. W. 880, 6 Am. Neg. Rep. 95; Belshan v. Illinois C. R. Co. 117 Minn. 110, 134 N. W. 507; Erickson v. Great Northern R. Co. 117 Minn. 348, 39 L.R.A.(N.S.) 237, 135 N. W. 1129, Ann. Cas. 1913D, 763, 3 N. C. C. A. 490; Bodkin v. Great Northern R. Co. 124 Minn. 219, 144 N. W. 937, Ann. Cas. 1915B, 705; Kiernan v. Metropolitan Constr. Co. 170

Mass. 378, 49 N. E. 648; Morey v. Shenango Furnace Co. 112 Minn. 528, 127 N. W. 1134.

Bunn, J., delivered the opinion of the court:

This action was to recover the value of a stock of merchandise and fixtures destroyed by fire, the claim of liability being that defendant, at the time of the fire, negligently cut the service wires that supplied electric light to plaintiff's store, plaintiff, by reason of the darkness, being unable to remove and save his stock and fixtures. The case was by consent tried before the court without a jury. The decision was in favor of plaintiff and the intervening insurance companies, which had paid plaintiff for part of the loss, for the full amount claimed as the value of the property destroyed.

The case is an important one, and involves an unusual, if not an entirely new, state of facts. We have reached the conclusion that there should be a new trial because the evidence, in our opinion, does not show that plaintiff used due care or diligence in attempting to save his property. The other questions are determined to guide the trial court when the case shall be retried. These questions concern the liability of defendant, and may be stated thus: (1) Was defendant guilty of a breach of duty towards plaintiff in cutting the wires when it did? (2) Was such act the proximate cause of plaintiff's loss, conceding that he did all he reasonably could have done to save his property?

The facts which the evidence justified the trial court in finding true may be summarized as follows: Defendant owned and operated an electric light plant in the city of Morris, furnishing electric current to consumers under contract with them. Plaintiff owned a lot on the corner of Atlantic avenue and Sixth street. The lot fronted on Atlantic avenue, was 25 feet in width on that street, and 140 feet in depth along Sixth street. There was a two-story frame building on this lot, the front 65 feet of which was occupied and used by plaintiff as a clothing and gentlemen's furnishing store. The rear 30 feet of the building was used as a restaurant, consisting of a dining room and kitchen; the dining room was next to the store, and separated from it by a solid double partition without doors or windows. Between the dining room and the kitchen there was a stairway and a door under it, with two partitions, except in the place where the door led into the kitchen. This restaurant was not conducted by plaintiff. Defendant furnished electric current to plaintiff, under contract made with the former owner of the plant and assumed by defendant upon its purchase thereof. This L.R.A.1916D.

contract provided, among other things, that "the company shall use all due diligence in providing a regular and uninterrupted supply of current, but in case supply of current shall be interrupted or be defective the company shall not be held liable therefor."

The service wires entered plaintiff's store at a point on Sixth street about 20 feet from the rear of the store, and about 9 feet from the floor. They came from a pole on the corner of Atlantic avenue and Sixth street, across Sixth street from the front of plaintiff's store. Two other wires carried the current for the restaurant, and were strung from a pole standing on the other side of Sixth street nearly opposite to the rear of the plaintiff's store. These wires entered the building in the dining room of the restaurant.

About 2:45 o'clock on the morning of February 20, 1913, fire broke out in the kitchen of the restaurant. It was a cold, calm morning. The fire alarm sounded and the volunteer fire department responded, as did plaintiff, four employees of defendant, and numerous citizens. Plaintiff opened the front door of his store, turned the electric-light switch, and there was no light. With a number of men to help, plaintiff tried to remove his stock and fixtures. They succeeded in taking out one show case, with some neckwear, and a few shoes, but abandoned further effort because, as plaintiff claims, they were unable to do anything on account of the complete darkness of the store. In spite of the efforts of the firemen, in forty minutes after plaintiff came on the scene, the fire broke through from the restaurant into the store, and the result was soon the complete destruction of the store and the stock and fixtures in it. The evidence of plaintiff and a number of witnesses is that, had the electric light been burning in the store, all the stock and fixtures could have been removed to a place of safety in twenty minutes. Nick Finneman, an electrician in the employ of defendant, was at the scene of the fire soon after the alarm was given. He tried to get into the store to rescue the meter, but found the door locked. He then climbed the pole at the corner of Atlantic avenue and Sixth street, and cut the wires that supplied plaintiff's store. This was the reason why plaintiff was unable to turn on the lights when he entered his store. It is this action of Finneman upon which plaintiff bases his claim of liability. There was much testimony bearing upon the necessity of cutting service wires in case of a fire. It was practically all directed to the danger to the plant or to people on the street by the chance of a short circuit being caused by the melting or burning of the fuses in

the building, the burning of the insulation around the wires, their falling and coming in contact with each other. There was testimony that such a short circuit might cause serious damage in the plant of defendant, and testimony that this chance was extremely remote. The trial court found that this danger was very remote, and it was practically the unanimous opinion of the experts that the danger to people on the street was almost negligible.

The evidence is practically undisputed that Finneman could have waited thirty or forty minutes before cutting the wires without any danger of their being affected by the fire. In fact witnesses for the defendant are inclined to admit that Finneman acted before he should have. It is plain that he knew that plaintiff would need lights to remove his stock. He does not seem to have thought of this at the time, though he waited before cutting the wires serving an adjacent store until the owner and volunteers had removed the stock.

1. Was this act of Finneman in cutting the wires serving plaintiff's store with electric current forty minutes before there was any necessity for so doing, and with knowledge that this might prevent plaintiff from saving his property, a breach of any legal duty that defendant owed plaintiff? The contract between the parties is not important except for the bearing it has on the question of what the legal duty of defendant was. It is not a breach of contract that plaintiff complains of, but a tort, actionable negligence on the part of a servant of defendant in the course of the performance of his duties. We are unable to find that the state of facts has ever been presented to any court for its decision as to whether it constitutes actionable negligence. It is admitted that ordinances have been enacted in some cities requiring power companies to cut their electric wires in case of a fire, but there was no such ordinance in the city of Morris. We hold, however, that in case of fire, a power company supplying electricity to consumers has the right to cut its wires in case it is reasonably necessary to do so in order to save loss or damage to its property. But this does not answer the present question. While the company should not be compelled to take nice chances as to the particular moment of time when it is justified in severing the wires supplying current to a burning building, there would certainly be no excuse for such action in a case where it was apparent that there was no danger for hours of the fire reaching a point where the wires would be affected, and where it was apparent that the act might cause loss to the consumer. It cannot be said that de-

endant owed no legal duty to plaintiff. It could not cut off his supply of current arbitrarily and escape liability for consequent damages. We think it must be held that the legal duty of defendant was not to deprive plaintiff of needed light unless and until the protection of its own interests, or safety to the public, made it reasonably necessary to do so. It would be liable for a breach of this duty that was the proximate cause of damages to plaintiff. And we are unable to hold on the evidence before us that the trial court was not justified in finding that there was this breach of duty, as before pointed out. Finneman cut the wires from forty to fifty minutes before there was any necessity for doing so, either from the standpoint of protecting the property of defendant or that of protecting people on the street from electrical shocks. That it was an error of judgment defendant concedes. To the knowledge of Finneman the fire was then confined to the restaurant, there was no wind, and it was not making rapid progress toward the store. He knew that plaintiff had a stock of goods that could be saved if he had light. His act was unnecessary, and the trial court's finding that it was a negligent act must be sustained.

2. Was the negligence of defendant in cutting the wires the proximate cause of plaintiff's loss? We are unable to draw a sound distinction between this case and that of *Erickson v. Great Northern R. Co.* 117 Minn. 348, 39 L.R.A.(N.S.) 237, Ann. Cas. 1913D, 763, 135 N. W. 1129, 3 N. C. C. A. 490, where it was held that the act of cutting a hose being used to extinguish the fire was the proximate cause of the burning of the hotel, the evidence being sufficient to sustain a finding that the fire would have been extinguished but for the act. In the present case the evidence is uncontradicted that plaintiff's stock and fixtures could and would have been saved had defendant postponed for half an hour the severing of the service wires. It is impossible to distinguish between the two cases. We hold that the evidence sustains the finding of the trial court that the negligent act of cutting the wires was the proximate cause of plaintiff's loss, unless it can be said that plaintiff could have averted the loss by the exercise of reasonable diligence after discovering that the wires had been severed.

3. It was plainly the duty of plaintiff to do all he could to make his loss as small as possible. If he could have removed his stock in the darkness, or if he could have obtained light from other sources in time to have removed it, he should not be allowed to charge defendant for his loss. The efforts

of plaintiff to obtain light consisted of appeals to bystanders to get lanterns. Plaintiff seems to have made no search for them himself. The city had been lighted with electricity for many years, and it may be that lanterns, lamps, candles, and other means of illumination were not readily available.

The evidence makes no mention of candles; little of oil lamps. It is not clear how much light there was on the street. The testimony was directed to efforts to procure lanterns. One was brought in answer to an appeal, but proved smoky and was discarded. Two others were found in a hardware store, but there was no oil. There was probably a lantern on the hose cart, but plaintiff, though a member of the fire department, did not know where this hose cart was stationed, though it was in fact but a short distance from the front of his store. Plaintiff did nothing himself in the way of searching for lanterns or other lights, but just stood around, trusting entirely to his requests of bystanders who had no personal interest in saving his stock. It is not very clear why the smoky lantern could not have been cleaned and made useful, or why oil could not have been procured for those brought from the hardware store. And it is not easy to under-

stand why candles or lamps or other illumination might not have been procured in time to enable plaintiff and his willing volunteer assistants to remove at least a large portion of the stock and fixtures. If, as they testify, this could all be done in twenty minutes, and if it took the fire forty minutes to reach the store, there was twenty minutes' time which could have been profitably used in serious effort to obtain light. Our conclusion is that the evidence on this branch of the case is so unsatisfactory that a new trial is demanded.

We call attention to the state of the evidence on the question of the value of plaintiff's stock of goods. He testified to the value of his stock as a whole, based upon the cost price as shown by an inventory taken a short time before the fire. This inventory was produced in court, but not put in evidence, nor was there any examination or cross-examination as to the different items of merchandise or their value. Nothing was deducted for shelf-worn stock. We would not grant a new trial for the insufficiency of the evidence on the question of damages, but the evidence on this issue is quite unsatisfactory, and should be made more convincing on another trial.

Order reversed, and new trial granted.

Annotation—Liability of electric power or light company for cutting off, or failure of, electric current.

As to liability for damages caused by shutting off water or gas from premises, see note to *Brame v. Light, Heat, & Water Co.* 21 L.R.A.(N.S.) 468.

As to duty to cut off electric connection in case of fire, see note to *Pennebaker v. San Joaquin Light & P. Co.* 31 L.R.A.(N.S.) 1099.

As to liability of telephone company for failure to make connections for subscribers, see note to *Lebanon, L. & L. Teleph. Co. v. Lanham Lumber Co.* 21 L.R.A.(N.S.) 115.

MULLEN v. OTTER TAIL POWER CO. ante, 447, seems to be a case of first impression as to the liability of an electric company to a consumer for injuries due to the turning off of electric current where the liability is predicated not on a breach of contract, but in tort in having breached an alleged duty owed. The decision in *MULLEN v. OTTER TAIL POWER CO.*, that an electric company that shuts off the current before it is absolutely necessary, either in order to fulfil its duty to the public or to protect its own property, is guilty of an actionable wrong, is sound in principle. And the question involved

might be said to be, When, under circumstances similar to those in the *MULLEN CASE*, does the duty of the company to a consumer end, and the duty to the public and the right to protect its own property begin? And this it would seem would usually be a question of fact for the jury under the particular circumstances of each case.

Nor can there be any ground for questioning the decision that the loss sustained in this case would be the natural consequences of the electric company's act, at least in the absence of any breach of duty that the consumer himself might owe to endeavor to avert any loss. The following cases, where the liability was predicated on a breach of contract, are included not as bearing on the question of substantive liability, but because, the liability once fixed, the measure of damages in either instance would be the same.

In *Stone v. Schenectady R. Co.* (1904) 99 App. Div. 44, 90 N. Y. Supp. 742, a contract for electric current to operate a stereopticon used in throwing advertisements at night upon a screen pro-

vided that the power company had the right to cut off the current after the expiration of ten days from the presentation of a bill, and in violation of this provision the current was cut off within three days after the presentation of a bill, and it was held that the power company was liable for such damages as the owner of the stereopticon suffered from the time the current was cut off until notified by the company of its intention to again furnish the electricity. In this case notice to the party's attorney was held sufficient.

In *Terrace Water Co. v. San Antonio Light & P. Co.* (1905) 1 Cal. App. 511, 82 Pac. 562, where an electric power company contracted to sell to the water company for a period of five years, during the irrigation season, electric power to operate the pump used in pumping water from its wells, and after furnishing power for a certain period of time, destroyed the connections and refused thereafter to furnish any power whatever, it was held that the water company was entitled to recover the excess cost in procuring power from another company. The court stated that the proposition advanced by the power company, that a party may disregard his obligations and confidently assume that the only consequence thereof is a nominal damage, and that such nom-

inal damage is all that necessarily follows such violation and all that can reasonably be anticipated, should have no support.

In *Morris v. Loughborough Corp.* [1908] 1 K. B. (Eng.) 205, the act of incorporation required that the electric company furnish electrical energy to certain classes of persons, and also gave it permission to enter into special agreements with others to furnish them with electrical energy. A clause of the act provided that "whenever the undertakers make default in supplying energy to any owner or occupier of premises to whom they may be and are required to supply energy under this part of this act, they shall be liable in respect of each default to a penalty. . . ." In construing this penalty clause, it was held to apply only to cases of default in supplying electrical energy to those to whom it was required to furnish such energy, and did not apply to cases of default in supplying electrical energy to one with whom the company had entered into a special agreement to supply such energy, and so plaintiffs, being of the latter class, having been deprived of electrical energy for a certain period of time, were held to be entitled to maintain an action for damages suffered thereby. J. H. B.

OHIO SUPREME COURT.

J. B. DOPPEL SONS LUMBER COMPANY,
Plff. in Err.,
v.
CINCINNATI, NEW ORLEANS, & TEXAS
PACIFIC RAILWAY COMPANY.

(— Ohio St. —, 110 N. E. 640.)

Carrier — switching service.

1. "A switching service," within the meaning of §§ 8998 and 9000, General Code, is one which precedes or follows a transportation service, and applies only to a shipment upon which legal freight charges have already been earned or are to be earned.

For other cases, see Carriers, IV. c, in Dig. 1-52 N. S.

Same — transportation within city.

2. A transportation service may be rendered within the terminal limits of a city, and where a contract of carriage calls for the movement of a car from a point on one railroad to a point on a connecting road, both of which are within such limits, the

railroad companies in their charge for service are not subject to the provisions of § 9000, General Code, but may charge for such service a rate that is just and reasonable.

For other cases, see Carriers, III. c, in Dig. 1-52 N. S.

(May 25, 1915.)

ERROR to the Court of Appeals for Hamilton County to review a judgment reversing a judgment of the Court of Common Pleas in plaintiff's favor in an action brought to recover overcharges for alleged switching service. Affirmed.

Statement by Newman, J.:

Plaintiff in error brought an action under § 9002, General Code, in the court of common pleas of Hamilton county against the defendant in error and the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company to recover the sum of \$150.

The allegations of the petition in substance are as follows: The lumber yards of plaintiff are contiguous to the railroad tracks of defendant in error, and are connected therewith by sidetrack leading therefrom and to the lumber yards, all of which

Headnotes by the COURT.

Note. — As to what constitutes switching service, see annotation following this case, post, 455.
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tracks are within the proper terminal limits of the city of Cincinnati. The tracks of the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company are connected with the tracks of defendant in error, and the distance from plaintiff's tracks to the general freight house of defendant in error in said city does not exceed 5 miles. On October 2, 1911, plaintiff caused to be transported upon and over the road of the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company, from Fernbank, Hamilton county, Ohio, to its siding in the city of Cincinnati, one car of lumber, and requested that the shipment be made to its switch, known as the "Doppes switch, Cincinnati, New Orleans, & Texas Pacific Railway," and both the defendant railroad companies so transported it. Fernbank is within the switching limits of the city of Cincinnati. The Cleveland, Cincinnati, Chicago, & St. Louis Railway Company demanded and received from plaintiff for transporting said car the following amounts, viz.: Trackage charge at Fernbank \$2, switching from Fernbank to Cincinnati \$5, and the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company and defendant in error demanded and received from plaintiff for switching from the tracks of the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company on to and over the tracks of the defendant to plaintiff's siding the sum of \$6.

The railroad companies are entitled to demand and receive for said switching from the tracks of one on to and over the tracks of the other to the sidetrack of plaintiff the sum of \$2 and no more, this sum being the rate fixed by § 9000, General Code, for such service for that distance, to wit, not exceeding 5 miles, and the railroad companies, their officers and agents, violated or permitted to be violated said § 9000, and demanded, exacted, and received of plaintiff the sum of \$6 for said service, which sum is \$4 in excess of the amount authorized by law therefor.

Plaintiff in its petition says that it has been aggrieved by said overcharges, and by reason thereof it is entitled to recover from the railroad companies the sum of \$150, for which amount judgment is asked.

The railroad companies each filed an answer in which practically all the allegations of the petition are admitted to be true, but there is the averment in each of the answers that the transportation described in the petition was transportation of freight between a local station on the line of the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company and a local station on the line of the defendant in error, that the same was not a switching service, and that L.R.A.1916D.

the statute mentioned in the petition does not apply.

Plaintiff and each of the railroad companies filed a motion for judgment on the pleadings in their favor, respectively. The court of common pleas sustained the motion of the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company, and that company was dismissed from the case. The motion of defendant in error here was overruled, and that of plaintiff in error was sustained, and judgment was rendered in favor of plaintiff in error against the defendant in error in the sum of \$150.

Defendant in error, the Cincinnati, New Orleans, & Texas Pacific Railway Company, filed a petition in error in the court of appeals, and the judgment of the court of common pleas was reversed, and final judgment was rendered in its favor. Plaintiff in error is here asking for a reversal of the judgment of the court of appeals and an affirmance of that of the court of common pleas.

Messrs. Dolle, Taylor, & O'Donnell, for plaintiff in error:

Defendant must switch cars on the sidetrack of plaintiff at the rates specified in Gen. Code, § 9000.

Hay & Grain Co. v. R. 6 Ohio L. Rep. 147, 53 W. L. B. 285; Troy Wagon Works Co. v. Cincinnati, H. & D. R. Co. 16 Ohio Dec. 111, 3 Ohio N. P. N. S. 412; Rodefer v. Pittsburg, O. V. & C. R. Co. 72 Ohio St. 272, 70 L.R.A. 844, 74 N. E. 183.

The service performed by defendant was purely a switching, and not a transportation, service.

Baltimore & O. R. Co. v. Wilson, 31 Ohio St. 555; Dixon v. Central of Georgia R. Co. 110 Ga. 173, 35 S. E. 369.

The penalty provided is not so enormous or so severe as to prevent the defendant from making the defense that the rate is unreasonable.

Wadley Southern R. Co. v. Georgia, 235 U. S. 651, 59 L. ed. 405, P. U. R. 1915A, 106, 35 Sup. Ct. Rep. 214; Missouri P. R. Co. v. Tucker, 230 U. S. 340, 347, 57 L. ed. 1507, 1509, 33 Sup. Ct. Rep. 961; Minnesota Rate Cases (Simpson v. Shepard) 230 U. S. 352, 57 L. ed. 1511, 48 L.R.A.(N.S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18; Portland R. Light & P. Co. v. Portland, 210 Fed. 667; Kansas City Southern R. Co. v. Anderson, 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599; Yazoo & M. Valley R. Co. v. Jackson Vinegar Co. 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40; Seaboard Air Line R. Co. v. Seegers, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup.

Ct. Rep. 441, 14 Ann. Cas. 764; Missouri P. R. Co. v. Humes, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484.

The statute to the extent that it gives double damages is valid.

Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; Cincinnati, S. & C. R. Co. v. Cook, 37 Ohio St. 265; Iron R. Co. v. Lawrence Furnace Co. 49 Ohio St. 102, 30 N. E. 616; Toledo & O. C. R. Co. v. Wren, 78 Ohio St. 137, 84 N. E. 785.

Messrs. Harmon, Colston, Goldsmith, & Hoadley, for defendant in error:

The statute confers no rights upon any shipper.

T. B. Townsend Brick & Contracting Co. v. Central Trust Co. 109 C. C. A. 381, 187 Fed. 63.

The service performed by defendant was a transportation, not switching.

Dixon v. Central of Georgia R. Co. 110 Ga. 173, 35 S. E. 369; Sparta Gas & Electric Co. v. Illinois Southern R. Co. 155 Ill. App. 283, affirmed in 247 Ill. 346, 93 N. E. 312; Grand Trunk R. Co. v. Michigan R. Commission, 198 Fed. 1009, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

The statute under which this suit is brought is unconstitutional.

Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961; Chicago, M. & St. P. R. Co. v. Pott, 232 U. S. 165, 58 L. ed. 554, 34 Sup. Ct. Rep. 301.

Messrs. Morison R. Waite and John R. Schindel, for Cincinnati, H. & D. R. Co.:

The service was a transportation service.

Dixon v. Central of Georgia R. Co. 110 Ga. 173, 35 S. E. 369; Sparta Gas & Electric Co. v. Illinois Southern R. Co. 155 Ill. App. 283; Grand Trunk R. Co. v. Michigan R. Commission, 198 Fed. 1009, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; T. B. Townsend Brick & Contracting Co. v. Central Trust Co. 109 C. C. A. 381, 187 Fed. 63.

The penalty prescribed renders § 9002 as applied to the facts in this case unconstitutional.

Missouri P. R. Co. v. Tucker, 230 U. S. 340, 57 L. ed. 1507, 33 Sup. Ct. Rep. 961.

Newman, J., delivered the opinion of the court:

Section 8998, General Code, requires a railroad company, whose tracks lie contiguous to sidetracks suitable for loading or unloading, to switch the cars of other railroad companies, at the request of such companies or shippers, over and upon the tracks so lying by such sidetracks, for the purpose L.R.A.1916D.

of unloading freight into or from such side tracks without demurrage, for forty-eight hours. Section 9000 fixes the amounts which a railroad company owning such tracks lying contiguous to sidetracks and within the proper terminals of a city shall receive from the company whose cars are so switched, loaded, or unloaded, at such sidetracks. For a distance over 2½ miles, and not exceeding 5 miles, the maximum charge that may be made is \$2 per car.

Plaintiff in error, claiming to be an aggrieved party within the meaning of § 9002, predicates its right to recover the amount named in that section upon an alleged violation by defendant in error of the provisions of § 9000, in charging \$6 for what is alleged by it (plaintiff in error) to be a switching service, instead of \$2, the maximum amount fixed by law for the switching of a car a distance not exceeding 5 miles. If the service rendered by defendant in error, as shown by the pleadings, was not a switching service, within the meaning of § 9000, defendant in error is not liable under the provisions of § 9002.

The court of common pleas in reaching its conclusion proceeded upon the theory that the transportation of the car of lumber was completed when it reached the terminal limits of the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company. But was the court correct in this in view of the express allegations of the petition? It is alleged that plaintiff caused the car of lumber to be transported over the road of the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company from Fernbank to its siding in the city of Cincinnati, that it requested the shipment to be made to its switch, known as the "Doppes switch, Cincinnati, New Orleans, & Texas Pacific Railway," and that both of the railroad companies so transported it. It is true plaintiff calls the service rendered by defendant in error a switching service. It is equally true that it is termed transportation service by defendant in error. But the nature and character of the service is to be determined from the facts, regardless of the designation given it by the parties.

As we view it, the contract of carriage involved a transportation from Fernbank to Doppes switch, such a transportation as is provided for in § 8999, which reads: "When the tracks of two companies are so connected, either, when required, shall transport over its road to its destination thereon, any freight offered, in cars in which it is offered, at its local rates per mile as set forth in its freight tariff for the distance most nearly corresponding, and return the cars, with or without freight or unnecessary delay."

In this case the destination of the car was Doppes switch, and the fact that Doppes switch and Fernbank, from which the shipment originated, are both within the terminal limits of Cincinnati is immaterial. Mr. Justice McKenna, in *Grand Trunk R. Co. v. Michigan R. Commission*, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152, in commenting on the decision of the United States court of appeals in the same case, uses the following language, which we think is in point here: "And it was remarked that the fact that the freight movement begins and ends within the limits of a city does not take from it its character 'of an actual transportation between two termini,' the other conditions obtaining. We concur in the conclusion of the court."

The United States court of appeals had held that a service does not cease to be a transportation merely because the movement begins and ends within a city, or is only between an intracity junction or team track or side track. (D. C.) 198 Fed. 1009.

In the present case the total amount charged for the shipment from Fernbank to Doppes switch was \$13. As has been said by the Interstate Commerce Commission, it is immaterial to the shipper how the carriers divide the charge, provided it is reasonable. Whether or not it is reasonable in the case at hand is a matter with which we are not concerned, as plaintiff does not base its claim upon an excessive freight rate. It is to be presumed, however, that the railroad companies have followed the requirements of § 512, General Code, and that the rate charged for the transportation of the freight over the connecting lines was reasonable.

In *Dixon v. Central of Georgia R. Co.* 110 Ga. 173, 35 S. E. 369, it is held: "A switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned, or are to be earned."

We approve and adopt this definition.

In the Georgia case, the court, in illustrating what would be a switching or transfer service, say that if the shippers had ordered freight over the Central Railway to be shipped to Savannah from Macon, Georgia, they would be liable for regular rates for transportation from that point to the railway terminal at Savannah; and the Central Railway Company, in shipping the freight from its depot over the spur track to the shipper's place of business, would

simply be entitled to the rates fixed for such transfer service. Or, if the shippers desired the Central Railway Company to transport freight from their place of business in Savannah to Macon, and the Central Railway Company transported the goods over its spur track from the shipper's place of business to its depot, it could only charge additional, for this part of the transportation, simply the switching-service rate.

The court of common pleas did not seem to question the holding of the Georgia court, but was of the opinion that the rule announced there has no application here because of the fact that the transportation in the present case was completed when the car of the plaintiff reached its destination within the terminal limits of the Cleveland, Cincinnati, Chicago, & St. Louis Railway Company. But, as we have said, the court was in error in this, for the car did not reach its destination under the contract of carriage until it was delivered at Doppes switch.

The word "switching" is synonymous with "transferring." We think that a switching service is rendered, within the meaning of § 9000, when a car is transferred from a sidetrack, over the tracks of a railroad lying contiguous thereto, to the line of the company which is to have what is termed the "line haul," or from the line of the company which has had the line haul, over the track of the company which delivers the freight, to the siding of the shipper. In such case the railroad company receiving the car from or delivering it to the company having the line haul would be limited in its charge to the amount fixed by statute for switching service.

We have no such case here. According to our view the movement of the car in question from Fernbank to Doppes switch was a transportation service for which a reasonable freight rate could be charged. The movement of the car by defendant in error was not incidental to the shipment as a whole, but was a part of it. Our holding is that the service rendered by the defendant in error was not a switching service, within the meaning of § 9000, and therefore there could be no violation of its provisions. In view of this holding it is unnecessary to consider the other questions raised by counsel for defendant in error.

Judgment affirmed.

Nichols, Ch. J., and Johnson, Donahue, Jones, and Matthias, JJ., concur.

Annotation—Carriers: what constitutes switching service.

As to duty of carrier to accept freight originating and terminating within city L.R.A.1916D.

limits, see note to *Higdon v. Louisville & N. R. Co.* 33 L.R.A.(N.S.) 442.

The test of distinction between transportation service relatively to loaded freight cars for which a railway company can lawfully charge tonnage rate, and switching or transfer service for which it is restricted to a fixed charge per car, is not whether the movement of the cars involves the use of a portion of the company's main line or that of another; for there may be a transportation service over one or more spur tracks of the same company, if the contract of affreightment requires no movement over other tracks or lines of railway; whereas the switching or transfer service is one which precedes or follows a transportation service, and applies only to a shipment on which legal freight charges have already been earned or are to be earned. *Dixon v. Central of Georgia R. Co.* (1900) 110 Ga. 173, 35 S. E. 369. Approved in *J. B. DOPPEL SONS LUMBER CO. v. CINCINNATI, N. O. & T. P. R. Co.* ante, 452.

So, the fact that the entire service rendered by a railroad company is confined to spur tracks of the company will not prevent it from being transportation pure and simple. *Dixon v. Central of Georgia R. Co.* (Ga.) *supra*.

And so it was held that a contract of carriage from one point to another was a transportation service, although the entire service was on spur tracks and the distance was less than 3 miles, and was not a switching service within a rule of the Railroad Commission that "a charge of no more than \$2 per car will be allowed for switching or transferring a car from any point on any road to any connecting road or warehouse within a space of 3 miles from starting point, without regard to weight or contents." (Ga.) *Ibid*.

So, also, the service rendered by a railroad company in hauling cars between a town on its road and a town on the opposite side of a river, the terminal of another road over which the cars had come or are to be forwarded, was held in *Vicksburg, S. & P. R. Co. v. Railroad Commission* (1915) — La. —, 69 So. 161, not to be a switching service within the definition of such a service, and should not be declared such by a Railroad Commission.

Movement of freight between points within switching limits in cities or at terminals constitutes transportation, where the shipment begins and ends within such district, and is not preceded or followed by a transportation service for which freight charges are assessed, and such movement will be treated as L.R.A.1916D.

transportation movement between separate shipping points. *Railroad Commission v. Railroads* (La. R. Com.) P.U.R. 1915E, 33.

So, also, where a railroad company moved coal from a coal mine to a point distant less than 2 miles, the service all being performed on its own rails with its own cars, no other railroad participating in the haul or delivery, it was held in *Sparta Gas & Electric Co. v. Illinois Southern R. Co.* (1910) 155 Ill. App. 283 (affirmed in (1910) 247 Ill. 346, 93 N. E. 312), to be a transportation service, and not a switching service, within the meaning of a rule of the Railroad and Warehouse Commission which reads as follows: "Switching includes the hauling of loaded cars from the station yards, sidetracks, elevators, or warehouses to the junctions of other railroads when not billed from stations on its own road to said junctions, and from junctions of other railroads to the stations, sidetracks, elevators, and warehouses situate on the tracks owned or controlled by the railroad company doing said switching; it is that transfer charge ordinarily made for moving loaded cars for short distances for which no regular waybill is made and which do not move between two regularly established stations on the same road." The court said that "all of the elements of a regular transportation service are found in the service rendered, such as the collection of the cars and placing them for loading, the haul after they were loaded, and the loss of two days' use of the cars at the end of the haul. The service contemplated by the rules is simply moving loaded cars to or from the junction of another railroad, the cars so moved usually belonging to another road, or, if belonging to the road doing the switching, it is usually paid a per diem for the use of its cars by the junction road, but does not share in the transportation charge of the junction road."

And in *Grand Trunk R. Co. v. Michigan R. Commission* (1912) 198 Fed. 1009, affirmed in (1913) 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152, in upholding the validity of an order of the Railroad Commission requiring that railroads shall accept freight for transportation between two points within the same city, as against the contention that such a service was not transportation service but was switching service, the court said that "a service calling for the use of the so-called terminal facilities of a connecting railroad does not lose what would otherwise be the quality of transporta-

tion, from the mere facts either that the movement begins and ends within the switching or corporate limits of a city, or that the transportation is only between an intracity junction and team track or sidetrack."

Another test is whether the movement of cars is under the direction of the yard master or under orders from the train despatcher,—if the former, it is a switching service; if the latter, it is a transportation service.

Thus, a service upon a main line out-

side of a yard's limits, under orders as in cases of regular or special trains, was held in *State v. Chicago, M. & St. P. R. Co.* (1893) 88 Iowa, 445, 55 N. W. 331, not to be a switching service.

And so the court refused to sustain an order of the Railroad Commission requiring that a railroad transfer cars received at its yards from another railroad company to their destination, a place on its main line 1 mile beyond the yard limits, as a switching service. (*Iowa*) Ibid. J. H. B.

OREGON SUPREME COURT.
(Department No. 2.)

STATE OF OREGON, Resp.,
v.
CHARLES L. WALLACE, Appt.

(— Or. —, 154 Pac. 430.)

Seduction — divorcee.

1. A divorced woman is within the operation of a statute imposing a penalty on one who, under promise of marriage, shall seduce an unmarried female of previous chaste character.

For other cases, see Seduction, II. in Dig. 1-52 N. S.

Evidence — corroboration — letters — identification.

2. Letters identified only by the testimony of prosecutrix are not admissible in evidence to corroborate her in a prosecution for seduction.

For other cases, see Evidence, IV. a; IV. k, in Dig. 1-52 N. S.

(January 25, 1916.)

A PPEAL by defendant from a judgment of the Circuit Court for Lane County convicting him of seduction. Reversed.

The facts are stated in the opinion.

Messrs. W. B. Dillard and L. Blyeu, for appellant:

An unmarried woman within the intent of the statute is one that has never been married.

Jennings v. Com. 109 Va. 821, 21 L.R.A. (N.S.) 265, 132 Am. St. Rep. 946, 63 S. E. 1080, 17 Ann. Cas. 64; *Kirk v. Long*, 7 U. C. C. P. 365; *State v. Meister*, 60 Or. 474, 120 Pac. 406.

The evidence of the female alleged to be seduced must be corroborated as to all the material elements of the crime.

Burnett v. State, 76 Ark. 295, 113 Am. St. Rep. 94, 88 S. W. 957; *State v. Burns*, 110 Iowa, 745, 82 N. W. 325.

Note. — As to seduction of divorced woman or widow, see annotation following this case, post, 458.
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Conviction cannot be had on the uncorroborated evidence of an accomplice.

State v. Kelliher, 49 Or. 77, 88 Pac. 867; *Barnard v. State*, — Tex. Crim. Rep. —, 76 S. W. 475.

Letters alleged to have been written by defendant must be proved to be his by some witness other than the prosecutrix, in order to be corroborating evidence.

Carrens v. State, 77 Ark. 16, 91 S. W. 30; *Bishop v. State*, — Tex. Crim. Rep. —, 151 S. W. 821.

The prosecuting witness having had previous meretricious relations with the accused, she was not a chaste woman at the time of the act relied upon by the state for conviction, and the act charged in the indictment and relied upon for conviction could not constitute an offense.

People v. Nelson, 153 N. Y. 90, 60 Am. St. Rep. 592, 46 N. E. 1041; *Knight v. State*, 64 Tex. Crim. Rep. 541, 144 S. W. 969.

Messrs. J. M. Devers and J. F. Brumbaugh, for respondent:

The term "unmarried" in § 2076 of the statute is used in its full sense as to persons, and in a narrow sense as to time.

1 *Bishop, Crim. Law*, § 236; *Jennings v. Com.* 109 Va. 821, 21 L.R.A. (N.S.) 265, 132 Am. St. Rep. 946, 63 S. E. 1080, 17 Ann. Cas. 64; *Pratt v. Mathew*, 22 Beav. 328, 4 Week. Rep. 418.

Letters are proper corroborative evidence as introduced in the case at bar.

35 Cyc. 1355; 2 Enc. Ev. p. 694; *State v. Bennett*, 137 Iowa, 427, 110 N. W. 150; *Weaver v. State*, 142 Ala. 33, 39 So. 341; *State v. Meister*, 60 Or. 476, 120 Pac. 406; 11 Enc. Ev. 698; *Harvey v. Territory*, 11 Okla. 156, 65 Pac. 837.

A woman having had sexual relations with the accused before the date of the indictment is not necessarily unchaste.

State v. Meister, 60 Or. 485, 120 Pac. 406; *Knight v. State*, 64 Tex. Crim. Rep. 541, 144 S. W. 974; 3 *Whart. Crim. Law*, 11th ed. 2274; *State v. Dacke*, 59 Wash. 238,

30 L.R.A.(N.S.) 176, 109 Pac. 1050; Blair v. State, 72 Neb. 501, 101 N. W. 17.

Benson, J., delivered the opinion of the court:

It is contended by appellant that, since it appears conclusively from the record that at the time of the commission of the alleged crime the prosecutrix was a divorced woman, she was not "an unmarried female" within the meaning of the statute, and that therefore the defendant was entitled to an instructed verdict of acquittal. The statute under which the prosecution is maintained provides that: "If any person, under promise of marriage, shall seduce and have illicit connection with any unmarried female of previous chaste character, such person, upon conviction, shall be punished," etc.

Our attention has been called to but one reported case directly in point, namely, *Jennings v. Com.* 109 Va. 821, 21 L.R.A. (N.S.) 265, 132 Am. St. Rep. 946, 63 S. E. 1080, 17 Ann. Cas. 64, in which it was held, under a statute practically identical with ours, that the phrase "an unmarried female" should be construed to mean a woman who has never been married, and that the seduction of a divorced woman is not a violation of the law. In *Pratt v. Mathew*, 22 Beav. 328, 4 Week. Rep. 418, it is said that the word "unmarried" does not necessarily mean "without having been married," and that no fixed meaning can be assigned to it, but it must be determined according to the circumstances of the case. This authority has been cited with approval by many of the courts, and indeed is approved in the case of *Jennings v. Com.* supra, in which case the court argues that since a divorced woman has necessarily had experience in the lecherous ways of men, she is immune from their wiles and does not need the protection of the law. We cannot agree with this interpretation, however, for the spirit of the law does not and cannot take into consideration the wisdom and experience of those whom it undertakes to protect from wrong. We entertain the view that law is intended for the safeguarding of the virtue of the chaste widow just as much as for that of the woman who has never been a wife.

Upon the trial the defendant requested the court to charge the jury as follows:

"That the letters alleged to have been written by the defendant to prosecutrix were not identified or proved to be letters of the defendant except by the prosecutrix's testimony; hence they do not afford evidence corroborating prosecutrix's testimony."

This instruction was refused, and such refusal is assigned as error. The record discloses that certain letters were introduced in evidence which, according to the testimony of prosecuting witness, were written by the defendant and received by her through the mails. No other evidence was offered as to the identity of the missives, and they were relied upon by the state to corroborate the prosecutrix as to the essential elements of the crime charged. We have found but few cases which discuss the question thus presented, but all of those to which our attention has been called support defendant's contention. In a case similar to the one under consideration the court of criminal appeals of Texas says: "The prosecuting officers evidently relied on the letters said to have been written by appellant and introduced in evidence. Miss Harrison testified that the letters were written by appellant, and this rendered them admissible in evidence; but could they be used to corroborate her, when she alone testified they were written by appellant? Eliminate her testimony, and the letters go with it. If it was desired to use the letters as corroborative testimony, some evidence, other than that of Miss Harrison, should have been introduced, tending to show that appellant wrote the letters. An accomplice cannot corroborate herself. And no testimony she gives can be so used. . . . This charge should have been given." *Bishop v. State*, — Tex. Crim. Rep. —, 151 S. W. 821.

To the same effect are the cases of *Smith v. State*, 58 Tex. Crim. Rep. 106, 124 S. W. 919; *Rogers v. State*, 101 Ark. 45, 49 L.R.A.(N.S.) 1198, 141 S. W. 491; *Carrens v. State*, 77 Ark. 16, 91 S. W. 30; *James v. State*, 72 Tex. Crim. Rep. 155, 161 S. W. 472. We conclude, then, that the court erred in refusing to give the instruction as requested, and the judgment is reversed, and the cause remanded for a new trial.

Moore, Ch. J., and Burnett and McBride, JJ., concur.

Annotation—Seduction of divorced woman or widow.

Earlier cases covering the question under annotation will be found in note to *Jennings v. Com.* 21 L.R.A.(N.S.) 265.

STATE v. WALLACE, ante, 457, the prosecution in which is based on a statute practically identical with that in the L.R.A.1916D.

Jennings Case, is in direct conflict with that case. The court takes exception to the argument therein that, since a divorced woman has necessarily had experience in the lecherous ways of men, she is immune from their wiles and does not

need the protection of the law; and adopts the view that law is intended for the safeguarding of the virtue of the chaste widow just as much as for that of the woman who has never been a wife.

This view finds support in *People v. Weinstock* (1912) 140 N. Y. Supp. 455, a prosecution under a statute similar to that in the *WALLACE* and *Jennings* cases. This was a preliminary examination to determine whether the crime of seduction had been committed and whether there was sufficient cause to believe defendant guilty. It seems that prosecutrix had been married, but had been deserted by her husband, and had neither heard from nor of him for over ten years, and so she claimed the protection of the statute as an unmarried woman, asserting that the presumption of death operated in her favor. The defendant contended that prosecutrix was a married woman, and therefore unchaste, and argued that the statute was enacted solely to protect females who had never been married. In denying this contention, and holding that a widow or a divorced woman was within the contemplation of the statute, the court said that "the main purpose of the statute is to protect all women who are single at the time of the perpetration of the wrong. The absurdity that a different construction would effect must be obvious. It seems reasonable that, if a woman once fallen from virtue . . . may upon proof of reformation be the subject of seduction, then a woman who has become a widow after a married life of virtue is entitled to no less protection than the female who at some time in the

past has been guilty of illicit intercourse. It does not seem reasonable to me that the legislature ever intended any such result. I do not think that the word 'unmarried' should be construed in its narrow sense. . . . The foundations of civil society require a fair and broad meaning. The policy of the law is to protect. If previously married women are not included, it would be tantamount to saying that by marriage a woman loses the protection of the statute. Confidence and affection seem to play a great part in all cases of seduction, may not inducements lead even a previously married woman, not single, to consent?"

The only other reported case found considering the question under annotation is *Cambridge v. Sutherland* (1914) 20 D. L. R. 832, 7 Western Week. Rep. 1219, an action by a widow to recover damages for her own seduction. The only authority for bringing such an action by a person seduced was an ordinance giving such right to an "unmarried female." The court adopted the construction placed upon the term "unmarried female" in *Kirk v. Long* (1858) 7 U. C. C. P. 365, cited in earlier note, and held that it was intended to apply only to females who had never been married. This case, it will be seen, is opposed to *STATE v. WALLACE*, supra, and the *Weinstock Case* (N. Y.) supra, and is in harmony with *Jennings v. Com.*

It may be interesting in this connection to know that "the Roman law made penal the seduction of widows as well as virgins." 3 Whart. Crim. Law, 11th ed. p. 2268, note 2. J. H. B.

WISCONSIN SUPREME COURT.

A. T. ROCK, Resp.,
v.

L. P. EKERN, Appt.

(— Wis. —, 156 N. W. 197.)

Attorney and client — contract to assist prosecuting attorney — validity.

No recovery can be had on a contract between an attorney and a prosecuting witness to render assistance to the prosecuting attorney in a criminal case, although the court and prosecuting attorney acquiesce in the arrangement and the services are

Note. — As to right of attorney to compensation from private employer for assisting in prosecution in criminal case, see annotation following this case, post, 462. L.R.A.1916D.

rendered at the preliminary examination of accused, since the contract is against public policy.

For other cases, see *Contracts*, III. c, 1, in *Dig. 1-52 N. S.*

(February 1, 1916.)

APPEAL by defendant from a judgment of the Superior Court for Douglas County in plaintiff's favor in an action brought to recover for services rendered pursuant to contract in a criminal prosecution in which defendant was the complaining witness. Reversed.

Statement by Stebecker, J.:

This is an action brought by the plaintiff, an attorney at law, to recover for services rendered pursuant to a contract in a crim-

inal prosecution in which defendant was the complaining witness.

One Fowler, treasurer of a company in which defendant was interested, was charged with having embezzled some of the company's money. Plaintiff was employed by the defendant to secure requisition from the governor for the return of the accused. After the requisition was issued the accused returned to the state in response to it. A short time before the preliminary hearing of the accused the defendant entered into a contract with the plaintiff by which the plaintiff was employed by the defendant privately to assist in the criminal prosecution of the accused. The district attorney consented to this assistance. The contract reads as follows:

February 26, 1914.

A. T. Rock, the undersigned, hereby agrees to assist the district attorney of Douglas county, Wis., in the prosecution of Homer T. Fowler so long as L. P. Ekern, the complaining witness, desires the services of said Rock therein, at and for the sum of twenty-five (25) dollars per day and his expenses when called from home in said prosecution, and said L. P. Ekern hereby agrees to pay said Rock for his services said sum of twenty-five (25) dollars per day for each and every day of his services, and pay his expenses when out of Superior or Duluth, Minn., in said work.

[Signed] A. T. Rock.

L. P. Ekern.

February 26, 1914.

Received from L. P. Ekern twenty-five (25) dollars as advance fees on above contract.

[Signed] A. T. Rock.

The plaintiff assisted in the preliminary examination of Fowler, and the court, the district attorney, the lawyers of the accused, and the accused acquiesced in the plaintiff's assisting the district attorney in the prosecution of the case. Plaintiff had full charge of the case and conducted the examination. At the conclusion of the hearing the municipal judge dismissed the complaint against the accused, and that terminated the prosecution. The defendant refused to pay the plaintiff for his services as per contract, and this suit was brought to recover payment for the services rendered under the contract. The following is an itemized statement of the amount plaintiff claims is due him from defendant:
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1913.

Feb. 25.	One-half day examining books of Fowler-Eimon-Oyaas Co., at \$25 per day	\$ 12.50
Feb. 26, 27, 28.	Examining books of Fowler-Eimon-Oyaas Co., at \$25 per day	\$ 75.00
Mar. 3 to 12.	Attending trial of State of Wisconsin v. Homer Fowler, 9 days at \$25 per day	\$225.00
April 3 and 4.	Attending court in case of L. P. Ekern v. Homer Fowler at \$25 per day	\$ 50.00
Total		\$382.50

The court submitted a general verdict to the jury, who found for the plaintiff in the sum of \$212.50. The verdict contains the statement: "Of the above sum nothing is found as fees in the civil suit."

This part of the verdict is not concerned on this appeal. The court, in accordance with the verdict, entered judgment for the plaintiff to recover the sum of \$212.50, together with the costs and disbursements of the action. From such judgment this appeal is taken.

Messrs. Hanitch & Hartley, for appellant:

The contract of the plaintiff was unenforceable as against the public policy and statutes of the state.

Oborn v. State, 143 Wis. 249, 31 L.R.A. (N.S.) 966, 126 N. W. 737; Biemel v. State, 71 Wis. 444, 37 N. W. 244, 7 Am. Crim. Rep. 556; State v. Russell, 83 Wis. 330, 53 N. W. 441; State ex rel. Durner v. Huegin, 110 Wis. 221, 62 L.R.A. 700, 85 N. W. 1046, 15 Am. Crim. Rep. 332; Emery v. State, 101 Wis. 646, 78 N. W. 145; Income Tax Cases, 148 Wis. 456, L.R.A.1915B, 569, 134 N. W. 673, 135 N. W. 164, Ann. Cas. 1913A, 1147; Smith v. State, 146 Wis. 111, 33 L.R.A. (N.S.) 463, 130 N. W. 894; Frederick v. Douglas County, 96 Wis. 411, 71 N. W. 798; Gebhardt v. Holmes, 149 Wis. 436, 135 N. W. 860; Coon v. Metzler, 161 Wis. 328, L.R.A.1916B, 667, 154 N. W. 377; Bryan v. Reynolds, 5 Wis. 200, 68 Am. Dec. 55; Wight v. Rindskopf, 43 Wis. 344.

Messrs. Dietrich & Dietrich for respondent.

Siebecker, J., delivered the opinion of the court:

The plaintiff sues upon the express contract he made with the defendant, which appears in the foregoing statement. It was

agreed that the plaintiff was "to assist the district attorney of Douglas county, Wisconsin, in the prosecution of Homer T. Fowler so long as L. P. Ekern, the complaining witness, desires the services. . . . The evidence shows that the plaintiff rendered services under the contract by assisting the district attorney in conducting the preliminary examination in the municipal court for Douglas county. He claims there was due for nine days' services in attending court on such examination the sum of \$225. The jury found \$212.50 due him for such services, and included nothing for other services. The defendant challenges the right of plaintiff to recover under the contract, upon the ground that the contract is against the policy of the law and the statutes of this state and void, and that no recovery thereon will be permitted. The question of the policy of the state regarding such contracts as this was examined by this court in the case of *Biemel v. State*, 71 Wis. 444, 37 N. W. 244, 7 Am. Crim. Rep. 556. In that case an attorney who had been employed and paid for his services by a private party was permitted by the court to assist the district attorney in the prosecution of the case. This court there held that the statutes of the state providing for the election of a district attorney to act as the public prosecutor, and prohibiting him from receiving "any fee or reward from or on behalf of any prosecutor or other individual, for services in any prosecution of business to which it shall be his official duty to attend; nor be concerned as attorney or counsel for either party, other than for the state or county, in any civil action depending upon the same state of facts upon which any criminal prosecution commenced but undetermined shall depend," together with the statute vesting in the judges of the courts the power to appoint attorneys to assist the district attorney whenever the court finds it necessary and proper in prosecuting felonies and prosecutions before grand juries,—declare a policy of the state which regulates and limits the appointment of such counsel to assist in such prosecutions to attorneys who are not employed and paid by private parties, and that such counsel must be appointed by the court and paid from the public fund, and thus place such assisting attorney in the same position of impartiality as the district attorney elected by the people. The court declared: "We think it is quite clear from the reading of our statutes on the subject, as well as upon public policy, that an attorney employed and paid by private parties should not be permitted either by the courts or by the prosecuting attorney to assist in the trial of such criminal cases."

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It is emphasized in the opinion that prosecutors in criminal cases should be free from prejudice and have no private interest in prosecution. In *Wight v. Rindskopf*, 43 Wis. 344, in speaking of the duties and function of prosecuting officers, the court states that: He "is a quasi judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent. . . . He is trusted with broad official discretion, generally subject, however, to judicial control."

These views are supported in the case of *State v. Russel*, 83 Wis. 330, 53 N. W. 441. These adjudications clearly establish that employment and payment of private counsel to assist the district attorney in the prosecution of persons for crime, by private parties, is against the public policy of this state. We are of the opinion that this policy has not been changed by subsequent legislation, and must be adhered to. From the facts and circumstances shown in this case it appears that plaintiff contracted with the defendant "to assist the district attorney of Douglas county, Wisconsin, in the prosecution of Homer T. Fowler so long as L. P. Ekern [defendant], the complaining witness, desires the services of said Rock [plaintiff] therein. . . ." It is without dispute that the amount of the recovery against defendant was for services plaintiff rendered under this contract in the preliminary examination of Fowler upon defendant's complaints. The contract as proved is against the public policy of this state, and the trial court erred in permitting the plaintiff to recover thereon. The acquiescence of the accused, the court, and the district attorney to allow plaintiff to assist in the prosecution of Fowler under his private employment by defendant, does not purge the contract of employment of its illegal character, and affords no excuse to enforce it. *Wight v. Rindskopf*, supra. In *Melchoir v. McCarty*, 31 Wis. 262, 11 Am. Rep. 605, it was held: "The general rule of law is that all contracts which are repugnant to justice, or founded upon an immoral consideration, or which are against the general policy of the common law, or contrary to the provisions of any statute, are void," even where such statute does not expressly declare them void.

It is argued that the plaintiff rendered the services here involved upon the preliminary examination, and hence they are not of the class of services which are prohibited to be performed by counsel employed by private parties under this public policy. We cannot accede to this claim. A preliminary examination of a person accused of

crime is one step in the prosecution for the crime charged. It is so regarded and treated in the common law and the statutes. The court committed error in permitting the plaintiff to recover on the contract in this case.

The judgment appealed from is reversed, and the cause remanded to the Superior Court for Douglas County, with direction to enter judgment dismissing plaintiff's complaint.

Annotation—Right of attorney to compensation from private employer for assisting in prosecution in criminal case.

As to right of accused to complain because prosecution is conducted or assisted by an unofficial member of the bar, see notes to *State v. Bartley*, 24 L.R.A.(N.S.) 564, and *Flege v. State*, 47 L.R.A.(N.S.) 1106.

As to effect of appearance of special attorney or private counsel before the grand jury, see note to *Hartgraves v. State*, 33 L.R.A.(N.S.) 568.

As to right of prosecutrix in bastardy proceedings to private counsel, see note to *State v. Smith*, 33 L.R.A.(N.S.) 463.

As to right of prosecuting attorney to compensation from individual, see note to *Coggeshall v. Conner*, 39 L.R.A.(N.S.) 81.

The basis of the decision in *Rock v. EKERN*, ante, 459, that no recovery can be had on a contract of employment between a private party and an attorney, for services of the latter in assisting at the trial of a criminal case, is the rule in that jurisdiction that it is against public policy for a privately employed counsel to assist in such trials, and it is probable that the same decision would follow as a matter of course in other jurisdictions where a similar rule prevails.

But in *Price v. Caperton* (1864) 1 Duv. (Ky.) 207, the only reported case found, aside from *Rock v. EKERN*, which has considered the question under annotation, it was held that as it was not against public policy to permit a privately employed attorney to assist in a prosecution of a criminal case, an agreement to pay for such services could be enforced. The court in the course of its opinion said: "Such a contract, express

or implied, though quite common, has never, so far as we know, been adjudged void as against public policy. And why it should be so considered we are not able to perceive. It may be possible that some such employed counsel may make improper efforts to convict, regardless of the guilt or innocence of the accused. But there is scarcely as much danger that such prostitution will convict the innocent as there is that the like abuses of forensic privilege, by counsel for the accused, may acquit the guilty. On each side all the counsel are under the control of the presiding judge, who should keep all equally in their proper track; and the aid to the official attorney may also be controlled, as he always should be, by him. In many cases of atrocious crime an array of able counsel in the defense may require, for justice to the commonwealth, some assistance to her official representative in the prosecution; and in such a case it would certainly be the privilege, and might even be the civic duty, of a patriotic lawyer to aid his country in bringing to condign punishment its public enemy. . . . We cannot see any consistent reason for denouncing the mere employment or withholding a reasonable compensation, either conventional or implied." The court added, as dictum however, that a contingent fee dependent on conviction ought never to be permitted to stimulate assistant counsel; and, so far, it might be the policy of the law to withhold its remedies for enforcing such a contract.

J. H. B.

IOWA SUPREME COURT.

HENRY FREY

v.

J. T. STANGL, Appt.

(148 Iowa, 522, 125 N. W. 868.)

Appeal — refusal to compel election — substituted pleading.

1. Refusal to compel plaintiff to elect be-
L.R.A.1916D.

tween several counts of his declaration is not reversible error where the declaration is superseded before verdict by an amended and substituted one.

For other cases, see *Appeal and Error*, VII. m, 7, a, in *Dig. 1-52 N. S.*

Note. — As to right of vendee to recover back payment made upon a contract for the sale of land which does not satisfy the statute of frauds, see annotation following *Cook v. Griffith*, post, 468.

Statute of frauds — parol contract for real estate — recovering advance payment.

2. Where an oral agreement to convey real estate is not void, the vendee may recover the amount paid in part performance of it in case the vendor denies its existence, unless the vendor affirmatively shows that he is ready, willing, and able to perform on his part.

For other cases see Assumpsit, II. c, 1, in Dig. 1-52 N. S.

Assumpsit — return of purchase money — demand.

3. Demand for return of money paid on an oral contract for sale of real estate is not necessary upon repudiation of the contract by the vendor, if circumstances show that it would have been unavailing.

For other cases, see Action or Suit, I. b, 3, in Dig. 1-52 N. S.

Deposition — motion to strike — good in part.

4. A motion to strike an answer to an interrogatory in a deposition is properly overruled if a portion of it is admissible.

For other cases, see Depositions, III. in Dig. 1-52 N. S.

(April 11, 1910.)

A PPEAL by defendant from a judgment of the District Court for Carroll County in plaintiff's favor in an action brought to recover money paid on a contract for the purchase of land which had been repudiated by the vendor because not in writing. Affirmed.

The facts are stated in the opinion.

Messrs. Reynolds & Meyers, for appellant:

Plaintiff cannot recover back money paid on an oral contract without previously having made a demand therefor.

Abbott v. Draper, 4 Denio, 51, 2 Am. Dec. 139.

The oral understanding could have no effect on the previous written contract, which was required by the statute of frauds to be in writing.

Warren v. A. B. Mayer Mfg. Co. 161 Mo. 112, 61 S. W. 644; Bradley v. Harter, 156 Ind. 499, 60 N. E. 139; Browne, Stat. Fr. ¶¶ 409-414; Wood, Stat. Fr. ¶ 403.

The written contract is still in force, and before plaintiff can recover, he must show his willingness to comply with that contract, and default on the part of the defendant.

Hanson v. Gunderson, 95 Wis. 613, 70 N. W. 827.

Plaintiff was not entitled to recover until he showed defendant in default.

9 Cyc. 601; Nelson v. Plimpton Fireproof Elevating Co. 55 N. Y. 480; White v. Day, 56 Iowa, 248, 9 N. W. 210; Smith v. Cedar Rapids & M. R. Co. 43 Iowa, 239. L.R.A.1916D.

Messrs. W. C. Saul and Charles C. Helmer, for appellee:

Where a person has been guilty of fraud, he will not be permitted to shelter himself behind the statute of frauds.

Bazemore v. Mullins, 52 Ark. 207, 12 S. W. 474; Martin v. Martin, 170 Ill. 639, 62 Am. St. Rep. 411, 48 N. E. 924; Smelling v. Valley, 103 Mich. 580, 61 N. W. 878; Sathre v. Rolfe, 31 Mont. 85, 77 Pac. 431; Holliday v. Perry, 38 Ind. App. 588, 78 N. E. 877; Powell v. Yearance, 73 N. J. Eq. 117, 67 Atl. 892.

Where the vendor under an oral contract for the sale of land declines to perform, and sets up the statute of frauds, an action at law will lie against him for any part of the purchase price he has received.

Littell v. Jones, 56 Ark. 139, 19 S. W. 497; Pressnell v. Lundin, 44 Minn. 551, 47 N. W. 161; Whitaker v. Burrows, 24 N. Y. Supp. 1011; Durham Consol. Land & Improv. Co. v. Guthrie, 116 N. C. 381, 21 S. E. 952; Moore v. Powell, 6 Tex. Civ. App. 43, 25 S. W. 475; Welch v. Darling, 59 Vt. 136, 7 Atl. 547; Allen v. Richards, 83 Mo. 55; Tucker v. Grover, 60 Wis. 233, 19 N. W. 92; Nelson v. Shelby Mfg. & Improv. Co. 96 Ala. 515, 38 Am. St. Rep. 116, 11 So. 695; Interstate Hotel Co. v. Woodward & B. Amusement Co. 103 Mo. App. 198, 77 S. W. 114.

Ladd, J., delivered the opinion of the court:

The parties hereto entered into a written contract March 11, 1904, by the terms of which plaintiff undertook to buy of the defendant, for the consideration of \$16,000, 240 acres of land in Missouri. Therein he agreed to assume the payment of an indebtedness of \$6,000 and another of \$6,200, secured by trust deeds of the land, to execute a note to defendant for \$2,300 upon taking possession of the same, with a deed of trust securing it, March 1, 1905, and presently to execute a note for \$1,500, payable without interest on that day. The instrument contained no recitals of what was required of defendant. On the same day the plaintiff executed his note of \$1,500, payable to defendant, and the latter, shortly thereafter, indorsed it to a local bank. The deal was never closed, but the plaintiff paid the note January 18, 1905, and in this action seeks to recover the amount so paid, with interest. The original petition was in three counts, but as this was superseded by an amended and substituted petition, after introduction of the plaintiff's evidence in chief, the defendant was in no wise prejudiced by the refusal of the court to require plaintiff to elect on which count of the original petition he would proceed. The

issues as finally joined involved inquiries as to whether, because of misrepresentations as to the date of the maturity of the indebtedness secured by trust deeds, the written contract was abandoned, and an oral agreement modifying it or in lieu thereof was entered into, as to whether the note of \$1,500 was paid by plaintiff to relieve himself of any obligation under the written contract or in part performance of the oral agreement, and as to whether, in the latter event, the statute of frauds of the state of Missouri operated to defeat recovery. The defendant expressly denied the making of any oral agreement for the sale of the land, and alleged that, if one was made, such statutes rendered it unenforceable.

That the written contract was abandoned and a subsequent oral agreement for the purchase of the land entered into which was not fully performed appears from the evidence. Whether the \$1,500 was paid to release plaintiff from his obligation under the written contract or in part performance of the subsequent oral agreement was submitted to the jury, and rightly so, as the evidence bearing thereon was in conflict. There was also a conflict in the evidence as to whether, as a part of the oral agreement, plaintiff undertook to execute new trust deeds and deliver to defendant his note secured by trust deeds on the land, and, because of the exactions of the party holding these, refused to carry out the oral agreement, or whether under this defendant was to procure the extension of time of payment of the indebtedness either under the existing trust deeds or upon the execution of new ones, and, owing to said exactions, he did not comply. In other words, there was some conflict in the evidence as to which party was at fault in not executing the oral understanding between them.

The main contention of appellant in argument is that the evidence concerning the oral understanding of the parties was not admissible because of the statute of frauds of the state of Missouri, where the parol agreement was had. Conceding, without deciding, that the statute of that state is controlling, and that part payment did not operate as an exception thereto, it is to be said that the design of this action is not to enforce an oral modification of the written agreement or subsequent oral contract, but to compel the restitution of the money paid as part performance thereof. If the vendee paid the money on faith and in part performance of a nonenforceable oral agreement, the law implies a promise on the part of the vendor to repay the same, or else perform on his part. *Tucker v. Grover*, 60 Wis. 223, 19 N. W. 92; *Littell v. Jones*, 56 L.R.A.1916D.

Ark. 139, 19 S. W. 497; *Pressnell v. Lundin*, 44 Minn. 551, 47 N. W. 161; *Welch v. Darling*, 59 Vt. 136, 7 Atl. 547; 29 Am. & Eng. Enc. Law, 2d ed. 836. These are decisions to the effect that the right of recovery depends solely upon whether the contract is binding on the vendor; holding that, if not, then recovery may be had for the part performance, regardless of who in fact repudiated the parol agreement. *Reynolds v. Harris*, 9 Cal. 338; *Flinn v. Barber*, 64 Ala. 193; *Brandeis v. Neustadt*, 13 Wis. 142. But the great weight of authority in this country, as well as in England, is to hold that where the vendee has repudiated a parol agreement, or where the vendor stands ready, able, and willing to perform his contract, the latter may successfully defend by setting up the express contract and his readiness to comply therewith. The difference in the rulings seems to depend on the wording of statutes, those construed in the cited cases declaring an oral contract for the sale of land void. In this state such contracts are valid; the statute merely prescribing the rule of evidence concerning their proof. As between the parties, such agreement may be enforced as fully as though in writing, unless denied by the pleading, and may be established by the testimony of the adverse party. Code, §§ 4627, 4628. What may be the procedure in Missouri does not appear from the record, but the rule as last stated prevails in that state. *Luckett v. Williamson*, 37 Mo. 388; *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351.

As the contract is not void, it is manifest that the vendee may not recover money paid in part performance, if he has elected to repudiate the agreement, or if the vendor is ready, able, and willing to perform the agreement on his part. The authorities in general so hold. Thus, in *Shaw v. Shaw*, 6 Vt. 69, the court said: "When one party has partly performed under such a contract, he cannot recover from what he has done, unless the other party insist upon the statute and refuse to perform. This is too obviously just to require comment, and to disregard it would do violence to every leading principle. The contract cannot be considered void as long as he for the protection of whose rights the statute is made is willing to treat and consider the contract good." *Lane v. Shackford*, 5 N. H. 130: "We are of opinion that the plaintiff is not at liberty to treat the contract for the sale of the land in this case as void, unless the defendant refused, or disabled himself, to perform it. If one man contracts with another to perform labor, and receive as a compensation the conveyance of a particular tract of land, although the contract to convey the land is not a proper foundation

for an action, yet still common honesty and fair dealing require that he shall not be at liberty to refuse the land and demand money until the other party has refused to execute the contract. But we have no doubt that in general, when a contract within the statute of frauds has been in part executed by one party, there is a plain remedy for such party to a certain extent in a court of law, if the other party fraudulently refuse to execute the contract on his part. If money has been paid, it may be recovered back. If labor has been performed, a compensation for it may be recovered." *Coughlin v. Knowles*, 7 Met. 57, 39 Am. Dec. 759: "The provisions of the statute are not so broad as to entitle a party who has entered into an oral contract by which he is to receive a conveyance of land, and towards payment for which he has made advances in money, to set aside such contract as a nullity, and reclaim the money so advanced, the other party being no way in fault, but being both able and ready to perform his contract, and to make the conveyance in the manner stipulated by the oral agreement." See also *Eaton v. Eaton*, 35 N. J. L. 200; *Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76; *Crabtree v. Welles*, 19 Ill. 55; *Venable v. Brown*, 31 Ark. 564, where it is said: "Where a party has paid money, or delivered property on a parol contract for the purchase of land, which is void by the statute of frauds, he cannot maintain an action . . . [to recover back] the money or property so paid or delivered, so long as the other party [to whom the money has been paid, or property delivered] is able and willing to perform." *Richards v. Allen*, 17 Me. 296.

The reason for the ruling is thus stated in *Abbot v. Draper*, 4 Denio, 51, 2 Am. Dec. 139: "When the vendor refuses to go on with the contract, or has parted with his title so that he cannot perform, he is then in the wrong, and, having himself put an end to the contract, there is no longer any consideration for the payments which have been made under it; and the law will imply a promise to restore the money. But how can the law imply a promise to refund the money so long as the vendor is not in default? The payment was a voluntary one, made with a full knowledge of all the facts. Every time a payment was made and received the parties virtually said, 'Although the law will not enforce this contract, we will go on and carry it into effect.' The money is not received as a loan, but as a payment; and, so long as the vendor is able and willing to perform the contract on his part, he holds the money as owner, and not as a debtor. The consideration upon which the money was paid has not failed; and there is nothing from which a promise

to repay can be justly implied." See *Brown on Statute of Frauds*, § 122. It will be noted that defendant did not plead his readiness or ability to perform, and not only denied the making of the parol agreement, but interposed the statute of frauds of the state of Missouri as a defense. Though this did not constitute a defense to an action like this, it did indicate a denial of any obligation to perform the oral agreement if such there were; and surely in this state of the record it cannot be assumed that, had plaintiff performed his part, the defendant would have conveyed the land. Even though plaintiff did not perform as agreed, recovery of the money paid in part performance ought not to be denied, unless it affirmatively appear that defendant was ready, willing, and able to have performed on his part; otherwise, such part performance was without consideration. In other words, the denial of making the contract and the interposition of the statute of frauds amounted to a repudiation of the oral contract, if any there was, and, if the \$1,500 was paid in part performance of the oral agreement, the plaintiff, in view of the condition of the pleadings, was entitled to recover. This in effect was what the jury were told in the eighth and ninth instructions. Ordinarily a previous demand is essential in such a case. *Abbot v. Draper*, supra. The circumstances, however, were such as to show conclusively that it would have been unavailing. Though defendant had a deed duly executed by his wife in his possession, he did not join therein to deliver the deed, but, without so doing or restoring the money to plaintiff, immediately left the state, and communicated with him no further. This conduct obviated the necessity of a demand, as it plainly demonstrated an intention to appropriate the money previously paid.

The motion to strike the entire answer to the second interrogatory propounded in the deposition of Flook was rightly overruled; for, conceding a part to have been improper, the remainder was admissible. No error appears in the ruling on the motion to suppress this deposition; the record not disclosing that the motion was filed in apt time. Code, § 4712. As the answer to the second interrogatory propounded to the witness Kirk was included in that to the first cross-interrogatory, the motion to suppress his deposition was rightly overruled. The papers in the attachment proceedings in the suit of the Bank v. Defendant were admissible as bearing on the arrangement in pursuance of which the note was paid.

We discover no error in the record, and the judgment is affirmed.

WEST VIRGINIA SUPREME COURT
OF APPEALS.

HARVEY COOK

v.

JOHN R. GRIFFITH, Plff. in Err.

(— W. Va. —, 86 S. E. 879.)

Vendor and purchaser — noncompliance with contract — recovery of payments.

Where the vendor in an oral contract for the sale and purchase of land, voidable by the statute of frauds, is able, ready, and willing to execute the contract on his part by making, executing, and delivering to the vendee a good and sufficient deed for the land, upon payment to him of the balance of purchase money, or otherwise complying with his contract, the vendee cannot, in an action at law, recover back money paid the vendor on account of the purchase money. *For other cases, see Vendor and Purchaser, I. in Dig. 1-52 N. S.*

(October 19, 1915.)

ERROR to the Circuit Court for Raleigh County to review a judgment in plaintiff's favor in an action brought to recover back an amount paid by him to defendant under an oral contract for the purchase of an undivided interest in certain land. Reversed.

The facts are stated in the opinion.

Messrs. T. N. Read and John M. Anderson, for plaintiff in error:

Plaintiff, under the law, cannot recover money voluntarily paid to defendant with full knowledge of all the facts at the time he made such payment.

Beard v. Beard, 25 W. Va. 486, 52 Am. Rep. 219; Haigh v. United States Bldg. Land & L. Asso. 19 W. Va. 792; Richmond v. Judah, 5 Leigh, 305; Burton v. Burton, 10 Leigh, 600; West Virginia Transp. Co. v. Sweetzer, 25 W. Va. 443; 22 Am. & Eng. Enc. Law, p. 600; 30 Cyc. 1298, 1313, 1322; 20 Cyc. 298; Clark, Contr. §§ 129, 134.

Plaintiff having repudiated the contract and refused to perform his part, and defendant being not in default, and at all times being ready, able, and willing to perform the contract on his part, plaintiff cannot recover money paid under the contract.

22 Am. & Eng. Enc. Law, 632, 633, note 1; Richards v. Allen, 17 Me. 296; McKinney v. Harvie, 38 Minn. 18, 8 Am. St. Rep.

Headnote by MILLER, J.

Note.—As to right of vendee to recover back payments made upon a contract for the sale of land which does not satisfy the statute of frauds, see annotation following this case, post, 468. L.R.A.1916D.

640, 35 N. W. 668; Galway v. Shields, 66 Mo. 313, 27 Am. Rep. 351; Cobb v. Hall, 29 Vt. 510, 70 Am. Dec. 432; Sims v. Hutchins, 8 Smedes & M. 328, 47 Am. Dec. 90; Coughlin v. Knowles, 7 Met. 57, 39 Am. Dec. 759; Galvin v. Prentice, 45 N. Y. 162, 6 Am. Rep. 58; 2 Page, Contr. § 740; Potts v. Fitch, 47 W. Va. 67, 34 S. E. 959; Mankin v. Jones, 68 W. Va. 422, 69 S. E. 981.

Messrs. File & File, for defendant in error:

The contract was within the statute of frauds and unenforceable.

Griffith v. Cook, 74 W. Va. 452, L.R.A. —, —, 82 S. E. 256; Dunphy v. Ryan, 116 U. S. 491, 29 L. ed. 703, 6 Sup. Ct. Rep. 486; Walker v. Herring, 21 Gratt. 678, 8 Am. Rep. 616.

The contention of defendant that he holds the title to one third of the lands purchased by him under this contract, in trust for the benefit of Cook, cannot be sustained.

Nash v. Jones, 41 W. Va. 769, 24 S. E. 592; McGraw v. Bower, 62 W. Va. 420, 59 S. E. 175; Perry, Trusts, 2d ed. § 133; Harris v. Elliott, 45 W. Va. 245, 32 S. E. 176.

The mere fact that this action is based on a different demand growing out of the same contract does not prevent this question from being *res judicata*.

West Virginia Nat. Bank v. Spencer, 71 W. Va. 678, 77 S. E. 269; Roller v. Murray, 71 W. Va. 161, L.R.A.1915F, 984, 76 S. E. 172, Ann. Cas. 1914B, 1139; Custer v. Hall, 71 W. Va. 119, 76 S. E. 183.

This action is not on the contract, but on an implied promise to pay, and no demand was necessary.

4 Cyc. 336; Hoff's Pleading & Forms, § 93, p. 79; Mankin v. Jones, 68 W. Va. 422, 69 S. E. 981; Scott v. Bush, 26 Mich. 418, 12 Am. Rep. 311; Nelson v. Shelby Mfg. & Improv. Co. 38 Am. St. Rep. 117, and note p. 133, 96 Ala. 515, 11 So. 695.

Money paid on an oral contract for the purchase of land, which is within the statute of frauds, may be recovered under the common count in *assumpsit* as money had and received for the use of the purchaser, and a previous demand is not necessary, although demand is shown to have been made in this case.

Mankin v. Jones, 68 W. Va. 422, 69 S. E. 981; Scott v. Bush, 26 Mich. 418, 12 Am. Rep. 311; Nelson v. Shelby Mfg. & Improv. Co. supra; Dunphy v. Ryan, 116 U. S. 491, 29 L. ed. 703, 6 Sup. Ct. Rep. 486.

Money paid under a contract within the statute of frauds may be recovered, notwithstanding the willingness of the vendor to perform, because the statute of frauds was as much designed to protect the vendee as the vendor of land, and its primary effect is to prohibit an action for the breach of an

oral contract falling within its terms, either against the vendor or vendee.

Brown v. Gray, 68 W. Va. 555, 70 S. E. 276; *Hissam v. Parrish*, 41 W. Va. 686, 56 Am. St. Rep. 892, 24 S. E. 600; *Scott v. Bush*, 26 Mich. 418, 12 Am. Rep. 311; *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6; *Dunphy v. Ryan*, *supra*.

An oral contract within the statute of frauds cannot be made the ground of a defense any more than of a demand; the obligation of the plaintiff to perform the contract is no more available to the defendant in the former case than the obligation of the defendant to perform it would be to the plaintiff in the latter case.

Bernier v. Cabot Mfg. Co. 71 Me. 506, 36 Am. Rep. 343; *Allen v. Booker*, 2 Stew. (Ala.) 21, 19 Am. Dec. 33; 2 Page, Contr. § 740; 20 Cyc. 304; *Thompson v. New South Coal Co.* 135 Ala. 630, 62 L.R.A. 551, 93 Am. St. Rep. 49, 34 So. 31; *Lemon v. Randall*, 124 Mich. 687, 83 N. W. 994.

The right of the plaintiff to recover was a question of law, and not of fact; the law on the facts being for the plaintiff, it was the duty of the court to disregard the verdict of the jury, and render judgment for the plaintiff.

23 Cyc. 779; 4 Minor's Inst. pt. 1, pp. 946, 947; 1 Black, Judgm. § 16; *Mason v. Harper's Ferry Bridge Co.* 28 W. Va. 639.

Miller, J., delivered the opinion of the court:

In the case of *Griffith v. Cook*, 74 W. Va. 452, L.R.A.—, —, 82 S. E. 256, Cook, by pleading and relying on the statute of frauds, defeated Griffith, in an action against him for the balance of purchase money claimed as due from Cook, for an interest in six several tracts of land sold him.

In the present suit Cook sued Griffith in assumpsit to recover back the amount of purchase money paid Griffith, as he claims, in full for an interest in one of said tracts, and which Griffith had refused to convey him, but as Griffith contends, in part payment for an interest in all six of said tracts, and which he was then and had been able, ready, and willing to convey him on payment of the balance of purchase money due him therefor.

On the trial below, on the defendant's plea of nonassumpsit, and two special interrogatories submitted to the jury on plaintiff's motion, to be answered and returned with their verdict, the jury found for the defendant, and the interrogatories and their answers thereto were as follows: "Question 1. Did Cook agree to take an interest in any lands other than the C. C. Moomaw tract?" Answer, "Yes." "Question 2. Was L.R.A.1916D.

the contract for an interest in all the tracts of land, as claimed by John R. Griffith?" Answer, "Yes."

By the judgment complained of, the court, on motion of plaintiff to set aside the verdict and, non obstante veredicto, enter judgment in his favor, and of defendant, to enter judgment on the verdict in his favor, adjudged that the motion of defendant be overruled, that the verdict for defendant be set aside; and, notwithstanding the verdict, the court finding independently of the jury that there was due and owing from defendant to plaintiff the sum of \$1,690.77, it was thereupon considered and ordered that plaintiff recover of defendant said sum with interest from date, with the costs of the suit.

This action of the court on these motions was evidently based on the theory that the defense interposed by Griffith was bad and immaterial, and that, in view of the judgment against him in *Griffith v. Cook*, *supra*, no other or valid defense could be interposed by him. *Mason v. Harper's Ferry Bridge Co.* 28 W. Va. 639; 23 Cyc. 779; 1 Black, Judgm. § 16; 4 Minor's Inst. pt. 1, pp. 946, 947.

As the jury on the interrogatories submitted found against the plaintiff on the question whether his contract was for an interest in one of said tracts only, or for an interest in all six of said tracts, binding him, the single and decisive question now presented for decision is, can a vendee in a parol contract for the sale and purchase of land recover back money voluntarily paid by him to the vendor, when the latter is able and stands ready and willing, on payment of the balance of purchase money, to execute the contract on his part, by making, executing, and delivering to the vendee a good and sufficient deed for the property? Quite a long line of decisions answer this question in the negative. *Coughlin v. Knowles*, 7 Met. 57, 39 Am. Dec. 759; *Sims v. Hutchins*, 8 Smedes & M. 328, 47 Am. Dec. 90; *Cobb v. Hall*, 29 Vt. 510, 70 Am. Dec. 432; *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351; *Day v. Wilson*, 83 Ind. 463, 43 Am. Rep. 76; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640, 35 N. W. 668; *Ketchum v. Evertson*, 13 Johns. 359, 7 Am. Dec. 384; *Galvin v. Prentice*, 45 N. Y. 162, 6 Am. Rep. 58. The rule is different, of course, where the vendor is unable or refuses to execute the contract on his part. In such case the vendee may recover, not upon the oral contract, but on a contract which the law implies to refund the amount paid as for money had and received to use of plaintiff. *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 43, 18 Am. Rep. 142; *Sims v. Hutchins*, 8 Smedes

& M. 328, 47 Am. Dec. 90; *Jellison v. Jordan*, 68 Me. 373; *Nugent v. Teachout*, 67 Mich. 571, 35 N. W. 254.

There are decisions holding with the views of plaintiff's counsel, that money so paid may be recovered by the vendee, notably *Brown v. Pollard*, 89 Va. 696, 17 S. E. 6; *Nelson v. Shelby Mfg. & Improv. Co.* 96 Ala. 515, 38 Am. St. Rep. 116, 11 So. 695. In Alabama and Michigan, and in some of the other states, contracts falling within the purview of the statute of frauds are thereby declared to be absolutely void and unenforceable; while our statute amounts rather to a rule of evidence. Indeed, the subject of the chapter, chapter 98, Code 1913, is, "Of Written Evidence," and the subject of the first section (§ 4171) is: "When Written Evidence Required to Maintain Action," and it provides that "no action shall be brought in any of the following cases," naming them, and including among others the case of a contract for the sale of real estate or the lease thereof for more than a year. The Virginia statute is substantially like our own, but in the Virginia case last cited, following the Michigan cases, the court seems to treat the Virginia statute as rendering void contracts of this character. The decision in *Nelson v. Shelby Mfg. & Improv. Co.* supra, seems to be predicated, to some extent, at least, upon the statute of Alabama, declaring contracts for the sale and purchase of land,

not in writing and signed by the party to be charged therewith, absolutely void. Under our decisions, the statute of frauds, to constitute a defense, must be pleaded, and where there has been such partial performance thereof by one of the parties as to render it fraudulent on the part of the other to withhold performance, specific execution will be decreed. *Miller v. Lorentz*, 39 W. Va. 160, 19 S. E. 391, and the many cases collated and referred to by Judge Holt in his opinion, 39 W. Va. at pages 171 et seq. And some of our cases go so far as to decree specific performance of an oral contract for the sale and purchase of land where the pleadings admit the contract, and the statute of frauds is not pleaded or relied on. *Moore, K. & Co. v. Ward*, 71 W. Va. 393, 43 L.R.A.(N.S.) 390, 76 S. E. 807, Ann. Cas. 1914C, 263, and cases cited. After due consideration of the legal principles involved and the authorities cited, our conclusion is to hold with the majority of the decided cases, and to answer the question propounded above as decisive of the case, as those authorities do, in the negative.

The judgment below will, therefore, be reversed, and a judgment entered here reinstating the verdict, and that the plaintiff take nothing by his action, and that the defendant recover of the plaintiff his costs incurred in this court, as well as those incurred in the Circuit Court in this behalf expended.

Annotation—Right of vendee to recover back payments made upon a contract for the sale of land which does not satisfy the statute of frauds.

As to action for purchase price on contract for the sale of land where deed has been delivered, see note to *Malzer v. Schisler*, 51 L.R.A.(N.S.) 77; and see also *Birch v. Baker* (N. J.) post, 485.

A question closely analogous to that now under consideration is dealt with in the note to *Jackson v. Stearns*, 37 L.R.A.(N.S.) 639, on "Right to recover value of services rendered in consideration of a contract to convey or devise property which is void by the statute of frauds."

The right to compensation for improvements on land, made in good faith, under an oral contract or gift, is treated in the note to *Luton v. Badham*, 53 L.R.A. 337; and the liability of the purchaser for rents or for use and occupation where the vendor refuses to perform, in the note to *Grainger v. Jenkins*, L.R.A.1915E, 404.

The present note, of course, deals with the right of the vendee to recover back payments on the purchase price only so L.R.A.1916D.

far as it is affected by the statute of frauds. Generally as to rescission of contracts of sale of real property, see Index to L.R.A. Notes, under the title, "Vendor and Purchaser."

The question now under annotation presupposes that originally the agreement was within the statute of frauds, and not enforceable by or against either party. In most states, under a statute requiring the agreement to be signed by the "party to be charged," the contract may be enforced either at law or in equity against the vendee if signed by him, although not signed by the vendor (see notes in 28 L.R.A.(N.S.) 680, and 43 L.R.A.(N.S.) 410). In that case, of course, the vendee cannot, merely because of the statute of frauds, recover back what he has paid on the purchase price. However, in some jurisdictions, either because of an unusual construction of the phrase "party to be charged," or because of the express terms of the

statute, it is necessary, in order to bind either party, that the contract or memorandum be signed by the party by whom the sale is to be made, and, if so signed, it is enforceable at law or in equity by or against either party (see notes in 28 L.R.A.(N.S.) 680, and 43 L.R.A.(N.S.) 410). In such case, of course, the question now under annotation cannot arise.

Where vendor is unable or unwilling to perform.

It is settled, with practically no dispute, that the purchaser of land, or an interest therein, under a contract which does not satisfy the statute of frauds, may recover, as upon an implied promise, the amount he has paid, as a deposit, or upon the purchase price, where, without fault on his part, the vendor refuses, or is unable, to perform the contract by conveying such title or interest as the contract calls for.

Fed.—Dudley v. Hayward (1882) 11 Fed. 543.

Ala.—Allen v. Booker (1829) 2 Stew. (Ala.) 21, 19 Am. Dec. 33; Head v. Sanders (1914) 189 Ala. 443, 66 So. 621.

Ark.—Littell v. Jones (1892) 56 Ark. 139, 19 S. W. 497.

Ga.—Jay v. Sweatt (1911) 8 Ga. App. 481, 70 S. E. 16.

Idaho—Amonson v. Idaho Development Co. (1914) 25 Idaho, 615, 139 Pac. 352.

Ill.—Bergtold v. Worthy (1913) 182 Ill. App. 379.

Ind.—Barickman v. Kuykendall (1841) 6 Blackf. 21.

Kan.—Robertson v. Talley (1911) 84 Kan. 817, 115 Pac. 640; Sellers v. Bell (1901) 10 Kan. App. 581, 63 Pac. 457.

Ky.—Fox v. Longly (1818) 1 A. K. Marsh. 388; Hunt v. Sanders (1819) 1 A. K. Marsh. 552; Dougherty v. Goggin (1829) 1 J. J. Marsh. 374; Brown v. East (1827) 5 T. B. Mon. 405; Craig v. Prather (1841) 2 B. Mon. 9; McBrayer v. Thomas (1901) 23 Ky. L. Rep. 1179, 64 S. W. 906; Reid v. Reid (1911) 141 Ky. 402, 133 S. W. 219.

Me.—Richards v. Allen (1840) 17 Me. 296; Kneeland v. Fuller (1863) 51 Me. 518; Segars v. Segars (1880) 71 Me. 530; Harkness v. McIntire (1884) 76 Me. 201.

Md.—Colonial Park Estates v. Massart (1910) 112 Md. 648, 77 Atl. 275.

Mass.—Thompson v. Gould (1838) 20 Pick. 134.

Mich.—Wright v. Dickinson (1887) 67 Mich. 580, 11 Am. St. Rep. 602, 35 N. W. 164 (s. c. subsequent appeal (1889) 67 Mich. 590, 42 N. W. 849).

Minn.—Payne v. Hackney (1901) 84 L.R.A.1916D.

Minn. 195, 87 N. W. 608; Larson v. O'Hara (1906) 98 Minn. 71, 116 Am. St. Rep. 342, 107 N. W. 821, 8 Ann. Cas. 849.

Mo.—Andrews v. Broughton (1898) 78 Mo. App. 179 (s. c. on subsequent appeal (1900) 84 Mo. App. 640).

N. H.—Lane v. Shackford (1830) 5 N. H. 130; Luey v. Bundy (1838) 9 N. H. 298, 32 Am. Dec. 359.

N. Y.—Gillet v. Maynard (1809) 5 Johns. 85, 4 Am. Dec. 329; Whitaker v. Burrows (1893) 71 Hun, 478, 54 N. Y. S. R. 409, 24 N. Y. Supp. 1011.

N. C.—Ford v. Stroud (1909) 150 N. C. 362, 64 S. E. 1.

Ohio.—Buck v. Waddle (1824) 1 Ohio, 357.

Pa.—Hughes v. Heintzleman (1884) 2 Walk. 126; Milligan v. Dick (1884) 107 Pa. 259; Durham v. Wick (1904) 210 Pa. 128, 105 Am. St. Rep. 789, 59 Atl. 824, 2 Ann. Cas. 929.

R. I.—Arnold v. Garst (1887) 16 R. I. 4, 11 Atl. 167.

Tenn.—Pipkin v. James (1839) 1 Humph. 325, 34 Am. Dec. 652; Shied v. Stamps (1854) 2 Sneed, 175; Winters v. Elliott (1878) 1 Lea, 676.

Vt.—Hawley v. Moody (1852) 24 Vt. 603; Gifford v. Willard (1883) 55 Vt. 36; Bedell v. Tracy (1892) 65 Vt. 494, 26 Atl. 1031.

Wis.—Thomas v. Sowards (1870) 25 Wis. 631; Tucker v. Grover (1884) 60 Wis. 233, 19 N. W. 92; Miller v. Metz (1899) 103 Wis. 220, 79 N. W. 213.

Eng.—Gosbell v. Archer (1835) 2 Ad. & El. 500, 4 Nev. & M. 485, 1 H. & W. 31, 4 L. J. K. B. N. S. 78.

This rule is also assumed by the cases subsequently cited denying the purchaser's right to recover where the vendor is ready, able, and willing to perform his contract, and is sustained a fortiori by the cases upholding the purchaser's right to recover even in such circumstances. So, as shown in the note to Jackson v. Stearns, 37 L.R.A.(N.S.) 639, it is well settled that where services have been rendered in consideration of a contract to convey which does not satisfy the statute of frauds, and the vendor has either refused, or become unable, to perform on his part, the vendee may recover on a quantum meruit for the value of the services.

When the vendor refuses, or is unable, to perform the oral agreement, the rule which permits recovery by a purchaser of what he has paid upon the agreement applies whether the statute, like the 4th section of the original statute of frauds, declares that no action

shall be brought on the agreement, or, like the statutes in Alabama, Michigan, New York, Wisconsin, and some other states, declares the oral agreement void.

It will be noted that the rule does not give effect to the oral agreement contrary to the statute; but the recovery rests upon an implied promise, raised by law, on the part of the vendor, to restore what he has received from the purchaser in consideration of the agreement, which cannot be enforced against him, and which he is unable or unwilling to perform.

As observed by the court in *Craig v. Prather* (1841) 2 B. Mon. (Ky.) 9, referring to contracts within a statute which declares that no action shall be brought, such contracts, though not void, are not enforceable, and the failure or refusal of the vendor to perform renders the payment by the purchaser a payment without consideration, and it may be recovered back upon an implied promise to refund.

Assuming that the vendor is unable or unwilling to perform the contract, it is not important to inquire as to the precise nature and basis of the implied promise,—whether it arises in the first instance from the receipt by the vendor of money paid under an agreement which, by reason of the statute of frauds, cannot be enforced against him, or from his subsequent refusal or inability to perform,—but, as subsequently shown, that point becomes important when the vendor is ready, willing, and able to perform; and will be discussed in connection with that situation.

The rule stated in the beginning of the note was applied in *Thompson v. Gould* (1838) 20 Pick. (Mass.) 134, by upholding the vendee's right to recover back the purchase price paid, where, before the deed was tendered, the house on the property was destroyed by fire.

In *Cross v. Iler* (1906) 103 Md. 592, 64 Atl. 33 (a bill in equity), where land had been purchased with money furnished by plaintiff under an oral agreement to convey a portion of the same to her, which agreement could not be enforced because of the statute of frauds, it was held that the plaintiff might recover the money. See, to similar effect, *Schroeder v. Loeber* (1892) 75 Md. 195, 23 Atl. 279, 24 Atl. 226.

When one agrees orally that, for a certain sum to be paid him, he will procure a deed to another from the owner of a tract of land, and, under color of such agreement, delivers a paper purporting to be such a deed, and receives

the stipulated amount, he is liable for a return of the money upon the instrument turning out to be a forgery, regardless of what he may have paid to the person of whom he obtained it, and notwithstanding his own good faith in the transaction. *Robertson v. Talley* (1911) 84 Kan. 817, 115 Pac. 640.

In *Herrick v. Newell* (1892) 49 Minn. 198, 51 N. W. 819, the rule was applied to an oral contract for the sale of timber, the vendor having disabled himself to perform by selling the real estate to another.

And in *Arnold v. Garst* (1887) 16 R. I. 4, 11 Atl. 167, it was held that an action in assumpsit would lie by the purchaser to recover back the excess over the agreed purchase price, which, by the vendor's misrepresentations, he was induced to pay, although the contract was by parol. The court observed that the action was not brought to charge defendant on his oral contract, but upon an implied contract to refund money which, in consequence of his misrepresentations, the plaintiff had paid in excess of the contract price.

And in *Thayer v. Viles* (1851) 23 Vt. 494, where property had been conveyed by a quitclaim deed, but the title was not good, it was held that the grantee might maintain an action upon an implied promise of the vendor in such case to return the money. *Redfield, J.*, said: "If this action merely concerns the price of land, it is not a matter which, by the statute of frauds, is required to be in writing. It has often been decided that an action for the price of land which has already been conveyed might be maintained upon merely oral evidence." (See, as to latter point, note in 51 L.R.A. (N.S.) 77.)

Where the vendor refuses to perform, the vendee may recover back the payments on the purchase price, even though he has acquired rights under a contract which a court of equity might recognize. *Pressnell v. Lundin* (1890) 44 Minn. 551, 47 N. W. 161.

So, in *Davis v. Strobbridge* (1880) 44 Mich. 157, 6 N. W. 205, it was held that the vendee might recover, although he had taken possession, and the contract had been made valid by part performance, he having acquiesced in the vendor's measures to oust him.

And in *Porter v. Citizens' Bank* (1898) 73 Mo. App. 513, it was held that a purchaser may recover where the vendor is unable to convey such a title as was contemplated, notwithstanding that he took possession, which he abandoned as soon

as he learned that the contract could not be performed.

In *Jellison v. Jordan* (1878) 68 Me. 373, it was held that the fact that the vendee is in possession of the premises will not defeat his recovery. It seems, however, from prior decisions in Maine, that part performance does not enable even a court of equity to compel specific performance. (See *Patterson v. Yeaton* (1859) 47 Me. 308.) There was, however, no allusion to that point in the *Jellison* Case.

In *Johnson v. Puget Mill Co.* (1902) 28 Wash. 515, 68 Pac. 867, there having been part performance, taking the contract out of the statute, the right of the vendee to recover back payments on the purchase price was denied, she having been the first to repudiate the contract, notwithstanding that the vendor, who declared itself ready and willing to perform, may have previously said it did not consider itself any longer bound.

In *McDonald v. Beall* (1874) 52 Ga. 576, the court said that to entitle the vendee under a parol contract, who has taken possession, to recover back the money he had paid, upon the ground that he had a right to treat the contract as rescinded, it was incumbent upon him to prove that he had been actually evicted from the possession by a legal title paramount to that of the vendor, or he should have shown such a legal paramount title as, in the judgment of law, amounted to an eviction; but in this case the vendee relied upon an eviction.

In *Moore v. Powell* (1894) 6 Tex. Civ. App. 43, 25 S. W. 472, the rule permitting recovery by the vendee was applied by upholding a plea of reconvention by the vendee in an action by the vendor to enforce specific performance.

Henrikson v. Henrikson (1910) 143 Wis. 314, 33 L.R.A.(N.S.) 534, 127 N. W. 962, quotes with approval the statements of Browne, on *Statute of Frauds*, 5th ed. § 118a, as follows: "The rule that where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid, or recover for the services upon a quantum meruit, applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered; it does not apply to cases of money paid by the plaintiff to a third person in execution of a verbal contract between the plaintiff and defendant, such as by the statute of frauds must be in writing. Such L.R.A.1916D.

payment is not a payment to the defendant's use in the sense of the rule. It is a payment to his use only if he chooses to abide by the contract, and it is his right to refuse to do that." The doctrine was applied in this case by holding that there was no adequate legal remedy by a purchaser under an oral agreement in respect of the value of improvements placed upon the property, since the party with whom he contracted owned only an undivided interest in the property, and the improvements benefited the entire property. (The general question as to the right of the vendee to recover for improvements is not covered in this note; but see note in 53 L.R.A. 337.)

For an other application of the principle stated in the above quotation, see *Gazzam v. Simpson* (1902) 51 C. C. A. 19, 114 Fed. 71 (a case on its facts not within the scope of the present note).

But in *Johnson v. Krassin* (1878) 25 Minn. 117, it was held that plaintiff could maintain an action, in the nature of the common-law action of assumpsit for money paid, to recover an amount which he had paid to a third person upon a contract for the purchase of real property, taken in the name of defendant, in reliance upon the latter's promise to assign the same to plaintiff when requested, the defendant having refused to comply with that promise, and, in disregard thereof, assigned the contract to another for a good and valuable consideration.

Where the money paid on a parol contract is to be given to a third person if the contract stands, the latter cannot, on rescission of the contract, insist upon the money, since it belongs to the party who paid it. *Beaman v. Buck* (1848) 9 Smedes & M. (Miss.) 207.

Where one gives his note as the price of land, relying upon a verbal promise to convey, if the vendor collects the note by judgment, and then refuses to make title, taking advantage of the statute of frauds, a court of equity will not allow him to keep the money, but will compel him to refund the amount, on the ground that the note was obtained by a fraudulent misrepresentation and a false promise; and in such case the purchaser may maintain a bill and require the vendor either to comply with the confidence reposed in him and make title, or else refund the money. *Foust v. Shoffer* (1867) 62 N. C. (Phill. Eq.) 242.

If, upon the faith of a parol contract, the purchase money in whole or in part has been paid, a court of equity, upon a bill for a specific performance to which

the statute is set up as a defense, will decree that the money be refunded with interest, and, as against the vendors, it will be declared a lien on the land agreed to be conveyed; or at law the money may be recovered in an action of *indebitatus assumpsit* or debt. *Sneed v. Bradley* (1856) 4 *Sneed* (Tenn.) 301; *Hilton v. Duncan* (1860) 1 *Coldw.* (Tenn.) 313.

In *Love v. Burton* (1900) — *Tenn.* —, 61 S. W. 91, holding the vendee entitled to a return of the purchase money where the vendor repudiated the contract, the suit was in equity for an undivided half interest in property under a verbal contract, or, in the alternative, if defendant refused the deed, for a decree for the amount paid.

So, under the united jurisdiction of law and equity the proper remedy by a vendee under a parol contract is an action for specific performance with a general prayer for relief, under which he may recover back what he has paid if the vendor admits the contract, but refuses to perform. *Wilkie v. Womble* (1884) 90 N. C. 254. But see cases next cited, in which there appears to have been no prayer for specific performance.

There is some apparent conflict among the earlier decisions in North Carolina, or at least some uncertainty, as to the right of the vendee to recover the amount paid on the purchase price and for the value of improvements where the defendant denies the parol contract (see *Ellis v. Ellis* (1830) 16 N. C. (1 Dev. Eq.) 402; *Dunn v. Moore* (1844) 38 N. C. (3 Ired. Eq.) 364; *Albea v. Griffin* (1838) 22 N. C. (2 Dev. & B. Eq.) 9), but the rule of that state was settled in *Luton v. Badham* (1900) 127 N. C. 96, 53 L.R.A. 337, 80 Am. St. Rep. 783, 37 S. E. 143, and *Ford v. Stroud* (1909) 150 N. C. 362, 64 S. E. 1 (an action at law), to the effect that the vendee may recover back not only the payments made on account of the contract, but also the value of the improvements to the extent they have enhanced the value of the land, less the profits made by him while in possession, notwithstanding that the vendor denies the contract. In the *Ford* Case, the contract was not actually denied, but the court said that even if it had been, the court would not have hesitated to follow the *Luton* Case. In view of the decisions in these cases it is unnecessary and unprofitable to undertake to deal with the apparent conflict and uncertainty arising from the earlier decisions in that state.

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Where vendor is ready, able, and willing to perform.

According to the great weight of authority—although, as subsequently shown, there is some conflict on the point—the vendee under an agreement for the purchase of land which does not satisfy the statute of frauds may not recover back payments on the purchase price if the vendor has not repudiated the contract, and is ready, willing, and able to perform in accordance therewith, even though the contract could not be enforced against him either at law or in equity.

Fed.—*Dudley v. Hayward* (1882) 11 Fed. 543; *York v. Washburn* (1902) 118 Fed. 316 (affirmed in (1904) 64 C. C. A. 132, 129 Fed. 564; holding the question one of statutory construction, as to which the decisions of the Minnesota supreme court were controlling on the Federal court).

Ark.—*Venable v. Brown* (1876) 31 Ark. 564.

Cal.—*Laffey v. Kaufman* (1901) 134 Cal. 391, 86 Am. St. Rep. 283, 66 Pac. 471.

Ill.—*Mitchell v. McNab* (1878) 1 Ill. App. 297; *Crabtree v. Welles* (1878) 19 Ill. 55; *Brockhausen v. Bowes* (1893) 50 Ill. App. 98.

Ind.—*Lingle v. Clemens* (1861) 17 Ind. 124; *Day v. Wilson* (1882) 83 Ind. 463, 43 Am. Rep. 76.

Iowa.—*Frey v. Stangl* (Iowa) ante, 462.

Ky.—*Dougherty v. Goggin* (1829) 1 J. J. Marsh. 374; *Bedinger v. Whittamore* (1829) 2 J. J. Marsh. 552; *Duncan v. Baird* (1839) 5 Dana, 102; *Lewis v. Whitnell* (1827) 5 T. B. Mon. 191; *Hill v. Spalding* (1864) 1 Duv. 216 (arguendo).

Me.—*Kneeland v. Fuller* (1863) 51 Me. 518; *Plummer v. Bucknam* (1867) 55 Me. 105.

Mass.—*Coughlin v. Knowles* (1843) 7 Met. 57, 39 Am. Dec. 759; *King v. Welcome* (1855) 5 Gray, 41 (obiter); *Congdon v. Perry* (1859) 13 Gray, 3; *Kenniston v. Blakie* (1877) 121 Mass. 552.

Minn.—*Sennett v. Shehan* (1880) 27 Minn. 328, 7 N. W. 266; *McKinney v. Harvie* (1887) 38 Minn. 18, 8 Am. St. Rep. 640, 35 N. W. 668; *Keystone Iron Co. v. Logan* (1893) 55 Minn. 537, 57 N. W. 156 (arguendo).

Miss.—*Sims v. Hutchins* (1847) 8 Smedes & M. 328, 47 Am. Dec. 90.

Mo.—*Galway v. Shields* (1827) 66 Mo. 313, 27 Am. Rep. 351; *Lang v. Murphy* (1909) 137 Mo. App. 217, 117 S. W. 665.

Mont.—Perkins v. Allnut (1913) 47 Mont. 13, 130 Pac. 1.

N. H.—Lane v. Shaeckford (1830) 5 N. H. 130; Ayer v. Hawkes, 11 N. H. 148; Hill v. Grosser (1880) 59 N. H. 513.

N. J.—Eaton v. Eaton (1871) 35 N. J. L. 290 (recognized).

N. Y.—Abbott v. Draper (1847) 4 Denio, 51; Allis v. Read (1871) 45 N. Y. 142 (rule recognized; contract related to sale of goods); Collier v. Coates (1854) 17 Barb. 471; Northrup v. Mead (1907) 121 App. Div. 385, 106 N. Y. Supp. 150; Quinto v. Alexander (1907) 123 App. Div. 1, 107 N. Y. Supp. 422; Graham v. Healy (1912) 154 App. Div. 76, 138 N. Y. Supp. 611; Torres v. Thompson (1899) 29 Misc. 526, 60 N. Y. Supp. 790; Gaglione v. Ciambrone (1913) 79 Misc. 59, 139 N. Y. Supp. 85 (see *infra* for other New York cases).

N. C.—Clancey v. Craine (1833) 17 N. C. (2 Dev. Eq.) 363; Foust v. Shoffer (1864) 62 N. C. (Phill. Eq.) 242; Syme v. Smith (1885) 92 N. C. 338; Durham Consol. Land & Improv. Co. v. Guthrie (1895) 116 N. C. 381, 21 S. E. 952.

Okla.—Scheechinger v. Gault (1913) 35 Okla. 416, 130 Pac. 305, Ann. Cas. 1914D, 468; Weller v. Dusky (1915) — Okla. —, 151 Pac. 606.

Tenn.—Sneed v. Bradley (1856) 4 Sneed, 301; Hilton v. Dunan (1860) 1 Coldw. 314.

Vt.—Shaw v. Shaw (1834) 6 Vt. 69; Sutton v. Sutton (1841) 13 Vt. 71; Cobb v. Hall (1857) 29 Vt. 510, 70 Am. Dec. 432; Bedell v. Tracy (1892) 65 Vt. 494, 26 Atl. 1031.

Wash.—Johnson v. Puget Mill Co. (1902) 28 Wash. 515, 68 Pac. 867 (cites Browne on Statute of Frauds, 5th ed. § 122, to this effect; but in this case there had been part performance, and the same result might have been reached under the minority rule, *infra*).

W. Va.—COOK v. GRIFFITH, ante, 466.

In *Laws of England* (Halsbury) vol. 25, p. 402, it is declared in the text that where a deposit has been made under a verbal contract for the sale of land, a vendor who resists the purchaser's action on the contract by the plea of the statute of frauds is liable to return the deposit as money had and received to the use of the purchaser; but it seems that if the purchaser sets up the statute in order to escape from his contract, he cannot recover the deposit. The case of *Thomas v. Brown* (1876) L. R. 1 Q. B. Div. (Eng.) 714, 45 L. J. Q. B. N. S. 811, 35 L. T. N. S. 327, 24 Week. Rep. 821, is cited *infra* to the latter portion of the text, and referred to as question-L.R.A.1916D.

ing Casson v. Roberts (1862) 31 Beav. (Eng.) 613, *infra*, *contra*.

As stated at the beginning of the note, the question as to the right to recover the value of services rendered in consideration of a contract within the statute of frauds, to convey real property, is not within the scope of the present note, it having been treated in the note to *Jackson v. Stearns*, 37 L.R.A.(N.S.) 339. It may be observed here, however, that the rule which precludes a recovery back of the payments of the purchase price where the vendor is ready, willing, and able to convey has been held to preclude recovery for the value of services rendered in consideration of the agreement. See *Riley v. Williams* (1878) 123 Mass. 506.

Upon the other hand, it is not apparent why such a case does not fall within the distinction made by the court in *King v. Welcome*, 5 Gray (Mass.) 41, holding that there may be a recovery on a quantum meruit for services rendered under an oral contract not to be performed within a year, although the plaintiff voluntarily left the service before the expiration of the term. The court there said: "In the case of the money paid upon a contract for the sale of land, the action fails because no failure is shown of the consideration from which the implied promise springs. In the case at bar, the defense fails because the contract upon which the defendant relies is not evidenced as the statute requires for its verification and enforcement." In other words, when the action is upon an implied contract for the return of the purchase price, the oral contract is one of the circumstances on which the plaintiff must rely to establish the implied contract; whereas, if the action is quantum meruit for the value of services rendered, proof of the services rendered with the assent of the defendant is sufficient to establish a *prima facie* case; the oral contract is a part of the defense, not of the cause of action. (See, in this connection, note to *Fabian v. Wasatch Orchard Co.* post, —, as to recovery on quantum meruit for services under parol contract not to be performed within a year.)

The rule is reflected in decisions that the statute of limitations does not begin to run against an action by a vendee in a parol contract, to recover back the amount he has paid, until the vendor refuses to execute the contract. *Elliott v. Walker* (1911) 145 Ky. 71, 140 S. W. 51; *Hilton v. Duncan* (1860) 1 Coldw. (Tenn.) 313.

The rule was applied in *Durham Consol. Land & Improv. Co. v. Guthrie* (1895) 116 N. O. 381, 21 S. E. 952, although the vendor had disposed of the land before the action, but more than twelve months after the purchaser, upon demand, had failed to comply with his contract.

The rule was applied in *Sneed v. Bradley* (Tenn.) supra, by holding that the vendee's creditors could not maintain a bill to reach the amount paid by him, there having been no repudiation of the contract by the vendor.

In *Lane v. Shackford* (1830) 5 N. H. 130, it was held that the vendor had not disabled himself from performing, so as to permit a recovery, by mortgaging the land to a third person, his right to redeem not having been foreclosed.

The grounds on which the rule rests are stated somewhat at length in the cases subsequently cited. In substance they amount to this: that the failure of consideration from which the law raises an implied promise when the vendor refuses, or is unable, to perform, is negatived if the vendor is ready, able, and willing to perform; and that in such case, while the statute would prevent the enforcement of the contract against the purchaser, he cannot employ it in order to show lack or failure of consideration as the basis of an action for the return of the purchase price.

In *Mitchell v. McNab* (1878) 1 Ill. App. 297, the court said: "The reason is, that in such cases the contract, although it cannot be enforced at law against the vendor by reason of the prohibition of the statute, is yet not void. It remains a lawful contract, resting upon a lawful consideration. The party who has performed has thereby put it out of his power to repudiate on his part,—the very idea of repudiation after actual performance being incongruous,—and he has no right or authority to repudiate it for the other, who might for himself, if he would, but chooses rather to perform. He must recover then, if at all, upon an implied agreement; but the law never implies an agreement in the presence of an express one, which is lawful, subsisting, covering the same subject-matter, and which the party sought to be charged is ready and willing to fulfil. He is therefore without remedy until he puts the other party in default, as he ought to be, since he has suffered no wrong. He has done no more than he lawfully and knowingly agreed to do, and may receive, if he will, all that he agreed to take." L.R.A.1916D.

The real basis of an implied promise which supports the action by the purchaser to recover back the purchase price when the vendor refuses or is unable to perform, and its nonexistence when the vendor is ready, able, and willing to perform although he could not be compelled to do so, is well stated in *Jarboe v. Severin* (1882) 85 Ind. 496, where the court said: "It is also plain that where damages cannot be recovered for breach of an agreement, because of the statute of frauds, a party to it who has performed on his part must, in an action at law, recover upon an agreement implied by the law from the facts. But the implied agreement upon which the party who has performed his part of the contract recovers in such a case does not arise as supposed by counsel. Where, in pursuance of an express verbal contract for the purchase of land, the vendee has paid money, conveyed real estate, delivered personal property or performed service, and the vendor refuses to convey, the action, whatever its form, by which the vendee recovers, is, in fact, not based upon an implied promise of the vendor arising from the vendee's payment, conveyance, delivery, or rendering of service. These benefits were, in truth, conferred on the vendor and received by him under a special agreement, and 'the law . . . presumes a promise only where it does not appear that there is any special agreement between the parties.' 2 Greenl. Ev. § 103. The promise which, in such case, the law implies, is, that the vendor, unable or unwilling to perform his special agreement, will return whatever he has received thereunder or its value, as being held by him upon a consideration which has failed. *Browne*, Stat. Fr. § 118."

A New York case thus states the reasons and grounds of the rule: "When the vendor refuses to go on with the contract, or has parted with his title so that he cannot perform, he is then in the wrong; and having himself put an end to the contract, there is no longer any consideration for the payments which have been made under it; and the law will imply a promise to restore the money. But how can the law imply a promise to refund the money so long as the vendor is not in default? The payment was a voluntary one, made with a full knowledge of all the facts. Every time a payment was made and received the parties virtually said, although the law will not enforce this contract, we will go on and carry it into effect. The money is not received as a loan, but as

a payment, and so long as the vendor is able and willing to perform the contract on his part, he holds the money as owner, and not as a debtor. The consideration upon which the money was paid has not failed; and there is nothing from which a promise to repay can be justly implied." *Abbott v. Draper* (1847) 4 Denio (N. Y.) 51.

In *Coughlin v. Knowles* (1843) 7 Met. (Mass.) 57, 39 Am. Dec. 759, holding that a vendee may not recover the purchase price paid, where the vendor is willing and able to perform, the court observed that the statute of frauds would be a good answer if the party offering proof of the contract had offered the same to sustain an action to enforce the contract and compel a conveyance of the land, or to recover damages for the failure to do so; but that the provisions of the statute are not so broad as to entitle a party who has entered into an oral contract by which he has received a conveyance of land and towards payment for which he has made advances in money, to set aside such contract as a nullity, and reclaim the money so advanced, the other party being in no way at fault, but being both able and willing to perform his contract, and to make the conveyance in the manner stipulated by the oral agreement.

Without denying the rule itself a recovery by the vendee was upheld in *Reynolds v. Harris* (1858) 9 Cal. 338, although he was in possession and had been evicted; but in this case the vendee demanded a deed and the vendor was unable to comply, having no title.

In *Winkler v. Jerrue* (1912) 20 Cal. App. 555, 129 Pac. 804, the vendee was allowed to recover because of fraud on the part of the vendor, although there had been a partial performance which would have taken the case out of the statute of frauds.

The vendor cannot, under the rule above stated, prevent recovery by offering to perform after the vendee has instituted his action to recover back the purchase money. *Grace v. Gholson* (1914) 159 Ky. 359, 167 S. W. 420.

In *Barickman v. Kuykendall* (1841) 6 Blackf. (Ind.) 21, it was held that indebtedness *assumpsit* would lie by the vendee to recover the amount paid on a parol contract for the purchase of land, although he had taken possession of the property under the contract, where the vendor had died, and one of the heirs was a minor, notwithstanding that the heirs of legal age were willing to convey the land agreeably to the contract, and L.R.A.1916D.

the guardian of the minor had offered to give bond with surety, conditioned that the minor should convey when he came of age. In reply to the contention that the vendee's payment of part of the purchase money, and his taking possession of the land under the contract, was such a part performance as took the case out of the statute of frauds, the court said that, supposing that to be the rule in a court of chancery, it had no application to a court of law. It will be observed, however, that from the statement of facts, this was not a case where those who succeeded to the interest of the vendor were able and willing to carry out the contract.

So, in *Ritchie v. Bennett* (1898) 35 App. Div. 68, 54 N. Y. Supp. 379, the court, while recognizing the rule that there can be no recovery back of the purchase money if the vendor is able and willing to perform, held that the purchaser is not bound to demand a deed from the heirs of the deceased vendor as a condition of maintaining his action, distinguishing the case, *Fuller v. Williams* (1827) 7 Cow. (N. Y.) 53, 17 Am. Dec. 498, where the contract was valid, upon the ground that in the latter case a conveyance by the heirs would be free from the claims of general creditors, the interest of the vendor being personal property, while in the case at bar a conveyance by the heirs would be subject to unknown and undisclosed liens of any creditors of the deceased, since the contract being invalid, the interest of the vendor was real property, and not personal property.

—minority rule.

In a few states the vendee is allowed to recover back the payments made on the purchase price under a contract which does not satisfy the statute of frauds, notwithstanding that the vendor is ready, able, and willing to perform, unless there has been such part performance, by possession or otherwise, as would take the contract out of the statute of frauds and enable the vendee to enforce it in equity against the vendor. This view, which is directly opposed to the majority rule, prevails in Alabama, Michigan, and Wisconsin, and has been recognized at least by obiter statements in Virginia. In the three states first named, the statute in force at the time of the decisions declared the oral contract void, departing in this respect from the form of the 4th section of the original statute of frauds (29 Car. II. chap. 3), which declared merely that no action

should be brought on the contract. Most of the cases above cited in support of the rule denying recovery in such circumstances were decided under a statute following the original form, and, as subsequently shown, the Wisconsin supreme court expressed its approval of the majority rule under that form of statute, but held it inapplicable in a jurisdiction where the statute, like that of Wisconsin, declares the contract void.

In *Frey v. Stangl* (Iowa) ante, 462, sustaining the majority rule, it is said that the difference in the rulings seems to depend on the wording of the statutes; that the statutes in the cases upholding recovery declare an oral contract for the sale of land void, while, in Iowa, the statute merely prescribes the rule of evidence concerning the proof. The difference in the form of the statutes, however, does not altogether account for the difference in the decisions. In Minnesota and in North Carolina, which, as above shown, adhere to the majority rule denying recovery by the purchaser where the vendor is ready, willing, and able to perform, the statute declares the oral agreement void; and in California, Montana, and Oklahoma, which also adhere to that rule, the provision is that the oral agreement shall be "invalid," or that the agreement shall not be valid unless in writing.

Upon the other hand, in Virginia, where the minority rule seems to have been approved, at least in obiter expressions, the statute follows the original form and declares that no action shall be brought on the oral agreement. None of the cases in the states just referred to, however, discusses or even alludes to the distinction made by the Wisconsin supreme court.

The minority rule, which permits the vendee to recover the amount he has paid upon the purchase price under a contract which does not satisfy statute of frauds, notwithstanding that the vendor is ready, willing, and able to perform, unless there has been such part performance by possession or otherwise as to take the contract out of the statute, and enable the purchaser to enforce it in equity, is sustained by the following cases: *Flinn v. Barber* (1877) 59 Ala. 446, s. c. subsequent appeal (1879) 64 Ala. 193; *Nelson v. Shelby Mfg. & Improv. Co.* (1892) 96 Ala. 526, 38 Am. St. Rep. 116, 11 So. 695; *Scott v. Bush* (1873) 26 Mich. 418, 12 Am. Rep. 311; *Brown v. Pollard* (1893) 89 Va. 696, 17 S. E. 6 (see *infra* as to this case); *Brand-*

L.R.A. 1916D. *eis v. Neustadt* (1860) 13 Wis. 143 (see *infra* as to this and other Wisconsin cases).

In *Flinn v. Barber* (1879) 64 Ala. 193, it was stated that the weight of authority, both English and American, confines the right of a vendee of land, who has entered into a verbal agreement of purchase, to recover money paid, or to reclaim any other consideration with which he has parted, to cases of the refusal or the inability of the vendor to complete the contract; but the court held that that doctrine did not prevail in Alabama, unless the vendee had received possession from the vendor and retained it undisturbed, so as to acquire an equity to compel the vendor to perform specifically.

Chief Justice Dixon in *Brandeis v. Neustadt* (1860) 13 Wis. 158, discussed the point at length, and expressed his opinion obiter, that the readiness and ability of the vendor to perform, there being no such part performance as would take the case out of the operation of the statute, would not prevent the purchaser from recovering back the money paid, under the Wisconsin statute, which does not follow the old statute, which declares that no action shall be maintained upon the contract, but provides that the contract shall be void. The learned justice agreed with the majority of the cases that, under the old form of statutes, which merely declare that no action shall be maintained on the agreement, and do not declare the contract void there can be no recovery if the vendor is willing and able to perform, but was of the opinion that the rule was inapplicable under a statute which declares the oral agreement void. He said, in this connection: "The parol contract, being void, furnishes no consideration for the payment. A consideration, to be sufficient, must be either a benefit to one party or a damage to the other. The purchaser can derive no benefit from the supposed contract. Nothing passes to him by virtue of it; he obtains no interest in the land, and no promise or agreement on the part of the seller to convey him any; and he can never derive any advantage from what has transpired, except it be as a matter of favor on the seller's part. . . . The reason given for not allowing the purchaser under the English statute, and those like it, to repudiate the agreement and recover back what he has paid, so long as the seller is in no default, is very obvious. But it cannot be given here. It is that the agreement is not void, but

voidable; or, to speak more correctly, not actionable. . . . The repeal of the statute in such case would at once enable the purchaser to maintain his action upon the agreement. With us it is otherwise. Its repeal would leave him in no better situation than formerly. There is in that case a valid living contract between the parties, and though the remedy be suspended, it binds the conscience, and, until it has been broken, constitutes a sufficient consideration for the payment of the money. There being thus a good consideration, if the purchaser chooses to rely upon the honor of the seller for the performance of his contract, instead of putting it in such form that the courts can enforce it, it is no injustice to say to him that he shall not ignore it, at least until that honor has been violated. . . . Under our statute there is no contract; nothing which can be the foundation of any legal or equitable obligation; and how can the court create one? . . . So far as the law is concerned the whole affair is a mere false show, except the delivery of the money. It finds one party in the unexplained possession of the money of another, which he knowingly received without any legal equivalent, and not as a gift, and which he has no legal or equitable right to retain; and why should he not refund?"

The point was not involved in this case, and the opinion on the point was confessedly obiter. It seems, however, to have been recognized as expressing the rule in Wisconsin, although there appears to be no subsequent case in which the point is discussed and the conclusion distinctly reaffirmed.

In *Thomas v. Sowards* (1870) 25 Wis. 631, Chief Justice Dixon remarked that he was still of the opinion expressed in *Brandeis v. Neustadt* (Wis.) supra, as to the right of a purchaser to recover back moneys paid, and that his brethren were inclined to agree with him, but added that especially it must be held that the plaintiff was so entitled, since the jury had found that the vendor was in default.

And in *Clark v. Davidson* (1881) 53 Wis. 317, 10 N. W. 384, recognizing the right of a purchaser to recover for services in consideration of an oral agreement to convey, there was held to be a default on the part of the vendor. And that appears to have been the case in *Taylor v. Thieman* (1906) 132 Wis. 38, 122 Am. St. Rep. 943, 111 N. W. 229, also upholding a recovery for services; and in *Tucker v. Grover* (1884) 60 Wis. L.R.A.1916D.

233, 19 N. W. 92, and *Miller v. Metz* (1899) 103 Wis. 220, 79 N. W. 213, sustaining a recovery of the purchase price paid by the purchaser.

The point was not involved in *Henrikson v. Henrikson* (1910) 143 Wis. 314, 33 L.R.A.(N.S.) 534, 127 N. W. 962, but the court declares generally, without any qualification so far as the vendor's ability or willingness to convey is concerned, that one receiving money under a void contract for the sale of land is bound to return it, on the theory that it is money of the other party to the void contract.

Seifert v. Mueller (1914) 156 Wis. 629, 146 N. W. 787, is very briefly to the effect that a parol contract to convey real property to a broker in consideration of services being void, the broker may recover the reasonable value of his services. There is no discussion of the point, but there was evidence, apparently uncontradicted, that the vendor had tendered a deed, and there is no indication that there was any defect in the title. The result seems to be in accord with the opinion of Chief Justice Dixon in the *Brandeis Case* (Wis.) supra.

In *Scott v. Bush* (1873) 26 Mich. 418, 12 Am. Rep. 311, the court referred to the fact that the Michigan statute declares the contract void, and observed that it could not conceive of such a thing as a contract which cannot be enforced as a contract, and yet can be the foundation of legal obligations arising out of nothing else. The opinion further observed that some decisions have apparently disregarded the distinction between contracts made valid by part performance, and stipulations or arrangements which have never become binding; and added that an agreement made valid by part performance is, in law, as valid as in equity, for all purposes, except the remedy to enforce it; and that an equitable right is as good a consideration for a contract as a legal right. Further, the court remarked that had the plaintiff (the vendee) obtained possession from the defendant (the vendor) under a verbal arrangement, the contract would have been taken out of the statute, and would not have been void. Again the court said: "But as the case stands, we cannot see why, if the willingness of the vendor to convey entitles him to keep money paid and agreed to be forfeited, he would not equally be entitled to enforce a promise to pay a like sum, on the same conditions. There is no middle ground between binding contracts and the absence of any binding obligation."

In *Brown v. Pollard* (1893) 89 Va. 696, 17 S. E. 6, the court quoted from, and apparently approved, the opinion in *Scott v. Bush* (Mich.) supra, and observed that the purchaser in the case at bar could not have gone into equity and set up the alleged contract of the vendor to convey the land to her, and the payment of the purchase money as such part performance as would induce a court of equity to decree specific performance; and added that a mere parol contract which could not be enforced against the vendor could not bind the purchaser in favor of the vendor; mutuality of obligation and remedy must exist ab initio. The opinion on this point, however, seems to be obiter, since it was found that the notes for the recovery of which the action of detinue was brought were not delivered as a payment on the purchase price of property, and were never in fact delivered to the vendor. Moreover, the court, at the close of the opinion, added that, even if the purchaser had delivered the notes in payment for the parol purchase of land which the vendor was not able to convey and was not compellable to convey, he could not lawfully retain the notes.

There are other individual cases which apparently recognize and support the minority rule, that are explainable on other grounds, or are out of harmony with other decisions in the same state.

Thus, in *Collins v. Thayer* (1874) 74 Ill. 138, the court said that the purchaser can terminate the contract, and sue and recover back the payments made, and "this, too, without performing or offering to perform his part of the agreement." In this case, however, as pointed out in *Mitchell v. McNab* (1878) 1 Ill. App. 297, the vendor had given express notice that he no longer considered himself bound.

In *Laub v. De Vault* (1908) 139 Ill. App. 398, the court said that if the contract for the sale of land was oral and void, the vendee could sue and recover back the money under the common counts as money had and received, without offering any excuse for failure to take the land; but this was obiter, as the evidence showed that the contract was in writing; and the statement is opposed to the other Illinois cases.

In *Burks v. Douglass* (1913) 156 Ky. 462, 161 S. W. 225, it was said: "Appellant [vendor] does not deny the contract of sale, but seeks to avoid it by alleging that appellee [purchaser] 'relinquished the property on which the said \$70 had been paid, and abandoned and

left the property.' This allegation is no defense to an action to recover back the money paid on a verbal contract for the sale of land. The contract was not enforceable, and appellee had a right to elect to abandon the property and sue for the money paid." It is difficult to reconcile this language with the previous Kentucky cases cited in support of the majority rule. There is no discussion of the point or allusion to these cases, and this case can hardly be regarded as overturning the rule established by them.

In *Blew v. McClelland* (1860) 29 Mo. 304, it was held that the purchaser may recover where there has been no such part performance as will take the case out of the statute, and the building on the property has been burned. This was evidently upon the assumption that if the contract had been a valid one, the loss from the burning of the building would have fallen on the purchaser; and so the result seems to be opposed to the majority rule; but see other Missouri cases cited in support of that rule.

In *Crippen v. Bearden* (1844) 5 Humph. (Tenn.) 129, it was held that the purchaser could recover apparently without reference to the employer's willingness and ability to perform. The court said that there could be no obligation on either party to go on with the contract; and if money is advanced, it will be considered as a mere deposit to the use of the party making it. The case of *Graham v. Weaver* (1896) 97 Tenn. 485, 37 S. W. 221, was a bill by the vendor for the enforcement of a parol contract, or, if the defendant declined to confirm the sale, for the possession of the property. The court said that "the effect of the pleading was to tender to the defendants [purchasers] an option to confirm the parol sale and pay the [balance of the] purchase money, or to repudiate it and take their rights as fixed by law in such cases;" and it seems to be assumed that these would include the right to be reimbursed for the purchase price paid. But see other Tennessee cases previously cited in support of the majority rule.

There is some discrepancy among the New York cases on the point.

In *Dowdle v. Camp* (1815) 12 Johns. (N. Y.) 451, denying the right of the vendee to recover, the court observed that the payment of part of the purchase price was such part performance as to make the contract binding on the defendant, and a court of equity would compel a conveyance. This case, if it stood alone, could be reconciled with the min-

ority doctrine. And in *Rice v. Peet* (1818) 15 Johns. (N. Y.) 503, the court apparently recognized the right of a party to a parol agreement for the exchange of land to recover though he was himself in default.

Even if the *Rice Case* were to be ignored and what was said in the *Dowdle Case* as to part performance were not to be regarded as a limitation of the doctrine of that case, it will be observed that the *Dowdle Case* was decided under the old form of the statute, which provided merely that no action shall be brought on the contract; the other form, declaring the contract void, not having been adopted until the Revision of 1830.

However, subsequently to the Revision of 1830, the opinion was expressed in *Abbott v. Draper* (1847) 4 Denio (N. Y.) 51, that so long as the vendor is not in default, but is ready to perform the contract on his part, there is no principle by which the vendee can recall the payments which he has made under the agreement. In the *Abbott Case*, the vendee had entered into possession and enjoyment of the land, and the court said there was nothing to show that he was not still in possession of it. There was no suggestion, however, that the rule denying the vendee the right to recover where the vendor is ready, willing, and able to perform should be limited to cases where there has been such part performance as to take the contract out of the statute, and permit its enforcement in equity against the vendor; and any such limitation was expressly repudiated in *Collier v. Coates* (1854) 17 Barb. (N. Y.) 471, which denied the plaintiff's right to recover in such circumstances. The court refused to distinguish the *Dowdle* and *Abbott Cases* on that ground. There were alternative grounds for the decision in the *Abbott Case*, in that plaintiff had not demanded repayment or surrendered possession, both of which were held necessary even if the ability and willingness of the vendor to perform were not a defense. Neither the *Abbott* nor the *Collier Cases* commented on the change in the statute, or considered the possibility of the distinction subsequently made in *Brandeis v. Neustadt* (1860) 13 Wis. 142, based upon the differences in the form of the statutes. Nor did either of these cases refer to *Miller v. Pelletier* (1843) 4 Edw. Ch. (N. Y.) 102, which was decided under the New York Revision of 1830, which declares a contract void unless signed by the person to whom the sale is to be made, and held that, as the vendor did

not sign the contract, the vendee could recover back the deposits on the purchase price, notwithstanding the execution and tender of a deed by the vendor. The court said: "This was not making the contract of sale or the agreement for the sale to be made as contemplated by the statute, but it was the intended fulfilment of the previously made supposed contract. If the deed had been accepted, then it would have been an executed contract and all well enough; but the purchaser had a right to repose, as he did, upon the statute, and to repudiate the transaction." In *Hellman v. Strauss* (1858) 2 Hilt. (N. Y.) 9, holding that the purchaser could recover where he was induced to enter into the parol contract by the fraud of the vendor, the court queried as to whether there can be a recovery where the contract is free from fraud and the vendor is able and willing to perform, and recognized an apparent conflict among the New York cases on the point.

The point, however, appears to have been finally settled in New York in favor of the majority rule, which denies the vendee's right to recover where the vendor is willing and ready to perform. It may be said, however, that the New York cases which sustain that rule do not consider the possible effect of the change in the form of the statute upon which the distinction in the *Brandeis Case* is based.

As implied in the statement of the minority rule, that rule does not permit the purchaser to recover back payments on the purchase price where the vendor is able to perform and has not refused to do so, if there has been such part performance by possession or otherwise as to take the contract out of the statute of frauds and render it enforceable in equity at the instance of the vendee, although the part performance would not render the contract enforceable at law. And so, even in jurisdictions committed to the minority rule, it has been held that there can be no recovery of the purchase price by the vendee where he has been in possession, and the vendor has not refused to perform the contract. *Cope v. Williams* (1842) 4 Ala. 362; *Donaldson v. Waters* (1857) 30 Ala. 175, s. c. subsequent appeal (1859) 35 Ala. 107; *Nelson v. Shelby Mfg. & Improv. Co.* (1892) 96 Ala. 515; *Cilley v. Burkholder* (1879) 41 Mich. 749, 3 N. W. 221 (possession and removal of timber).

In *Casson v. Roberts* (1862) 31 Beav. (Eng.) 613, holding that a purchaser under a contract which did not satisfy the statute of frauds could recover back his

deposit, although the answer alleged the ability and willingness of the vendor to comply with the contract, the master of the rolls said that he could not conceive a more inconvenient process than that which would be inflicted on the court if, in a case in which the dealings for the purchase and sale of land did not amount to a valid contract on which an action or suit could be maintained, it should be the duty of the court to ascertain by whose default it came to pass that such invalid contract had not been carried into effect. But the authority of this case was seriously questioned in *Thomas v. Brown* (1876) L. R. 1 Q. B. Div. (Eng.) 714, 45 L. J. Q. B. N. S. 811, 35 L. T. N. S. 327, 24 Week. Rep. 821, although in that case there were alternative grounds for denying a recovery by the purchaser. And see *supra*, statement in 25 *Laws of England* (Halsbury) p. 402.

Property delivered or conveyed in payment.

As shown in the note to *Malzer v. Schisler*, 51 L.R.A.(N.S.) 77, where a parol contract for the sale of land has been executed as to the part within the statute of frauds by the delivery and acceptance of a deed of the premises, the vendor may recover the purchase price. But where the oral agreement is for an exchange of lands, the party who has conveyed may maintain an action to recover the value of the land conveyed by him, where the other party refuses to convey.

Thus, where a wife joined in a deed with her husband to land in consideration of a parol agreement to convey other land to her, it was held in *Jarboe v. Severin* (1882) 85 Ind. 496, that she could recover the value of her inchoate interest in the land conveyed where the other party refused to carry out the parol agreement. This was upon the ground that the law implies a promise that the vendor, unable or unwilling to perform his special agreement, will return whatever he has received thereunder or its value, as being held by him upon a consideration which has failed.

So, in *Andrews v. Broughton* (1899) 78 Mo. App. 179 (s. c. on subsequent appeal (1900) 84 Mo. App. 640), it was held that there could be a recovery of the value of a dower interest of a widow, not exceeding the contract price, where she had sold the same for a given sum, to be paid part in cash and part by a conveyance of other real estate, the contract not having been signed by the defendants, and so not enforceable against them as to the property to be conveyed by them.

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Where the vendor refuses or is unable to perform his parol agreement to convey, the vendee may recover the value of property delivered in consideration of that agreement. *Wyvell v. Jones* (1887) 37 Minn. 68, 33 N. W. 43; *Boyden v. Crane* (1873) 7 Alb. L. J. (N. Y.) 203.

Where one party to a verbal agreement for an exchange of land has conveyed to the other, but the latter has disabled himself from performing by conveying the other parcel to a third person, the former may recover the value of the property conveyed by him. *Miller v. Roberts* (1897) 169 Mass. 134, 47 N. E. 585.

In such a case, the declaration should be for the price or value of the land, and not for money had and received. *Basford v. Pearson* (1864) 9 Allen (Mass.) 387, 85 Am. Dec. 764. The court said, however, that the difference was technical rather than substantial, and the plaintiff could add a count in the latter form by amendment.

So, in *Keith v. Patton* (1817) 1 A. K. Marsh. (Ky.) 23, it was held that, after a purchaser delivered a horse, and the vendor refused to convey, the action must be detinue or trover, and not assumpsit.

In *Miller v. Jones* (1859) 3 Head (Tenn.) 525, where a purchaser sold personal property to the vendor, the price to be applied on the purchase price of real property, it was held that upon the purchaser's repudiation of the contract for the real property, the vendor might have rescinded the contract for the personal property by tendering it back, and in that case no action could have been maintained for the price; but, having failed to do so, he was liable for the price.

Where one refuses to perform an oral agreement within the statute of frauds for the transfer of an interest in real estate, his liability is for money had or for the value of a specific article which he has received as a payment on the purchase price, and it is not in his power, without the consent of the other party, to refuse the title of the specific thing and avoid liability for its value. *Hawley v. Moody* (1852) 24 Vt. 603. The court observed that the contract, although unenforceable, was not void; and that while either party may repudiate it so far as it is executory, it remains in full force so far as it has been executed.

However, the vendee cannot hold the vendor liable for the value of property delivered or conveyed in consideration of an oral agreement to convey, where the

other party is ready and willing to convey. *Green v. North Carolina R. Co.* (1877) 77 N. C. 95; *Torres v. Thompson* (1899) 29 Misc. 526, 60 N. Y. Supp. 790.

In *Baker v. Scott* (1873) 2 Thomp. & C. (N. Y.) 606, it was held that a party to an oral agreement for an exchange of land who has conveyed may recover against the other party the amount or value of the unpaid consideration. But this seems to be opposed to the cases above cited, and the court apparently overlooked the distinction between a promise to pay a money consideration, not itself within the statute of frauds, and an agreement to convey other land in consideration, which is within the statute.

Action on note or check for purchase price.

A purchaser who has given a note or check for the purchase price cannot defend an action thereon upon the ground that the agreement to sell was within the statute of frauds, if the vendor is ready, willing, and able to convey in accordance with the oral agreement; at least, if the purchaser has been let into possession. *Rhodes v. Storr* (1845) 7 Ala. 346 (note); *Gillespie v. Battle* (1849) 15 Ala. 276 (note); *Schierman v. Beckett* (1882) 88 Ind. 52; *Edelin v. Clarkson* (1842) 3 B. Mon. (Ky.) 31, 38 Am. Dec. 177 (note); *Curnutt v. Roberts* (1850) 11 B. Mon. (Ky.) 42 (obiter, note); *Hill v. Spalding* (1864) 1 Duv. (Ky.) 216 (note); *Ott v. Garland* (1840) 7 Mo. 28 (note); *McGowen v. West* (1842) 7 Mo. 569, 38 Am. Dec. 468; *Fleischman v. Plock* (1897) 19 Misc. 649, 44 N. Y. Supp. 413 (check); *Crutchfield v. Donathon* (1878) 49 Tex. 691, 30 Am. Rep. 112.

The case of *Bates v. Terrell* (1844) 7 Ala. 129, is opposed, but that case is contrary to the other Alabama cases, and was expressly disapproved in *Gillespie v. Battle* (1849) 15 Ala. 276.

The case of *Fite v. Orr* (1886) 8 Ky. L. Rep. 349, 1 S. W. 582, is also apparently contrary to that rule unless it can be distinguished upon the point as to possession, previously referred to; but see later Kentucky cases above cited.

In *Gillespie v. Battle* (1849) 15 Ala. 276, holding that a vendee who has been let into possession cannot defend an action upon a promissory note given for the purchase price of land upon the ground that the contract to convey was void under the statute of frauds, the court conceded that an action at law could not be maintained on the parol contract, although there had been a par-

tial performance of it. After showing that, apart from the question of consideration, it was plain that the statute could not be invoked against the contract in suit (the note), the court observed, with respect to the consideration, that although at law part performance of a parol contract for the sale of land will not take it out of the statute, it has that effect in equity, and that the consideration for the note would rest upon the fact that the vendor had put the vendee in possession, and placed himself in a position where the vendee, by paying the balance of the purchase price, could enforce specific performance in equity.

In *Schierman v. Beckett* (1882) 88 Ind. 52, the court said that the doctrine is based upon the same principle that prevents the vendee from recovering back the purchase money while the vendor is able and willing to convey according to his verbal agreement; the defense to the note in such case must be, not the statute of frauds, but want or failure of consideration; which cannot be made out if the vendor shows his ability and willingness to perform; the verbal contract for the sale of land is not void; the statute simply provides that no action shall be brought upon it; the action upon the vendee's note is not a suit upon the contract of sale; and the vendee's defense being want of consideration for the note, it would seem that he ought not to be permitted to assert as such defense the fact that the vendor might refuse performance, when the sole reason for the failure of the vendor to perform is the rejection by the vendee of offered performance.

In *Edelin v. Clarkson* (1842) 3 B. Mon. (Ky.) 31, the court said that the statute of frauds did not directly prohibit the action, because it was brought upon a note in writing, signed by a party charged in the action; and that the plea that the note was given in consideration of a sale of land, not evidenced by writing, was not a plea directly setting up the statute in bar of the action, but was nothing more or less than a plea of the want or failure of consideration; and that in the case at bar, a part of the contract of sale which formed the consideration of the note was that the possession should be delivered before the price was payable; and that part of the contract having been executed, defendant received a partial, but a very important, benefit from a partial performance of the contract or promise which formed the consideration of his promise; and that, although he cannot enforce full perform-

ance of the contract, the partial benefit which he has received and actually enjoyed precludes him from saying that there was either a total want or a total failure of consideration; and as a partial want of failure of consideration is not available as a defense at law, it followed that the plaintiff was entitled to recover.

A note given for the price of land under a verbal contract is not enforceable where the purchaser has derived no benefit from the contract and the vendor has sustained no loss or prejudice therefrom. *Curnutt v. Roberts* (1850) 11 B. Mon. (Ky.) 42. The court conceded, however, that where a purchaser has executed a note for the purchase price, and has obtained possession of the land, it has been decided that if he be sued upon the note, the fact that the contract was verbal, and the vendor has not executed a writing evidencing the sale, does not furnish him with a legal defense to the action; because, as he has acquired possession of the land, and derived some benefit from the contract, there is not an entire failure of the consideration upon which the note was executed.

In *McGowen v. West* (1842) 7 Mo. 569, 38 Am. Dec. 468, the court said that it saw no difference in principle between a case where the vendee seeks to recover back payments actually made and where he seeks to avoid liability on a note.

In *Fleischman v. Plock* (1897) 19 Misc. 649, 44 N. Y. Supp. 413, the court said that whether the contract was voidable by the plaintiff or not, his readiness and willingness to perform it, as a contract binding upon him, furnished consideration for the defendant's promise to pay; and after alluding to the rule that a purchaser cannot recover back what he has paid where the vendor is prepared to perform, said that where the vendor holds himself ready to perform, his attitude, in so far as the statute of frauds affects it, is the same when he defends the action for the return of the purchase price as when he stands as a suitor upon the promise to pay; in neither situation is he required to produce and rely upon a contract in writing within the statute, since in each case the vendee, alleging a failure of consideration, either for his case in chief or for defense to the instrument, has the burden of establishing the fact, and the presence of the consideration is made to appear, in either aspect, through the vendor's readiness and ability to perform the actual agreement, which the statute does not operate to render infirm except at an election. L.R.A.1916D.

tion, the right to which, in this matter, is abandoned by the only party possessing it.

In *Crutchfield v. Donathon* (1878) 49 Tex. 691, 30 Am. Rep. 112, the court observed that, as the action was brought upon the note, and not upon the contract of sale, it was not a valid defense to plead that the sale of the lot in consideration for which the note was given was not evidenced by writing, as required by the statute.

With the exception of *Schierman v. Beckett* (1882) 88 Ind. 52; *McGowen v. West* (Mo.); *Fleischman v. Plock* (N. Y.); and *Crutchfield v. Donathon* (Tex.)—*supra*, the rule is stated in the foregoing cases in terms that apparently imply that one of its conditions is that the vendee shall have been let into possession of the property under the agreement. In view, however, of the fact as above shown, that the rule rests upon the same reasoning as does the majority rule which denies a recovery back of payments on the purchase price where the vendor is ready, willing, and able to perform, it is not apparent why possession should be insisted upon as a condition, except in jurisdictions like Alabama, which are committed to the minority rule that permits recovery back of payments on the purchase price, notwithstanding the vendor's ability and willingness to perform, unless there has been such part performance as to take the case out of the statute of frauds, so that the purchaser could have enforced it in equity.

Since, as above shown, the rule which permits the vendor to recover the amount of the note or check given for the purchase price rests upon the ground that the action rests upon the note or check, and not upon the oral agreement in relation to the real property, it is entirely independent of any question whether or not the note or check amounts to a memorandum of the agreement to convey sufficient to take the contract out of the statute; although in *Crutchfield v. Donathon* (Tex.) *supra*, where the note referred quite explicitly to the consideration, that was suggested as a possible alternative ground for the decision. It was, however, distinctly held, regardless of this point, that the action might be maintained on the ground previously stated.

For the reasons just suggested, a case like *Oliver v. Alabama Gold L. Ins. Co.* 82 Ala. 417, 2 So. 445, holding that the vendor might recover on a note for the purchase price, is not in point, since, al-

though the contract to sell and purchase had not been signed by the vendor, and therefore could not be enforced against him, it had been signed by the purchaser, "the party to be charged," so that an action would lie on the contract itself against him, it not being necessary that it be signed by both parties (see note in 28 L.R.A.(N.S.) 680).

So, a case like *Caren v. Liebovitz* (1906) 113 App. Div. 674, 99 N. Y. Supp. 952, holding that a vendor who had signed the contract might recover on a check given for the purchase price, is not in point here because the contract to sell had been signed by the vendor, and that satisfied the requirement of the New York statute that the contract be signed by the party by whom the sale or lease is to be made. In this case the contract was undoubtedly mutually enforceable (see note in 28 L.R.A.(N.S.) 680).

On the other hand, a case like *Moore v. Powell* (1894) 6 Tex. Civ. App. 43, 25 S. W. 472, holding that the statute of frauds was not satisfied by the signing and delivery of a check for the purchase price, is not opposed to the rule permitting a recovery on the note or check where the vendor is willing and able to perform, since the action was not on the check, but was for the specific performance of the contract of sale and purchase.

Necessity of tender of performance by purchaser.

In jurisdictions committed to the majority rule, denying the vendee's right to recover back the payments on the purchase price where the vendor is ready, able, and willing to convey, it would seem that, as a condition of plaintiff's cause of action, he must allege and prove a tender of performance on his own part in order to put the vendor in default, unless such tender is excused.

Thus, to entitle the vendee, under a parol contract, to recover back the amount paid, he must allege and show that he has paid or offered to pay the balance of the consideration; an allegation of a refusal to convey is not sufficient, as it is not incumbent upon the vendor to convey until the consideration has been paid or there has been an offer to pay. *Laffey v. Kaufman* (1901) 134 Cal. 391, 86 Am. St. Rep. 283, 66 Pac. 471.

If a party who receives money or its equivalent under a parol contract to convey property afterwards repudiates it, the law will raise an assumpsit on his part to refund the payment received, for he shall not retain the money under the contract while he denies his obligation to

perform it; but until he refuses to perform it, the law will not imply a promise to refund the payment received under it. *Crabtree v. Welles* (1857) 19 Ill. 55. The vendee, therefore, has no cause of action to recover the part of the purchase price paid until he has placed himself in a proper position by demanding of the vendor that he go on and perform the parol agreement upon tendering the balance of the purchase price, and the vendor has thereupon refused to comply.

The vendee may not recover without showing that the vendor is either unable or unwilling to make title. *Lewis v. Whitnell* (1827) 5 T. B. Mon. (Ky.) 191.

The vendee may not recover without showing that he was ready and willing to perform. *Cave v. Osborne* (1907), 193 Mass. 482, 79 N. E. 794.

In *Northrup v. Mead* (1907) 121 App. Div. 385, 106 N. Y. Supp. 150, it was held that plaintiff, who performed services in consideration of an agreement that certain real property should belong to him upon the death of the promisor, could not enforce a claim against the estate for the consideration rendered without demanding a deed or performance from the heirs of the vendor, to put them in default.

The vendee may recover if the vendor, on proper demand, refuses to perform. *Bedell v. Tracy* (1892) 65 Vt. 494, 26 Atl. 1031.

The vendee may not recover unless he shows a tender of compliance on his part, and a refusal of compliance on the part of the vendor. *Commack v. Prather* (1903) — Tex. Civ. App. —, 74 S. W. 354.

Tender of performance by the vendee is unnecessary where the vendor has brought ejectment to recover the land (*Hairston v. Jaudon* (1869) 42 Miss. 380); or has refused to perform (*Welch v. Darling* (1886) 59 Vt. 136, 7 Atl. 547; *Cook v. Daggett* (1861) 2 Allen (Mass.) 439); or has repudiated the contract (*Durham v. Wick* (1904) 210 Pa. 128, 105 Am. St. Rep. 789, 59 Atl. 824, 2 Ann. Cas. 929); or has conveyed to a third person (*Bennett v. Phelps* (1867) 12 Minn. 326, Gil. 216; *Richards v. Allen* (1840) 17 Me. 296; *Bassett v. Bassett* (1867) 55 Me. 127).

So, while ordinarily a previous demand for the return of the money is essential to a recovery, such a demand may be dispensed with where the circumstances show conclusively that it would have been unavailing. *Frey v. Stangl* (Iowa) ante, 462.

In *Frey v. Stangl* (Iowa) supra, it is

stated that even though plaintiff does not perform as agreed, recovery of the money paid in part performance ought not to be denied, unless it affirmatively appears that the defendant was ready, willing, and able to perform on his part. In this case, however, defendant had interposed the statute of frauds against the establishment of the oral contract to convey, and so had in effect repudiated it.

In *Bedinger v. Whittamore* (1829) 2 J. J. Marsh. (Ky.) 552, the statement is that the vendee may not recover where the seller, by way of defense to the action, shows ability to perform and tenders performance of the contract; but it is apparently a mere accidental variation in the statement of the substantive rule, and probably is not intended to imply that ability and willingness to perform is an affirmative defense.

Lien.

Generally as to right of vendee under an executory contract to a lien on the land for the amount paid thereon where the contract fails or is rescinded, see note to *Davis v. Rosenzweig Realty Operating Co.* 20 L.R.A.(N.S.) 175.

It is generally held that if the circumstances are such as to permit a recovery back by the purchaser of the payments of the purchase price, made under an agreement for the sale of land within the statute of frauds, he is entitled to a lien on the premises therefor if he is in possession. *McC Campbell v. McC Campbell* (1824) 5 Litt. (Ky.) 94, 15 Am. Dec. 48; *Brown v. East* (1827) 5 T. B. Mon. (Ky.) 405; *Usher v. Flood* (1885) 83 Ky. 552; *Asher v. Brock* (1894) 95 Ky. 270, 24 S. W. 1070; *Elliott v. Walker* (1911) 145 Ky. 71, 140 S. W. 51; *Padgett v. Decker* (1911) 145 Ky. 227, 140 S. W. 152 (lien for payments and improvements); *Rhinehart v. Kelley* (1911) 145 Ky. 470, 140 S. W. 653 (lien for purchase money, with interest, and enhanced value by permanent improvements); *Taylor v. Johnson* (1882) 3 Ky. L. Rep. 615; *Hieronimus v. Chenoweth* (1886) 7 Ky. L. Rep. 610 (abstract); *Hoskins v. Chapel* (1886) 7 Ky. L. Rep. 611; *Sewell v. Adams* (1886) 7 Ky. L. Rep. 611 (abstract); *Curnutte v. Curnutte* (1900) 21 Ky. L. Rep. 1422, 55 S. W. 422 (lien for money paid, but not for interest, as vendee had use of property); *Lyttle v. Davidson*, 23 Ky. L. Rep. 2262, 67 S. W. 34; *Hilton v. Duncan* (1860) 1 Coldw. (Tenn.) 314 (holding that equity has power, as an incident to the rescission, to declare a lien for the purchase money, distinguishing *McNew* L.R.A.1916D.

v. Toby (1845) 6 Humph. (Tenn.) 27); *Chrisenberry v. Wylie* (1899) — Tenn. —, 54 S. W. 49 (vendee has equitable lien for amount paid where vendor refused to convey); *Vaughn v. Vaughn* (1898) 100 Tenn. 282, 45 S. W. 677 (ejectment; vendee entitled to have a lien for payments, with interest, declared on the land).

Where one takes possession of land under a parol purchase, although he cannot defeat an action for its recovery by the holder of the legal title, or enforce a specific performance, he has a resisting equity which entitles him to a lien upon the land for the consideration paid for it, and the enhanced value given the land by such lasting and valuable improvements as he may, in good faith, have put upon it. But he is chargeable with rent during his occupancy thereof; and, in adjusting the rights of the parties in such a state of case, the correct rule as to the quantum of rents is that they should be regulated by the interest on the consideration and on the value of the improvements, being neither greater nor less than their united amount. *Grace v. Gholson* (1914) 159 Ky. 359, 167 S. W. 420. (The questions as to vendee's accountability for rent and his right to interest are not within the scope of the present note. See, as to rent, the note in L.R.A. 1915E, 405.)

So it has been held that a vendee who pays the purchase money and makes improvements cannot be ousted until the vendor repays the purchase money and makes compensation for the improvements. *Daniel v. Crumpler* (1876) 75 N. C. 184; *Pass v. Brooks* (1899) 125 N. C. 129, 34 S. E. 228 (modified in (1900) 127 N. C. 119, 37 S. E. 151, as to allowance for rental value,—a point not within the scope of this note). See as to protection of purchaser who has made improvements, note in 53 L.R.A. 337.

A vendee under a parol contract has the right to recover the purchase money paid, as for money had and received. Equity will not require him to surrender his possession until the purchase money is repaid to him, and he is entitled to a lien upon the land until he is reimbursed. Possession, however, is essential to the existence of the lien. The lien exists solely as a creature of equity, the chancellor refusing to enforce the vendor's legal rights until he has done equity by restoring the consideration which he has received upon his unenforceable agreement. But when the vendee is no longer in possession, it is not necessary for the vendor to resort to the chancellor or to

a court of law to restore his property to him. When the vendee relinquishes possession, he abandons his lien; or rather, he voluntarily places himself in a situation where his right to have a lien enforced in his behalf ceases to exist, not because the moral right is changed, but because there is no legal warrant in the court to enforce it. He still has his legal right to recover the purchase money, not in the law's recognition of his void contract, but upon the principle that if he pays money to his vendor for a consideration which has failed, the latter then holds the money for him, and impliedly promises to repay it on demand. The obligation of the vendor is personal, and does not attach to the land except under the circumstances here stated. Wright

v. Yates (1910) 140 Ky. 283, 130 S. W. 1111.

So, in *Sewell v. Adams* (1886) 7 Ky. L. Rep. 611 (abstract), and *Bishop v. Martin* (1901) 23 Ky. L. Rep. 1494, 65 S. W. 807, it is declared that the vendee has no lien where he has not been placed in possession.

A party in possession of land under a parol contract, having paid the consideration, will be protected until the consideration is refunded, and he may interpose the defense whether the action of the vendor be at law or in equity; but his failure to interpose the defense at law affords no reason for his going into a court of equity. *Hieronymus v. Chenoweth* (1886) 7 Ky. L. Rep. 610 (abstract).
G. H. P.

NEW JERSEY COURT OF ERRORS AND APPEALS.

FOSTER F. BIRCH, Appt.,
v.

WILLIAM H. BAKER et al.

(85 N. J. L. 660, 90 Atl. 297.)

Vendor and purchaser — oral promise to pay consideration — statute of frauds.

Where a written contract for the sale of land is executed by delivery and acceptance of a conveyance passing the title, a previous oral promise to pay the consideration, whether the conveyance be to the promisor or to his nominee, is not within the statute of frauds; for the consideration of the promise is executed, and the law implies a debt recoverable in assumpsit when there has been a previous request by the defendant to convey to him or his nominee, coupled with circumstances showing that both parties expected that the plaintiff would be recompensed for complying with such request; and the action is not limited to cases where money alone has been expended, but extends to those where money, securities, and land have been parted with on a previous express request. Such promise is taken out of the statute of frauds by an executed and accepted conveyance, for it is an assumpsit to pay for land, and not a contract for the sale of land.

For other cases, see Contracts, I. e, 6, b, in Dig. 1-52 N. S.

(Gummere, Ch. J., and Minturn and Kalisch, JJ., dissent.)

Headnote by BERGEN, J.

Note. — As to action for purchase price on oral contract for sale of land where the deed has been delivered, see note to *Malzer v. Schisler*, 51 L.R.A.(N.S.) 77.

The right of vendee to recover back pay-L.R.A.1916D.

(March 16, 1914.)

A PPEAL by plaintiff from a judgment of the Moon's County Circuit of the Supreme Court granting a nonsuit in an action brought to recover, under an express oral promise, a certain amount in consideration of a conveyance by him under a written agreement for the sale of land. Reversed.

The facts are stated in the opinion.

Messrs. King & Vogt, for appellant:

This case is not within the prohibition of the statute of frauds and perjuries.

Browne, Stat. Fr. § 263; *Boyd v. Stone*, 11 Mass. 346; *King v. Hanna*, 9 B. Mon. 369; *Doggett v. Paterson*, 18 Tex. 158; *Evans v. Hardeman*, 15 Tex. 480; *Natchez v. Vandervelde*, 31 Miss. 706, 66 Am. Dec. 581; *Miller v. Roberts*, 18 Tex. 16, 67 Am. Dec. 688; *Graves v. Graves*, 45 N. H. 323; *Ford v. Finney*, 35 Ga. 258; *Gwaltney v. Wheeler*, 26 Ind. 416; *Godden v. Pierson*, 42 Ala. 374; *Aicardi v. Craig*, 42 Ala. 314; *Wetherbee v. Potter*, 99 Mass. 361; *Dow v. Way*, 64 Barb. 257; *Felch v. Taylor*, 13 Pick. 136; *Gully v. Grubbs*, 1 J. J. Marsh. 387; *Wilkinson v. Scott*, 17 Mass. 251; *Pomeroy v. Winship*, 12 Mass. 523, 7 Am. Dec. 91; *Nibert v. Baghurst*, 47 N. J. Eq. 207, 20 Atl. 252; *Spengeman v. Palestine Bldg. Asso.* 60 N. J. L. 358, 37 Atl. 723.

To give a consideration value sufficient for the support of a promise, it must be either such as deprived the person to whom the promise was made of a right which he before possessed, or else conferred upon the other party a benefit which he otherwise would not have had.

ments made upon a contract for the sale of land which does not satisfy the statute of frauds is considered in the annotation following *Cook v. Griffith*, ante, 468.

Conover v. Stillwell, 34 N. J. L. 54; Headley v. Leavitt, 65 N. J. Eq. 753, 55 Atl. 731.

An action can be maintained in assumption upon the contract of the defendants to pay.

Force v. Haines, 17 N. J. L. 386; Glover v. Collins, 18 N. J. L. 234; Smith v. Smith, 28 N. J. L. 208, 78 Am. Dec. 49; Cook v. Linn, 19 N. J. L. 11, 2 Mor. Min. Rep. 49; Hoyt v. Hoyt, 16 N. J. L. 146; Ainslee v. Wilson, 7 Cow. 662, 17 Am. Dec. 532; Gay v. Mooney, 67 N. J. L. 27, 50 Atl. 596.

Messrs. Benjamin W. Ellicott and Willard W. Cutler for appellees.

Bergen, J., delivered the opinion of the court:

The plaintiff and the five defendants, being residents of the town of Dover, were interested in procuring the Sims-Kent Company to locate there a manufacturing plant, and to accomplish this entered into negotiations with the company, which resulted in a written agreement between the plaintiff and the defendants as joint contractors, and the company, in which the plaintiff and the defendants agreed "to secure and convey to said company in fee simple the title of said land and premises from the said Foster F. Birch," the premises being a tract of land in Dover belonging to the plaintiff. In consideration of this conveyance, to be without cost to it, the Sims-Kent Company agreed to erect its factory on the lands. The plaintiff subsequently conveyed the land to the company, and it erected thereon its factory. The plaintiff, claiming that the defendants, to induce him to make the conveyance to the Sims-Kent Company according to their contract, promised orally to pay him \$2,000 of the consideration price and, upon their refusal to pay, brought this suit against the defendants on their oral promise. There was evidence from which it could be inferred that the defendants, to induce plaintiff to enter into the contract, and subsequently convey the land to the Sims-Kent Company, promised to pay him \$2,000. The trial court ordered a judgment of nonsuit, from which plaintiff appeals, and the defendants now seek to sustain the nonsuit upon the ground that the oral promise was one concerning the sale of lands, and, not being in writing, void under the statute for the prevention of frauds and perjuries (Comp. Stat. 2610), § 5 of which prohibits an action to charge any person "upon any contract or sale of lands, tenements, or hereditaments, or any interest in, or concerning them," unless the L.R.A.1916D.

agreement be in writing, signed by the person charged.

This case was before the supreme court on a rule to show cause, where it was held that such a promise was within the statute (79 N. J. L. 10, 74 Atl. 151), and on the second trial, the judge at circuit, following the judgment of the supreme court, ordered the nonsuit. The plaintiff having appealed from the judgment of nonsuit, the question presented is whether a promise, not in writing, to pay the owner of lands an agreed consideration if he convey the land to one in performance of a written contract by the promisor to secure such conveyance, and the owner does convey as requested, relying upon such promise, is enforceable as not being barred by the statute of frauds.

That a vendor may recover in assumption upon an oral promise by the vendee to pay the consideration agreed upon for land conveyed, and that such promise is not within the statute, has the sanction both of legal reasoning and adjudged cases. It was so held by the supreme court of this state in Murray v. Schuldt, 73 N. J. L. 489, 63 Atl. 904, where the court said that, "the property having been conveyed to the defendant, the plaintiff's action was not upon the express contract of sale, but upon the debt which arose upon the conveyance," and that such promise was not within the statute.

So, in Spengeman v. Palestine Bldg. Assn. 60 N. J. L. 357, 37 Atl. 723, where the prosecutor, who was vendor's broker, induced the defendant in certiorari, the plaintiff below, to purchase real estate upon his oral promise that he would allow plaintiff his commission as broker in reduction of the purchase price, and after conveyance and payment of the purchase price, the prosecutor, having collected the commission from the vendor, refused to carry out his promise, and, being sued, set up, among other defenses, that his promise was a contract for "sale of lands, or an interest in or concerning them," and not enforceable because of the statute. In sustaining plaintiff's right to recover, Mr. Justice Dixon said: "The present action, according to our view, is maintained, not upon the express agreement, but to enforce an implied obligation arising in part from what the plaintiff did under the influence of that agreement."

In Bolles v. Beach, 22 N. J. L. 680, 53 Am. Dec. 263, Beach agreed in writing to sell a tract of land to two persons or their assigns who were to associate themselves with others and form a company to dispose of it in parcels at public auction, Beach to make conveyances to such persons as the so-called company might require, and upon their request he conveyed a portion to Bolles,

subject to a mortgage previously given by Beach, the amount of which was allowed to Bolles by the company when they collected the consideration from him, and in the settlement with Beach deducted, from the price it had agreed to pay, the amount allowed Bolles, he having orally agreed to pay the mortgage. There was no contract for sale between the actual parties to the deed. The only written contract with the vendee, prior to the delivery of the deed, was the conditions of the sale made by the company which were carried out by the deed from Beach to their nominee, Bolles. The deed acknowledged payment of the consideration without reference to the mortgage, or written assumption of its payment, and, the vendee refusing to pay the mortgage, Beach, being obligated on his bond it was given to secure, was compelled to take care of the mortgage, and then brought his suit in assumpsit against Bolles to recover the sum "in part payment of the consideration money of the deed of conveyance." The defense set up was that Beach was estopped by the recitals in his deed to deny payment of the consideration, and that the agreement, not being in writing, was void under the statute of frauds. This court held, on error, that the evidence of the agreement did not affect the operation of the deed, but only the character and extent of the payment of the consideration, and was therefore not within the statute, and that the acknowledgment of payment of the consideration, while it could not be denied by the grantor for the purpose of destroying the effect and operation of the deed, it could be for the purpose of recovering the consideration money, and, further, that, although the consideration when paid became so much paid for the account of "the committee of speculators," yet, as it was to be paid to Beach as purchase money, he was the party in interest and entitled to sue. As there was no proof of any agreement by the vendee with the vendor to pay the consideration price, it would seem that the right of recovery was based either upon the promise of Bolles to pay the committee, or upon an implied promise to pay the vendor, upon conveyance, but in any event the committee, or the two contracting purchasers, were bound to pay the consideration to Beach when he conveyed to their nominee upon request, and the action affirmed simply avoided circuitry of action if based upon their contract with Bolles to appropriate the consideration money left in his hands for the discharge of the mortgage. While this case is not precisely like the one under review, it recognizes the principle that the consideration for lands conveyed may be recovered by the grantor from the vendee

without a previous written contract between them, and also that the promise to pay the consideration is not within the statute of frauds as a sale of land, or of an interest therein.

In *Brackett v. Evans*, 1 Cush. 79, it was held that "a party who receives a grant of land, on his promise to pay for it, cannot avoid payment by showing that the promise was not in writing."

In *Bowen v. Bell*, 20 Johns. 338, 11 Am. Dec. 286, the parties owned a tract of land as tenants in common,—one four sixths and the other two sixths,—which they agreed to divide equally, one party to pay the other one sixth. The conveyances were made, but the promisor refused to pay for the one sixth, for which the promisee brought suit in assumpsit. Proof of the promise to pay was objected to upon the ground that it was within the statute of frauds, but the supreme court held against this contention, for the reason that "this action is not on a contract for the sale of lands, or any interest in lands. The law raises a promise to pay, and in such case it is not within the statute of frauds, although it be raised from an agreement concerning an interest in lands,"—citing *Shephard v. Little*, 14 Johns. 210, where it is held that assumpsit will lie to recover the consideration for lands sold and conveyed.

In *Wetherbee v. Potter*, 99 Mass. 354, two of four purchasers of real estate agreed to furnish the consideration price, and the two agreed that one should pay the entire sum upon the promise of the other that he would reimburse him to the extent of one half of the cost. In an action in assumpsit for the one half of the cost, the defendant set up the statute of frauds. The court held that, although the money was advanced for the purpose of purchasing real estate and upon an oral agreement to that effect, it is not of itself a contract for the sale of land, and if the money be in effect advanced before the request is revoked, an action upon such promise is not forbidden by the statute.

And also in *Root v. Burt*, 118 Mass. 521, it was held, in a suit to recover the price of land sold and conveyed, that as a contract for the sale of lands, it is taken out of the statute by an executed and accepted conveyance.

In *Lewis v. Grimes*, 7 J. J. Marsh. 336, the action was in assumpsit to recover part of the consideration promised by defendant, and the court held: "An assumpsit to pay for land is not a 'contract for the sale of land.' Neither the letter, policy, nor object of the statute of frauds and perjuries should be deemed to embrace or apply to a promise, express or implied, to pay for land

which the vendor had conveyed or covenanted to convey. . . . Surely a conveyance of land, or a covenant to convey land, would be a legal and sufficient consideration for a binding promise to pay its actual or conventional value." A right of action to recover the consideration of land already conveyed, based upon an oral promise, is also declared in *Thayer v. Viles*, 23 Vt. 494. In the case under review, the defendants had in writing contracted to "secure and convey to said company in fee simple" land the title to which was vested in the plaintiff. This was a binding contract which the defendants fulfilled by inducing plaintiff to convey upon their oral promise to pay him a portion of the consideration money. He, relying upon that promise, parted with his land to the party the defendants had contracted with, thus completing for them the sale they had in writing agreed to secure, and thereby relieving them from their obligation to the vendee concerning the sale of the land, or of any interest therein, which is a sufficient and legal consideration for their promise. Having by their promise to plaintiff been enabled to fulfil their written obligation, binding under the statute, it would further the perpetration of a fraud of most flagrant character to allow the defendants to escape carrying out their bargain with the landowner, and this ought not to be permitted, unless their promise is barred by the statute, and we think it is not. If the conveyance had been made to the defendants, their promise, although oral, to pay the consideration, would not be within the statute, and their legal obligation to the vendor is not altered because he conveys to their nominee instead of to them; for they get a benefit from the conveyance in either event, and it is illogical to argue that what the plaintiff did for the defendants at their request was not a performance of their contract by the plaintiff, who advanced his land for their exoneration. Whether it was money or land which they had contracted to supply, and which the plaintiff supplied for them, is of no consequence, for, as was well said by Chief Justice Hornblower in *Cook v. Linn*, 19 N. J. L. 11, 2 Mor. Min. Rep. 49, whenever the plaintiff has discharged an obligation of the defendant "to any other person, by applying his own money, goods, chattels, securities, or lands to such discharge, he may recover the amount so paid or satisfied, in an action of general indebitatus assumpsit for money paid."

In *Woodward v. Smith*, 7 Ala. 112, S. agreed with O. to sell him a tract of land, but when the conveyance was about to be made, it was discovered that the title to a part of the tract was in the vendor's son, L.R.A.1916D.

who at his father's request conveyed his tract to O. In a suit for money had and received by the son to recover compensation from his father's estate for the land conveyed at his father's request, it was held that the promise of the father to pay the son was not within the statute. "Indeed we cannot perceive any sound distinction between a conveyance to the bargainee of land and a conveyance to one at his nomination; and we have heretofore held that assumpsit might be brought when a deed had been executed and accepted, although the contract of purchase was oral only."

To the same effect is *Follmer v. Dale*, 9 Pa. 83, where Dale conveyed to one Garman, in consideration of the oral promise of Follmer that he would pay the consideration if conveyance was made to Garman. The deed was made, Garman entered into possession, and Dale brought suit against Follmer as guarantor. The defense was that the promise to pay the consideration was not in writing, and therefore void under the statute. The court held in effect that, as Dale would not have conveyed without the promise of Follmer to pay, the promise was not within the statute, and said: "To enable Follmer to cut himself loose from the contract would encourage, not prevent, fraud." We have no doubt that where a sale of land is executed by delivery and acceptance of a conveyance passing the title, a previous oral promise to pay the consideration, whether the conveyance be to the promisor or to his nominee, is not within the statute of frauds, for the consideration of the promise is executed, and the law implies a debt recoverable in assumpsit, when there has been a previous request by the defendant to convey to him, or to his nominee, coupled with circumstances showing that both parties expected that plaintiff would be recompensed for complying with such request, and the action is not limited to cases where money alone has been expended, but extends to those where goods, securities, or land have been parted with on a previous express request.

It is not without significance that these defendants, in the contract they made with the Sims-Kent Company, required it to deposit in the bank a sum of money subject to their order, or to the order of a majority contracting to convey, as a guaranty that after conveyance that company would proceed to erect the factory on the land. The sum required to be deposited was not the full consideration named in the deed, but only \$2,000, which was the precise sum which plaintiff's case shows they promised to pay him, and the inference is permissible that this was required to secure the defendants for the cost of the land, if the

Sims-Kent Company did not make the agreed use of it.

It further appears that these defendants subsequently assented to the withdrawal of the \$2,000 by the depositing company when it had, to their satisfaction, complied with the terms of its contract with them, which may be taken, until otherwise explained, as an indication that the consideration which defendants contracted for as the price of the conveyance of the land had been fulfilled by their nominated vendee to their satisfaction, which would justify the inference of an accepted performance of the covenant contained in the contract of sale beneficial to them.

In this case there was testimony from which may be inferred, not only a request to convey, but a promise by the defendants to pay a part of the value of the land which at their request the plaintiff conveyed to their nominee in satisfaction of their contract; and when plaintiff advanced his land to relieve these defendants, at their request, the law raised an implied promise by the defendants so benefited to reimburse him, a promise which has no concern with the sale of land or of any interest therein. The sale was closed when plaintiff conveyed, and nothing remained to be done to complete the sale of the land. The promise which induced the conveyance became a debt of those who agreed to pay the consideration, enforceable as an implied obligation arising in part from what the plaintiff did under the influence of the contract. *Spengeman v. Palestine, Bldg. Asso.* 60 N. J. L. 357, 37 Atl. 723.

The appellant devotes a portion of his brief to the question whether the promise was a joint obligation or several, arguing that it was joint, but the defendant does not suggest or argue this question in his brief, nor was the motion for nonsuit put upon that ground, but, assuming that it is raised in this case, there was evidence from which a jury might find the promise to be joint, or joint and several, and therefore that question should have been left to them as a question of fact. On this question the plaintiff testified that when the effort to induce the local improvement association to purchase plaintiff's land proved to be unsuccessful, he proposed that five or six of the citizens, of whom he was one, should pay for the land, and thereupon the defendants and plaintiff agreed with each other to purchase the land from plaintiff for the Sims-Kent Company; that the price was finally fixed at \$2,500, of which plaintiff was to contribute \$500, and the balance, \$2,000, to be paid to him by the other five parties. An inference of a joint obligation to pay may be drawn from this, and there-
L.R.A.1916D.

fore, even if this question was relied upon by defendant, a nonsuit would not have been proper, but the question whether the obligation was joint or several, depending upon the testimony, was a jury question.

There was some evidence tending to show that, as between the promisors, they expected each to contribute \$400 towards the fund, but that would not of itself destroy their joint obligation to pay the whole sum to the plaintiff, if a joint promise existed.

The argument is advanced that oral proof of a promise to pay the consideration, if the vendor, upon request of the promisor, would convey to a third party, with whom the promisor had contracted to secure a conveyance of land to the vendee, would subject an alleged promisor to the danger of false testimony tending to establish such promise; but that danger is inherent in every case where it is sought to enforce a promise or fix the legal liability of a party in the case of any engagement clearly not within the statute. And if, as we hold, the promise to pay the consideration for an executed conveyance, under the circumstances present in this case, is not within the statute, proof of such promise is subject to the veracity of witnesses as in all cases of like character.

The judgment under review is reversed.

White, J., concurring:

The purpose of the statute of frauds is to prevent fraud. The question of its applicability is largely dependent upon this purpose. The statute is therefore not permitted to be invoked to perpetrate an equitable fraud. *Vreeland v. Vreeland*, 53 N. J. Eq. 387, 32 Atl. 3, and cases there cited.

I think that it is because of this well-established doctrine that a parol contract for the sale of real estate, which has been executed by a conveyance by the vendor and an acceptance by the vendee, will support an action by the vendor against the vendee for the agreed purchase price. 20 Cyc. 231, and cases there cited.

I am aware that in *Murray v. Schuldt*, 73 N. J. L. 489, 63 Atl. 904, the supreme court said that the recovery would be, not upon the express contract, but upon an implied contract, to pay for the land so conveyed; but what that case really decided was that it was error for the trial judge to exclude evidence of the price agreed upon in the express parol contract, which seems to me to substantiate my view rather than the one expressed in the opinion filed in that case. I cannot think that a man who has received and accepted a conveyance of real estate in pursuance of a parol contract to pay therefor the sum of \$10,000 may es-

cape with a payment of \$3,000 by proving that to be the real value of the land; nor that a man who has received a conveyance of real estate in pursuance of a parol contract to pay \$3,000 therefor may be required to pay \$10,000 upon proof that such was the real value of the property conveyed. Of course, it is true that where the parol contract to sell real estate has not been carried out by the conveyance, money paid for or on account of the purchase price may be recovered back, or services, properly measurable in money value, may be recovered for on a quantum meruit, both upon an implied contract. *Smith v. Smith*, 28 N. J. L. 208, 78 Am. Dec. 49; *Cooper v. Colson*, 66 N. J. Eq. 328, 105 Am. St. Rep. 660, 58 Atl. 337, 1 Ann. Cas. 997; *Gay v. Mooney*, 67 N. J. L. 28, 50 Atl. 596. But the reason for this is that the parol contract to sell the real estate, not having been performed, is barred by the statute, and, consequently, the payment or the performance of services, being without consideration, and under circumstances negating a gratuity, raises an implied contract. Where the parol contract to sell real estate has been performed, however, by the conveyance, the payment of the price, as it seems to me, is compelled, not upon the theory of the nonexistence of the parol contract, but in pursuance and enforcement of it. Under this view, obviously, a tender to the vendee of the conveyance, duly executed by the vendor, is not enough, although that is all the vendor can do, and the contract may, in a sense, be said to be performed so far as he is concerned. But in the absence of acceptance of the conveyance by the vendee, the statute interposes an absolute barrier to the enforcement of the contract. When, however, the vendee has accepted the benefit of performance of the contract by the vendor, a new element intervenes. To permit the vendee to then say that the contract could not be enforced against him because of the statute would be to permit him to invoke the statute in order to perpetrate the fraud of procuring a benefit on the faith of the promise to pay for it, and then, while retaining the benefit, repudiating that promise. The all-important element, therefore, is the acceptance by the vendee of the benefit of the performance. Without this acceptance there is no fraud, and mere performance by the vendor is without effect upon the barrier interposed by the statute.

I am for this reason unable to agree with that portion of the foregoing opinion which states that a conveyance by the vendor to, and an acceptance of the conveyance by, a third party, to whom, by the terms of the verbal contract of sale the conveyance was to be made, without further act on the part

of the other party to the verbal contract, the vendee, will suffice to take the case out of the prohibition of the statute, so that the price may be recovered from such vendee. All that he did was to enter into a verbal contract for the sale of land. The statute made that contract unenforceable against him, unless he, by some other act, accepted the benefit of performance of that contract, in which case it would be a fraud for him to invoke the statute. He did not accept such benefit. Where is his fraud? What has he done to estop him from claiming a protection (the statute) to-day after the conveyance to the third party which admittedly he had a perfect right to claim yesterday, before such conveyance? He has not accepted anything, nor has he received any benefit. I am unable to see that he is estopped from asking the protection of the statute.

That the situation presents an apt case for the application of the statute goes almost without saying. It is difficult to imagine a more appropriate subject for such application than one presented by the picture of an anxious seller and an obliging impecunious friendly buyer uniting, for mutual interests, in a conveyance from the former to the latter, and in a story of a verbal contract by the former with a financially responsible third party, whereby the payment of the price is foisted upon such third party. Surely a statute to prevent fraud has excellent ground for application here. Its terms seem quite broad enough to cover it. In fact it would seem to have covered it twice; once, as to the contract itself in the prohibition against a verbal contract for the sale of real estate, and again, as to the theory (viz., acceptance of benefit by a third party) upon which the exception is proposed to be grounded, in its prohibition of a verbal contract to pay the debt of another.

It may be that where the vendee comes in and admits the verbal contract and a request by him to convey to the third party, which was done, he may be estopped from setting up the statute because he has waived its protection by admitting the absence of what it is the purpose of the statute to prevent; but, where he admits nothing and simply invokes the statute, I think there is every justification for its intervention.

I concur, however, in a reversal of this judgment because in this case there was an act of acceptance by the vendees, the defendants, of performance by the vendor of the verbal contract of sale. That acceptance consisted in their joining in a perfectly legal and binding written contract with the third party (the Sims Company), whereby they obligated themselves to procure the

conveyance in question to be made, and the subsequent execution and delivery by the verbal vendor of that conveyance to the benefit of such vendees in the discharge of their said legal obligation. The vendees legally bound themselves to procure the making of this conveyance by the vendor, who then, at their request, discharged their obligation by making it. Clearly they have accepted performance of the verbal contract of sale, and have received the benefit of such performance. They now propose to retain that benefit, and, by invoking the statute, to decline to pay what they agreed to pay for it. That to permit them to do so would be to sanction a use of a statute for the prevention of fraud to perpetrate a fraud is equally clear.

This view, which appears not to have been presented, or evidently was overlooked, when this case was before the supreme court on rule to show cause (79 N. J. L. 10, 74 Atl. 151), leads me to concur in the reversal of the judgment; but I dissent from the much wider declaration contained in the majority opinion, not only because I think it is not involved in the decision of this case, but because it leaves wide open one of the doors leading to the perpetration of fraud, which, in my judgment, it was the expressed purpose of the statute to close.

Gummere, Ch. J., and Minturn and Kalisch, JJ., dissent.

KANSAS SUPREME COURT.

LUTHER C. BAILEY

v.

CITY OF TOPEKA et al.

(97 Kan. 327, 154 Pac. 1014.)

Parks — restrictions — concessions — validity.

1. The action of a city in granting to individuals, for pay, exclusive rights within a public park to operate refreshment and lunch stands, and to rent boats and bathing suits and towels and dressing rooms, does not constitute a use of the park for other than public purposes, nor is it in conflict with provisions of the deed of gift by which the city acquired the property, to the effect that it should be used for the benefit of the public, and should be inalienable by deed, gift, lease, or other method.

For other cases, see *Dedication*, I. a, in *Dig. 1-52 N. S.*

Municipal corporation — regulation of parks — concessions.

2. Sufficient power for the purpose indicated is conferred by statutes authorizing the city authorities to "regulate" parks.

For other cases, see *Municipal Corporations*, II. a, in *Dig. 1-52 N. S.*

(February 12, 1916.)

ORIGINAL action in the nature of quo warranto to oust defendants from the power which they are undertaking to exercise of using the park for other than public

Headnotes by MASON, J.

Note. — As to what use of squares, parks, or commons amounts to diversion from the use for which they were dedicated, see notes to *Daughters v. Ripley County*, 27 L.R.A. (N.S.) 938, and *Hopkinsville v. Jarrett*, 50 L.R.A. (N.S.) 465.
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purposes and in such manner as to violate the terms of its dedication. Judgment for defendants.

The facts are stated in the opinion.

Messrs. A. M. Harvey and J. E. Adlington, for plaintiff:

The city has no right to abandon the sovereign power given to it, and substitute therefor business activities.

Leavenworth v. Norton, 1 Kan. 435; *Leavenworth v. Rankin*, 2 Kan. 357; *State ex rel. Atwood v. Hunter*, 38 Kan. 581, 17 Pac. 177; *Steele v. Boston*, 128 Mass. 583; *Malchow v. Leoti*, 95 Kan. 787, L.R.A. 1915F, 568, 149 Pac. 687.

The power claimed by defendants violates dedication.

Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197; *Codman v. Crocker*, 203 Mass. 147, 25 L.R.A. (N.S.) 980, 89 N. E. 177; *Franklin County v. Lathrop*, 9 Kan. 453; *Armstrong v. Portsmouth Bldg. Co.* 57 Kan. 69, 45 Pac. 67; *Board of Education v. Kansas City*, 62 Kan. 374, 63 Pac. 600; *Franklin County v. Lathrop*, 9 Kan. 453; *Feizel v. First German Soc.* 9 Kan. 592; *Miami County v. Wilgus*, 42 Kan. 457, 22 Pac. 615; *McAlpine v. Chicago G. W. R. Co.* 68 Kan. 207, 64 L.R.A. 85, 75 Pac. 73, 1 Ann. Cas. 452; *Jefferson County v. Oskaloosa*, 80 Kan. 587, 102 Pac. 1095; *Hutchinson v. Danley*, 88 Kan. 437, 129 Pac. 163; *Hopkinsville v. Jarrett*, 156 Ky. 777, 50 L.R.A. (N.S.) 465, 162 S. W. 85; *Church v. Portland*, 18 Or. 73, 6 L.R.A. 260, 22 Pac. 528; *Clark v. Waltham*, 128 Mass. 569; *Steele v. Boston*, 128 Mass. 583; *Codman v. Crocker*, 203 Mass. 148, 25 L.R.A. (N.S.) 980, 89 N. E. 177; *Lincoln v. Boston*, 148 Mass. 578, 3 L.R.A. 257, 12 Am. St. Rep. 601, 20 N. E. 329; *Ward v. Field Museum*, 241 Ill. 496, 89 N. E. 731; *South Park Comrs. v. Montgomery Ward & Co.* 248 Ill. 300, 93 N. E. 910, 21 Ann. Cas. 127; *Clark v. Provi-*

dence, 1 L.R.A. 725, and note, 16 R. I. 337, 15 Atl. 763; *Sturmer v. County Ct.* 42 W. Va. 724, 36 L.R.A. 300, 26 S. E. 532; *Douglas v. Montgomery*, 118 Ala. 599, 43 L.R.A. 376, 24 So. 745; *Rozzee v. Pierce*, 75 Miss. 846, 40 L.R.A. 404, 65 Am. St. Rep. 625, 23 So. 307; *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *Sherburne v. Portsmouth*, 72 N. H. 539, 58 Atl. 38; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 227, 15 Am. Rep. 202; *Dill. Mun. Corp.* 4th ed. § 72; *Gushee v. New York*, 42 App. Div. 37, 58 N. Y. Supp. 967.

Messrs. **George P. Hayden** and **A. C. Bartell**, for defendants:

The city of Topeka has the right to grant concessions and privileges in Gage park.

Gibbons v. Ogden, 9 Wheat. 196, 6 L. ed. 70; 28 Cyc. 938; *Dill. Mun. Corp.* 5th ed. § 1096; *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *Harter v. San Jose*, 141 Cal. 659, 75 Pac. 344; *Gushee v. New York*, 42 App. Div. 37, 58 N. Y. Supp. 967.

Mason, J., delivered the opinion of the court:

The city of Topeka accepted a tract of land given to it for the purpose and on the condition that it should be used as a public park, "for the benefit of the health, comfort, and recreation of the citizens of Topeka and their friends, and such other orderly persons as may resort thereto." The deed of gift contained a provision that "said real estate shall be inalienable by said city of Topeka, either by way of deed, conveyance, lease, or in any other manner, and shall be forever held and used for the purposes aforesaid." *Luther C. Bailey*, who owns land facing on that referred to, brings an original action in this court in the nature of quo warranto, asking that the city and its officers be ousted from the power which they are undertaking to exercise of using the park for other than public purposes, and in such a manner as to violate the terms of its dedication. The case is submitted upon the pleadings.

Prior to answering, the city filed a motion to dismiss, on the grounds: (1) That the court had no jurisdiction to hear the case; (2) that the allegations of the petition did not show an illegal exercise of power; and (3) that the plaintiff had no peculiar or specific interest different from the citizens of Topeka as a whole. The motion was overruled; the first ground being regarded as not well taken, and the others as involving the sufficiency of the petition, and proper to be raised rather by a demurrer than by a motion to dismiss. Whether the plaintiff has or claims any such peculiar interest in the use to which the park is put as to enable him to main-

tain an action to restrain the city from wrongful conduct in its management may well be doubted. An abutting owner may sometimes sue to prevent a diversion of public property from the uses for which it was acquired. *Franklin County v. Lathrop*, 9 Kan. 453; note in 1 L.R.A. 725. But whether the plaintiff is within that rule need not be determined, by reason of the conclusion reached on the other branch of the case.

1. The action of the city of which complaint is made consists of the granting to individuals, for pay, of exclusive rights within the park to operate refreshment and lunch stands, and to rent boats and provide suits, towels, and rooms for bathers, at fixed prices. A free dressing pavilion is provided for bathers using their own suits and towels. Apparently there is nothing to prevent anyone from using his own boat on the pond, should he so desire. We see nothing in the conduct referred to that is inconsistent with the public character of the park, or that conflicts with the terms of the gift. The exclusive character of the privilege conferred is not the basis of any legitimate objection; for, as no one has a right to engage in the activities referred to except by permission of the city, no one is wronged by the monopoly created. The concessions granted do not amount to the leasing of any part of the park. *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S. W. 47. Nor do they involve the loss of control over it by the public officers. Clearly it is not inconsistent with the conditions imposed by the donor of the property, that visitors to the park should be afforded facilities for obtaining refreshments, for boating, and for bathing. No reason exists why they should not pay a fair price for what they eat or drink, or for the boating or bathing equipment they use. The city might, through its employees, furnish these conveniences directly, collecting reasonable charges therefor. The fact that a profit resulted would not render the transaction objectionable. The incidental revenue would not characterize the transaction as commercial rather than governmental. Substantially the same result is accomplished by authorizing certain individuals to attend to the business of supplying the wants of the public with respect to the matters referred to, retaining so much of the proceeds as will fairly compensate them for their services and investment, and turning the residue over to the city. The following text, and the cases supporting it, are in point at least to the extent of indicating that the facilities undertaken to be supplied are appropriate to the conduct of a public park: "Under a power to control and regulate parks the municipal author-

ities may provide for the pleasure, amusement, comfort, and refreshment of persons frequenting them, which in their discretion they may do by granting privileges to private persons to furnish food or refreshments, or means of innocent entertainment, with the right to erect necessary structures incident thereto which will not interfere with the rights of the public, and may give a license to use a building in a park for the purpose of a restaurant, which rights and privileges may be made exclusive, the municipality in all cases retaining the right of regulation and control over the manner of conducting the business." 28 Cyc. 938.

The suggestion is made that, if the present course of the city officers is held to be legitimate, there is nothing to prevent them at their pleasure from turning the park into a mere amusement resort, abounding in alluring catchpenny devices and dominated by a spirit of commercialism. This does not follow. That the power of regulation and management might be so abused as to war-

rant the interference of a court may be conceded. But we find in what has already been done no close approach to the danger line.

2. It is argued that special statutory authority would be required to enable the city to pursue the course of which complaint is made. A member of the city commission is designated as the "commissioner of parks and public property." Gen. Stat. 1909, § 1235, amended by Laws 1913, chap. 84, § 2. The commission is empowered to "regulate" parks. Gen. Stat. 1909, § 1280. "A park may be devoted to any use which tends to promote popular enjoyment and recreation." 3 Dill. Mun. Corp. 5th ed. § 1096, p. 1749. The furnishing of the conveniences referred to is a proper incident to the management of the park, and the method followed is so naturally adapted to the desired end that it must be regarded as a matter of administrative detail, not necessary to be specifically authorized by the legislature.

Judgment is rendered for the defendants.

KENTUCKY COURT OF APPEALS.

FIDELITY & COLUMBIA TRUST COMPANY, Extr., etc., of Gertrude K. Barret, et al., Appts.,

v.

A. HITE BARRET et al.

(— Ky. —, 179 S. W. 396.)

Power — to will estate — nonexclusive.

1. Under a will providing that the share of a beneficiary as it shall exist at his death "shall pass as he may direct by last will, to his wife and heirs at law," he has no authority to exclude either the wife or any heir at law from participation in his will.

For other cases, see Powers, II. in Dig. 1-52 N. S.

Same — illusory exercise of power — validity.

2. The exercise of a nonexclusive power to appoint an estate valued at \$150,000 among four persons, by giving three \$1,000 each and the other the remainder, is merely illusory as to the former, and therefore without effect.

For other cases, see Powers, II. in Dig. 1-52 N. S.

Estoppel — acceptance of illusory appointment.

3. The acceptance of the sum representing an illusory appointment by will does not, if it is returned within a reasonable time, estop the beneficiary from contesting the validity of the will because of failure properly to exercise the power, although

Note. — As to nonexclusive powers and illusory appointments, see annotation following this case, post, 498.
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in reliance upon the appointment another beneficiary has made a will which might have been different had he been promptly advised that the appointment was void.

For other cases, see Estoppel, III. k, in Dig. 1-52 N. S.

(October 26, 1915.)

APPEAL by defendants from a judgment of the Chancery Branch, First Division, of the Circuit Court for Jefferson County, directing the defendant trust company to turn over to plaintiffs one half of the estate in its possession as executor and trustee under the will of Gertrude K. Barret, deceased. **Affirmed.**

The facts are stated in the opinion.

Messrs Bruce & Bullitt and Grover G. Sale, for appellants:

In cases where powers have been held to be nonexclusive, the power of appointment has been limited to "children," a class easily ascertainable and usually small in number, and where it is more easily inferable that the maker of the power intended each child to have something. But where the class is wider and more indefinite than children, the tendency is to hold that the donee has the power of selection.

Re Veale, L. R. 4 Ch. Div. 61; Spring ex dem. Titcher v. Biles, 1 T. R. 435, note; Levi v. Fidelity Trust & S. V. Co. 121 Ky. 82, 88 S. W. 1083; Faloon v. Flannery, 74 Minn. 38, 76 N. W. 954; Lippincott v. Ridgway, 11 N. J. Eq. 526; Thrasher v. Ballard, 35 W. Va. 524, 14 S. E. 232; Inglis v. McCook, 68 N. J. Eq. 27, 59 Atl. 630; McGibbon v. Abbott, L. R. 10 App. Cas.

653, 54 L. J. P. C. N. S. 39, 54 L. T. N. S. 138.

No case can be found in America, whether in Kentucky or elsewhere, in which the old doctrine of "illusory appointments" has been applied, and an appointment held void because the amount given to some person was not enough.

Kemp v. Kemp, 5 Ves. Jr. 850, 5 Revised Rep. 182; *Gibson v. Kinven*, 1 Vern. 66; *Ray v. Sweney*, 14 Bush, 1, 29 Am. Rep. 388; *Spencer v. Spencer*, 5 Ves. Jr. 362; *Butcher v. Butcher*, 9 Ves. Jr. 383, 12 Revised Rep. 193, 1 Ves. & B. 79; *Mocatta v. Lousada*, 12 Ves. Jr. 123; *McGibbon v. Abbott*, L. R. 10 App. Cas. 653, 54 L. J. P. C. N. S. 39, 54 L. T. N. S. 138; *Hawthorn v. Ulrich*, 207 Ill. 430, 69 N. E. 885; *Graeff v. De Turk*, 44 Pa. 527; *Ingraham v. Meade*, 3 Wall. Jr. 32, Fed. Cas. No. 7,045; *Lines v. Darden*, 5 Fla. 51; *Fronty v. Godard*, Bail. Eq. 517; *McGaughey v. Henry*, 15 B. Mon. 383; *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523; *Clay v. Smallwood*, 100 Ky. 212, 38 S. W. 7.

Plaintiffs, the brothers and sister of *Lewis Barret*, are in no position to dispute the validity of his will. They have long since accepted, and for years have enjoyed, the provisions made for them by that will, and cannot now insist that it is void.

White v. Mayhall, 15 Ky. L. Rep. 830, 25 S. W. 881; *McElwain v. Smith*, 165 Ky. 496, 177 S. W. 244.

Plaintiffs are bound by their election to take under this will, even though they were ignorant of their rights.

Logsdon v. Haney, 25 Ky. L. Rep. 245, 74 S. W. 1073; *Light v. Light*, 21 Pa. 407.

Messrs. Humphrey, Middleton, & Humphrey, for appellees:

The power of appointment conferred upon *Lewis Barret* was a nonexclusive power, under the terms of which he could not exclude any member of the class.

Watson v. Watson, 21 Tex. Civ. App. 348, 51 S. W. 1105; *Faloon v. Flannery*, 74 Minn. 38, 76 N. W. 954; *Lippincott v. Ridgway*, 11 N. J. Eq. 526; *Inglis v. McCook*, 68 N. J. Eq. 27, 59 Atl. 630; *Thrasher v. Ballard*, 35 W. Va. 524, 14 S. E. 232; 31 Cyc. 1066.

The execution of the power of appointment by *Lewis Barret* is void because the appointments made to the appellees herein—his sole heirs at law—are unsubstantial and illusory.

McGaughey v. Henry, 15 B. Mon. 383; *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523; *Clay v. Smallwood*, 100 Ky. 212, 38 S. W. 7; *Levi v. Fidelity Trust & S. V. Co.* 121 Ky. 82, 88 S. W. 1083.

The following cases do not substantiate L.R.A.1916D.

the statement that the illusory appointment doctrine was not applied in them:

Lines v. Darden, 5 Fla. 51; *Hawthorn v. Ulrich*, 207 Ill. 430, 69 N. E. 885; *Graeff v. De Turk*, 44 Pa. 527; *Van Syckel's Estate*, 9 Pa. Dist. R. 367; *Fronty v. Godard*, Bail. Eq. 517.

The English chancellors applied this doctrine to cases to which it should not have been applied, and dissatisfaction arose. The doctrine was abolished in 1830 by an act of Parliament known as the illusory appointment act.

Vanderzee v. Aclom, 4 Ves. Jr. 771; *Spencer v. Spencer*, 5 Ves. Jr. 363; *Mocatta v. Lousada*, 12 Ves. Jr. 123; *Butcher v. Butcher*, 9 Ves. Jr. 382, 12 Revised Rep. 193; *Wilson v. Piggott*, 2 Ves. Jr. 351, 2 Revised Rep. 246.

The doctrine has been applied in Kentucky with its proper limitations, and up to this time no dissatisfaction has been expressed concerning it.

Levi v. Fidelity Trust & S. V. Co. 121 Ky. 82, 88 S. W. 1083.

A share of \$1,000, compared to a share of \$147,000, is manifestly unsubstantial and illusory.

Bax v. Whitbread, 16 Ves. Jr. 15; *Kemp v. Kemp*, 5 Ves. Jr. 849, 5 Revised Rep. 182.

The will of *Lewis Barret* violates the expressed intention of the will of *Thomas L. Barret*.

Morgan v. Halsey, 97 Ky. 789, 36 L.R.A. 716, 31 S. W. 866.

The facts in this case did not impose upon the appellees a duty to elect, because *Lewis Barret* did not dispose of any property of his own; hence the appellees are not estopped.

40 Cyc. 1959; 11 Am. & Eng. Enc. Law, 2d ed. 65; *Bispham*, Eq. §§ 298, 301; *Brossenne v. Schmitt*, 91 Ky. 465, 16 S. W. 135; *Huhlein v. Huhlein*, 87 Ky. 247, 8 S. W. 260; *McQuerry v. Gilliland*, 89 Ky. 434, 7 L.R.A. 454, 12 S. W. 1037; *Pom. Eq. Jur.* § 478; *Bristow v. Warde*, 2 Ves. Jr. 336, 2 Revised Rep. 235, 21 Eng. Rul. Cas. 356; *Re Fowler*, 27 Beav. 362; *Re Brooksbank*, L. R. 34 Ch. Div. 160, 56 L. J. Ch. N. S. 82, 55 L. T. N. S. 593, 35 Week. Rep. 101; *White v. White*, L. R. 22 Ch. Div. 555, 52 L. J. Ch. N. S. 232, 48 L. T. N. S. 151, 13 Week. Rep. 451; *Reid v. Reid*, 25 Beav. 469.

The will of *Lewis Barret* is void, and the appellees took nothing under it or against it.

Landers v. Landers, 151 Ky. 206, 151 S. W. 386, Ann. Cas. 1915A, 223; *Truett v. Funderburk*, 93 Ga. 686, 20 S. E. 260; *Leach v. Prebster*, 39 Ind. 492; *Staples v. Hawes*, 24 Misc. 476, 53 N. Y. Supp. 860, affirmed in 39 App. Div. 548, 57 N. Y.

Supp. 452; *Re Beales* [1905] 1 Ch. 256, 74 L. J. Ch. N. S. 67, 53 Week. Rep. 216, 92 L. T. N. S. 268, 21 Times L. R. 101; *Re Oliver* [1905] 1 Ch. 191, 74 L. J. Ch. N. S. 62, 53 Week. Rep. 215, 21 Times L. R. 61.

Assuming, for the purpose of the argument, that the appellees were compelled to make an election, and did elect, they are not bound by the election because they did not act advisedly.

Kentucky Title Sav. Bank & T. Co. v. Langan, 144 Ky. 46, 137 S. W. 846; *Polites v. Barlin*, 149 Ky. 376, 41 L.R.A.(N.S.) 1217, 149 S. W. 828; *Redwine v. Redwine*, 160 Ky. 282, 169 S. W. 864; 40 Cyc. 1985, 1977, 1978; 1 Pom. Eq. Jur. § 512; 11 Am. & Eng. Enc. Law, 2d ed. 97; *Gore v. Stevens*, 1 Dana, 201, 25 Am. Dec. 141; *White v. Mayhall*, 15 Ky. L. Rep. 830, 25 S. W. 881; *Tomlin v. Jayne*, 14 B. Mon. 160; *Bannon v. P. Bannon Sewer Pipe Co.* 136 Ky. 556, 119 S. W. 1170, 124 S. W. 843; *Young v. Young*, 51 N. J. Eq. 491, 27 Atl. 627; *Packard v. De Miranda*, — Tex. Civ. App. —, 146 S. W. 211; *Owens v. Andrews*, 17 N. M. 597, 49 L.R.A.(N.S.) 1072, 131 Pac. 1004; *Medill v. Snyder*, 61 Kan. 15, 78 Am. St. Rep. 306, 58 Pac. 962; *Re McFarlin*, 9 Del. Ch. 430, 75 Atl. 281; *Eddy v. Eddy*, 93 C. C. A. 586, 168 Fed. 590.

It was incumbent upon the trust company to see to it that the property of Thomas L. Barret was disposed of as directed by his will.

Adams v. Cowen, 177 U. S. 471, 44 L. ed. 851, 20 Sup. Ct. Rep. 668.

Hannah, J., delivered the opinion of the court:

Thomas L. Barret died in 1896 domiciled in Louisville, Kentucky. He had five children, A. Hite Barret, Theodore L. Barret, Virgie Barret Bridges, Irwin T. Barret, and Lewis Barret. By his will, after making a few minor bequests, he devised the bulk of his property to a trustee, directing that it be divided into five equal parts, one part to be held in trust for each of the above-mentioned children. In the case of each of the four sons it was provided that his part should be held for his benefit during life, with power in the trustee to pay over the principal or any part thereof if, in the judgment of the trustee and an advisory committee nominated by the will, it was deemed wise to do so; and it was further provided that at the death of each of said sons "the share, as it then exist, shall pass as he may direct by last will, to his wife and heirs at law, and in the absence of a will, to his widow, if he leaves one, and to his heirs at law, in the same proportion as if he had died owning the same in fee simple, according exactly to the law of L.R.A.1916D.

descent and distribution as it then be in force in the state of Kentucky."

The trustee never paid over to Lewis Barret any part of the principal of his share, which at his death amounted to \$150,000. He died in 1910, survived by his widow, Gertrude Ketcham Barret, no children having been born to them. In the meantime one of the brothers, Irwin T. Barret, had died intestate, and that portion of the estate held for him was distributed, one half to his widow and the other half to his brothers and sister. By will Lewis Barret appointed to his sister, Virgie Barret Bridges, and to his brothers, A. Hite Barret and Theodore L. Barret, the sum of \$1,000 each; the remaining \$147,000 he devised to a trustee for the use and benefit of his widow for life, with the power to dispose of the estate by will.

In 1913 the widow, Gertrude K. Barret, died, leaving a will devising the \$147,000 appointed to her by her husband, Lewis Barret, to a trustee for the use and benefit of her mother, Mrs. Elizabeth Ketcham, her brother, James B. Ketcham, and her sister, Grace Ketcham. This action was thereupon instituted in the Jefferson circuit court by A. Hite Barret, Theodore L. Barret, and Virgie Barret Bridges against Gertrude Ketcham Barret's executor and trustee under the will and the beneficiaries thereunder as above mentioned, to require the executor and trustee to turn over to them one half of the estate in its possession. The plaintiffs, having theretofore received and accepted the \$1,000 so appointed to each of them by the will of Lewis Barret, paid the same into court. The court below having rendered a judgment in accordance with the prayer of the petition, the defendants are here upon appeal.

This action was brought upon the theory that the will of Lewis Barret did not constitute a valid exercise of the power of appointment granted to him by the will of his father, Thomas L. Barret, which provided that his share, "as it then exist, shall pass as he may direct by last will, to his wife and heirs at law;" that the power of appointment thus granted was a nonexclusive power; that, being such, the donee, in order to execute the power in a valid manner, must have appointed to each member of the designated class a substantial share of the fund subject to the power; that the appointment of only \$1,000 to the heirs at law of the donee of the power, and of \$147,000 to the widow, was such that the appointments to the heirs were merely illusory; and that therefore the will of Lewis Barret was void for failure to conform to the power of appointment in execution of which it was made, and his heirs at law

should take as if no will had been made by him.

1. Powers of appointment to a class are "exclusive" or "nonexclusive,"—"exclusive" when there is granted to the donee of the power the right to exclude entirely any members of the designated class; and "non-exclusive" when no such right of selection or exclusion is granted. In the case of "nonexclusive" powers, the exclusion of any member of the designated class in making the appointments will invalidate the attempted exercise of the power.

2. And, as a corollary of the rule of the invalidation of a nonexclusive power by the exclusion of a member of the designated class of appointees, there has been developed the further doctrine that the donee of a nonexclusive power must not only not exclude any member of the designated class, but he must also give to each a substantial share of the fund to be appointed, the failure to do which constitutes it an illusory appointment, and invalidates the attempted execution of the power in the same manner as does an entire exclusion of such member of the designated class. Under the illusory appointment doctrine, a nonexclusive power cannot be legally exercised except by giving to each appointee a beneficial interest in the fund, fairly proportioned to the amount for distribution; and the appointment of a nominal share to a beneficiary is illusory. 31 Cyc. 1137.

3. So, as the ultimate question of law in this connection is whether the will of Lewis Barret is void under the illusory appointment doctrine, the first inquiry is whether the power granted to him by the will of his father was an exclusive or non-exclusive power.

In *McGaughey v. Henry*, 15 B. Mon. 383, it was said, upon the authority of *Kemp v. Kemp*, 5 Ves. Jr. 850, 5 Revised Rep. 182, that the power of appointment is nonexclusive where there is no express power of selection or exclusion.

In *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523, a power of appointment was conferred upon the donor's widow to dispose of the property devised "among my children as she may think best." This was held to be a nonexclusive power.

And in *Clay v. Smallwood*, 100 Ky. 212, 38 S. W. 7, a daughter of the testator was given the power to dispose of one half of the estate to the donor's "other children as she may direct." This was likewise held to be a nonexclusive power.

In *Levi v. Fidelity Trust & S. V. Co.* 121 Ky. 82, 88 S. W. 1083, the widow of the testator was given the power to "will or distribute to her relations and to my relations any property, real or personal, as L.R.A.1916D.

she may choose or desire them to have," the testator further stating: "I am satisfied that she will act justly in this matter." This was held to be an exclusive power.

A consideration of the foregoing cases and of the rule that, where there is no express power of selection or exclusion, the power of appointment is nonexclusive, is sufficient, we think, to demonstrate that the power granted under the will of Thomas Barret was a nonexclusive power.

4. The power of appointment conferred upon Lewis Barret by the will of his father being, therefore, a nonexclusive one, we are confronted with the question whether the appointments made by him to his brothers and his sister were illusory; that is, whether Lewis Barret appointed to his brothers and sister a substantial share in the fund when he gave to them the sum of \$1,000 each, and to his widow the remaining \$147,000. It seems to us that the mere statement of the proposition carries with it the answer that the sums so appointed were not sufficient to constitute a substantial compliance with the requirements of the illusory appointment doctrine. True it is that \$1,000 is a substantial sum of money in itself; but the question here is, as we think, its relation to the whole of the amount to be distributed pursuant to the power. Viewed from that standpoint, or even from the standpoint of that disposition of the estate which would have been effected had Lewis Barret failed to exercise the power of appointment of which he was the donee in virtue of his father's will, it may readily be seen that the sense of proportion is grossly violated by such an execution of the power. So, if the illusory appointment doctrine is the law in Kentucky, as contended by appellees and denied by appellants, the will of Lewis Barret was clearly not a valid execution of the power of appointment here involved.

5. It may be conceded that the illusory appointment doctrine, although it originated in England, has been the subject of much criticism by able English jurists, and that it was abrogated in 1830 by Lord St. Leonard's act (1 Wm. IV. chap. 46), and that in 1874, by Lord Selborne's act (37, 38 Vict. chap. 37), the distinction between exclusive and nonexclusive powers was practically abolished. In *McGibbon v. Abbott*, L. R. 10 App. Cas. 653, 54 L. J. P. C. N. S. 39, 54 L. T. N. S. 138, the English privy council, in referring to the course of decision in respect of this doctrine, said that it had been swept away by the legislature as fraught with inconvenience and mischief.

It seems to us, however, without desiring to lay ourselves open to a charge of the undue assumption of superior powers of dis-

crimination, that a careful review of the English authorities will produce the conviction that the mischief arose, not from any fault of the illusory appointment doctrine, or of the rules establishing the distinction between powers exclusive and non-exclusive, but rather because of a too liberal construction of certain powers of appointment as nonexclusive, when, in point of fact, the evident intention of the testator was to grant an exclusive power. In its real and proper sense, the illusory appointment doctrine does not involve the substitution of the opinion of the chancellor for the discretion vested in the donee of the power, in respect of the extent of the appointments made in execution thereof; for, where the power is nonexclusive, then of necessity the donee of the power has no discretion except such as is involved in a distribution of the estate to the appointees after the giving to each of the class a substantial share, and with that discretion the doctrine mentioned does not interfere. But an unlimited, uncontrolled discretion on the part of the donee of the power in respect of the value of the shares so distributed to the appointees would be nothing more and nothing less than the abolition of the distinction between exclusive and nonexclusive powers; and that is a distinction which this court will not abolish. To do so would be to take from the testator the right to require that the donee of the power of appointment shall recognize all the members of the designated class of appointees in the execution of the power.

On the other hand, so long as the distinction between powers exclusive and powers nonexclusive is preserved, so long as there is such a thing as a nonexclusive power, it inevitably follows that the illusory appointment doctrine must likewise be preserved. Otherwise the donee of a nonexclusive power, while not permitted to exclude entirely any member of the designated class of appointees, might just as effectually do so by means of an illusory appointment. It is manifest, therefore, that the enforcement and maintenance of the distinction between powers exclusive and nonexclusive of necessity raise the doctrine of illusive appointments, requiring that, where the power of appointment to a class is nonexclusive, it must be executed according to its terms, and that the donee of such a power shall not be permitted to thwart the intention of the donor of the power under the guise of an illusory appointment entirely out of proportion to the estate appointed.

It has been said that the doctrine is founded upon no principle, and that it is an arbitrary one, subject to no restraint or limitation, but in this we do not concur, L.R.A.1916D.

for it is grounded upon the principle that, where a testator and donor of a power of appointment has confided to the donee thereof a nonexclusive power to dispose of the estate to the members of a designated class, the donee must fairly and reasonably execute the power and justify the confidence reposed in him, and that equity will nullify any attempt to betray the trust thus created. Nor is the doctrine an arbitrary one, subject to no restraint or limitation; for, if the appointments made in execution of the power are fairly and reasonably proportioned to the estate so distributed, there is a valid execution of the power, notwithstanding that the members of the designated class are not made equal in the distribution. If such a rule is arbitrary, then most, if not all, of the rules of equity, possess the same attribute.

It may be conceded that in the Kentucky cases heretofore mentioned the illusory appointment doctrine was not directly involved. In *McGaughy v. Henry*, 15 B. Mon. 383, was stated to be "the rule," but recognized as not therein applicable. In *Degman v. Degman*, 98 Ky. 717, 34 S. W. 523, it was again stated to be "the well-settled doctrine," though in that case the direct question was the effect of exercising the power in securing to the donee thereof a personal benefit, rather than the making of an illusory appointment. And in *Clay v. Smallwood*, 100 Ky. 212, 38 S. W. 7, it was also stated "to be a well-recognized rule in equity," though in that case there was involved an entire exclusion of one of the members of the designated class; the power of appointment being nonexclusive. If an analysis of these cases leaves any doubt, however, that the illusory appointment doctrine is the law of this state, we have no hesitation now in adopting it as a competent rule in the testing of the execution of nonexclusive powers.

It follows, therefore, that the will of Lewis Barret is void for failure to conform to the power of appointment in execution of which the will was made.

6. But it is contended by appellants that, as appellees accepted the \$1,000 appointed to each of them by the will of Lewis Barret, they are now estopped from questioning the failure to conform to the power of appointment given to him by the will of his father; this contention being based upon the well-known doctrine that one cannot take under a will and at the same time contest its validity.

We find but little merit in this contention in the instant case. The appointments so made to, and accepted by, appellees, were manifestly illusory. The money received was in reality their own, and we have been

unable to see anything in the acceptance thereof that would render inequitable their present attack upon the validity of the Lewis Barret will because of his failure to properly exercise the power of which he was the donee. Estoppel rests largely upon injury or prejudice to the rights of him who asserts it; and appellants have not been injured by the temporary acquiescence of appellees. It is argued, however, that, had Mrs. Gertrude K. Barret, by an assertion upon the part of appellees of their present attack upon the will of Lewis Barret, been advised that she had but one half of the \$150,000 to dispose of by will, she would have made a different disposition of it. She devised the \$147,000 in trust, one half of the income to go to her mother during life, and the other half of the income to be divided between her brother and her sister during life, the whole of the income to be divided between them in the event of the death of her mother, and upon the death of her brother and sister the principal of the estate to be divided per stirpes among their issue. But this alleged injury or prejudice seems to us entirely too speculative to bring it within the class of detriments which render an estoppel operative.

In this state the doctrine of estoppel by acquiescence or by acceptance of benefits under a will has not been freely applied. *Deppen v. Deppen*, 132 Ky. 755, 117 S. W. 352; *Smith v. Smith*, 6 Ky. L. Rep. 453; *Pinkston v. Pinkston*, 13 Ky. L. Rep. 206; *Brown v. Brown*, 22 Ky. L. Rep. 840, 58 S. W. 993.

In *Kasey v. Fidelity Trust Co.* 131 Ky. 604, 115 S. W. 737, this court undoubtedly recognized by implication the right of one to contest a will notwithstanding a previous acceptance of benefits thereunder. In that case, however, the contesting beneficiary was the sole heir at law of the testator, and

had given to the executor express written authority to pay certain special legacies, and had herself accepted the property devised to her. The court held that under this state of facts she could not contest the will for mental incapacity of the testator, especially without returning what she had received.

In the well-considered case of *Stone v. Cook*, 179 Mo. 534, 64 L.R.A. 287, 78 S. W. 801, it was said: "The sum of the matter then is that, as a general rule, one who has received a benefit under a deed, will, or other instrument, cannot thereafter contest its validity; but the general rule is subject to this qualification: That, if the benefit was received without a knowledge of his right to elect between the benefit so conferred and of his right to the property outside of the deed, will, or instrument, or if he was induced by fraud or deception to accept the benefit conferred by the instrument, he may revoke the election and contest the validity of the instrument and claim under the law, provided that innocent third persons will not suffer by a revocation, and provided that there has been no unreasonable delay in exercising the right of revocation, and provided he pay into court the benefits received."

It is here conceded that appellees accepted the \$1,000 each, and under a misapprehension as to their legal rights. No one has suffered by their acceptance of the appointments. There has been no unreasonable delay in asserting their rights, and they have paid into court the sums so received by them. They are thus brought within the rule of the case mentioned, and are not estopped to contest the validity of the exercise of the power of appointment vested in Lewis Barret by the will of his father.

The judgment is therefore affirmed.

Annotation—Nonexclusive powers and illusory appointments.

The general question of what is a sufficient execution by will, of a power of appointment, has already been covered.¹

History of the doctrines in England.

At common law, if the donor of the power named a class of persons as ob-

jects of the power without naming the individuals, and expressly provided that there might be exclusions, of course, an appointment was not invalid on the ground that a member or members of the class received nothing.² But if he did not expressly provide that exclu-

¹ See note to *Lane v. Lane*, 64 L.R.A. 849.

² *Bland v. Plummer* (1864) 9 L. T. N. S. (Eng.) 825; *Chamberlain v. Napier* (1880) L. R. 15 Ch. Div. (Eng.) 634, 49 L. J. Ch. N. S. 628, 29 Week. Rep. 194; *Macey v. Shurmer* (1739) 1 Atk. (Eng.) 389; *Spring ex dem. Titcher v. Biles* (1784) 1 T. R. (Eng.) 435, note; *Swift ex dem. Huntley v. Gregson* (1786) 1 T. R. (Eng.) 432; *Thomas v. L.R.A.* 1916D.

Thomas (1705) 2 Vern. (Eng.) 513; *Turner v. Bryans* (1862) 31 Beav. (Eng.) 303; *Re Veale* (1877) L. R. 5 Ch. Div. (Eng.) 622, 46 L. J. Ch. N. S. 799, 36 L. T. N. S. 634; *Wollen v. Tanner* (1800) 5 Ves. Jr. (Eng.) 218.

It was held in *Thomas v. Thomas* (1705) 2 Vern. (Eng.) 513, that a power to give a fund to one or more of testator's children

sions or selections could be made, the appointment was invalid unless each member of the class received some share under it.³ At law, the appointment of any share, however small, proportionally or intrinsically, was a valid appointment.⁴ The courts of chancery, however,

then living, in such manner as the donee should think fit, is an exclusive power.

A will leaving money "upon trust to pay and apply all the same trust moneys, and to assign and transfer the security and stock in and upon which the same shall be then invested, to and amongst my other children or their issue in such parts, shares, and proportions, manner and form, as my said daughter . . . shall by deed or will direct, limit, and appoint; and in default of such direction, limitation, and appointment, I direct that the same shall fall into and form part of my residuary personal estate," grants an exclusive power. *Re Veale* (1877) L. R. 5 Ch. Div. (Eng.) 622.

³ *Alexander v. Alexander* (1755) 2 Ves. Sr. 640, 2 Eng. Rul. Cas. 415; *Barry v. Barry* (1876) Ir. Rep. 10 Eq. 397; *Barron v. Barron* (1836) 2 Jones (Ir.) 226; *Beere v. Prendergast* (1833) *Hayes & J. (Ir.)* 384; *Bulteel v. Plummer* (1870) L. R. 6 Ch. (Eng.) 160, 23 L. T. N. S. 753; *Re Aplin* (1865) 13 Week. Rep. (Eng.) 1062; *Burleigh v. Pearson* (1749) 1 Ves. Sr. (Eng.) 281; *Cloves v. Awdry* (1850) 12 Beav. (Eng.) 604; *Coleman v. Seymour* (1748) 1 Ves. Sr. (Eng.) 209; *Donoghue v. Brooke* (1875) Ir. Rep. 9 Eq. 489; *Fowler v. Hunter* (1829) 3 Younge & J. (Eng.) 506; *Kemp v. Kemp* (1801) 5 Ves. Jr. (Eng.) 849, 5 Revised Rep. 182; *Lloyd v. Lance* (1845) 14 L. J. Ch. N. S. (Eng.) 456; *Pocklington v. Bayne* (1785) 1 Bro. Ch. (Eng.) 450; *Ranking v. Barnes* (1864) 3 New Reports (Eng.) 660, 33 L. J. Ch. N. S. 539, 10 Jur. N. S. 463, 12 Week. Rep. 566; *Robinson v. Sykes* (1856) 23 Beav. (Eng.) 40, 26 L. J. Ch. N. S. 782, 2 Jur. N. S. 895; *Stolworthy v. Sanicroft* (1864) 10 Jur. N. S. (Eng.) 762, 33 L. J. Ch. N. S. 708, 10 L. T. N. S. 223, 12 Week. Rep. 635; *Spencer v. Spencer* (1800) 5 Ves. Jr. (Eng.) 362; *Strutt v. Braithwaite* (1852) 5 De G. & S. (Eng.) 369, 21 L. J. Ch. N. S. 609, 16 Jur. 882; *White v. Wilson* (1852) 1 Drew. (Eng.) 298, 22 L. J. Ch. N. S. 62, 17 Jur. 15, 1 Week. Rep. 47; *Young v. Waterpark* (1842) 13 Sim. (Eng.) 199, 11 L. J. Ch. N. S. 367, 6 Jur. 656.

The power to distribute money left "upon trust to pay the rents to A for life, and after her decease, 'in case she should leave issue, upon trust to dispose of his said estate in such manner, amongst such issue' as A should by deed or will appoint, with gifts over in default of such issue," is a nonexclusive power. *Stolworthy v. Sanicroft* (1864) 10 Jur. N. S. (Eng.) 762.

A marriage settlement vesting in trustees for the husband and wife successively for life, certain hereditaments, and on the death of the survivor of them to pay the rent in maintenance of all and every the child or

children, until such child or children should attain twenty-one, and as such child or children respectively should attain twenty-one, upon trust to convey unto such child or children as the parent should appoint, and in default of appointment to convey all the same premises unto and among such children equally, gives to the donee a non-exclusive power. *Strutt v. Braithwaite* (1852) 5 De G. & S. (Eng.) 369, 21 L. J. Ch. N. S. 609, 16 Jur. 882.

It was held in *Robinson v. Sykes* (1856) 23 Beav. (Eng.) 40, 26 L. J. Ch. N. S. 782, 2 Jur. N. S. 895, that a power to appoint "unto and amongst such child or children of the marriage, or unto and amongst the issue of such child or children," is a non-exclusive power.

A power to dispose of a fund "amongst her children as she shall think proper," is a nonexclusive power. *Kemp v. Kemp* (1801) 5 Ves. Jr. (Eng.) 849, 5 Revised Rep. 182.

⁴ *Bax v. Whitbread* (1809) 16 Ves. Jr. (Eng.) 15, affirming (1804) 10 Ves. Jr. 31; *Butcher v. Butcher* (1804) 9 Ves. Jr. (Eng.) 382, 12 Revised Rep. 193, affirmed in (1812) 1 Ves. & B. 79; *Re Capon* (1879) L. R. 10 Ch. Div. (Eng.) 484, 48 L. J. Ch. N. S. 355, 27 Week. Rep. 376; *Kemp v. Kemp* (Eng.) supra; *Spring ex dem. Titcher v. Biles* (1784) 1 T. R. (Eng.) 435, note; *Vanderzee v. Aclom* (1797) 4 Ves. Jr. (Eng.) 771; *Preamble to Lord St. Leonard's Act*, 1 Win. IV. chap. 46; 2 Sugden, Powers, p. 181.

⁵ *Butcher v. Butcher* (1804) 9 Ves. Jr. (Eng.) 382, 12 Revised Rep. 193, affirmed in (1812) 1 Ves. & B. 79; *Kemp v. Kemp* (1801) 5 Ves. Jr. (Eng.) 849, 5 Revised Rep. 182; *Vanderzee v. Aclom* (1797) 4 Ves. Jr. (Eng.) 771; *Wall v. Thurborne* (1886) 1 Vern. (Eng.) 355; 2 Sugden, Powers, p. 181.

⁶ *Alexander v. Alexander* (1755) 2 Ves. Sr. 640, 2 Eng. Rul. Cas. 415; *Kemp v. Kemp* (1801) 5 Ves. Jr. (Eng.) 849, 5 Revised Rep. 182; *Lysaght v. Royse* (1804) 2 Sch. & Lef. (Ir.) 151; *Pocklington v. Bayne* (1785) 1 Bro. Ch. (Eng.) 450; *Spencer v. Spencer* (1800) 5 Ves. Jr. (Eng.) 362; *Vanderzee v. Aclom* (1797) 4 Ves. Jr. (Eng.) 771. In the following cases the doctrine was recognized, but not applied: *Bax v. Whitbread* (1809) 16 Ves. Jr. (Eng.) 15; *Bristow v. Warde* (1794) 2 Ves. Jr. 336, 2 Revised Rep. 235, 21 Eng. Rul. Cas. 356; *Burrell v. Burrell* (1768) 2 Ambl. (Eng.) 660; *Dyke v. Sylvester* (1806) 12 Ves. Jr. (Eng.) 126; *Hockley v. Mawbey* (1790) 1 Ves. Jr. (Eng.) 150, 1 Revised Rep. 93; *Long v. Long* (1800) 5 Ves. Jr. (Eng.) 445, 5 Revised Rep. 101; *Wilson v. Piggott* (1794) 2 Ves. Jr. (Eng.) 351, 2 Revised Rep. 246.

all discretion, and made the appointment on what they considered the merits of the case. Of course, the donee had Hobson's choice, i. e., the choice of

distributing the funds equally among the members of the class, or of letting the court make the appointment. Unless the shares were equal, equity would

In *Kemp v. Kemp* (1801) 5 Ves. Jr. (Eng.) 858, there is an excellent review of the earlier decisions from the point of view of a court that felt bound by the doctrine to decide contrary to its convictions. It is there said: "I will now state the cases that have occurred upon this subject, chronologically, and see how far the opinions upon this question of illusory appointment—and I lament extremely that it has ever found its way into this court—have been carried. The case that settled this is *Gibson v. Kinven* (1682) 1 Vern. (Eng.) 66, determined by that great judge, Lord Nottingham, styled the Father of Equity. It was contended in that case that anyone might have been excluded. It is said in the report to have been the opinion of Chief Justice Pemberton, then at the bar, that a ring might have been given to one; and so it might, if this would be good; but the appointment was set aside by Lord Nottingham for inequality. How can the words in that case be distinguished from 'amongst her children?' Lord Nottingham was of opinion it was necessary to give some part to each, and a nominal part would not satisfy the object of the power. That case was followed by *Wall v. Thurborne*, reported in two places in *Vernon* (1 Vern. (Eng.) 355, 414); but that book is unfortunately so inaccurate that I do not know upon which statement to rely. If I take the first statement, it is very near this case. Two other cases are quoted there, by whom determined I do not know. *Cragrave v. Perroset* and *Swetnam v. Woolaston*. Upon the first I rather think the court would have paused before they would have set that aside, but for the peculiar circumstances. But *Swetnam v. Woolaston*, if it is to have any authority, would be against the decision in *Gibson v. Kinven*. It is a decision departed from in the principal case, and by whom determined I do not know. Therefore it is not entitled to be considered as of any authority. *Clarke v. Turner* (1694) *Freem. Ch.* (Eng.) 198, was, I believe, determined by Lord Somers. Whether or not the court was struck with the extent of the word 'relations' and the subject being land, they took upon themselves to execute the trust, and decreed it to the heir at law. The next case is a very extraordinary one. *Warburton v. Warburton* (1702) 4 Bro. P. C. (Eng.) 1,—a power to two of the testator's daughters, whom he appointed his executors, to dispose to the use of themselves, their brothers and sister, or to such of them and in such proportions as they should judge fit and convenient according to their needs and necessities. There the Lord Keeper Wright and the House of Lords seem to have thought that the trust devolved upon the court. The reason is a very odd one. I hope they did not lay much stress upon

his being bred to the law. It is hardly to be collected what construction they put upon it. It seems as if they exercised the power themselves,—a power which of late the court has disclaimed; and I hope that always will be followed. If the power is not executed properly, the rule now is to set aside the execution and give the fund equally. But I suppose the construction there was that it was a general trust, to be exercised for their own benefit; and therefore the court was very jealous, and completely controlled it. The next cases are *Thomas v. Thomas* (1705) 2 Vern. (Eng.) 513, referred to in *Swift ex dem. Huntley v. Gregson* and *Astry v. Astry* (1706) *Prec. in Ch.* (Eng.) 256. The former could admit no doubt; and it was determined that the fund might be given to one. The power being to give to one or more, there was no room for the court to interfere. In *Astry v. Astry* the power was to divide among his three daughters in such proportions as the wife should think fit; and the court was of opinion it must be equally, unless a good reason appeared. That I take not to be the rule of the court now. However, it is perfectly clear that under words of this sort, if some very good reason does not appear which I admit might be given in the particular case, for giving a very small sum to one, such a disposition cannot be allowed. Then we come to some cases more modern, and upon which the rule is settled as it now stands. In *Menzey v. Walker* (1800) *Forrest* (Eng.) 72, notwithstanding the reason given, viz., the provision from the grandfather, yet Lord Talbot thought, under the words in that case, everyone must have a share, and not an illusory share. The next case is *Maddison v. Andrew* (1747) 1 Ves. Sr. (Eng.) 57. The principal point does not bear upon this; but this was held clearly, that each of the objects living were entitled to a share, and that no discretion in such a case devolved upon the court. Then in *Coleman v. Seymour* (1748) 1 Ves. Sr. (Eng.) 209, it was held that a share must be given to each, and that a share not illusory. The next is a case very often quoted, *Alexander v. Alexander* (1755) 2 Ves. Sr. (Eng.) 640, which seems almost to decide upon such words as these. Under a power to appoint unto and among such children begotten between them, and in such proportion as she shall direct, etc., Sir Thomas Clark held that each must have some share, and that must not be a nominal share. The last case I shall take notice of is that which has been so much commented upon. *Burrell v. Burrell* (1768) 2 Ambl. (Eng.) 660. The testator gave all his real and personal estate to his wife, to the end that she might give his children such fortunes as she should think proper, or they best deserve, to whom he charged his sons and

interfere,⁷ inquire into the behavior of the beneficiaries, their circumstances, etc.,⁸ and adjust the amount of the shares.⁹ But the chancery courts later gave up this practice, interfering only in case a share was merely nominal

in amount.¹⁰ And then they merely declared the appointment invalid and distributed the fund as if no appointment had been made. Fraud is a very questionable ground for interference by the chancery court.¹¹ Aside from this, how-

daughters to be dutiful and obedient, and loving and affectionate to each other. The son had an estate of £400 a year. The wife gave two daughters £200 each; to the son a guinea; and the remainder to two other daughters. It is impossible to suppose that Lord Camden laid any stress upon the guinea. I cannot conceive that he considered that as anything, for it is not too well settled, and it is imposed on every judge as an obligation, whatever may be the inclination of his own opinion, that, though a gift of any part is a good execution at law, yet in equity, unless it is substantial and real, it is the same as no execution. The words of the report leave it a little doubtful. It states two reasons, and concludes that Lord Camden being of the same opinion, the bill was dismissed. Lord Camden, as I conceive, was of the opinion that these words were so ample that if she thought fit to give nothing to one, she might so execute her power. I will not say what my own opinion would have been. I am willing to subscribe to that of Lord Camden upon such a doubtful question; being perfectly satisfied that in setting aside these appointments, criticizing upon the words 'to and amongst,' etc., and the rule as to illusory shares, the court goes against the intention. I must therefore think that under the words of that will, Lord Camden thought the wife might have given the whole to one child, and had a right to exclude any who in her opinion did not want it. Then ought that to have any effect upon these words? I think not. My inclination is strong to support the execution of this power, if I could consistently with the rules I find established. Finding those rules established, I must consider these words with reference to those rules. This is a trust beyond all question. What is the effect of the words 'amongst her children?' Is it necessary to say 'all and every?' Alexander v. Alexander and the cases quoted in Swift ex dem. Huntley v. Gregson plainly show that, if it was not for the word 'such,' the word 'amongst' would require a distribution so that everyone must take some share. A court of law says a share, however little, will be sufficient. The power must be executed according to the words. If not, it will be bad at law. I shall mention Pocklington v. Bayne in order to show that Lord Thurlow's opinion was the same. His Lordship held an acre given to two for their lives was illusory, evidently adopting the rule, which is too firmly established for a judge to extricate himself from it. I wish to consider these cases as going upon the ground of fraud. I do not notice the late cases, principally because most of them were determined by L.R.A.1916D.

me; but all of them (Bristow v. Warde (1794) 2 Ves. Jr. 336, 2 Revised Rep. 235, 21 Eng. Rul. Cas. 356; Wilson v. Piggott (1794) 2 Ves. Jr. (Eng.) 351, 2 Revised Rep. 246, and Vanderzee v. Aclom (1799) 4 Ves. Jr. (Eng.) 771) are upon the same principle."

In McGibbon v. Abbott (1885) L. R. 10 App. Cas. (Eng.) 653, the court says: "It would be lamentable if their Lordships, in a case arising in Lower Canada and to be determined by the law of that country, should feel themselves bound by a course of English decisions which have been swept away by the legislature as fraught with inconvenience and mischief, and thus be driven to such a construction of the will of William as would form a precedent in future cases of a similar nature, and thereby introduce into Lower Canada all those difficulties and inconveniences which it required the force of an act of Parliament in England to remove." And it was held that the doctrine never had a place in the law of Lower Canada.

⁷ Astry v. Astry (1706) Prec. in Ch. (Eng.) 256; Clarke v. Turner (1694) Freem. Ch. (Eng.) 198; Gibson v. Kinven (1682) 1 Vern. (Eng.) 66; Thomas v. Thomas (1705) 2 Vern. (Eng.) 513.

⁸ Kemp v. Kemp (1801) 5 Ves. Jr. (Eng.) 849, 5 Revised Rep. 182.

⁹ Clarke v. Turner (1694) 2 Freem. (Eng.) 198; Astry v. Astry (1706) Prec. in Ch. (Eng.) 256; Gibson v. Kinven (1682) 1 Vern. (Eng.) 66; Thomas v. Thomas (1705) 2 Vern. (Eng.) 513; Kemp v. Kemp (Eng.) supra.

¹⁰ Kemp v. Kemp (1801) 5 Ves. Jr. (Eng.) 849, 5 Revised Rep. 182.

¹¹ "In the case of Butcher v. Butcher (1804) 9 Ves. Jr. (Eng.) 383, 12 Revised Rep. 193, affirmed in (1812) 1 Ves. & B. 79, a question arose whether, under a power to appoint to children, equity could relieve against an appointment under which a share merely illusory was given to one child. The master of the rolls said, in terms, the power, though limited as to objects, is discretionary as to shares. A court of law says no object can be excluded; but there it stops. It does not attempt to correct any the extremest inequality in the distribution; and yet if that is a fraudulent execution of the power, why is it not void at law? A fraudulent act has no more validity in a court of law than in a court of equity; and if it is not a fraudulent execution, upon what principle does a court of equity deny it effect? It is sometimes said this court interferes for the purpose of carrying into effect the intention of the party creating the power, who must have meant that each object should derive the

ever, there is the difficulty of formulating any rule of law or equity for determining what is an illusory appointment. The chancery courts themselves could not formulate any rule that would be certain; and certainly is the only merit of the law of nonexclusive appointments,¹² including the right to give a nominal share. The evils resulting from the illusory appointment doctrine became so glaring that the chancery courts themselves condemned it.¹³ Some of them practically nullified it by holding any share to be substantial for lack of precedent in which a share in the exact amount had been held to be illusory.¹⁴

same real benefit from the execution of the power. Now, every instrument must receive the same construction from every court. Whatever is its true meaning must be its meaning everywhere. If, then, the true meaning of the power, however discretionary in terms, be that each object shall have what is called a substantial share, it is not executed according to its true meaning, and therefore it is not well executed, by an appointment that does not give to each object a substantial share. A court of equity may, in the exercise of its own particular jurisdiction, supply defects in the execution of a power. But he could not well understand how the question whether a power is well or ill executed could receive different determinations in different courts. If it is not executed according to its true import, how can a court of law say it is well executed? And if it is executed according to its true import, how can a court of equity say it is ill executed? Upon questions like that in the last case, the jurisdiction exercised by equity is infinitely more strong than the common relief in case of fraud. If a man having a power to appoint to A or B appoint to A in consideration of a sum paid by him, equity will relieve against the fraud, and the courts of law would refuse to interfere, on the ground that they have not the same means of enforcing the discovery of fraud, and of relieving against it. But where, as in *Butcher v. Butcher*, a man has a power over a fund which it is admitted will at law enable him to give any share, however trifling, to one party, and he without fraud exercise that power accordingly, equity, by interposing its authority, actually puts a different construction on the instrument to what it must receive in a court of law; and yet if a power gives a clear, right to appoint to several persons, or any of them exclusively of the others, equity can grant no relief against the bona fide exercise of it in favor of some of the objects, excluding the others. But however strange this doctrine may seem, it was well established that where the power did not authorize an exclusive appointment, equity would relieve against any appoint-

In 1830 Parliament came to their relief by enacting that no appointment should be held to be invalid on account of its being merely nominal, illusory, or unsubstantial.¹⁵ This statute merely compelled the chancery courts to follow the law.¹⁶ It did not change the rule that an exclusion is invalid unless there is an express power of selection or exclusion contained in the instrument,¹⁷ and under it the appointment of any share, however small, was good both in law and in equity.¹⁸ In 1874 exclusions were legalized,¹⁹ avowedly for the reason that many appointments were declared invalid because the donee had in good faith

ment of an illusory share, although this relief can no longer be administered." 2 Sugden, Powers, p. 182.

¹² See footnote 27, *infra*.

¹³ *Butcher v. Butcher* (1804) 9 Ves. Jr. (Eng.) 382, 12 Revised Rep. 193, affirmed in (1812) 1 Ves. & B. 79; *Fowler v. Hunter* (1829) 3 Younge & J. (Eng.) 506; *Kemp v. Kemp* (1801) 5 Ves. Jr. (Eng.) 849, 5 Revised Rep. 182; *Mocatta v. Lousada* (1806) 12 Ves. Jr. (Eng.) 123; *Spencer v. Spencer* (1800) 5 Ves. Jr. (Eng.) 362.

¹⁴ *Butcher v. Butcher* (1804) 9 Ves. Jr. (Eng.) 382, 12 Revised Rep. 193, affirmed in (1812) 1 Ves. & B. 79; *Mocatta v. Lousada* (1806) 12 Ves. Jr. (Eng.) 123.

¹⁵ Lord St. Leonard's Act, 1 Wm. IV. chap. 46.

In *Re Capon* (1879) L. R. 10 Ch. Div. (Eng.) 484, in construing the act the court said: "What the act meant by an 'unsubstantial, illusory, or nominal' appointment was an appointment that had the mere shadow or appearance of an appointment; and as to such appointments it says they shall be valid in equity as well as at law."

In *Minchin v. Minchin* (1853) 3 Ir. Ch. Rep. 167, it was held that the statute "made the appointment of a nominal or illusory share, which was a valid appointment at law, also valid in equity; but it did not make that which was an invalid appointment, both at law and in equity, because some of the objects of the power were excluded, valid in equity."

In *Moynan v. Moynan* (1878) L. R. I. R. 1 Eq. (Ir.) 382, the appointment was made by will before the passage of the statute of 1874 which legalized exclusions, and the donee died after the passage of the statute. It was held that the power was non-exclusive and that the appointment was void for an exclusion, the statute of 1830 and the common law being the rule that controls the decision.

See citation of later cases under footnotes 3 and 4, *supra*.

¹⁶ See cases cited under 15, *supra*.

¹⁷ See later cases cited under 3, *supra*.

¹⁸ See cases cited under 16, *supra*.

¹⁹ Lord Selborne's Act, 37, 38 Vict. chap. 37.

excluded a member of the class entirely.²⁰ These appointments, of course, ought not to fail because of the donee's ignorance of the law. But under this statute the donee of such a power cannot exclude all the objects of the power and give the fund to persons who are not objects of the power.²¹ The chancery courts can interfere if there is fraud, in the proper sense of that term, just the same as they could before the statute was enacted.²²

The doctrines in the United States.

What the English chancery courts really did was to interfere with the law court's interpretation of the instrument.²³ Suppose a case in which the testator has expressly declared that there shall be no exclusion, but that an appointment of 1 cent shall be valid. The chancery courts would, no doubt, uphold an appointment of 1 cent under the express power. At law the express power is the exact equivalent of a power in which donee had discretion to divide among members of the class.²⁴ But the chancery courts interfered with this interpretation. Obviously there is no fraud in giving a nominal share under this class of powers, any more than in giving a nominal share in the supposed case, if the law courts interpreted the powers correctly. Any interference by equity with the law court's interpretation of a class of instruments must naturally create friction.

The doctrine of nonexclusive powers, including the power to give a merely nominal share, has its defects in actual practice, which will be stated; but it has one merit, i. e., certainty. It furnishes a clear-cut definite rule or guide for making, executing, and interpreting powers. One who, knowing the law, gives another the power to distribute a fund so unequally that one member of the class may get \$1,000 while another gets \$1, and prohibits an exclusion, cannot with good grace ask a court to deprive the donee of the discretion with which

he has been clothed, or to extend the discretion so as to permit a total exclusion. The beneficiary has no cause of complaint, for the donor has done indirectly only that which the law would permit him to do directly. Theoretically, the intention of the donor is strictly carried into effect, as the donor when he wrote the power, and the donee when he executed it, knew the law and acted with reference thereto. If this law is deprived of its certainty, it not only becomes useless, but it carries its harsh features to a class of cases that were originally not within its purview.

One defect in the law of nonexclusive appointments, when the right to give a nominal share is included, is that it is too rigid when applied to cases where there has been an exclusion. It compels too much attention to the mere wording of the particular clause, and appears almost, if not entirely, to shut out other considerations that may indicate more clearly the intention of the testator.²⁵ It developed into law at a time when the courts construed wills almost wholly upon the technical wording of the particular clause in question. This objection furnishes a strong reason why the whole doctrine of nonexclusive powers in its technical form should be abolished,²⁶ and an equally strong reason why its scope should not be extended to include cases not within it, by adopting the illusory appointment doctrine. And, it is said that the law makes the decisions turn upon the giving or not giving of a mere trifle, so that no practical effect can be given to the law of non-exclusive appointments if the donee can satisfy the law by giving a merely nominal share. Theoretically, this objection would appear to be based upon the assumption that the donor does not know the law and that the donee does. But whatever force the objection has, it should be directed against the whole doctrine of nonexclusive powers. Adopting the illusory appointment doctrine makes matters worse, both practical-

²⁰ The purpose of the legislation is disclosed in the preamble to the statute.

²¹ *Re Enever* [1912] 1 I. R. (Ir.) 511.

²² *Tharp v. Tharp* [1916] 1 Ch. (Eng.) 142. In this case the donee of the power induced the testator to destroy a codicil which would have deprived donee of the power, by means of a promise that he would so exercise the power that a certain third person should take a remainder after donee's life estate in default of issue. After testator's death the donee attempted to execute the power which had been restored by the destruction of the codicil, by conveying L.R.A.1916D.

the remainder to himself. He had no children; and the chancery court, at the instance of the third person, set the conveyance aside for fraud.

²³ See footnote 11, *supra*.

²⁴ See footnote 4, *supra*.

²⁵ See footnote 29, *infra*, for wording of clauses that have been held nonexclusive.

²⁶ A study of the English cases cited *supra*, and the American cases cited under footnote 29, *infra*, shows that the decisions were, under the rule, made to turn upon the technical wording of the clause in question. For example, if the testator said,

ly^{26a} and theoretically.^{26b} When that part of the law that permits the giving of a nominal share is stricken down, by the adoption of the illusory appointment doctrine, the law is deprived of its prin-

cipal merit, i. e., its certainty. Neither the donor, the donee, nor the court can know in advance of a trial how much must be given to make the appointment valid.²⁷ The scope of the law is extended

"to be divided among the children as he may see proper," the power was always held to be nonexclusive; but if he happened to use the term "such children," the power was held to be exclusive.

^{26a} See "History of the Doctrine in England," supra, and observe the practical results of this practical method of giving the doctrine of nonexclusive powers a practical effect. See also quotations under footnote 27, *infra*.

^{26b} See quotations under footnote, 27 *infra*.

²⁷ The court in *Ingraham v. Meade* (1855) 3 Wall. Jr. 32, Fed. Cas. No. 7,045, said: "The theory on which the English chancellors have acted in setting aside certain appointments as 'illusory' is apparently founded in equity and justice. But like many other theories which are very plausible in the abstract, experience has shown this one to be difficult in application. The term 'illusory' is vague and indefinite, depending on uncertain discretion or opinion of the person using it. Where a power is given by the donor to another to distribute, it is for the purpose of inequality, which future and unknown events may make just and judicious. The donor might do with his own as he pleased,—give a penny to one, and ten thousand to another. He has a right to intrust his power to another by substitution. The objects of his bounty are now all equally worthy (infants perhaps); if the division were made now, there is no reason for inequality. But before the time arrives for distribution, there may be a thousand reasons why the distribution should be unequal. When a chancellor undertakes to decide that any degree of inequality is a fraudulent exercise of the power, he is assuming to himself a knowledge of the secret wish and intention of the donor not expressed in the deed, and undertaking to exercise a discretionary power not intrusted to him, but to another. It would perhaps have been better originally to have adopted the adage, 'stet pro ratione voluntas,' in such cases, than to have assumed this indefinite, discretionary, and therefore dangerous power over men's property. However much the chancellor may laud his great principle that equality is equity, how does he know that even extreme inequality was not the very purpose and object of the power? I certainly concur with the scruples expressed on this subject in the English chancery cases of *Kemp v. Kemp* (1801) 5 Ves. Jr. (Eng.) 849, 5 Revised Rep. 182; *Butcher v. Butcher* (1804) 9 Ves. Jr. (Eng.) 393, 12 Revised Rep. 193; and *Bax v. Whitbread* (1809) 16 Ves. Jr. (Eng.) 15."

In *Hawthorn v. Ulrich* (1904) 207 Ill. 430, 69 N. E. 885, the court said: "Certain diffi-

culties in the way of the practical enforcement of this doctrine would cause us to hesitate about adopting it, even if it had received the unquestionable approval of courts of last resort in other states. The only basis upon which a court of equity could interfere would be that the power had not been executed as the testator intended. For the reason that he intended each of the beneficiaries to receive a substantial portion of his bounty. Manifestly he did not intend that they must receive equal portions, or the power to decide what portion each should receive would not have been given another. If, now, a court of chancery determines that the appointment made is a fraud upon the power and shall be set aside for the reason that the donor's purpose has been thwarted, what, then, shall be done with the property? Shall it be distributed equally? That, too, in the absence of a direction to that effect from the donee of the power, would be as manifestly a perversion of his will, and it would seem to be impossible, by any investigation, to determine just what portion each must receive to make the final distribution conform to the desires of the testator. Equity cannot do better than to leave the power of distribution where the testator left it, and refuse to interfere where the power has been executed by conveying to each intended beneficiary some portion, however small, of the testator's property."

In *Lines v. Darden* (1853) 5 Fla. 51, the court said: "It cannot be denied but that the English courts have assumed jurisdiction even over discretionary powers. And in this view, there is nothing in this doctrine of illusory appointment which commends itself to the favorable consideration of the court, and we feel but little disposition to adopt a rule which is never mentioned but with distrust as to its soundness, and regret that it ever was established. *Butcher v. Butcher* (1804) 9 Ves. Jr. (Eng.) 391. It is a mistake that the doctrine flows from a trust, or is connected with it. In the case of discretionary powers, there is no principle to guide a court in determining when an appointment is illusory, and when it is not. The rule itself is founded upon no principle. It is an arbitrary one, subject to no restraint or limitation. It is going too far to say that the exercise of the power which a testator has reposed in the honesty, good faith, and discretion of another shall be controlled by the court. It is fair to conclude that the testator had no fixed purpose of his own, and to control the judgment of the donee is to do violence to the intention of the testator, and leave the execution of the power to the discretion of the court who tries the case; and that of itself is a sufficient answer to the soundness of

to,—no one knows where,—and it then applies to, many cases that were not within it.

Several American courts have adopted the whole law, including the right to give a nominal share, and rejected the illusory appointment doctrine.²³ Others

have adopted the doctrine of nonexclusive appointments without indicating—it being unnecessary to indicate—what position they would take if there had been a merely nominal share given and no exclusion.²⁴ Others, while holding exclusions invalid, have uttered dicta that

the doctrine. See *Fronty v. Godard* (1833) *Bail. Eq. (S. C.)* 517."

In *Fronty v. Godard* (S. C.) *supra*, the court said: "The doctrine of illusory appointments, which in England, has been carried to a most unwarrantable length, and is reprobated by the wisest judges, is nevertheless predicated on the ground that the power given has not been executed according to the intention of the testator. This, if it had been confined to plain and palpable violations of the intention, as indicated by the words of the power, could have produced no conflict between law and equity. But when it attempted to control a discretionary power of distribution among children, by saying that each must receive a substantial part, it is to substitute the discretion of the court for the discretion of the person to whom the power is confided. It is creating an equity against and above the law, when it is our duty to follow and obey the law; to declare it, not to make it."

In *Graeff v. De Turk* (1863) 44 Pa. 527, the court said: "There is no doubt that Philip De Turk has executed the power intrusted to him, however harsh and cruel its execution may appear to those who regard females as well as males as entitled to the equal regard and affection of their parents. The only question is, Had he the power to make such an unequal division as is presented to us? The words of the will of Martin Shenkel are large enough to authorize it, and the question is, Is there any rule of law in Pennsylvania restraining him from so doing? Such a distribution was always good at law, and we see no reason for introducing the equitable rule of an illusory appointment, which was found in England so unsatisfactory and so difficult to administer that an act was passed (1 Wm. IV. chap. 46) on the 16th July, 1830, making the rule in equity the same as at law. And for this statute restoring the common-law rule, that great equity lawyer and judge, Lord St. Leonards, says he is responsible. As the rule in equity has never been sanctioned by any decisions in this state (*Ingraham v. Meade* (1855) 13 Phila. Leg. Int. (Pa.) 372, *Fed. Cas. No. 7,045*, per Justice Grier), we do not feel inclined to depart from the common-law rule, but reject the exploded equitable English doctrine of illusory appointments."

And see footnote 6, *supra*.

²³ *Lines v. Darden* (1853) 5 Fla. 51; *Hawthorn v. Ulrich* (1904) 207 Ill. 430, 69 N. E. 885; *Graeff v. De Turk* (1863) 44 Pa. 527; *Neilson's Estate* (1885) 17 W. N. C. (Pa.) 158, rehearing in (1886) 17 W. N. C. 326; *Van Syckel's Estate* (1900) 24 (Pa.) Co. Ct. 241; *Fronty v. Godard* (1833) 1 L.R.A.1916D.

Bail. Eq. (S. C.) 517 (dictum); *Ingraham v. Meade* (Pa.) *supra*.

In *Hawthorn v. Ulrich* (1904) 207 Ill. 430, 69 N. E. 885, the court said: "In view of the fact that this doctrine was long discredited and reluctantly enforced by the English courts of equity, until the steadily increasing dissatisfaction was recognized by a statute entirely forbidding its application, and in view of the further fact that no case, as it seems, can be found in which it has ever been applied by an American court, we are of the opinion that in the light of the authorities above cited from Pennsylvania and other states, and in consideration of the reasons which make against the rule and its enforcement, we would not be warranted in ingrafting this doctrine of illusory appointment upon the laws of Illinois." The property was "to be divided between her heirs in the manner in which she may decide."

And see quotations under footnote 27, *supra*.

²⁴ *Hatchett v. Hatchett* (1893) 103 Ala. 556, 16 So. 550; *Melvin v. Melvin* (1854) 6 Md. 541 (an indirect holding); *Falloon v. Flannery* (1898) 74 Minn. 38, 76 N. W. 954; *Lippincott v. Ridgway* (1854) 10 N. J. Eq. 164; *Wright v. Wright* (1886) 41 N. J. Eq. 382, 4 Atl. 855; *Den ex dem. Mischeau v. Crawford* (1825) 8 N. J. L. 90; *Cochran v. Elwell* (1890) 46 N. J. Eq. 333, 19 Atl. 672; *Cameron v. Crowley* (1907) 72 N. J. Eq. 681, 65 Atl. 875; *Shannon v. Pickell* (1886) 2 N. Y. S. R. 160; *Stuyvesant v. Neil* (1883) 67 How. Pr. (N. Y.) 16; *Kemp v. Kemp* (1901) 36 Misc. 79, 72 N. Y. Supp. 617; *Little v. Bennett* (1859) 58 N. C. (5 Jones, Eq.) 156; *Stableton v. Ellison* (1871) 21 Ohio St. 527; *Shank v. Dewitt* (1886) 44 Ohio St. 237, 6 N. E. 255; *McKonkey's Appeal* (1850) 13 Pa. 259; *Graeff v. De Turk* (1863) 44 Pa. 527; *Russell v. Kennedy* (1870) 66 Pa. 248; *Neilson's Estate* (1885) 17 W. N. C. (Pa.) 158, rehearing in (1886) 17 W. N. C. 326; *Seibels v. Whatley* (1837) 2 Hill, Eq. (S. C.) 605; *Hudson v. Hudson* (1819) 6 Munf. (Va.) 352; *Carrington v. Belt* (1819) 6 Munf. (Va.) 374; *Morris v. Owen* (1801) 2 Call. (Va.) 520; *Knight v. Yarbrough* (1820) Gilmer (Va.) 27; *Thrasher v. Ballard* (1891) 35 W. Va. 524, 14 S. E. 232.

In *Cowles v. Brown* (1803) 4 Call. (Va.) 477, the court said: "Power is given to the husband to distribute the slaves among the nephews and nieces of the testatrix 'in such manner and proportion as he shall think proper;' and there is nothing in the will to show that an equal division was intended. Of course, it was left to him to make the appointments according to his

own discretion; and then, what right has the court to control the execution? The latitude which has been sometimes taken by chancellors in England has been reprobated, and a different course is beginning to manifest itself there (2 Foul. Eq. 201) which meets with my own approbation. Consequently, as the power was general in the present case, and the husband has given part of the slaves to each of the legatees, without any proof of fraud, I concur with the rest of the judges, that the decree ought to be affirmed."

A nonexclusive power is granted by the following language: "I give and bequeath all my property, both real and personal, that I die possessed of, both in the state of New Jersey and the city of New York (after my funeral expenses and debts shall be paid), to my wife, . . . to use or dispose of in any manner that she may think proper during her lifetime, and at her death may by will dispose of the same between my children and grandchildren as she may think proper." *Wright v. Wright* (1886) 41 N. J. Eq. 382, 4 Atl. 855.

The words, "and I do further authorize my wife after my death to dispose of all the above said property to my heirs as she thinks best," constitute a nonexclusive power. *Shank v. Dewitt* (1886) 44 Ohio St. 237, 6 N. E. 255.

A will in which testator "devised to his wife, Martha Pennock, the use, benefits, and profits of my real estate, during her natural life; and also all my personal estate of every description, including ground rents, bank stock, bonds, notes, book debts, goods and chattels, absolutely; having full confidence that she will leave the surplus to be divided at her decease justly amongst my children," grants a nonexclusive power. *McKonkey's Appeal* (1850) 13 Pa. 253.

One empowered by the will of his deceased wife to dispose of all her property for his own or the children's benefit during his lifetime, and at his death to dispose of it, "or what remains of the same, among our children and grandchildren by will in such proportions to each as he may choose, hereby giving him the same authority and power to divide my estate among our heirs, children, and grandchildren which I myself have," does not have power to absolutely exclude any child or grandchild. *Hatchett v. Hatchett* (1893) 103 Ala. 556, 16 So. 550.

A will giving "full power . . . [after it] to dispose by last will and testament of his or her part or share of the said residuary estate among his or her children and grandchildren, if any, in such shares and proportions, and on such terms, as he or she may deem fitting and proper," grants a nonexclusive power. *Neilson's Estate* (1885) 17 W. N. C. (Pa.) 158, rehearing in (1886) 17 W. N. C. 326.

Where a testator directed that his estate should be divided equally among his four children, their heirs and assigns, and one of his children died without issue, the appointment of a fund equally among the three surviving children is not a valid ex-

clusion of the power. *Bryce's Estate* (1913) 238 Pa. 519, 86 Atl. 286.

A will reading, "full power by will to divide all my real and personal estate among my children as she shall see proper, giving to each such a share as her judgment shall dictate," grants a nonexclusive power. *Darling v. Edson* (1897) 4 Pa. Super. Ct. 498.

A testator who bequeathed to his wife certain slaves during her life, and directed that the same should be by her disposed of among his children, after her death, as she should think proper," granted a non-exclusive power. *Hudson v. Hudson* (1819) 6 Munf. (Va.) 352.

The power to distribute personal property "among my children as she thinks proper" is a nonexclusive power. *Morris v. Owen* (1801) 2 Call. (Va.) 520.

A power in a will giving to testator's widow property "to live upon, pay my debts, and dispose of among my children and grandchildren as she pleases, and should she find it necessary to sell all or either of the lands, to convey and make titles thereto, to any person or persons whatsoever, which title so made shall be valid to all intents," etc., gives the widow a nonexclusive power. *Knight v. Yarbrough* (1820) Gilmer (Va.) 27.

Under a nonexclusive power to distribute among those who would inherit the property in default of execution of the power, an appointment of part of the property to one beneficiary, leaving the balance to descend to all, is a valid appointment. *Russell v. Kennedy* (1870) 66 Pa. 248.

But an exclusive power is granted by language in a will as follows: "I hereby empower my wife, in case she shall continue my widow during her life (but not otherwise), to make a will, or other writing in the nature thereof, directing my said estate to be divided to and among such of my children or their issue in such shares and proportions as she may see proper and best." *McNeile's Estate* (1907) 217 Pa. 179, 66 Atl. 328.

And a will which gives an estate "to be divided among her surviving heirs, or by her last will and testament, if she executed one," is an exclusive power. *Horner's Estate* (1887) 4 Pa. Co. Ct. 189.

The power to distribute "to any of her children or grandchildren that she may think proper to bequeath the same to" is an exclusive power. *Cochran v. Elwell* (1890) 46 N. J. Eq. 333, 19 Atl. 672.

Giving the share to a married daughter by a will," to her sole and separate use free from the control of her husband," instead of the fee free from the trust, does not invalidate the appointment made by a widow having a life estate by her deceased husband's will with power" to give and to divide among our children the property I may leave, or the proceeds thereof, in such proportions as she shall think just and expedient." *Friend v. Oliver* (1855) 27 Ala. 532.

A deed to a third person by Daniel

would indicate an intention to adopt the illusory appointment doctrine.³⁰ But in no state except Kentucky has any American court actually declared an appointment invalid on the ground that it was

illusory. This would seem to indicate that all the American courts to which the question has been presented have felt obliged or willing to adopt the law of nonexclusive powers, and that all ex-

Stoner, in trust for his wife, giving to her the power of appointment by will with reference to the property conveyed, "to give such portion thereof as she may think proper to the said Daniel Stoner, or the children which they now have, or any which they may have," gives a nonexclusive power. *Thrasher v. Ballard* (1891) 35 W. Va. 524, 14 S. E. 232.

³⁰ In holding that there was no exclusion, for the reason that an advancement had been made, the court in *Hatchett v. Hatchett* (1893) 103 Ala. 556, 16 So. 550, said: "The law requires that in executing a power of this character and scope, each person sharing in the benefits of its execution is entitled to receive, not of right an equal proportion with the others, but some substantial part." The action was an ejectment, and the court also held that the illusory appointment doctrine had no place in a court of law.

In a replevin suit to recover two sleighs alleged to belong to an estate, for the distribution of which an unexecuted nonexclusive power exists, a member of the class of beneficiaries is not disqualified, on account of interest, as a witness for the plaintiff. *Melvin v. Melvin* (1854) 6 Md. 541. In discussing this question the court said: "Although, under the power, if executed, she must have given a part to each, she might have given to each any part she pleased, provided it was not an illusory portion, and was under no obligation to give to the witness any of the property in dispute."

Two Virginia cases, *Rhett v. Mason* (1868) 18 Gratt. (Va.) 541, and *McCamant v. Nuckolls* (1888) 85 Va. 331, 12 S. E. 160, have sometimes been cited as adopting the illusory appointment doctrine. In the former case the court said: "The doctrine of illusory appointments does not apply to this case, but only to a case in which the appointment is to be made among persons of a certain class, so as to entitle each one of the class to a substantial portion of the subject." And in the latter case it was found as a fact that a substantial amount had been given, although the shares were by no means equal. While these cases give color to the belief that the court might adopt the doctrine on proper occasion, they are by no means convincing of that fact. There is no careful consideration of the merits of the doctrine or of its binding force.

In *Cruse v. McKee* (1858) 2 Head (Tenn.) 1, 73 Am. Dec. 186, the court said: "This does not fall under the head of illusory appointments. That only applies to a case where one invested with a power to apportion property amongst a class, with full discretion as to the amount to be given to each, gives to one a merely nominal share. L.R.A.1916D.

That will be set aside as illusory, as a fraud upon the donor of the power, as he certainly intended by making all the objects of his bounty, or of the power, that each should have a substantial share. 1 Am. Lead. Cas. (Hare & W.) 332. But in this case she had full power to give all to one or two or more, with an unrestricted discretion. It was not to his children as a class, without discretion, but she might exclude one or more if she chose, entirely. Not so in cases to which illusory appointment applies; though in these cases discriminations may be made, yet not to the entire exclusion of anyone, or a nominal share to one."

In *Herrick v. Fowler* (1902) 108 Tenn. 410, 67 S. W. 861, the court, in holding that an appointment to the surviving member of the class, with only \$100 to the children of the deceased member, was a good execution of a nonexclusive power, said: "In addition, when it appears that Henry Y. Herrick had been provided for by F. C. Herrick, the donee of the power, out of his own means, or that of his wife, Harriet R. (and it does not matter which), the rule of illusory appointments does not apply, and a merely nominal amount would suffice to be given to the party thus provided for. And hence, if Henry were alive, he could not claim as against the will of said F. C. Herrick and the appointment thereunder. *Bristow v. Warde* (1794) 2 Ves. Jr. (Eng.) 336, 2 Revised Rep. 235, 21 Eng. Rul. Cas. 356; *Long v. Long* (1800) 5 Ves. Jr. (Eng.) 445, 5 Revised Rep. 101; *Mocatta v. Lousada* (1806) 12 Ves. Jr. (Eng.) 123; *Kemp v. Kemp* (1801) 5 Ves. Jr. (Eng.) 849, 5 Revised Rep. 182; *Vanderzee v. Aclom* (1797) 4 Ves. Jr. (Eng.) 771; *Spencer v. Spencer* (1800) 5 Ves. Jr. (Eng.) 362."

In *Thrasher v. Ballard* (1891) 35 W. Va. 524, 14 S. E. 232, the court, by way of argument in holding an appointment invalid for an exclusion, said: "But it may be said that under this discretion Mrs. Stoner might give one child substantially all the estate, and give another only a nominal amount. This is not so, for this would be what is in equity called an illusory appointment. At law any share, however nominal, as a ring or a shilling out of £100,000, was a valid appointment under the power, but in equity it would be illusory and void. An equal distribution in amount is not, however, required, and very large latitude of discretion is allowed the appointer. 2 Minor Inst. 743; *Rhett v. Mason* (1867) 18 Gratt. (Va.) 541; 2 Lomax, Dig. 170, 172; 2 Greenleaf's *Cruse*, on Real Prop. 257, 2 Sugden, Powers, 581."

And see Kentucky cases cited in *FIDELITY & C. TRUST CO. v. BARRET*, ante, 493.

cept the Kentucky court,³¹ to which the question of illusory appointments has been directly presented, have been unwilling to adopt it. The question was presented in Ohio,³² but not decided for the reason that the record showed an attempt to dispose of the property for the benefit of the donee, and the ap-

pointments were held invalid on this ground alone, the court avoiding the question of illusory appointments. The Kentucky court³³ skilfully presents the arguments in favor of adopting the illusory appointment doctrine. The objections to its adoption have already been pointed out.

³¹ FIDELITY & C. TRUST CO. v. BARRET.

³² Shank v. Dewitt (1886) 44 Ohio St. 237, 6 N. E. 255. This case furnishes a good example of invalidity of appointments for fraud. The court said: "That her own personal, pecuniary benefit was in the contemplation of the parties to the transactions, seems too clear for discussion. We may well suppose that those heirs of the testator who were practically excluded from all benefits of the power conferred would have substantially shared in the disposition

of the property but for these appointments made for her own benefit. It was clearly the intention of the testator that his widow should not share in the estate beyond the life interest which the will bestowed upon her; and in seeking to derive a substantial benefit for herself from the estate, which was intended to be appointed to the heirs of the testator, she exceeded and abused the power conferred."

³³ FIDELITY & C. TRUST CO. v. BARRET.

J. W. M

KENTUCKY COURT OF APPEALS.

RUSSELL O'CONNELL, by Next Friend,
Appt.,
v.

MERCHANTS' & POLICE DISTRICT
TELEGRAPH COMPANY.

(167 Ky. 468, 180 S. W. 845.)

Municipal corporation — contractor for public work — exemption from liability for negligence.

One contracting with a city to convey its prisoners to and from jail, and its sick and injured to the hospitals, is not entitled to the city's exemption from liability for injuries to pedestrians due to his negligence in the performance of that duty.

For other cases, see *Negligence*, I. d., in *Dig.* 1-52 N. S.

(December 17, 1915.)

A PPEAL by plaintiff from a judgment of the Common Law and Equity Division of the Circuit Court for Kenton County sustaining a demurrer to a petition filed to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. B. F. Graziani for appellant.

Mr. C. B. Thompson for appellee.

Miller, Ch. J., delivered the opinion of the court.

The appellant, Russell O'Connell, a minor, who sues by his next friend, appeals from a judgment of the circuit court that sus-

tained a demurrer to his petition. The petition, in substance, states that the defendant, the Merchants' & Police District Telegraph Company, was at the time the plaintiff was injured a private corporation, engaged in the business of running and operating a wagon for the purpose of carrying persons to and from the jail, and to and from the hospital, or carrying the injured or sick from the streets, highways, and buildings of the city of Covington, to their homes, hospitals, or jails; that on March 20, 1913, while plaintiff was traveling along Madison avenue near the intersection of Sixth street, in Covington, the defendant, with gross and wanton carelessness and negligence upon the part of its servants, ran its team and wagon over the plaintiff, severely and permanently injuring him in the several ways detailed in the petition, to his damage in the sum of \$5,000; that at the time it inflicted the injuries upon the plaintiff the defendant was hired by the city of Covington and paid a sum of money under contract for its services, and was operating its team and patrol wagon, through its agents and officers, for a payment of money and gain.

The circuit court rested its judgment sustaining the demurrer to the petition upon the authority of the case of the Bluegrass Traction Co. v. Grover (1909) 135 Ky. 685, 135 Am. St. Rep. 498, 123 S. W. 264, and similar cases, which hold that, where a county performed its governmental functions through a contract with another, the contractor was not liable for negligence in the performance of the work, when the county would not have been liable if it had performed the work through its own employees. See also *Schneider v. Cahill*, —

Note. — As to right of contractor with public to immunity which latter enjoys from liability for damages, see annotation following this case, post, 511. L.R.A.1916D.

Ky. —, 27 L.R.A.(N.S.) 1009, 127 S. W. 143.

It is generally held that, where one contracts with a municipal corporation to keep its streets in repair, he takes upon himself the duty of the city towards the public, and, if the municipality would be liable for its negligence in such a case, so is the contractor, whose negligence caused the injury.

But the converse of that proposition, which exempts the contractor from liability for his own negligence in case the city would not be liable if it had been guilty of negligence in doing the same work, is of comparatively late origin, and this rule is by no means universal in its application. There are many exceptions to it; and the consequences of extending the doctrine of nonliability while in the performance of governmental functions makes us unwilling to say that all the various functions of municipal government can be performed by agents or contractors without liability to persons injured through their negligence in the performance of such work. An instance of an exception to the rule is found in the liability to individuals of water companies performing the governmental function of furnishing water for fire protection. This liability has been upheld in this state as resting upon the breach of the contract made for the benefit of the individual. *Graves County Water Co. v. Ligon*, 112 Ky. 775, 66 S. W. 725; *Terrell v. Louisville Water Co.* 127 Ky. 77, 105 S. W. 100.

In *Bluegrass Traction Co. v. Grover*, supra, the traction company had built a bridge over the Southern Railway Company's track, under an agreement with the fiscal court of the county to maintain the bridge forever, free of cost to the county. The bridge formed a part of the county road. The traction company permitted the bridge to get out of repair, with the result that a valuable horse belonging to Grover was injured while crossing the bridge. Grover recovered a judgment against the traction company, which was reversed by this court, upon the theory that since the county being an arm of the state government, and exercising a part of the powers of the state, and created by the legislature for that purpose, neither it nor any of its officials could be held liable for damages in the performance of that duty, the traction company, which had taken over that duty, was likewise not liable. In the course of the opinion the court said: "To hold that the county is not responsible for a defect in the highway, but that the contractor who agrees with the county to discharge the duty which the law places upon the county is responsible to a traveler in-

jured by a defect in the highway, would be to overlook the reason upon which the rule rests; for, if such liability existed, the county would be unable to make contracts for the keeping in repair of its highways on as reasonable terms as it can where it must only pay a reasonable price for the necessary work, because, if the contractor assumes the greater liability, he must necessarily take this into consideration in fixing the price for which he may do the work."

The court further said: "The bridge was a part of the county highway, and, unless the traction company became liable by reason of its contract with the fiscal court, or by some other fact shown in the case, then it is not liable to Grover for an injury to his mare while traveling on the public highway by reason of a defect in it."

The opinion then quotes the contract between the traction company and the county at length, and closes as follows: "To hold the traction company liable for such damages on a contract to maintain the bridge free of cost to Fayette county would be to extend the obligation of the contract beyond the fair and natural meaning of its terms."

It will be observed that the conclusion there reached is based entirely upon the idea, which is emphasized, that the traction company's relation with the county was contractual only, and that it was therefore liable in the same way and to the same extent, and no further, than the county would have been liable. Grover sought a recovery by reason of the contractual relation of the traction company.

But, conceding that the city of Covington would not have been liable to the plaintiff for the accident inflicted upon him in this case if the city had been operating the wagon, because it would then have been performing a governmental function, does it follow that the appellee is not liable for its own negligence in performing that work? We think this question is answered by the opinion of this court in *Jones & Co. v. Ferro Concrete Constr. Co.* 154 Ky. 52, 156 S. W. 1060. In that case *Jones & Co.* and the *Ferro Company* were building separate portions of the sewers of the city of Louisville, under separate contracts with its commissioners of sewerage, a corporation created for the purpose of installing an extended system of sewers for and on behalf of the city of Louisville. In prosecuting its work the *Ferro Company* damaged the work of the *Jones Company*, whereupon the *Jones Company* sued the *Ferro Company* and the commissioners of sewerage for damages. This court exempted the commissioners of sewerage from liability, under the well-known doctrine that it was not

liable for negligence in performing a governmental function; that the money in its hands was a fund created by taxation for the purpose of supplying the city with an adequate system of sewers, and which, under the mandate of the Constitution, could not be diverted to any other purpose. But, in holding the Ferro Company liable for its negligence and consequent damage to the Jones Company, the court had this to say in explanation of the opinion in *Bluegrass Traction Co. v. Grover*, supra: "That was a suit upon the contract, and the question decided was simply that the damages sued for were not within the reasonable contemplation of the parties to the contract, and not covered by its terms. If this was a suit upon the contract made by the Ferro Concrete Construction Company with the sewerage commission, and damages were claimed by reason of a breach of the terms of that contract, then the two cases would be similar. But this is not a suit for a breach of a contract. It is a suit to recover damages for negligence. If in that case the traction company had negligently thrown a timber from its bridge and injured Grover's horse beneath, then the two cases would be parallel. No such question was presented by that record, and the opinion of the court is limited to the effect of the contract. The court did not have before it in that case the question of the liability of the traction company for negligence independently of its contract with the fiscal court."

From the above extract it will be observed that the court was careful to point out the distinction that the Grover Case was a suit upon the contract between the traction company and the county, and that, if in the Grover Case the traction company had negligently thrown a timber from its bridge and injured Grover's horse beneath, then the two cases would be parallel. The distinction between the liability of the contractor under a contract with the municipality and his liability for his negligence independently of his contract is clearly drawn. In the first class of cases the contractor is not liable because the municipality would not be liable; in the second class of cases the contractor is liable because he is sued for his own negligence independently of his contract with the municipality.

In *Appleby v. State*, 45 N. J. L. 165, the distinction above made was recognized, and stated as follows: "A duty the breach of which is an actionable wrong, may arise from a contract, or be imposed by positive law, independent of contract. In the first case the party to the contract only can sue. . . . In the other case any person injured may sue if he be one of the class of

persons for whose benefit the duty is imposed."

Solberg v. Schlosser, 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91, is directly in point. In that case the drainage board of a county let a contract to build a drain across a highway, and reserved no right of supervision. The contractor negligently piled earth on the roadway, thereby causing the injury to the plaintiff. In a suit against him for his negligence the contractor answered that he was an agent of the drainage board, and that, as the drainage board was not liable, neither was he. But in holding him liable the court said:

"We do not agree with the defendant's contention as to the cause of action set forth in the complaint. It is not a cause of action for damages growing out of a breach of contract. It is one for damages growing out of the defendant's tort in rendering the highway dangerous through his negligence in leaving the dirt thereon in piles, and not leveled off. The contract is not set forth in the complaint nor mentioned therein. It was not offered in evidence by the plaintiff, but by the defendant. . . .

"In this case, although there existed a contract between the drainage board and the defendant, still the liability, as pleaded, does not depend on the contract, but arises out of a legal duty devolving upon the defendant, as well as the public in general, not to obstruct or make the highway dangerous for travel. Such a duty, being to the public generally, may be enforced by anyone, if damages occur on account of the failure to perform that duty. The liability in this case arises by reason of the fact that the defendant negligently placed a nuisance in the highway, which rendered it dangerous for travel, and a violation of § 6641, Rev. Codes 1905, Comp. Laws 1913, § 7228. Inasmuch as the liability pleaded is not based upon a contract, it is not necessary for us to determine whether there was a breach of the contract in this case. In support of our conclusion that the complaint in this case properly alleged a cause of action growing out of a breach of duty on the part of the defendant, see *Nye v. Dibley*, 88 Minn. 465, 93 N. W. 524; *Elzig v. Bales*, 135 Iowa, 208, 112 N. W. 540. . . .

"The defendant also urges that he was engaged in excavating the drain as the agent of the drainage board, and contends that no liability can be upheld against him as agent, as his principal would not be liable as a matter of law. So far as this case is concerned, it is immaterial whether the drainage board could be held for damages or not, as it clearly appears that the relation of principal and agent did not exist between

the defendant and the drainage board by virtue of the contract. A reading of that contract shows that the defendant independently contracted to dig the drain in accordance with plans and specifications which were made a part of the contract. The drainage board exercised no control or supervision over the work or over the defendant while engaged in doing the work."

The reason for exempting a municipality from damages for injuries inflicted in the performance of its governmental functions is one of public policy, to protect public funds and public property. Taxes are raised for certain specific governmental purposes; and, if they could be diverted to the payment of damage claims, the more important work of government, which every municipality must perform regardless of its other relations, would be seriously impaired, if not totally destroyed. The reason for the exemption is sound and unobjectionable. But, when an individual or private corporation, for compensation, undertakes to perform work for a municipality, the reason for the rule ceases. It has become a maxim that, when the reason for a rule of law ceases, the rule itself should cease. To hold the contractor liable for his negligence in no way jeopardizes the public funds of the municipality. To say that holding the contractor liable for his own negligence would prevent the municipality from securing contractors to do its work at a reasonable price is entirely too fanciful and farfetched in its application to the practical affairs of life to receive serious consideration. This difficulty does not arise in work done for individuals; indeed, experience shows that individuals usually get the same character of work done for lower prices than are paid by municipalities. If, on the contrary, it should be announced as

a rule of law that a contractor doing work for a municipality is not to be held liable for his own negligence, it would not only be a deplorable rule that would put a premium upon negligence, but the contractor would, in all probability, and because of the application of the rule to his case, have to pay enhanced wages for the enhanced danger thereby incurred by the laborer, and thereby increasing the cost of the work. If we were permitted to speculate as to the results to be obtained in giving or denying the exemption from liability to contractors doing municipal work of a governmental character, we would conclude that it would be to the interest of the municipality, as well as the laborer, to deny the exemption. Nobody but the contractor would profit by granting the exemption, while the life and property of the citizen would be exploited for the contractor's benefit.

We have heretofore called attention to the language of the opinion in the Jones Case, where the court, in referring to the Grover Case, said that "if in that case the traction company had negligently thrown a timber from its bridge and injured Grover's horse beneath," it would have been liable for its own negligence.

Clearly, that is the case we have before us. The petition charges that the appellee, through the gross carelessness and negligence of its servants, ran over the appellant and injured him. If that be true, and we must so take it upon the demurrer, this case comes squarely within the rule announced in *Jones & Co. v. Ferro Concrete Constr. Co.* above cited, and the appellee is responsible in damages.

Judgment reversed, and case remanded, with instructions to overrule the demurrer to the petition, and for further proceedings.

Annotation—Right of contractor with public to immunity which latter enjoys from liability for damages.

The present question, of course, cannot arise except in those jurisdictions where the public enjoy an immunity from liability for damages arising from the performance by the public authorities of a governmental function. Consequently those cases in which the public is excused from liability upon the ground that the performance of a governmental function has been delegated to an independent contractor do not fall within the scope of the annotation, and are not treated herein.

The cases involving the liability of a highway contractor for dangerous conditions where the municipality, county, or town is not liable are treated in the L.R.A.1916D.

annotations to *Schneider v. Cahill*, 27 L.R.A.(N.S.) 1009, and *Ockerman v. Woodward*, L.R.A.1916A, 1005, and should be examined in connection with the present annotation.

The general rule seems to be that where the act or failure to act which causes an injury complained of is one which the contractor was employed to do, and the injury results not from the negligent manner of doing the work, but from the doing of or failure to do it at all, the contractor is entitled to the immunity from liability which the public enjoys, but, on the other hand, is not entitled to such immunity where the injury arises from the negligent manner

of performing the work. In other words, one contracting with the public is generally not liable for incidental or unavoidable injury necessary to the performance of the work, but is liable for damages arising from casual or collateral negligence, negligence being casual or collateral when it arises incidentally in the course of the performance of, and not directly from, the act authorized.

Thus it has been held that independent contractors constructing drainage improvements are not liable for damages which do not result from negligence or unskillfulness in performing the contract, or, in other words, for damages necessarily inflicted in doing the work. *Wood v. Drainage Dist.* (1913) 110 Ark. 416, 161 S. W. 1057, holding that one contracting with a drainage district was not liable for injuries to adjoining lands where no negligence was established; *Timothy J. Foohey Dredging Co. v. Lovewell* (1914) — Ark. —, 170 S. W. 1012, citing *Wood v. Drainage Dist.* with approval; *Timothy J. Foohey Dredging Co. v. Mabin* (1915) 118 Ark. 1, 175 S. W. 400, holding that one contracting for the construction of a drainage ditch was not liable for damages caused by acts necessary to the construction of the ditch. So, it was held in *Hanrahan v. Baltimore* (1911) 114 Md. 517, 80 Atl. 312, that contractors for the construction of a public sewer were in the precise position of the public contractee with respect to liability for incidental and unavoidable injury done in constructing the sewer. And in *De Baker v. Southern California R. Co.* (1895) 106 Cal. 257, 46 Am. St. Rep. 237, 39 Pac. 610, where a levee was constructed pursuant to a contract with a city, it was held that the contractor was entitled to the immunity of the city for indirect and consequential damages, such as the cutting away by a flood of land on the side of the stream opposite the levee, the plans and location of the levee being such as to exonerate the city, and no negligence being attributed to the contractor in the construction of the work. So, in *Salliotte v. King Bridge Co.* (1903) 65 L.R.A. 320, 58 C. C. A. 466, 122 Fed. 378, writ of certiorari denied in (1903) 191 U. S. 569, 48 L. ed. 306, 24 Sup. Ct. Rep. 841, where a riparian owner sought to hold a contractor for the erection of a bridge across a navigable river liable for injury to his land caused by the turning of the current against same by the deepening of the channel, the court held the contractor entitled to all the immunities of the public, and not liable in the instant L.R.A.1916d.

case because the injury in question was incidental to a valid exercise of the public authority. And in *Bennett v. Mt. Vernon* (1904) 124 Iowa, 537, 100 N. W. 349, where it became necessary to destroy a private drain in laying water mains, it was held that neither the town nor the contractor was liable for the resulting damages, the work having been done in a proper and lawful manner.

But contractors for the construction of public drains are liable if, in exercising the rights conferred by contract, by negligence, unskillfulness, or acts performed for mere convenience, they injure the property of another, although the drainage district itself is not liable for negligence. *Wood v. Drainage Dist.* (dictum); *Timothy J. Foohey Dredging Co. v. Lovewell* (dictum); and *Timothy J. Foohey v. Mabin* (Ark.) supra (holding that a contractor for the construction of a drainage ditch was liable for injury to an adjoining landowner for damages resulting from the damming up of a ditch, where such act was not a necessary part of the construction work which the contractor had undertaken to do). And it has been held that an independent contractor for the laying of a water main would be liable for damages caused by the destroying of a private drain if the injury were the result of doing the work contracted for in an unreasonable and negligent manner. *Bennett v. Mt. Vernon* (Iowa) supra. So, in *Thompson v. Polk County* (1838) 38 Minn. 130, 36 N. W. 267, it was held that a contractor for the construction of a public ditch was liable for injuries due to his negligence, although the county itself was not liable therefor. And in *Turner v. Degnon-McLean Contracting Co.* (1904) 99 App. Div. 135, 90 N. Y. Supp. 948, affirmed on prevailing opinion below in (1906) 184 N. Y. 525, 76 N. E. 1111, it was expressly held that a contractor for the construction of a tunnel under city streets does not stand in the same position as would the city were it doing the work without the intervention of a contractor, as regards injuries caused by striking a pedestrian lawfully on the public street, with a stone thrown in negligent blasting, and, therefore, that the contractor was not immune from liability. And see *Bates v. Holbrook* (1902) 171 N. Y. 460, 64 N. E. 181, affirming (1901) 67 App. Div. 25, 73 N. Y. Supp. 417, which reversed (1901) 35 Misc. 342, 71 N. Y. Supp. 1013, wherein it was held that a contractor who in constructing a public improvement, such as a subway, unnecessarily damaged prop-

erty by maintaining at one point and for his own convenience machinery and other appliances which could as well have been located where they would not have caused damage, was liable for such damage. And see also *Dow v. Oroville* (1913) 22 Cal. App. 215, 134 Pac. 197, wherein a contractor for the construction of a city sewer system was held liable for injuries caused by a pedestrian falling into an unguarded trench, and in which the complaint was dismissed as to the city. In the latter case, however, the ground upon which the city was excused from liability is not shown, but the court did say that a mere recital in the complaint of contractual relations subsisting between the city and the contractor would not relieve the latter from liability for the consequence of any negligence in performing the work called for by the contract.

And a similar conclusion has been reached in a case (*Green v. Eden* (1900) 24 Ind. App. 583, 56 N. E. 240) somewhat similar as regards its facts to *O'CONNELL v. MERCHANTS' & POLICE DIST. TELEG. Co.* ante, 508, it being held that one contracting with a city to furnish and operate a hospital ambulance in response to all calls from the city dispensary was liable for injuries to a pedestrian caused by his servant's negligence in performing the contract duty, notwithstanding the contract with the city, which successfully defended the action as against itself. It does not appear, however, that the city defended upon the ground that, being a public entity, it was entitled to immunity from liability.

And where the public is held to be immune from liability for negligence in performing a governmental function, a further refinement of the above discussed general rule has been made by drawing a distinction between actions founded upon the negligent performance or nonperformance of duties arising under the contract with the public, and actions bottomed upon liability of the contractor for his negligence independently of his contract. This distinction is clearly laid down in *O'CONNELL v. MERCHANTS' & POLICE DIST. TELEG. Co.* supra, which sets out at length and quotes with approval the earlier Kentucky case of *Jones & Co. v. Ferro Concrete Constr. Co.* (1913) 154 Ky. 47, 156 S. W. 1060, wherein a similar distinction was made, it being held that where the action is upon the contract the contractor is entitled to the immunity from liability even for negligence which the public en-

joys, but that the contractor cannot escape liability by pleading public immunity where he has been guilty of negligence independently of his contract. This distinction is also indicated in the opinion of the court in *Solberg v. Schlosser* (1910) 20 N. D. 307, 30 L.R.A.(N.S.) 1111, 127 N. W. 91, which is set out in both the *O'CONNELL CASE*, and in the note on "Liability of highway contractor" in 27 L.R.A.(N.S.) 1009. But in connection with the above cited Kentucky cases the reader should also examine *Schneider v. Cahill* (1910) — Ky. —, 27 L.R.A.(N.S.) 1009, 127 S. W. 143, and *Ockerman v. Woodward* (1915) 165 Ky. 752, L.R.A.1916A, 1005, 178 S. W. 1100, in both of which highway contractors were held entitled to the immunity enjoyed by the public in actions founded upon the independent negligence of the contractor and not upon the omission or commission of duties imposed by the contract itself. The *Ockerman Case* does not advert to the distinction laid down in *Jones & Co. v. Ferro Concrete & Constr. Co.*, which, as above stated, is approved and applied in the *O'CONNELL CASE*, which was decided subsequently to *Ockerman v. Woodward*, and the latter case is not cited in the *O'CONNELL CASE*. Moreover, the annotator is unable to reconcile the decisions in the two cases last cited, the latter of which seems to necessarily overrule the former. See also the criticism of *Ockerman v. Woodward* contained in the annotation to that case on page 1006 of L.R.A.1916A.

And that phase of the above discussed rule which declares that where the action is founded upon breach of a duty arising out of a contract to do something which the contractee would not be liable for failure to do, the contractor is entitled to the immunity which the former enjoys, was laid down in *Williams v. Stillwell* (1889) 88 Ala. 332, 6 So. 914, wherein it was held that one who contracted to keep county bridges in repair was not liable to a traveler injured by a defective bridge which the contractor had failed to repair, the court saying that the county itself was not liable for the injury in question, and that it knew of no authority which would authorize "A to maintain an action against B for an alleged injury suffered from the latter's failure to comply with a contract made with C." And upon the lack of privity of contract phase of the case, see *Choppin v. Louisiana Levee Co.* (1878) 30 La. Ann. 345, wherein a suit against contractors with the state for the construction and repair of a levee, based upon a

breach of the contract, was dismissed upon exceptions that there was no privity of contract between the complainant and the contractors, and that the petition disclosed no cause of action. But this rule regarding the necessity of privity of contract is not of universal application. For example, it has been held that an independent contractor for a public improvement is in privity with the public at large so as to render him liable for his negligence. *Casey v. Wrought Iron Bridge Co.* (1905) 114 Mo. App. 47, 89 S. W. 330.

Another case of possible interest in connection with the present question is *Lee v. Delaware, L. & W. R. Co.* (1901) 57 App. Div. 378, 68 N. Y. Supp. 407, wherein it was held that a statute exempting towns from liability to one injured by the breaking of a bridge across which he is taking a load of over 4 tons applies to a railroad bridge necessarily constructed to carry a highway over its tracks, and relieves the railroad from liability to the same extent as the town. G. J. C.

KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

J. A. JOHNSON.

(168 Ky. 351, 182 S. W. 214.)

Carrier — lease — liability for injury to passenger.

1. The owner of a railroad is liable for injury negligently inflicted by a lessee upon a passenger on a train operated by the latter.

For other cases, see *Railroads, I. in Dig.* 1-52 N. S.

New trial — judgment non obstante veredicto — denial of peremptory instruction.

2. The court cannot, after erroneously denying a motion for peremptory instruction, grant a motion for judgment non obstante veredicto, but must grant a new trial.

For other cases, see *Judgment, I. c. 4, in Dig.* 1-52 N. S.

Carrier — duty to assist passenger out of car.

3. A carrier is not bound to go into a car and assist to the exit a passenger who is able to walk about, although he has lost some fingers and toes, so as to be liable for injury to him through his attempting to alight from the moving train which has stood at the station the regular time to discharge and receive passengers.

For other cases, see *Carriers, II. j, 1, a, in Dig.* 1-52 N. S.

(February 8, 1916.)

Note. — For right to judgment non obstante veredicto, because of failure of proof, see note to *Kirk v. Salt Lake City*, 12 L.R.A. (N.S.) 1021.

As to liability of lessor of railroad for injuries caused by negligence of another company using the road under a lease, license, or other contract, see note to *Caruthers v. Kansas City, Ft. S. & M. R. Co.* 44 L.R.A. 737; and see later cases, *Harden v. North Carolina R. Co.* 55 L.R.A. 784; 1 L.R.A. 1916D.

APPEAL by defendant from a judgment of the Circuit Court for Franklin County overruling defendant's motion for new trial of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Shelby, Northcutt, & Shelby and T. L. Edelen, for appellant:

Defendant was entitled to a judgment notwithstanding the verdict because of the failure to reply to the plea of contributory negligence.

Evans v. Stone, 80 Ky. 78; *Louisville & N. R. Co. v. Copas*, 95 Ky. 460, 26 S. W. 179; *Louisville & N. R. Co. v. Mayfield*, 18 Ky. L. Rep. 224, 35 S. W. 924; *Louisville R. Co. v. Hibbitt*, 139 Ky. 43, 139 Am. St. Rep. 464, 129 S. W. 319.

The necessity for a reply to the plea of contributory negligence is not affected by the fact that the petition contains a statement that plaintiff was in the exercise of due care.

Louisville & N. R. Co. v. Copas, 95 Ky. 460, 26 S. W. 179; *Louisville & N. R. Co. v. Paynter*, 26 Ky. L. Rep. 761, 82 S. W. 412.

The fact that a motion for a peremptory instruction was made and overruled at the trial does not deprive the defendant of its right to a judgment upon the pleadings under § 386, Civil Code.

Louisville & N. R. Co. v. Copas, supra; *Illinois C. R. Co. v. Beauchamp*, 25 Ky. L. Rep. 1429, 77 S. W. 1096; *Louisville & N.*

Chicago & G. T. R. Co. v. Hart, 66 L.R.A. 75; *Hamilton v. Louisiana & N. W. R. Co.* 6 L.R.A. (N.S.) 787; *Clinger v. Chesapeake & O. R. Co.* 15 L.R.A. (N.S.) 998; and *Johnson v. Louisiana R. & Nav. Co.* 36 L.R.A. (N.S.) 887.

As to duty of carrier to assist passenger boarding or alighting, see note to *Louisville & N. R. Co. v. Dyer*, 48 L.R.A. (N.S.) 816, and other notes there referred to.

R. Co. v. Cox, 145 Ky. 716, 141 S. W. 59; Connecticut F. Ins. Co. v. Moore, 154 Ky. 18, 156 S. W. 867, Ann. Cas. 1914B, 1106; Western & Southern L. Ins. Co. v. Quinn, 130 Ky. 397, 113 S. W. 456.

The alleged failure to render plaintiff increased aid and assistance could not be regarded in any event as the proximate cause of the accident.

Cooley, Torts, § 76; Wharton, Neg. § 134; Setter v. Maysville, 114 Ky. 68, 69 S. W. 1074; Wight v. Cumberland Teleph. & Teleg. Co. 137 Ky. 302, 125 S. W. 718.

Defendant is in no event responsible for the negligence of its lessee in respect of the latter's passengers.

Swice v. Maysville & B. S. R. Co. 116 Ky. 253, 75 S. W. 278; Illinois C. R. Co. v. Sheegog, 126 Ky. 252, 103 S. W. 323; Mahoney v. Atlantic & St. L. R. Co. 63 Me. 68.

Messrs. O'Rear & Williams for appellee.

Thomas, J., delivered the opinion of the court:

On November 8, 1913, the appellee, J. A. Johnson (whom we shall hereafter designate as plaintiff), at about 4:15 P. M., boarded a train at Winchester, Kentucky, to go to Frankfort, Kentucky, which train was that of the Chesapeake & Ohio Railway Company. In due time the train arrived at Frankfort, but, according to the testimony, something like five minutes later than its schedule time, and, while attempting to alight from the train at the latter place, the plaintiff fell, and in some manner one of his legs got caught under the train and was run over by the front trucks of one of the coaches and had to be amputated. There was an injury to the knee of the other leg which appears to have rendered it almost, if not, stiff, and there was a slight wound about the head which seems not to have been very serious, but more or less painful and annoying at the time. He was carried to a hospital in Frankfort, and, after remaining there for quite a while, he recovered sufficiently to be able to, with the assistance of an artificial limb, travel about to some extent. He filed this suit in the Franklin circuit court on December 13, 1913, against the appellant, Louisville & Nashville Railroad Company (whom we shall hereafter refer to as defendant), seeking to recover against it as damages for his injury the sum of \$25,500. Upon the first trial of the case there was a verdict and judgment against the defendant for the sum of \$15,000, but the trial court granted to the defendant a new trial and set aside that verdict, and upon a second trial there was a verdict and judgment in favor of plaintiff for the sum of \$6,000, and defendant's L.R.A.1916D.

motion for a new trial having been overruled, it prosecutes this appeal.

Before considering the merits of the case, there are two preliminary questions urged upon us by defendant which we deem necessary to dispose of. They are:

(1) That the defendant was not operating the train upon which the plaintiff took passage, but that same was being operated by the Chesapeake & Ohio Railway Company over a track of railroad from Lexington to Louisville owned by the defendant, but which had been long previously leased to the Chesapeake & Ohio Railway Company for the purpose of operating upon it between said points trains exclusively owned by it, and that the injury to plaintiff, if produced by any negligence at all, was that of the latter company as lessee of defendant, and for which the defendant is not at all liable.

(2) At the close of the plaintiff's testimony at the first trial the defendant moved the court to peremptorily instruct the jury to return a verdict in its behalf, which was overruled and exceptions taken, and the same motion was renewed at the close of all of the testimony which was heard upon that trial, with the same result, and after the returning of the verdict, and before a rendition of the judgment thereon, the defendant entered a motion for a judgment notwithstanding the verdict; this being based upon the fact that its answer contained, in addition to a general denial, a plea of contributory negligence on behalf of plaintiff, and which plea of contributory negligence was not denied either by pleading or being controverted of record.

Considering these questions in the order named, it appears that the Chesapeake & Ohio Railway Company owns a line of railroad from Lexington, Kentucky, eastward, and that the defendant owns a line of railroad from Lexington through Frankfort and running into the city of Louisville, and that this condition existed on the 23d day of March, 1895. On that day, in consideration of certain agreements and counter agreements, there was a written lease entered into between defendant and the Chesapeake & Ohio Railway Company by which, for the considerations stated, the latter company was given the privilege to operate its trains between Lexington and Louisville running through intermediate stations, including Frankfort, over the tracks of the defendant, and it is claimed in this case that, notwithstanding this lease, inasmuch as the injuries complained of were inflicted by the Chesapeake & Ohio Railway Company, this defendant is not liable.

It would serve no useful purpose to set out in this opinion any of the stipulations

or conditions of that lease contract, because on a previous occasion it was before this court wherein a similar question was presented, and the contention now made by defendant was then denied by this court. *Louisville & N. R. Co. v. Breeden*, 111 Ky. 729, 64 S. W. 667. It was therein determined that, although it might appear that both the lessor and lessee of a railroad track had authority to enter into such a contract, still the lessor company could not relieve itself by such a lease of the duties which it owed to the public to maintain and operate its railroad in such a way as the law demands of it, which is in a reasonable, prudent, and careful manner, and without negligence resulting in the injury or hurt of any member of the public, and, if any member of the public shall through the negligence of the lessee sustain injuries from which damages result, the lessor would be liable for such damages to the injured party as much so as if the same had been the result of acts of it or any of its agents or servants. See also *McCabe v. Maysville & B. S. R. Co.* 112 Ky. 861, 66 S. W. 1054; *Swice v. Maysville & B. S. R. Co.* 116 Ky. 253, 75 S. W. 278; *Illinois C. R. Co. v. Sheegog*, 126 Ky. 252, 103 S. W. 323.

It was furthermore determined in the *Breeden Case*, supra, that "the contract above quoted [which is the same herein involved] is nothing more than a traffic arrangement. The two companies jointly maintained the roadbed."

It is insisted, however, that inasmuch as the injured parties in the cases referred to were not at the time passengers upon the lessee's train, this rule should not apply herein, because the relationship of the plaintiff as passenger to the lessee was contractual, and is to be governed by the same rule applicable as between the employees of the lessee and it, and the effort is made to bring a passenger of the lessee in the same category with an employee of the lessee. This is wholly untenable. The very foundation of the rule which relieves the lessor of liability for injuries to the employees of the lessee is that such employees established their relationship to the lessee by a voluntary act on their part. Not so with the passenger. While in one sense he voluntarily becomes a passenger on that particular train, yet in a still further sense he is compelled to take that particular train if he wants to go to a point on that road at that particular time, and, because he assumes voluntarily the position of passenger towards the lessee carrier, he does not thereby and for the time being cease to be a member of the public to whom the lessor owes certain specified duties in carrying out the purposes of its charter. The contention of the defendant upon this point is unsound, and cannot be upheld.

Second. It is urged that the motion for a judgment non obstante veredicto at the close of the first trial should have prevailed, and that the trial court erred in granting a new trial, thereby giving an opportunity for the plaintiff to reply to the plea of contributory negligence, and we are asked to reverse the judgment and direct the lower court to enter a judgment for the defendant.

This we cannot do. *Chesapeake & O. R. Co. v. Thieman*, 96 Ky. 509, 29 S. W. 357; *The Blue Wing v. Buckner*, 12 B. Mon. 248; *Louisville & N. R. Co. v. Copas*, 95 Ky. 460, 28 S. W. 179; *Mast v. Lehman*, 100 Ky. 466, 38 S. W. 1056; *Louisville & N. R. Co. v. Schweitzer*, 14 Ky. L. Rep. 856; *Schulte v. Louisville & N. R. Co.* 128 Ky. 631, 108 S. W. 941; *Louisville R. Co. v. Hibbitt*, 139 Ky. 44, 139 Am. St. Rep. 464, 129 S. W. 319; *Louisville & N. R. Co. v. Tuggle*, 151 Ky. 412, 152 S. W. 270; *Connecticut F. Ins. Co. v. Moore*, 154 Ky. 20, 156 S. W. 867, Ann. Cas. 1914B, 1106.

The direct question of practice under consideration was presented to this court in the case of *Mast v. Lehman*, 100 Ky. 466, 38 S. W. 1056, and decided contrary to the present contention of the defendant; and this case is referred to with approval in this court's opinion in the case of *Connecticut F. Ins. Co. v. Moore*, 154 Ky. 20, 156 S. W. 867, Ann. Cas. 1914B, 1106, in which latter case this court upon the question said: "It is the rule that, where a party asks for a peremptory instruction which should have been given, he is not thereafter entitled to a judgment notwithstanding the verdict, but only to a new trial for the error of the court in refusing the peremptory,"—citing both the *Lehman* and *Hibbitt Cases*.

In the case of *Louisville R. Co. v. Hibbitt*, 139 Ky. 44, 139 Am. St. Rep. 464, 129 S. W. 319, almost the precise question of practice herein involved was before this court, and, denying the present contention, this court, quoting with approval from the *Lehman Case*, said: "The motion for a peremptory instruction should have been sustained, and certainly the company ought not to suffer because of the error of the court committed over its objection and after it had done everything it could do to save its rights. This precise question was before us in *Mast v. Lehman*, supra, in which the petition was so fatally defective as not to entitle the plaintiff to a verdict. The court said: 'At the conclusion of the trial the defendant moved the court to peremptorily instruct the jury to find for the defendant. This motion of defendant should have been sustained by the court, and would have been sustained if the court had been aware of

the true condition of the pleadings. It is true the plaintiffs objected to the instruction; but, in our opinion, such objection did not relieve the court of its obligation to properly instruct the jury as to the law of the case based upon the pleadings and the proof. If the court had sustained this motion, as it was clearly his duty to do, it would necessarily have brought to the attention of the plaintiffs the defense which had been so carefully concealed from the very beginning of the case. And before the submission of the case to the jury he would have had an opportunity to have offered an amendment curing the defects in his petition, which, in furtherance of justice, it would have been the duty of the court to have allowed to be filed."

See also the very recent case of Lancaster Electric Light Co. v. Taylor, 168 Ky. 179, 181 S. W. 967.

To hold in accordance with this rule does not say that the asking for a peremptory instruction is a waiver of the right to move for a judgment notwithstanding the verdict. The one is universally recognized as challenging the sufficiency of the evidence, while the other is a challenge directed to the sufficiency of the pleading; but, when a motion for a peremptory has been made, whether for an insufficiency of pleading or evidence, and which should have been given, but was not, a subsequent motion for a non obstante judgment, if sustained, would place the right to a hearing by the adverse party beyond repair, and the court in furtherance of the general principle that it is preferable that cases should be disposed of on their merits, rather than upon technicalities, should in such cases as we are here dealing with reconsider his ruling in denying the motion for a peremptory instruction and grant a new trial, rather than sustain the motion for a judgment notwithstanding the verdict. If the motion for a peremptory instruction had not been made in such cases, there would be no error which the trial court could correct by the granting of a new trial, and he would then be compelled to sustain the motion for a judgment notwithstanding the verdict. We are, however, confronted with no such conditions in this instant case. We therefore hold that there was no error in refusing the motion for a verdict made by the defendant under the facts presented. This brings us to a consideration of the merits of the case.

It appears that a year or more previous to this accident the plaintiff, on account of being exposed to the cold weather, had sustained injuries by frost bite whereby he lost some of his fingers to both hands and some of the toes to both of his feet, but he does not seem to have been otherwise seriously injured; and it is insisted that upon boarding the train upon the occasion involved at Winchester he explained to an agent and servant of the Chesapeake & Ohio Railway Company his crippled condition, and requested special aid in alighting from the train upon the arrival at his destination, which he says was promised to him, and which he claimed was not rendered. It is not clear, however, that the petition charges this failure to be a causal act resulting in the injury to plaintiff, but for the purpose of this case we will treat the allegations as being broad enough to cover this point. It is also charged that the railroad company suffered other passengers to crowd upon the train when it arrived at Frankfort, and thereby prevented plaintiff from alighting, and that through its negligence and carelessness the train at the time plaintiff was about to alight was caused to make an unusual or unnecessary jerk, whereby he was thrown to the platform and injured; the entire part of the petition setting up the facts constituting plaintiff's grounds for recovery being as follows: "Plaintiff says that of their gross negligence and carelessness the defendant, its agents, servants, and employees in charge of said train, failed and refused to give him the increased care or attention made necessary by his condition, or any care or attention, but, upon the contrary, when the train arrived at Frankfort, of their gross carelessness and negligence suffered new passengers to crowd upon the train and into the doorways and aisles of the coach before plaintiff could alight, and whilst plaintiff was on the platform of one of defendant's coaches preparatory to alighting, and whilst using due care for his own safety considering his condition, the said defendant's said agents and employees, by their gross negligence and carelessness, caused an unusual and unnecessary jerk of the train, whereby the plaintiff was suddenly thrown from the platform and steps of said train under its wheels."

It will be observed that the failure of those in charge of the train to render to him the increased aid which he insists that his crippled condition demanded is not clearly charged as the producing cause of his injury.

The proof shows that, notwithstanding the crippled condition of the plaintiff, he was perfectly able to walk about and go wheresoever he pleased. He resided with his daughter about 4 miles from Winchester, and in going to town frequently walked part of the way, and sometimes all the way, and on the day that he made this trip he started from his home with a grip, or suit case, and, after walking perhaps one half of the way, he rode into town in a vehicle

with a traveler on the turnpike. He deposited his grip in a saloon, where he drank a milk punch, and, after leaving the saloon and visiting some places in town, he returned and drank another milk punch, and later on, after engaging in other travel about the city, and about 11 o'clock, he returned to the saloon and drank a third milk punch. At this time he purchased two pints of whisky and put them in his grip, or suit case. He then went to the home of one Mr. Dougherty, where he had his dinner, and about 3:30 o'clock he left this place and went to the saloon, and took out one of the pints of whisky and put it in his pocket, and then went to the depot and purchased his ticket, and subsequently boarded the train. He took his seat on the left-hand side of the rear end of the smoking car; the next car following being the day coach, or ladies' car. He put his grip on the seat immediately in front of the one he was occupying, and there was sitting beside him a young man whose name does not seem to be known to anyone testifying in the case, and who was not introduced as a witness. Other passengers, however, and indeed it is admitted by plaintiff, say that en route plaintiff offered to this fellow passenger a drink, and at the same time took one himself. Plaintiff claims that his companion passenger accepted the drink, while other passengers did not see this, but testified that the plaintiff's offer was refused. However this may be, within a comparatively short while a controversy arose between the plaintiff and this passenger, and the former became so loud and boisterous in his talk that it attracted the attention of other passengers in the car; the language used by him, as testified to by the witnesses, being by no means the most elegant. As a consequence of this he changed his place in the car, and by the time he got to Frankfort he was unable to locate his grip, or suit case, and according to the proof made no effort either to find it or to alight from the train until after all of the passengers had gotten off and all those desiring to take passage had gotten on, and many, if not all of them, had secured seats in the respective coaches. About this time someone suggested to him that the train had arrived at Frankfort, whereupon he began a search for his grip, and after finding it, and after he got within 3 or 4 feet of the smoking car door going out, the train made the usual start without any jerk unusual or otherwise, and by the time plaintiff got out upon the platform the train was cleverly started, and he, over the protests of the brakeman and that of a Mr. Wilson, who is a citizen of Frankfort, and whose testimony is both intelligent and convincing,

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undertook to jump off the car, which was then moving at a speed of from 2 to 3 miles per hour, and in so doing fell, and thereby sustained the injuries for which he sues.

There is no dispute but that at the usual place the station of Frankfort was announced in the usual way, and no testimony showing that the train did not stop upon this occasion the usual time, which was about three minutes. There is absolutely no proof that any unusual number of passengers crowded on to the car, and there was such an utter failure to produce evidence of any jerking start of the train that the plaintiff himself abandons this theory by failing to offer any instruction upon it.

The court, in submitting the case to the jury by its instruction (No. 1), did so solely upon the theory that the plaintiff was physically impaired by reason of being crippled, and that, if the defendant and its agents and servants knew this, it was their duty to render to him aid in alighting from the train beyond that ordinarily accorded other passengers, and that, if the jury believed that the agents and servants negligently failed to do this, and by reason thereof the plaintiff was injured, it would be the duty of the jury to return a verdict for the plaintiff. Other parts of the instruction set forth in apt terms the rule as to the measure of damages. There is no doubt in this state as to the rule fixing the degree of care which a carrier owes to its passengers. This is the highest degree of care, and this duty exists until the relationship of passenger and carrier ceases, and it has been time and again decided that such relationship did not cease until after the passenger had alighted from the train and had gotten off of the railroad premises by the means provided by the carrier for a departure from the station. *Cincinnati, N. O. & T. P. R. Co. v. Vivion*, 19 Ky. L. Rep. 687, 41 S. W. 580, 3 Am. Neg. Rep. 28.

It is an equally well-established rule that a physically disabled passenger shall receive such care as is commensurate with his infirmities, if such infirmities disable him from properly caring for his own safety, provided the carrier has knowledge of such infirmities. But we are unable to find any authority, either in this state or elsewhere, nor have we been cited to one, where, when a passenger was able to walk and move around, as the plaintiff undoubtedly was in this case according to the testimony, the carrier should give him the extra care of going into the coach and specially calling his attention to the arrival of the train, and to assist him to the steps in order for him to alight, and to see that he presented himself for the purpose of making his exit before the arrival of the time for the train

to depart, after it stopped a sufficient length of time to have enabled him to have done this of his own accord with safety. If, as contended in this case, the physical condition of plaintiff rendered it unsafe for him to attempt to alight from the train unassisted, and such was known by the agents and servants in charge of the train, it would have been their duty to have rendered such assistance as his physical necessities required after he had presented himself at the platform and steps for the purpose of alighting. But we have no such case here. The plaintiff neglected to present himself within the time which the law allowed him to do so, and no such assistance could be rendered him, and the only dereliction, if any, that the testimony shows on the part of the carrier, is that its agents and servants failed to go into the coach, and find plaintiff's baggage, and lead him to the steps, and assist him off the train. This they were not required to do. To hold that to a passenger in the physical condition of the plaintiff is due from the carrier such duties would be violating all adjudicated rules upon the subject, both in this state and other jurisdictions, so far as we have been able to discover. As stated, numbers of passengers, including those already on the train, as well as those who boarded the train at Frankfort, testify as to the length of time which the train stopped, and that the train was going from 2 to 3 miles per hour when the plaintiff attempted to alight; that some of the passengers hollowed out, "Don't let that old man jump off the train!" and the witness Wilson admonished him not to do so, as did the brakeman, and the lat-

ter, in order to prevent the plaintiff from being injured, pulled the whistle cord to signal the engineer to stop, which was done within a moment's time, but in the meantime plaintiff had, by his own act, sustained the injuries in the manner hereinbefore stated. The brakeman urged him to wait till the train could be stopped.

We think the evidence clearly shows that this unfortunate accident was the result of the acts of the plaintiff in not making an effort to alight from the train while it was standing, which, as we have seen, was of sufficient length to have amply enabled him to do so, and to have presented himself at the steps so that he could have been rendered what assistance, if any, he needed. If he had been injured while attempting to alight while the train was standing without any extra aid, he might have been entitled to recover under the facts disclosed by the record, but no such conditions are shown to have existed in this case. His failure to make any efforts in this regard, and his attempting to alight after the expiration of the stopping time of the train and while it was moving, were, beyond question, the causes of the accident and of his resulting injuries, and were in no wise produced by any acts of commission or omission on the part of the carrier.

It results, therefore, that the peremptory instruction to find for the defendant should have been given, and, if the facts are substantially the same upon another trial, the motion should prevail.

Judgment reversed, with directions to proceed in accordance with this opinion.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,
Respt.,
v.

HANS SCHMIDT, Appt.

(216 N. Y. 324, 110 N. E. 945.)

New trial — newly discovered evidence — perjured confession.

1. Evidence that one who confessed to murder, feigning insanity as a defense, was not guilty but did so to shield persons who performed a criminal operation which caused the victim's death, is not within a statute permitting a new trial if evidence discovered since the trial, not cumulative and the failure to produce which was not

owing to want of diligence, would, if received, have probably changed the verdict. *For other cases, see New Trial, IV. in Dig. 1-52 N. 8.*

Criminal law — insanity — absence of knowledge of moral wrong.

2. One acting under the insane delusion that God has appeared to and ordered the commission of a crime by him is, although he knows his act to be contrary to the law of the state, within the exception to the statute providing that a person is not excused from criminal liability as insane except at the time of committing the criminal act he was laboring under such a defect of reason as not to know that the act was wrong.

For other cases, see Criminal Law, I. b, in Dig. 1-52 N. 8.

Appeal — error in instructions — immateriality.

3. Error in the instructions upon the question of insanity is not ground for reversal of a conviction where accused con-

Note. — For knowledge that one's act is contrary to law as affecting defense of insanity, see annotation following this case, post, 527.
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cedes that his defense of insanity was a fraud.

For other cases, see Appeal and Error, VII. m, 4, a (1) in Dig. 1-52 N. S.

(November 23, 1915.)

APPEAL by defendant from a judgment of a Trial Term, part I. Criminal Branch, of the Supreme Court for New York County, convicting him of murder in the first degree, and from an order denying a motion for a new trial. Affirmed.

The facts are stated in the opinion.

Mr. Alphonse G. Koelble, for appellant:

While this court has been loath (and properly so) to exercise this power, still it has never failed to set aside a verdict of murder in the first degree, where it has appeared that injustice had been done to a defendant.

People v. Corey, 157 N. Y. 332, 51 N. E. 1024, 11 Am. Crim. Rep. 487; *People v. Driscoll*, 107 N. Y. 414, 14 N. E. 305; *People v. Lyons*, 110 N. Y. 618, 17 N. E. 391; *People v. Filippelli*, 173 N. Y. 509, 66 N. E. 402; *Platt v. Munroe*, 34 Barb. 291; *Barret v. 3d Ave. R. Co.* 45 N. Y. 628; *People v. Benham*, 30 Misc. 466, 63 N. Y. Supp. 923; *People v. Lane*, 31 Hun, 13; *People v. Hovey*, 1 N. Y. Crim. Rep. 324; *People v. Shea*, 16 Misc. 119, 38 N. Y. Supp. 821; *Smith v. Matthews*, 21 Misc. 150, 47 N. Y. Supp. 96; *Sistare v. Olcott*, 22 N. Y. S. R. 564, 5 N. Y. Supp. 114.

The court erred in failing to charge correctly the law as to insanity.

People v. Waltz, 50 How. Pr. 204; *Casey v. People*, 31 Hun, 158, 2 N. Y. Crim. Rep. 190; *Moett v. People*, 85 N. Y. 373; *People v. Krist*, 168 N. Y. 30, 60 N. E. 1057.

Mr. Robert C. Taylor, with Mr. Charles Albert Perkins, for respondent:

The trial judge correctly stated the legal test of responsibility and then defined the word "wrong," as meaning "criminal, contrary to the laws of the state."

People v. Gaimari, 176 N. Y. 84, 68 N. E. 112; *Moett v. People*, 85 N. Y. 373; *People v. Katz*, 154 App. Div. 44, 139 N. Y. Supp. 137, affirmed in 209 N. Y. 311, 103 N. E. 305, Ann. Cas. 1915A, 501.

There is no inherent power to grant a new trial.

Quimbo Appo v. People, 20 N. Y. 531; *People v. Greenwall*, 115 N. Y. 520, 22 N. E. 180; *People ex rel. Jerome v. Court of General Sessions*, 112 App. Div. 424, 98 N. Y. Supp. 557, affirmed in 185 N. Y. 504, 78 N. E. 149; *People v. Hovey*, 30 Hun, 354; *Boyd v. Boyd*, 130 App. Div. 161, 114 N. Y. Supp. 361; *Brown v. Newell*, 132 App. Div. 548, 116 N. Y. Supp. 965.

Retraction is not newly discovered evidence. L.R.A.1916D.

ence, inasmuch as it merely tends to impeach or to contradict the witness.

People v. Priori, 164 N. Y. 469, 58 N. E. 668; *People v. Patrick*, 182 N. Y. 131, 74 N. E. 843; *People v. Eng Hing*, 212 N. Y. 373, 106 N. E. 96; *People v. Becker*, 215 N. Y. 126, 109 N. E. 127.

The so-called newly discovered evidence is in no sense newly discovered within the meaning of Code Crim. Proc. § 465, subdiv. 7. Defendant knew of it all the time, and wilfully concealed it from his attorneys in order that he might be able to make a defense of shammed insanity.

Quimbo Appo v. People, 20 N. Y. 531; *People v. Becker*, 91 Misc. 329, 155 N. Y. Supp. 107.

Cardozo, J., delivered the opinion of the court:

In September, 1913, the dismembered body of Anna Aumuller was found in the Hudson river. Suspicion pointed to the defendant. He was arrested, and confessed that he had killed the woman by cutting her throat with a knife. He repeated this confession again and again. He attempted, however, to escape the penalty for murder by the plea that he was insane. He told the physicians who examined him that he had heard the voice of God calling upon him to kill the woman as a sacrifice and atonement. He confessed to a life of unspeakable excesses and hideous crimes, broken, he said, by spells of religious ecstasy and exaltation. In one of these moments, believing himself, he tells us, in the visible presence of God, he committed this fearful crime. Two physicians of experience, accepting as true his statement that he was overpowered by this delusion, expressed the opinion that he was insane. Other physicians of experience held the view that his delusion was feigned, and his insanity a sham. The jury accepted this latter view, and by their verdict found him guilty of murder in the first degree.

The defendant was condemned to death in February, 1914. In July, 1914, he made a motion for a new trial on the ground of newly discovered evidence. In his affidavit, upon that motion, he tells a most extraordinary tale. He now says that he did not murder Anna Aumuller, and that his confession of guilt was false. He says that she died from a criminal operation, and that to conceal the abortion, to which he and others were parties, he hacked the dead body to pieces, and cast the fragments in the river. His crime, he now says, was not murder, but manslaughter. He tells us why he chose to charge himself with the graver offense. He believed that he could feign insanity successfully, and that after a brief term in an asylum he would again

be set at large. To confess to the abortion would implicate his confederates, and bring certain punishment to everyone. To confess to murder, but at the same time feign insanity, might permit everyone to go free. The compact was then made, he says, between himself and his confederates, that he would protect them from suspicion, and play the madman himself. The men and the woman who are said to have been the confederates deny that such a compact was made. Whether they were parties or not to the fraud upon the court is of little moment at this time; in any event, the defendant now tells us that he was sane; that the tale which he told the physicians, the tale of monstrous perversions and delusions, was false; and that he did not hear the Divine voice calling him to sacrifice and to slay. He asks that he be given another opportunity to put before a jury the true narrative of the crime.

There is no power in any court to grant a new trial upon that ground. The statute says that a new trial may be granted "when it is made to appear, by affidavit, that upon another trial the defendant can produce evidence such as, if before received, would probably have changed the verdict: if such evidence has been discovered since the trial, is not cumulative; and the failure to produce it on the trial was not owing to want of diligence." Code Crim. Proc. § 465, sub-div. 7. The power to order a new trial in criminal causes is created and measured by the statute. *People ex rel. Jerome v. Court of General Sessions*, 112 App. Div. 424, 98 N. Y. Supp. 557; *Id.*, 185 N. Y. 504, 78 N. E. 149; *People v. Hovey*, 30 Hun, 354; *Id.*, 93 N. Y. 651; *Id.*, 1 N. Y. Crim. Rep. 477, 479; *Quimbo Appo v. People*, 20 N. Y. 531. The defense now offered by the defendant was not "discovered since the trial." It was known to him, on his own showing, from the beginning. He chose to withhold it, because he had faith in his ability to deceive the courts of justice. We do not attempt to determine how much of his present tale is true. Even if the entire tale is true, the courts are powerless to help him. A criminal may not experiment with one defense, and then, when it fails him, invoke the aid of the law which he has flouted, to experiment with another defense held in reserve for that emergency. It would be strange if any system of law were thus to invite contempt of its authority. The statute withholds that power from us, if we were otherwise disposed to exercise it. Code Crim. Proc. § 465, sub-div. 7. The remedy and the one remedy available to a criminal who finds himself thus enmeshed in a trap of his own making is not in the processes of

courts or the machinery of law; it is by appeal to the clemency of the governor. Strange to say, with all its incongruous features, the defendant's tale supplies a plausible explanation of some of the mysteries of this tragedy. We do not mean to express a belief that the tale is true. All that we say is that in an appropriate proceeding it would merit earnest scrutiny. We do not doubt that such scrutiny will be given to it, and that right will be done, if hereafter an appeal for clemency is made to the executive.

The defendant shifts his ground, however, and insists that even though his motion for a new trial was properly denied, we must none the less reverse the judgment for error in the charge. The error is said to have been committed in the definition of the degree of insanity that relieves from responsibility for crime. The rule of our statute is that "A person is not excused from criminal liability as an idiot, imbecile, lunatic, or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as: (1) Not to know the nature and quality of the act he was doing; or (2) Not to know that the act was wrong." Penal Law, § 1120.

The learned trial judge said to the jury that "wrong" in this definition means "contrary to the law of the state." The jury was instructed in pointed and impressive terms, that even if the defendant believed in good faith that God had appeared to him and commanded the sacrifice of Anna Aumuller, and this belief was a delusion, the result of a defect of reason, the defendant must none the less answer to the law if he knew the nature and quality of the act, and knew that it was wrong, in the sense that it was forbidden by the law of the state. We think that is the fair meaning of the whole charge as the jury must have understood it. For brevity, we quote its substance rather than its exact language. It is true that adopting with a proviso a request of the defendant's counsel, the court did say that "if the jury believe that at the time of the commission of the act, the defendant was completely obsessed by the delusion that he was acting under a Divine command, and that every other thought was excluded from his mind at the time, they must acquit the defendant, provided that the jury are satisfied that at the time he committed that act he was laboring under such a defect of reason as either not to know the nature and quality of the act he was committing, or that it was wrong."

This left the meaning of the word "wrong" still obscure, and the judge had already told the jury that it meant an offense

against the law of the state. If, however, the jury could have supposed that he intended to modify his previous instructions, that belief must have been dispelled by the instructions that immediately followed. The counsel for the people said: "The only matter I would ask your Honor to charge again to the jury is based on the last request of the defendant, that the term 'wrong' as used in your Honor's charge means 'wrong according to the law of the state of New York.'" And to this the court responded: "I so charge you, gentlemen." The defendant saved his rights by appropriate exceptions.

We are unable to accept the view that the word "wrong" in the statutory definition is to receive so narrow a construction. We must interpret the rule in the light of its history. That history has been often sketched. In the beginning of our law the madman charged with murder was not acquitted. A special verdict was given that he was mad, and then the King pardoned him. 2 Stephen, *History of Crim. Law*, p. 151; 2 Pollock & M. *History of English Law*, p. 478; 3 Holdsworth, *History of English Law*, 395, 396. There was the same need of the royal pardon for homicide by misadventure or in self-defense. Stephen, *supra*.

"The man who commits homicide by misadventure or self-defense deserves but needs a pardon." 2 Pollock & M. *History of English Law*, p. 477.

"If the justices have before them a man who, as a verdict declares, has done a deed of this kind, they do not acquit him, nor can they pardon him, they bid him hope for the King's mercy." *Id.* p. 477.

Then came the age of what has become known as the "wild beast test." The law of that age and of later days has been adequately stated by Judge Doe in *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533, and by Judge Ladd, writing for the same court, in *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242.

The defendant was not excused unless he was totally deprived of his reason, understanding, and memory, and did not know what he was doing any more than a wild beast. *Arnold's Case*, 16 How. St. Tr. 764.

As late as 1800, in *Hadfield's Case*, 27 How. St. Tr. 1288, that test was announced as law. The first departure from the ancient rule came in 1812. *Parker's Case*, *Collinson, Lunacy*, p. 477; *Bowler's Case*, *Id.* p. 673; *Bellingham's Case*, *Id.* p. 636. The capacity to distinguish right from wrong was then put forward as another test. As propounded in these cases, it meant a capacity to distinguish right from wrong, not with reference to the particular

act, but generally or in the abstract. Sometimes it was spoken of as a capacity to distinguish between "good and evil." *Bellingham's Case*, *supra*. See also *Com. v. Winnemore*, 1 Brewst. (Pa.) 356; *Re Ball*, 2 N. Y. City Hall Rec. 85. Wrong was conceived of as synonymous, not with legal, but rather with moral, wrong. Lord Mansfield told the jury in *Bellingham's Case*: "It must be proved beyond all doubt that at the time he committed the atrocious act, he did not consider that murder was a crime against the laws of God and nature."

That became for many years the classic definition. It was followed by Lord Lyndhurst in *Reg. v. Oxford*, 9 Car. & P. 533. Its phraseology, as we shall see, has survived with little variation in charges and opinions of our own day.

Then in 1843 came the famous decision of the House of Lords in *M'Naghten's Case*, 10 Clark & F. 200. It is idle to look to this decision for precise and scientific statement. The judges passed, not on a concrete case, but on hypothetical questions addressed to them by the lords. Five questions were answered, of which three only are material for present purposes. The second and third questions, which were answered together, were:

"What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defense?"

And: "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?"

To this the judges responded (p. 210): "That the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction, and that to establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when

put with reference to the party's knowledge of right and wrong, in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that everyone must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require."

The definition here propounded is the one that has been carried forward into our statute. The judges expressly held that a defendant who knew nothing of the law would none the less be responsible if he knew that the act was wrong, by which, therefore, they must have meant, if he knew that it was morally wrong. Whether he would also be responsible if he knew that it was against the law, but did not know it to be morally wrong, is a question that was not considered. In most cases, of course, knowledge that an act is illegal will justify the inference of knowledge that it is wrong. But none the less it is the knowledge of wrong, conceived of as moral wrong, that seems to have been established by that decision as the controlling test. That must certainly have been the test under the older law when the capacity to distinguish between right and wrong imported a capacity to distinguish between good and evil as abstract qualities. There is nothing to justify the belief that the words "right and wrong," when they became limited by *M'Naghten's Case* to the right and wrong of the particular act, cast off their meaning as terms of morals, and became terms of pure legality.

Another answer in *M'Naghten's case*, the answer to the first question, is yet to be considered. That question was: "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a

view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

And to this the answer was: "Assuming that your Lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion that notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law, by which expression we understand your Lordships to mean the law of the land."

Many judges have pointed out that this answer introduces "an entirely new element." Ladd, J., in *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; Maudsley, *Responsibility in Mental Disease*, p. 105. "How," it is asked (*State v. Jones*, supra), "are these two rules to be reconciled? It would seem to be plain that they are in hopeless conflict, and cannot both stand." See also 2 Stephen, *History of Crim. Law*, pp. 154, 159, 160, 162. It is not the answer to the first question, but the answer to the second and third, that has become embodied in our statute. In case of conflict, therefore, the first answer must give way. But the truth, we think, is that the conflict is more apparent than real. The answer to the first question, though it seems to make the knowledge of the law a test, presupposes the offender's capacity to understand that violation of the law is wrong. It applies only to persons who "are not in other respects insane." We must interpret the answer in the light of the assumptions of the question. A delusion that some supposed grievance or injury will be redressed, or some public benefit attained, has no such effect in obscuring moral distinctions as a delusion that God himself has issued a command. The one delusion is consistent with knowledge that the act is a moral wrong, the other is not.

"The questions are so general in their terms, and the answers follow the words of the questions so closely, that they leave untouched every state of facts which, though included under the general words of the questions, can nevertheless be distinguished from them by circumstances which the House of Lords did not take into account in framing the question." 2 Stephen, *History of Crim. Law*, p. 154.

The real point of the inquiry was whether a defendant who knew that the act was

wrong was excused because he had an insane belief that either personal or public good would be promoted by the deed. There was no thought of any conflict between the commands of law and morals.

We have still another guide to help us to a sound construction of M'Naghten's Case and of the statutory rule derived from it. That guide is found in the practice of judges by whom the decision has been applied. We refer to a few instances among many. In *Reg. v. Townley*, 3 Fost. & F. 839, Martin, B., left it to the jury to say whether the prisoner knew that the act was "contrary to the law of God and punishable by the law of the land." In *Reg. v. Layton*, 4 Cox, C. C. 149, Rolfe, B., said that the jury must determine whether the prisoner's delusion "had the effect of making him incapable of understanding the wickedness of murdering his wife." See also *Reg. v. Law*, 2 Fost. & F. 836. In many cases, both in our own courts and in those of sister states, the language of Lord Mansfield in *Bellingham's Case*, 27 How. St. Tr. 636, is adopted with trifling changes, and the test is said to be whether the defendant understood that the act was forbidden "by the laws of God and man." *People v. Waltz*, 50 How. Pr. 204, 232; *People v. Pine*, 2 Barb. 566, 570; *Casey v. People*, 31 Hun, 158, 161. In *Com. v. Rogers*, 7 Met. 500, 41 Am. Dec. 458, Shaw, Ch. J., in expounding the rule, assumed for illustration an insane delusion that God had commanded a crime. He told the jury that a defendant, to be responsible, "must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty;" and then, to explain the delusions that will relieve a man from criminal liability, he said: "A common instance is where he fully believes that the act he is doing is done by the immediate command of God, and he acts under the delusive but sincere belief that what he is doing is by the command of a superior power, which supersedes all human laws and the laws of nature."

In *Guiteau's Case* (D. C.) 10 Fed. 161, these words were quoted approvingly, and supplemented by other illustrations. The court instanced the case of a man known to be an affectionate father, who "insists that the Almighty has appeared to him and commanded him to sacrifice his child." Of these and like cases, the court said (p. 182): "If a man insanely believes that he has a command from the Almighty to kill, it is difficult to understand how such

a man can know that it is wrong for him to do it."

Such a man is no less insane because he knows that murder is prohibited by human law. Indeed, it may emphasize his insanity that, knowing the human law, he believes that he is acting under the direct command of God.

Cases may be found where, in explaining what is meant by knowledge that an act is wrong, the courts have blended the elements of legal and moral wrong, but none, we believe, can be found in which the element of moral wrong has been excluded. Thus, in *Willis v. People*, 32 N. Y. 715, the trial judge had charged the jury that the defendant must have known that the act was a violation of law, and wrong in itself. There was no question in that case of an insane belief that God had commanded the defendant to override the law. This court held that the charge was sufficiently accurate, but said that it would have been more precise and discriminating to have charged that the defendant must have known that the act was "unlawful and morally wrong." In *Moett v. People*, 85 N. Y. 373, the decision was that where the trial judge had laid down the test of criminal responsibility in the language of the statute, it was not error to refuse to amplify the charge by expounding to the jury the meaning of the word "wrong." That decision would be applicable here if the trial judge had limited himself to the statutory definition. The difficulty is that he went beyond the definition, and undertook of his own motion to explain what is meant by knowledge that an act is wrong. A remark of this court in the *Moett Case* is quoted by the people as sustaining the charge, but we think it fails of that effect. The remark which they quote is this: "When it is said that a prisoner must, at the time of the alleged criminal act, have sufficient capacity to distinguish between right and wrong with respect to such act, it is implied that he must have sufficient capacity to know whether such act is in violation of the law of God, or of the land, or of both." p. 380.

But no question of any conflict in the mind of the prisoner between the law of God and man was involved in that case; and nothing that was said can be deemed to have adjudged the rule of liability, where, because of an insane delusion, such a conflict has arisen. To the reported cases in which the word "wrong" in the statutory definition has been used as importing a moral wrong, there may be added a multitude of unreported cases. As an illustration we may refer to a case recently decided by this court. *People v. Purcell*, 214 N. Y. 693, 109 N. E. 1087. There the trial judge

(Nott, J.) in a careful and able charge told the jury that knowledge of the nature and quality of the act has reference to its physical nature and quality, and that knowledge that it is wrong refers to its moral side; that to know that the act is wrong, the defendant must know that it is "contrary to law, and contrary to the accepted standards of morality," and then he added, with a slight variation of the words of Lord Mansfield, that it must be known to be "contrary to the laws of God and man."

In the light of all these precedents, it is impossible, we think, to say that there is any decisive adjudication which limits the word "wrong" in the statutory definition to legal as opposed to moral wrong. The trend of the decisions is indeed the other way. The utmost that can be said is that the question is still an open one. We must, therefore, give that construction to the statute which seems to us most consonant with reason and justice. The definition of insanity established by the statute as sufficient to relieve from criminal liability has been often and harshly criticised. See, e. g., *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266. Some states reject it altogether. *Parsons v. State*, *supra*, and cases there cited. A recent case in Massachusetts (*Com. v. Cooper*, 219 Mass. 1, 5, 106 N. E. 545) says that an offender is not responsible if he was "so mentally diseased that he felt impelled to act by a power which overcame his reason and judgment, and which to him was irresistible." That is not the test with us. *Flanagan v. People*, 52 N. Y. 467, 11 Am. Rep. 731; *People v. Taylor*, 138 N. Y. 398, 34 N. E. 275; *Penal Law*, § 34. Whatever the views of alienists and jurists may be, the test in this state is prescribed by statute, and there can be no other. *People v. Silverman*, 181 N. Y. 235, 240, 73 N. E. 980. We must not, however, exaggerate the rigor of the rule by giving the word "wrong" a strained interpretation, at war with its broad and primary meaning, and least of all, if in so doing we rob the rule of all relation to the mental health and true capacity of the criminal. The interpretation placed upon the statute by the trial judge may be tested by its consequences. A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. It seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong. If the definition propounded

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by the trial judge is right, it would be the duty of a jury to hold her responsible for the crime. We find nothing either in the history of the rule, or in its reason and purpose, or in judicial exposition of its meaning, to justify a conclusion so abhorrent. No jury would be likely to find a defendant responsible in such a case, whatever a judge might tell them. But we cannot bring ourselves to believe that in declining to yield to such a construction of the statute, they would violate the law.

We hold, therefore, that there are times and circumstances in which the word "wrong" as used in the statutory test of responsibility ought not to be limited to legal wrong. A great master of the theory and practice of the criminal law, Sir James Fitz-James Stephen, in his *General View of the Criminal Law of England* (pages 79, 80), casts the weight of his learning and experience in favor of that view. See also 2 Stephen, *History of Crim. Law*, p. 168. Knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that, according to the accepted standards of mankind, it is also condemned as an offense against good morals. Obedience to the law is itself a moral duty. If, however, there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong.

It is not enough, to relieve from criminal liability, that the prisoner is morally depraved. Wharton, *Crim. Law*, 11th ed. § 63. It is not enough that he has views of right and wrong at variance with those that find expression in the law. The variance must have its origin in some disease of the mind. *People v. Carlin*, 194 N. Y. 448, 455, 87 N. E. 805. The anarchist is not at liberty to break the law because he reasons that all government is wrong. The devotee of a religious cult that enjoins polygamy or human sacrifice as a duty is not thereby relieved from responsibility before the law. *Guiteau's Case* (D. C.) 10 Fed. 161, 175, 177; *Parsons v. State*, 81 Ala. 577 at 594, 60 Am. Rep. 193, 2 So. 854, 7 Am. Crim. Rep. 266; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244; *People ex rel. Hegeman v. Corrigan*, 195 N. Y. 1, 13, 87 N. E. 792. In such cases the belief, however false according to our own standards, is not the product of disease. Cases will doubtless arise where criminals will take shelter behind a professed belief that their crime was ordained by God, just as this defendant attempted to shelter himself behind that belief. We can safely leave such fabrications to the common sense of juries.

We have considered the charge of the trial judge upon the subject of insanity, because the question is in the case, and the true rule on a subject so important ought not to be left in doubt. But, even though we hold that there was error in the charge, we think the error does not require us to disturb the judgment of conviction. It is of no importance now whether the trial judge charged the jury correctly upon the question of insanity, because in the record before us the defendant himself concedes that he is sane, and that everything which he said to the contrary was a fraud upon the court. It is of no importance now whether the defendant would be relieved of guilt if his diseased mind had revealed the Divine presence to his eyes and the Divine command to his ears, because he tells us that he never saw the vision and never heard the command. He concedes, therefore, that the issue of his sanity was correctly determined by the jury; he concedes that even if there was error in the definition of insanity no injustice has resulted; and his position is that, having fabricated a defense of insanity in order to deceive the trial court, it is now the duty of another court to give him a new trial because his fabricated defense was imperfectly expounded.

The law does not force its ministers of justice to abet a criminal project to set the law at naught. This court is a court of review, and cannot, of course, go beyond the record, but the confession that the defense of insanity was fabricated is part of the record (*People v. Priori*, 163 N. Y. 99, 57 N. E. 85), and the defendant himself has invited us to consider it as a basis for our judicial action. The principle is fundamental that no man shall be permitted to profit by his own wrong. It enters, by implication, into all contracts and all laws. *Riggs v. Palmer*, 115 N. Y. 506, 5 L.R.A. 340, 12 Am. St. Rep. 819, 22 N. E. 188. We cannot ignore it in the application of a statute which commands us to do justice without reference to technical defects. Code Crim. Proc. § 542. We cannot listen to a claim of error which is conceded to have no relation to anything except a fraudulent defense. The refusal to give ear to such a claim does not need the sanction of express statute. The power is implied in the very function of courts of justice.

We hold, therefore, that the defendant has forfeited the right to avail himself of the error in the charge. There is nothing to show that he is mentally incompetent to conduct the appeal, to advise with counsel, or to understand the meaning and the consequences of his own affidavit. If that is his state of mind, if the confession is only L.R.A.1916D.

another manifestation of disease, the law provides a remedy. *People v. Skwirsky*, 213 N. Y. 151, 107 N. E. 47. The court would then refuse to hear the appeal at all until the defendant regained his sanity. Such a state, if it exists, must be proved; it is not to be presumed. The defendant's counsel has no misgivings on the subject. On the contrary, he expressly conceded the defendant's sanity both in his printed brief and in his oral argument. In such a situation we must take the defendant at his word. It is argued that we ought not to accept his statement that his defense of insanity was a sham, and reject his statement in the same affidavit that the victim died from a criminal operation. But that is not an accurate description of our attitude. We neither accept nor reject the defendant's present statement of his participation in the crime. We merely say that if it is true, it does not make out a case of newly discovered evidence. We find the statement coupled with a confession that the defense of insanity was a fraud upon the court, and we hold that while that confession remains before us, the defendant who made it, who still adheres to it, and who must be presumed to have sufficient mind to be responsible for it, will not be suffered by a court of justice to take advantage of his wrong.

In thus holding we do not overlook the rule that "a conviction shall not be had upon a plea of guilty where the crime charged is or may be punishable by death." Code Crim. Proc. § 332. The defendant's counsel invokes the protection of that statute, but we think it has no application to the case before us. The defendant has not been convicted upon a plea of guilty. He has been tried before a duly organized court (*Cancemi v. People*, 18 N. Y. 128); and even though there may have been error, there has been no denial in any fundamental sense of due process of law. After conviction upon such a trial, we think that the requirements of that statute have been satisfied. The defendant was not compelled by law to appeal at all; and as he had the right, at his pleasure, to forego the privilege of an appeal, so also he had the right to limit the scope and effect of his appeal. In jurisdictions where the statute is silent, a plea of guilty is allowable though the punishment is death. *Re Opinion of Justices*, 9 Allen, 585; *Green v. Com.* 12 Allen, 155. Even where the law forbids such a plea, there are many rights which a defendant may still renounce upon his trial. *Pierson v. People*, 79 N. Y. 424, 429, 35 Am. Rep. 524; *People v. Guidici*, 100 N. Y. 503, 508, 3 N. E. 493, 5 Am. Crim. Rep. 455. If he may renounce them upon the

trial, he may renounce them upon appeal. We cannot extend the statute to the situation now before us, and we will not aid the defendant in his effort to gain the benefit of a fraudulent defense.

The judgment of conviction should be affirmed.

Hiscock, Chase, Cuddeback, Hogan, and Pound, JJ., concur. Willard Bartlett, Ch. J., concurs in result.

An *ex parte* motion for reargument having been made, the following *Per Curiam* response was handed down on January 7, 1916 (216 N. Y. 762, 111 N. E. 1095):

This motion is irregular, since such an application requires notice to the district attorney, and we have no evidence that the prescribed notice has been given (rule XX. of rules of the court of appeals). Notwith-

standing this irregularity, in view of the fact that the execution of the judgment is fixed for the week beginning next Monday, we have looked carefully into the merits and find nothing which would justify us in granting a reargument. In affirming the judgment, this court held that the defendant was not harmed by an error relating to a defense which he alleged and admitted under oath to be fraudulent and a sham. His counsel now insists that by so holding we deprived him of rights guaranteed by the Constitution of the United States. We can perceive no basis for this assertion. The request of counsel for a certificate that a Federal question was involved in the appeal cannot be complied with, for it is not the fact. The motion for a reargument must be denied.

All concur.

Annotation—Knowledge that one's act is contrary to law as affecting defense of insanity.

Many other phases of the subject of criminal responsibility as affected by mental condition are treated in notes cited in Index to L.R.A. Notes under the title "Criminal law, mental condition as affecting criminal responsibility."

While there are numerous cases in which the courts, in defining the legal test of insanity, loosely include expressions indicating that knowledge on the part of the accused that the act charged is in violation of the law of the land is a part of the test, there are but few cases like *PEOPLE v. SCHMIDT*, ante, 519, in which the court actually discusses the propriety of including it.

In *Kearney v. State* (1890) 68 *Miss.* 233, 8 *So.* 292, an instruction that the defendant was responsible for his act if the jury believed at the time of the killing that "the mind of the defendant was capable of knowing that if he shot the deceased, not in his own self-defense, he was committing an offense against the law of the land, and it will not matter what the jury believe was the moral conception of the defendant of the act at the time," was held to be such a departure from the right and wrong test as to be reversible error, the court saying: "It will not avail to contend that one who has sufficient capacity to know that he is violating a human law must also know that the act also violates a Divine or moral law."

In *Harrison v. State* (1902) 44 *Tex. Crim. Rep.* 164, 69 *S. W.* 500, a prosecution for bigamy, it was held that the fact that defendant acted under a belief

that he had a direct revelation from God that his first marriage was wrong, and that he would do no wrong by getting married again without a divorce, would not excuse him from responsibility, where he knew that his act was in violation of the law of the state.

The converse question was presented in *Bell v. State* (1915) — *Ark.* —, 180 *S. W.* 186, where counsel for defendant contended that instructions given to the jury were wrong because they did not tell the jury that the defendant should be acquitted if the preponderance of evidence showed that, at the time of the killing, he did not know that the act of killing was a violation of law. The court said that the counsel "are mistaken in their contention that mental incapacity to know that one's acts are in violation of the law shall also be included in the alternative as one of the tests of insanity. It is true that this is frequently loosely stated in the conjunctive with the right and wrong test, but it is not recognized separately as one of the tests of insanity."

The following cases are cited, without attempting to make the list exhaustive, as illustrative of the class of cases mentioned above in which the courts, apparently without carefully considering the matter, have included expressions which would seem to indicate that lack of knowledge that the act is contrary to law is properly a part of the test of insanity:—against the laws of God and his country (*McAllister v. State* (1850) 17 *Ala.* 434, 52 *Am. Dec.* 180; *Boswell v.*

State (1879) 63 Ala. 307, 35 Am. Rep. 20; against the laws of God and man (Blackburn v. State (1872) 23 Ohio St. 146); that the act is wrong and unlawful (State v. Branton (1899) 33 Or. 533, 56 Pac. 267); wrong and criminal (Com. v. De Marzo (1909) 223 Pa. 573, 72 Atl. 893; Bond v. State (1914) 129 Tenn. 75, 165 S. W. 229); to distinguish moral or legal right from moral or legal wrong, to recognize the particular act charged as morally or legally wrong (State v. Jackson (1910) 87 S. C. 407, 69 S. E. 883); that the act was wrong, was prohibited by the laws of the land, and would entail punishment (People v. Oxnam (1915) — Cal. —, 149 Pac. 165);

that the act was wrong and criminal, and would subject him to punishment (People v. Willard (1907) 150 Cal. 543, 89 Pac. 124; Com. v. Rogers (1844) 7 Met. (Mass.) 500, 41 Am. Dec. 458; Bovard v. State (1856) 30 Miss. 600; State v. Summons (1852) 1 Ohio Dec. Reprint, 416, 9 West. L. J. 407; Com. v. Lewis (1908) 222 Pa. 302, 71 Atl. 18; Sayres v. Com. (1879) 88 Pa. 291; United States v. Holmes (1858) 1 Cliff. 98, Fed. Cas. No. 15,382); that he will be subject to punishment (People v. Klein (1845) 1 Edm. Sel. Cas. (N. Y.) 13; Oborn v. State (1910) 143 Wis. 249, 31 L.R.A.(N.S.) 966, 126 N. W. 737).

R. L. S.

NORTH DAKOTA SUPREME COURT.

JOHN EATON, Appt.,

v.

ED DELAY et al., Respts.

(32 N. D. 328, 155 N. W. 644.)

Bills and notes — alteration — negotiable instruments law.

1. Under the negotiable instruments law in force in this state, any change or addition which changes the date; the sum payable, either for principal or interest; the time or place of payment; the number or the relations of the parties; the medium or currency in which payment is to be made; adds a place of payment where no place of payment is specified; or alters the effect of the instrument in any respect,—is a "material alteration."

For other cases, see *Alteration of Instruments*, II. b, in *Dig. 1-52 N. S.*

Same — memorandum on margin.

2. A promissory note is not materially altered where the holder, at or after the maturity thereof, writes on its margin the words, "May 1st, 1913," as a reference memorandum of a promise made by him to the principal maker, at the time the words were written, to extend the time of payment from December 1, 1912, to May 1, 1913.

For other cases, see *Alteration of Instruments*, II. b, in *Dig. 1-52 N. S.*

(December 22, 1915.)

Headnotes by CHRISTIANSON, J.

Note. — As to whether memorandum on negotiable instrument constitutes an alteration, see annotation following this case, post, 533.

Other questions in relation to alteration of instruments may be found by consulting the Index to L.R.A. Notes, under the title, "Alteration of Instruments." L.R.A.1916D.

APPEAL by plaintiff from a judgment of the District Court for Ramsey County, granting defendants' motion for judgment notwithstanding a verdict for plaintiff in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. R. Goer and J. B. Wineman, for appellant:

Accommodation makers are primarily liable.

Wolstenholme v. Smith, 34 Utah, 300, 97 Pac. 329; Northern State Bank v. Bellamy, 19 N. D. 509, 31 L.R.A.(N.S.) 149, 125 N. W. 888; Dow v. Lillie, 26 N. D. 512, L.R.A. 1915D, 754, 144 N. W. 1082; Richards v. Market Exch. Bank Co. 81 Ohio St. 348, 26 L.R.A.(N.S.) 99, 90 N. E. 1000; Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679, Ann. Cas. 1913C, 525; Vanderford v. Farmers' & M. Nat. Bank, 105 Md. 164, 10 L.R.A.(N.S.) 129, 66 Atl. 47; National Citizens' Bank v. Toplitz, 81 App. Div. 593, 81 N. Y. Supp. 422, affirmed in 178 N. Y. 464, 71 N. E. 1; Cellers v. Meachem (Sellers v. Lyons) 49 Or. 186, 10 L.R.A.(N.S.) 133, 89 Pac. 426, 13 Ann. Cas. 997; Murphy v. Panter, 62 Or. 522, 125 Pac. 292; Bradley Engineering & Mfg. Co. v. Heyburn, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170; Hunter v. Harris, 63 Or. 505, 127 Pac. 786; Fritts v. Kirchdorfer, 136 Ky. 643, 124 S. W. 882; Rouse v. Wooten, 140 N. C. 557, 111 Am. St. Rep. 875, 53 S. E. 430, 6 Ann. Cas. 280; Lumbermen's Nat. Bank v. Campbell, 61 Or. 123, 121 Pac. 427.

The indorsement of a mere memorandum on a note is not a material alteration of the instrument.

Richards v. Market Exch. Bank Co. 81 Ohio St. 348, 26 L.R.A.(N.S.) 99, 90 N. E. 1000; 2 Cyc. 142; 2 Am. & Eng. Enc. Law,

184; Morrill v. Otis, 12 N. H. 472; Moore v. Macon Sav. Bank, 22 Mo. App. 684; State Solicitors' Co. v. Savage, 39 Fla. 703, 23 So. 413; Cambridge Sav. Bank v. Hyde, 131 Mass. 77, 41 Am. Rep. 193; Stone v. White, 8 Gray, 589; Drexler v. Smith, 30 Fed. 754; Theopold v. Deike, 76 Minn. 121, 77 Am. St. Rep. 607, 78 N. W. 977; J. I. Case Threshing Mach. Co. v. Ebbighausen, 11 N. D. 466, 92 N. W. 826; Wicker v. Jones, 159 N. C. 102, 40 L.R.A.(N.S.) 69, 74 S. E. 801, Ann. Cas. 1914B, 1083; Huff v. Cole, 45 Ind. 300; Burnham v. Gosnell, 47 Mo. App. 637; Hutches v. J. I. Case Threshing Mach. Co. — Tex. Civ. App. —, 35 S. W. 60; American Nat. Bank v. Bangs, 42 Mo. 450, 97 Am. Dec. 349; Iowa Valley State Bank v. Sigstad, 96 Iowa, 491, 65 N. W. 407; Roberds v. Laney, — Tex. Civ. App. —, 165 S. W. 114; Hensler v. Watts, 113 Iowa, 741, 84 N. W. 666; Prudden v. Nester, 103 Mich. 540, 61 N. W. 777; Reed v. Culp, 63 Kan. 595, 66 Pac. 616; Boutelle v. Carpenter, 182 Mass. 417, 65 N. E. 799; Wolferman v. Bell, 6 Wash. 84, 36 Am. St. Rep. 126, 32 Pac. 1017; Stroud v. Thomas, 139 Cal. 274, 96 Am. St. Rep. 111, 72 Pac. 1008; Lyndon Sav. Bank v. International Co. 78 Vt. 169, 112 Am. St. Rep. 900, 62 Atl. 50; Cass County v. American Exch. State Bank, 9 N. D. 263, 83 N. W. 12; Byers v. Harris, 67 Iowa, 685, 25 N. W. 879; Fisherick v. Hutton, 44 Neb. 122, 62 N. W. 488; Johnson v. Weber, 70 Neb. 467, 97 N. W. 585; Sawyer v. Campbell, 107 Iowa, 397, 78 N. W. 56; Rouse v. Wooten, 140 N. C. 557, 111 Am. St. Rep. 875, 53 S. E. 430, 6 Ann. Cas. 280; Delaware County Trust, S. D. & Title Ins. Co. v. Haser, 199 Pa. 17, 85 Am. St. Rep. 763, 48 Atl. 694; Barnes v. Van Keuren, 31 Neb. 165, 47 N. W. 848.

Messrs. Miller & Zuger also for appellant.

Messrs. Flynn & Traynor, for respondents:

The note was avoided by material alteration.

Corbett v. Clough, 6 S. D. 176, 65 N. W. 1074; Niblack v. Champeny, 10 S. D. 165, 72 N. W. 402; 8 Cyc. 29, note 92; 2 Am. & Eng. Enc. Law, p. 228; 1 Dan. Neg. Inst. §§ 149, 150; Sanders v. Bagwell, 32 S. C. 238, 7 L.R.A. 743, 10 S. E. 946; Flanigan v. Phelps, 42 Minn. 186, 43 N. W. 1113; Warrington v. Early, 2 El. & Bl. 763, 23 L. J. Q. B. N. S. 47, 2 C. L. R. 398, 18 Jur. 42, 2 Week. Rep. 78; Harnett v. Holdredge, 5 Neb. (Unof.) 114, 97 N. W. 443; Warren v. Fant, 79 Ky. 1; Woodworth v. Bank of America, 19 Johns. 391, 10 Am. Dec. 239; Tuckerman v. Hartwell, 3 Me. 147, 14 Am. Dec. 225, note p. 232; Wheelock v. Freeman, 13 Pick. 165, 23 Am. Dec. 674; National L.R.A.1916D.

Ulster County Bank v. Madden, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; Polo Mfg. Co. v. Parr, 8 Neb. 379, 30 Am. Rep. 830, 1 N. W. 312; Joyce, Defenses to Commercial Paper, §§ 154, 155, 179; 2 Cyc. 142; Pelton v. San Jacinto Lumber Co. 113 Cal. 21, 45 Pac. 12; 2 Dan. Neg. Inst. §§ 1373, 1377; Post v. Loscy, 111 Ind. 74, 60 Am. Rep. 677, 12 N. E. 121.

Christianson, J., delivered the opinion of the court:

The plaintiff, at the solicitation of the defendant Delay, agreed to loan him \$575, upon the condition that the joint promissory note of the three defendants Delay, Jones, and Dunn for that amount be executed and delivered to the plaintiff. The note was executed and delivered, and the defendant Delay received from the plaintiff the full amount of the loan agreed upon. The note as delivered to plaintiff was in words, figures, and form as follows:

\$575.00 Extended to Extended to Extended to No.	Devils Lake, North Dakota. March 26, 1912. December 1, 1912 (without grace) after date I promise to pay to the order of John Eaton five hundred seventy-five & no/100 dollars with interest at the rate of twelve per cent per annum (payable annual- ly) until paid. Payable at the First National Bank of Devils Lake, North Da- kota. Value received. Ed Delay. P. O. Address Ed Jones. F. S. Dunn.
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About December 1, 1912, at the request of the defendant Delay, the plaintiff agreed to extend the time of payment to May 1, 1913. The defendant Delay thereafter paid the interest due on the note up to December 1, 1912, such interest payment being received by plaintiff on December 4, 1912. About this time (the record fails to disclose the exact date), plaintiff inserted in the margin of the note a notation of the extension. The note, with this notation added, is in words, figures, and form as follows:

\$575.00 Extended to May 1st 1913. Extended to Extended to Extended to No.	Devils Lake, North Dakota. March 26, 1912. December 1, 1912 (without grace) after date I promise to pay to the order of John Eaton five hundred seventy-five & no/100 dollars with interest at the rate of twelve per cent per annum (payable annual- ly) until paid. Payable at the First National Bank of Devils Lake, North Da- kota. Value received. Ed Delay. P. O. Address Ed Jones. F. S. Dunn.
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The note not being paid, the plaintiff, on October 4, 1913, instituted this action. The complaint is in the usual form. The defendant Delay defaulted; but the defend-

ants Jones and Dunn answered, asserting as a defense that they executed the note only as sureties for the accommodation of the defendant Delay, and in no other capacity; that the note was never presented to them for payment, and that on the day the note became due the plaintiff accepted a payment from the defendant Delay in the sum of \$375, and agreed with said Delay to extend the balance due on said note until May 1, 1913; that shortly thereafter the defendant Delay paid the further sum of \$45 in consideration of such extension, and that on or about May 1, 1913, the time of payment was again extended until September 1, 1913; that all of such extensions were granted without the knowledge or consent of the answering defendants. The cause came on for trial upon such pleadings. At the close of the testimony defendants' counsel moved for a directed verdict. The motion was denied, and after the denial of such motion defendants' counsel asked leave to amend the answer by inserting therein the defense that the note was materially altered by changing the time of payment thereof. This motion was granted. No further evidence was offered, nor was the motion for a directed verdict renewed after the answer was amended.

The court submitted the issues framed by the pleadings to the jury, and the jury returned a verdict in favor of the plaintiff for the full amount claimed by him. Subsequently defendants moved for judgment notwithstanding the verdict. This motion was granted, and this appeal is from the judgment thereafter entered in favor of the defendants Jones and Dunn.

Defendants' counsel no longer relies upon the defense interposed in the original answer, but concedes that under the decision of this court in *First Nat. Bank v. Meyer*, 30 N. D. 388, 152 N. W. 657, the defendants Jones and Dunn were primarily liable, and hence were not discharged by an extension of time of payment. The only defense relied upon by defendants' counsel on this appeal is the one presented by the amendment, viz., that the note was materially altered by plaintiff's inserting in the margin thereof the words "May 1st 1913;" and that such alteration avoided the note as against the defendants Jones and Dunn, under the provisions of § 7009, Compiled Laws 1913.

A "material alteration," under the negotiable instruments law, is: "Any alteration which changes: (1) The date. (2) The sum payable, either for principal or interest. (3) The time or place of payment. (4) The number or the relations of the parties. (5) The medium or currency in which payment is to be made. Or which adds a place of payment where no place of payment is

specified, or any other change or addition which alters the effect of the instrument in any respect." Comp. Laws 1913, § 7010.

No objection was made to the introduction of the note in evidence on the ground of alteration, or that it constituted a contract different from that signed by the defendants, or upon any other grounds. Defendants' answer alleges that the agreement to extend payment of the note was made on the day it fell due, but the evidence shows that the interest payment was not received or indorsed on the note until three days after the note matured. There is no contention either in the pleadings or in the proof that the extension was made or the notation written in the margin of the note until after it became due.

The space wherein the notation was made constituted no part of the note. It was separated from the body of the note, in a manner, and the printed portions thereof were such as to indicate clearly that this space was to be utilized by the holder of the note for memoranda for his convenience and guidance. It is true that courts have held that under certain circumstances memoranda made on the back or in the margin of a note may constitute a part of the contract. But we are aware of no authority holding a notation of the character, and made under the circumstances, involved in the case at bar, to be a part of the contract, or the addition or erasure thereof to constitute a material alteration.

In *Bay v. Shrader*, 50 Miss. 326, the court said: "The test of the materiality of such memoranda or indorsement on the back of the instrument is the time and the intent and purpose of it. If made before or at the time of the execution of the instrument, it may be parcel of it, and may control the obligation in some important particular. . . . If such memoranda are at the foot or on the back of the note or other instrument, when executed, they constitute a part of the contract. But being disconnected from the body of the instrument to which the maker's name is signed, it forms no original part of it, until shown to have been upon it when executed."

And in *Theopold v. Deike*, 76 Minn. 121, 77 Am. St. Rep. 607, 78 N. W. 977, the supreme court of Minnesota, speaking through the distinguished jurist Judge Mitchell, said: "To constitute a mutilation of a note or other contract which will avoid it, there must be some change or alteration in the writing constituting the evidence of the contract so as to make it another and different instrument, and no longer evidence of the contract which the parties made. The ground upon which the doctrine rests is that such an alteration avoids the instru-

ment; that it destroys the identity of the contract. A memorandum of a payment indorsed by the holder on the back of a promissory note is no part of the contract of the parties. The original note, which constituted the evidence of their contract, remains intact. The memorandum of payment is merely evidence against the holder of the fact of the payment, and is of no more effect than if made on a separate piece of paper. *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193. Writing on the back of an instrument may be such as to form a part of the contract itself, and in such a case an alteration of the indorsement would constitute an alteration of the written evidence of the contract of the parties; but a memorandum of a partial payment indorsed by the holder on the back of a promissory note is not of this character. It is neither a contract nor any part of a contract, but a mere acknowledgment, in the nature of a receipt of payment, which is open to contradiction or explanation by parol."

The reasoning of the supreme courts of Mississippi and Minnesota in the two cases above cited is entirely applicable to the case at bar. The notation in the margin of the note was made after it became due. The contract evidenced by the note signed by the defendants remained unchanged. The contractual effect of the note, and the rights and liabilities of the makers thereof, were in no manner affected. The contract remained exactly the same as it was at the time of its execution and delivery. The notation in the margin did not become a part of the contract, or affect the defendants in any particular. The only party affected was the holder of the note. As an indorsement of payment on a note is evidence against the holder, tending to show such payment, so the notation in the margin in the case at bar, in case of dispute, would have been some evidence (as an admission against his interest) against the holder of the note, tending to establish an agreement for extension, but it would not of itself have been evidence against or established any such agreement against the makers. The notation in the margin does not purport to be a part of the contract signed by the defendants. It clearly shows that it was merely a memorandum for the convenience and guidance of the holder of the note, and had reference to some understanding outside, and subsequent to the delivery, of the note. "A promissory note is not materially altered by writing thereon a memorandum which is purely collateral to, and independent of, the promise or contract which it contains. And the placing of a mere reference memorandum on a promissory note will not constitute a material alteration of the instrument." 2 Am. & Eng. Enc. Law, 227, 228.

See also *Carr v. Welch*, 46 Ill. 88; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; *Howe v. Thompson*, 11 Me. 152; *Bay v. Shrader*, 50 Miss. 326; *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817, 8 N. W. 241; *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193; *Horton v. Horton*, 71 Iowa, 448, 32 N. W. 452; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 46 Am. Rep. 39, 15 N. W. 177; *Fisk v. McNeal*, 23 Neb. 726, 8 Am. St. Rep. 162, 37 N. W. 616; *Maness v. Henry*, 96 Ala. 454, 11 So. 410; *Richards v. Market Exch. Bank Co.* 81 Ohio St. 348, 26 L.R.A.(N.S.) 99, 90 N. E. 1000; *State Solicitors' Co. v. Savage*, 39 Fla. 703, 23 So. 413; *Moore v. Macon Sav. Bank*, 22 Mo. App. 684; *Bachelor v. Priest*, 12 Pick. 399; *American Nat. Bank v. Bangs*, 42 Mo. 450, 97 Am. Dec. 349; *Morrill v. Otis*, 12 N. H. 466; *Mente v. Townsend*, 68 Ark. 391, 59 S. W. 41; 1 Enc. Ev. 787; 2 Am. & Eng. Enc. Law, 227; 2 Cyc. 210; 2 C. J. 1212, 1213.

While not material to a determination of this action, it may be observed, in passing, that the cause was submitted to the jury on the theory that the answering defendants were secondarily liable, and that hence any extension of the time of payment by the holder would relieve them from liability, provided such agreement of extension was supported by a consideration. The court submitted to the jury the question of whether there was any consideration for the extension, and the jury found that there was no consideration therefor.

Defendants' counsel places great reliance upon the decision of the Minnesota supreme court in the case of *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113, which, it is asserted, is direct authority in support of their contention that the note involved in this case was materially altered. An examination of that decision shows that it is not susceptible of the construction for which defendants' counsel contends. In that case the contract itself was altered by the insertion of the following stipulation in the body of the note, above the signatures of the makers: "Privilege of extension for 30 days after maturity given." It seems too clear for argument that the decision in that case can have absolutely no bearing upon the question presented in the case at bar.

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In that case the contract itself was changed by the insertion of a stipulation over the signatures of the contracting parties whereby the time of payment was extended conditionally for thirty days.

The defendants also rely upon the decision of the supreme court of Washington in the case of Washington Finance Corp. v. Glass, 74 Wash. 653, 46 L.R.A.(N.S.) 1043, 134 Pac. 480. In that case the contract itself was changed, in this: that the accommodation makers signed a note for \$15,000, with the understanding that a loan for this amount was to be made by the payee named in the note, to the principal maker. After the execution by the accommodation makers, but before delivery, the contract was changed and the loan reduced to \$11,000. And in order to effect this change, an indorsement was made on the note of a fictitious payment of \$4,000, thereby in effect changing the note from a note for \$15,000 to a note for \$11,000. In discussing the effect of the indorsement, the court said: "Whether an indorsement, made in good faith after the instrument has been given currency, would be a material alteration, we are not called upon to decide. We are quite clear, however, that the indorsement of a fictitious payment as a condition precedent to the acceptance, negotiation, discount, or delivery of a note to the original payee or lender of the money changes 'the effect of the instrument,' as well as the sum payable, and is an act proscribed by the statute."

It is unnecessary for us to enter into any further discussion of the Washington decision, or express any opinion as to the soundness of the conclusions there reached. But it is obvious that that decision can have no application to the facts in the case at bar. In that case the effect of the contract itself was changed by the indorsement on the note prior to its delivery. In that case the terms and legal effect of the contract were changed after it was signed by the accommodation makers. The memorandum or indorsement on the contract was made for the express purpose of changing the legal effect of the contract as signed. The note which the holder sought to enforce against the accommodation makers was in effect a note for \$11,000; the note they signed was a note for \$15,000. The note had no contractual effect until delivered. The contract signed by the accommodation makers was changed in amount before it was delivered. That is not the condition here. In the case at bar, it is conceded that the notation was made L.R.A.1916D.

after the note had become due, and then only as a memorandum of plaintiff's gratuitous promise to the defendant Delay to extend the time of payment of the note until May 1, 1913.

Respondents also cite and rely on Woodworth v. Bank of America, 19 Johns. 391, 10 Am. Dec. 239, as an authority in point. That case involved the liability of an indorser. No place of payment was mentioned in the note, and the material alteration found consisted of the following words, written in the margin of the note: "Payable at the Bank of America." That case, under the then-existing practice in New York, was decided by the state senate. The majority opinion was written by Senator Skinner and concurred in by seventeen other senators. An extended minority opinion was prepared by that great jurist, Chancellor Kent, and concurred in by nine senators. In the minority opinion, Chancellor Kent said: "To conclude, then, I think that the following propositions are well founded:

... That such a memorandum, made out of the body of the note, and being a mere intimation of the place of payment, was no part of the contract; but it was sufficient to justify the holder to call at such a place for payment, and, being refused, he had a right to look to the indorser. This is a clear, settled rule in England, and it has been repeatedly recognized in this country, and in this state."

No good purpose would be served by any further discussion of the various authorities bearing on this question. We are agreed that the notation made in the margin of the note in the case at bar formed no part of the note, and in no manner altered it, but was a mere memorandum.

The judgment appealed from is reversed, and the trial court is directed to vacate the same and reinstate the judgment entered on the verdict.

A petition for rehearing having been filed, Christianson, J., handed down the following additional opinion:

Respondents have filed a petition for rehearing herein. A consideration of such petition and the authorities therein cited only more fully confirms our belief in the correctness of our former opinion upon the merits of the appeal, and we are therefore entirely agreed that the petition for rehearing should be denied.

But in the former opinion certain questions of practice were discussed, and in their petition for rehearing defendants' counsel request that, even though a rehearing be

denied, the former opinion be modified by eliminating therefrom that portion relating to such questions of practice. While we have no reason to doubt the correctness of our views upon such questions of practice as expressed in the former opinion, still, in view of the fact that consideration thereof is not necessary to a determination of the merits of this appeal, we have decided to

grant the request of defendants' attorneys. The former opinion has therefore been modified and the portion relating to such practice questions eliminated therefrom.

In order to avoid any misunderstanding, it may be stated that the original opinion has not been reported, and the foregoing opinion constitutes the decision of this court in this case.

Annotation—Making memorandum on negotiable instrument as an alteration.

The question whether a writing which amounts to an alteration is material or immaterial is beyond the scope of this note, which, as indicated in the title, is confined to a discussion of whether the making of a memorandum upon a negotiable instrument amount to an alteration thereof.¹ It is assumed that the memorandum is made after the instrument has been delivered.

The decision in *EATON v. DELAY*, ante, 528, is in accord with the general rule as to memoranda on negotiable instruments; that is, a writing which is manifestly a mere memorandum, not incorporated into the body of the instrument, nor intended to modify it, does not amount to an alteration.² Thus, memoranda as to interest after due,³ the residence of parties to the instrument,⁴ place where pay-

¹ As to the effect of detachment of paper attached to a bill or note, and modifying the terms thereof, upon the rights of subsequent bona fide purchaser, see note to *Bothell v. Schweitzer*, 22 L.R.A.(N.S.) 263.

As to the indorsement of payment on a bill or note as a material alteration, see note to *Washington Finance Corp. v. Glass*, 46 L.R.A.(N.S.) 1043.

As to alteration of date of note, see note to *Lombardo v. Lombardini*, 32 L.R.A.(N.S.) 515, and that to *Barton Sav. Bank & T. Co. v. Stephenson*, 51 L.R.A.(N.S.) 346.

² A memorandum made on a bill to the effect that it is "left with Mr. B. as collateral" is not an alteration. "It was a memorandum of a collateral agreement," says the court, "between the maker and the indorsee, which did no more affect the liability of the parties to the note than it would have done had it been made on a separate paper." *Bachelor v. Priest* (1832) 12 Pick. (Mass.) 399.

Words added at the foot of a note, below the signature of the maker, were held in *Culver v. Yocum* (1887) 9 Ky. L. Rep. 148, to be nothing more than memoranda, and not to affect the liability of the maker. The words that were added do not appear in the abstract of this case.

In *Smith v. Smith* (1849) 1 R. I. 398, 53 Am. Dec. 652, the figures, "\$175.94," upon the margin of a bill stated in the body thereof in words to be for \$375.94 were changed by the clerk of the bank discounting the bill, so as to agree with the body of the bill. This is stated to be a mere marginal notation, not constituting any part of the bill, but simply a memorandum or abridgment of the contents of the bill for convenience of reference. It was held that the contract could not be altered by these marginal figures.

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A written indorsement upon the margin of a promissory note payable upon condition, of the performance of the condition, is not a material alteration of the note. *Jackson v. Boyles* (1884) 64 Iowa, 428, 20 N. W. 746.

³ An unexplained memorandum on a note, below and apart from the signatures, to the effect that "when due to draw 15 per cent," does not affect the note. *Knoles v. Hill* (1861) 25 Ill. 288.

The words "ten per cent after due," written in red ink on the face of a note in black ink, apart from the body of the instrument, the first two words being on one line and the last two on the line below, at the right-hand lower corner of the note, do not constitute a material alteration, but are a mere memorandum for the guidance of the holder of the note, very probably having reference to some verbal understanding between himself and the maker. *Carr v. Welch* (1867) 46 Ill. 88. No evidence was offered on either side in regard to these words.

⁴ The noting of the residence of drawers and indorsers of a bill, after their names does not affect the identity of the bill, nor avoid it as to any of the parties to it. It is in the nature of a memorandum for the notary, that he may know how to address notices of protest. It does not vary the tenor of the bill, nor add to the responsibility of indorsers. *Struthers v. Kendall* (1861) 41 Pa. 214, 80 Am. Dec. 610.

The insertion in the left-hand corner of a mortgage note, in a blank space attending the words "postoffice address," of the name of one of the successive purchasers of the property covered by the mortgage, by way of a memorandum, does not amount to an alteration of the note. *Schafer v. Jackson* (1912) 155 Iowa, 108, 135 N. W. 622.

able,⁵ and purpose for which given,⁶ have all been held immaterial.

The fact that it is in a different colored ink than that with which the note is written is a circumstance which, in the absence of explanatory evidence, tends to show that it is a mere memorandum,

which does not amount to an alteration.⁷

Writings on the back of notes, which are mere memoranda, do not amount to an alteration.⁸ Thus, memoranda as to the residence of parties⁹ to the instrument, or residence and capacity in which a party is charged,¹⁰ as to interest¹¹ and

⁵ The words, "at Goodyear Bros. & Durand's, New York, Jan. 10-13," placed at the foot of a note, to the left of the signature, without the knowledge or consent of the makers, was held, in *American Nat. Bank v. Bangs* (1868) 42 Mo. 450, 97 Am. Dec. 349, to be a mere memorandum, and therefore immaterial.

An alteration by the acceptor of a bill of exchange which he had originally accepted, payable at his own house, by making the bill payable at another place, is held to be a mere memorandum, not affecting the acceptor's liability in an action against him, in *Walter v. Cubley* (1833) 2 Crompt. & M. (Eng.) 151, 4 Tyrw. 87, 3 L. J. Exch. N. S. 2; and the writing on a bill of exchange of, "When due at the Crosskeys Blackfriars Road," is held, in *Trapp v. Spearman* (1800) 3 Esp. (Eng.) 57, to be an alteration in an immaterial part of the bill, and therefore not to invalidate it.

The memorandum at the bottom of a note, "Payable at the domicile of B.," was held not to prevent the introduction of the note in evidence, in *Nugent v. Delhomme* (1812) 2 Mart. (La.) 307.

See *Woodworth v. Bank of America*, infra, note 23.

⁶ The addition below the body of a note given by the president of a corporation for a corporate debt, of the words, "Given on account of International M. & D. Co.," is held to be immaterial memoranda or notations, not amounting to a material alteration. *Pitt v. Little* (1910) 58 Wash. 355, 108 Pac. 941.

The words, "receipt No. 124," written at the end of the note, the purport of which was that the receipt was a security for the payment of the money for which the note was executed, were held not material, in *First Nat. Bank v. Wolff* (1889) 79 Cal. 69, 21 Pac. 551, 748.

In *Maness v. Henry* (1892) 96 Ala. 454, 11 So. 410, the words, "On D. H. Shield's debt," written in pencil on the margin of the face of a note, were held not to render it inadmissible in evidence. The objection here was to the admission of the note unless the plaintiff would erase the writing; this objection was overruled and the note admitted without such erasure, the court stating that the writing in pencil on the note was manifestly a mere memorandum, and could not be mistaken for an attempted alteration.

⁷ *Carr v. Welch* (1867) 46 Ill. 88. After referring to the manner in which the words appeared on the face of the note, as stated above, the court states that this circumstance and the still more convincing fact that the words are in red ink show clearly L.R.A.1916D.

that they were designed by the deceased holder of the note as a mere memorandum for his own guidance.

In *Yost v. Watertown Steam-Engine Co.* (1894) — Tax. Civ. App. —, 24 S. W. 657, a note to secure which a mortgage was afterwards given had written on the margin in red ink, presumptively by some holder of the note, without the knowledge of the maker, the words, "secured by mortgage number 173 on machinery, stock," etc. There was also written in red ink just below the figure showing the amount of the note, in the left-hand corner, the following, "Int. 20.19," and just above and to the right of the amount the following, "\$432.69," and at the bottom of the note, "S -21." The court states that it is apparent from an inspection of the note that none of the red ink entries were ever intended to become a part of the note itself. Evidence of a bank cashier was given in this case that the red ink entries were of frequent occurrence and form no part of the note, but were made as memoranda and merely for reference.

⁸ There was held to be no ground for the objection that a bill of exchange was mutilated because of a memorandum indorsed on it by a commissioner for the purpose of identification when it was attached as an exhibit to the deposition of a witness, in *Manning v. Maroney* (1888) 87 Ala. 563, 13 Am. St. Rep. 67, 6 So. 343.

⁹ The words "Glens Falls, N. Y.," written in pencil by the manager of a bank, below an indorser's signature upon the note, as a mere memorandum, pursuant to a custom of the bank to do so where the address of the indorser was not known, for the purpose of direction to the clerks in the bank in keeping their record, does not amount to an alteration of the indorser's contract. *Merchants' Bank v. Brown* (1903) 86 App. Div. 599, 83 N. Y. Supp. 1037.

See *Struthers v. Kendall* (1861) 41 Pa. 214, 80 Am. Dec. 610, supra, note 4.

¹⁰ The pencil notation, "818 Security Bldg. comaker," after the name of an indorser on a promissory note, placed there by the holder at the time suit was begun, and at the request of the justice, who desired to know the address of the indorser and the capacity in which he was sought to be held, is not an alteration of the note. *Johnson v. Parker* (1901) 86 Mo. App. 660.

¹¹ A memorandum made by the holder on the back of a promissory note to the effect that the interest after a certain day shall be at a rate less than that stated in the body of the note is not an alteration of the note, and does not discharge the maker. *Reed v. Culp* (1901) 63 Kan. 595, 66 Pac.

place of payment,¹² have been held immaterial.

Writings evidencing separate contracts, but made on a note, have been held not material.¹³ Thus, a writing evidencing an extension of time, made on the back of a note, is separate and apart from the note.¹⁴ Neither an agreement to pay a different rate of interest,¹⁵ nor a guaranty of a note upon the back thereof¹⁶ amounts to an alteration. The general question of indorsement of a supplemental agreement, however, is beyond the scope of the present note; at least, where not treated as a memorandum.

As shown in some of the cases supra, the objection was to the admission of the note as evidence. Where the note is declared on as originally written, its introduction in evidence with the memorandum has been objected to as a variance. If the memorandum takes the form of a marginal notation, it cannot be considered as part of the contract, and the introduction of the note in evidence is not a variance.¹⁷

In some instances writings in the body of the instrument have been held mere memoranda, and not to amount to an alteration.¹⁸ An insertion of the place of payment in the body of a note by a

616. Nor does such a memorandum amount to an alteration which will discharge a surety, especially where the parties did not intend to release the principal debtor or the sureties from their obligation to pay the note, but only to remit a portion of the interest payable under it for the use of the money. *Cambridge Sav. Bank v. Hyde* (1881) 131 *Mass.* 77, 41 *Am. Rep.* 193.

¹² Writing the place of payment on the back of a note after the maker's death, and after the payee had been appointed his administratrix, does not amount to a material alteration. *Horton v. Horton* (1887) 71 *Iowa*, 498, 32 *N. W.* 452. See discussion of this case in note in 31 *L.R.A.* (N.S.) 645.

See *Woodworth v. Bank of America*, *infra*, note 23.

¹³ A writing at the foot of a bond for the payment of money, in the words, "The above notes are to bear interest from the date given under my hand and seal this 24th of April 1832," and signed and sealed by the principal obligor in the bond, was held not to release the sureties, in *Tremper v. Hemphill* (1836) 8 *Leigh* (Va.) 623, 31 *Am. Dec.* 673.

See *Bachellor v. Priest* (1832) 12 *Pick. (Mass.)* 399, *supra*, note 2.

¹⁴ The indorsement on the back of a non-negotiable instrument of a memorandum of an agreement between the maker and the holder to this effect: "Compound interest to be allowor on the within every six months," and signed by the maker, was held, in an action against the surety, not to be an alteration of the instrument, but to be a mere memorandum outside of the note. *Moore v. Macon Sav. Bank* (1886) 22 *Mo. App.* 684. Although the indorsement above set forth says nothing about an extension of time, it is treated by the court as a memorandum of such agreement.

¹⁵ An agreement indorsed upon a note to pay a higher rate of interest after the date of the agreement, and signed by the principal maker, does not amount to an alteration of the note. *Huff v. Cole* (1873) 45 *Ind.* 300; *Bucklen v. Huff* (1876) 53 *Ind.* 474.

A memorandum made and signed by one joint maker—whether before or after delivery does not appear—of a note payable *L.R.A.* 1916D.

"on demand with interest," that "interest on above note to be nine per cent," is held not to be a material alteration as to the other joint maker. *Littlefield v. Coombs* (1880) 71 *Me.* 110. The fact that it was signed by only one of the joint makers is stated to show that the parties did not intend to change the joint promise, but to treat it as an independent undertaking by the joint maker so signing.

¹⁶ *Hutches v. J. I. Case Threshing Mach. Co.* (1896) — *Tex. Civ. App.* —, 35 *S. W.* 60.

¹⁷ *Becker v. Hofsommer* (1914) 186 *Ill. App.* 553 (notation at the bottom of a note, below the signature, that it is "payable at Bellville, Ill. No. . . . due demand").

¹⁸ *Light v. Killinger* (1896) 16 *Ind. App.* 102, 59 *Am. St. Rep.* 313, 44 *N. E.* 760. Upon the sale of a note to one who desired to know the bank at which a previous indorser did business, this fact was ascertained and the name of the bank inserted in a blank space left for that purpose. Upon dishonor, the note was returned to the vendor, who brought suit upon it as it was before the insertion of the name of the bank. It was urged that the insertion of these words constituted a material alteration and defeated the right of recovery, either in its original or altered form. It is stated that there was evidence from which the court might legitimately have found that the words were inserted as a mere memorandum to enable the purchasers to present it for payment when it became due, inasmuch as the indorser's residence was a considerable distance from their office. The words were written in pencil, and there appears to have been no attempt to indorse the note to an innocent purchaser or to defraud or impose upon anyone. It could easily have been seen at a glance that the words were written by a different hand from those written in ink in the body of the note. No harm resulted to the maker or any other person from the placing of the words in the blank space. The action upon the note in its original form was accordingly sustained.

The insertion of a pencil memorandum in a blank left in a premium note given in lieu of prepayment of the cash premium on an insurance policy, of the number of the

clerk in the employ of the holder, but without the holder's authority or consent, so that it amounted to the act of a third party, has been held a spoliation, and not to release the maker of liability.¹⁹ But a writing in the body of the instrument is not usually treated as a memorandum,²⁰ and such writings have, in general, been excluded from this note.

policy, is not such an alteration as to invalidate the note or cause its rejection as evidence, where there is no question as to the identity of the note given, or of any fraud. *Hipp v. Fidelity Mut. L. Ins. Co.* (1907) 128 Ga. 491, 12 L.R.A.(N.S.) 319, 57 S. E. 892.

¹⁹ *Port Huron Engine & Thresher Co. v. Sherman* (1901) 14 S. D. 461, 85 N. W. 1008.

²⁰ Crossing out the date of a note, and writing another above it, cannot be regarded as a mere memorandum of the time from which interest is to be figured, rather than an alteration of the instrument. *Barton Sav. Bank & T. Co. v. Stephenson* (1914) 87 Vt. 433, 51 L.R.A.(N.S.) 346, 89 Atl. 639.

It was held in *Baldwin v. Haskell Nat. Bank* (1911) 104 Tex. 122, 133 S. W. 864, 134 S. W. 1178, that an interlineation in pencil in a blank space in a note after the word "maturity" of the word "date," in case of a dispute as to whether the note bore interest from maturity or from date, could not be treated as a mere memorandum for information or convenience.

²¹ The addition in one corner of a note of the words, "Interest at six per cent per annum," is a material alteration which releases a nonconsenting maker. *Warrington v. Early* (1853) 2 El. & Bl. (Eng.) 763, 2 C. L. R. 398, 23 L. J. Q. B. N. S. 47, 18 Jur. 42, 2 Week. Rep. 78. The note was drawn with lawful interest. Upon the payee desiring to know the meaning of lawful interest, the above writing was added by one of the makers. This writing is stated to be a part of the contract. Had it been inserted in the body of the note, there would be no question, and though it was inserted in the corner, if that had been done before the note was signed, it would have bound the maker. It is then stated that the naming of a place of payment in

Where the writing is intended to modify the instrument it ceases to be a memorandum and is an alteration which, if material, avoids the instrument. Thus, statements as to interest rate,²¹ or manner of payment,²² or place of payment of note,²³ which are intended to modify the instrument, have been held material alterations.

the corner does not make that a part of the contract, not because the writing is in the corner, but because what is there written is, from mercantile usage, a mere memorandum for the convenience of the parties.

An addendum written below the signatures on a sealed note bearing interest at 7 per cent, saying, "The above note is to be accounted for with interest at 8 per cent per annum," and signed by the principal obligor on the note, constitutes a material alteration which will avoid the note as against a surety thereon who did not consent to the alteration. *Sanders v. Bagwell*, (1890) 32 S. C. 238, 7 L.R.A. 743, 10 S. E. 946.

²² Likewise the addition immediately under the body of a note of the words, "Int. to be paid semi-annually," in pursuance of an agreement to that effect between the holder and principal debtor, releases the surety. *Dewey v. Reed* (1863) 40 Barb. (N. Y.) 17.

²³ A memorandum written on the margin of a note, namely, "Payable at the Bank of America, James Kane," is a material alteration, assuming that it is given effect as making the instrument payable at the place designated. *Woodworth v. Bank of America* (1821) 10 Johns. (N. Y.) 391, 10 Am. Dec. 239. It is further stated that if the memorandum did not alter the contract it would be equally fatal to a recovery against the indorsers, since no demand of payment was made upon them, as required by law, the demand having been made at the designated bank instead of upon the indorsers personally.

See cases in notes 5 and 12, *supra*.

As to the alteration of notes by inserting place of payment, see note to *Diamond Distilleries Co. v. Gott*, 31 L.R.A.(N.S.) 643.

W. A. E.

TENNESSEE SUPREME COURT.

J. C. STONE, Appt.,
v.

FIDELITY & CASUALTY COMPANY OF
NEW YORK.

(133 Tenn. 672, 182 S. W. 252.)

Insurance — accident — loss of sight.

Loss of sight because of a blood clot on the retina of the eye due to a sudden intentional movement of the hand to reach a desired object when in a weakened condition from the taking of purgatives, and L.R.A.1916D.

under a high blood pressure, is not within a policy insuring against injury through accidental means.

For other cases, see *Insurance*, VI. b, 3, a, in *Dig. 1-52 N. S.*

(January 17, 1916.)

APPEAL by complainant from a judgment of the Chancery Court for Hamilton County sustaining a demurrer to a

Note. — As to when death or injury may be deemed to have been caused by accidental means, though the voluntary act of the in-

complaint filed to recover the amount alleged to be due under a policy of accident insurance. Affirmed.

The facts are stated in the opinion.

Messrs. Spears & Spears for appellant.

Messrs. Thompson, Williams, & Thompson, Creed F. Bates, and James B. Wright, for appellee:

To constitute an injury sustained through accidental means there must be some slip, jerk, twist, or other involuntary or accidental movement in the act which produces the injury, and unless there is such a movement the means are not accidental, although the result may be.

Clidero v. Scottish Acci. Ins. Co. 19 Rettie, 355, 29 Scot. L. R. 303; Re Scarr [1905] 1 K. B. 387, 2 B. R. C. 358, 92 L. T. N. S. 128, 21 Times L. R. 173, 74 L. J. K. B. N. S. 237, 1 Ann. Cas. 787; McCarthy v. Travelers' Ins. Co. 8 Biss. 362, Fed. Cas. No. 8,682; Niskern v. United Brotherhood, C. J. 93 App. Div. 364, 87 N. Y. Supp. 640; Smouse v. Iowa State Traveling Men's Asso. 118 Iowa, 436, 92 N. W. 53; Feder v. Iowa State Traveling Men's Asso. 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; Cobb v. Preferred Mut. Acci. Asso. 96 Ga. 818; 22 S. E. 976; Shanberg v. Fidelity & C. Co. 143 Fed. 651, affirmed in 19 L.R.A.(N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1; Travelers' Ins. Co. v. Selden, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285; Southard v. Railway Pass. Assur. Co. 34 Conn. 576, Fed. Cas. No. 13,182; Hastings v. Travelers' Ins. Co. 190 Fed. 258; Appel v. Aetna L. Ins. Co. 86 App. Div. 83, 83 N. Y. Supp. 240; Lehman v. Great Western Acci. Asso. 155 Iowa, 737, 42 L.R.A.(N.S.) 563, 133 N. W. 752; Smith v. Travelers' Ins. Co. 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Standard Life & Acci. Ins. Co. v. Schmaltz, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49; Reynolds v. Equitable Acci. Asso. 59 Hun, 13, 1 N. Y. Supp. 738; Pervanger v. Union Casualty & Surety Co. 85 Miss. 31, 37 So. 461; Atlanta Acci. Asso. v. Alexander, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616; Bailey v. Interstate Casualty Co. 8 App. Div. 127, 40 N. Y. Supp. 513; Rodey v. Travelers' Ins. Co. 3 N. M. 543, 9 Pac. 348; McGlinchey v. Fidelity & C. Co. 80 Me. 251, 6 Am. St. Rep.

sured was the primary cause thereof, see notes to Fidelity & C. Co. v. Carroll, 5 L.R.A.(N.S.) 657; Hutton v. States Acci. Ins. Co. L.R.A.1915E, 127; and New Amsterdam Casualty Co. v. Johnson, L.R.A. 1916B, 1021.

A somewhat analogous question is treated in the note to Lehman v. Great Western L.R.A.1916D.

190, 14 Atl. 13; Stout v. Pacific Mut. L. Ins. Co. 130 Cal. 471, 82 Pac. 732; Taylor v. General Acci. Assur. Corp. 208 Pa. 439, 57 Atl. 830; Accident Ins. Co. v. Bennett, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723; Union Casualty & Surety Co. v. Harroll, 98 Tenn. 591, 60 Am. St. Rep. 873, 40 S. W. 1080.

Fancher, J., delivered the opinion of the court:

Complainant sued to recover under the terms of a policy which was to insure him against bodily injury sustained during the term of one year, through accidental means, and resulting directly, independently, and exclusively of all other causes, in immediate, continuous, and total disability. The injury complained of is stated as follows: "Complainant would now show the court that some time in November, 1913, he went to Nashville, Tennessee, to attend the football game between Vanderbilt and Sewanee; that the day was rather cool, and the ground was rather damp; he attended the game on the afternoon of November 27, 1913, and at that time contracted a cold, resulting in lumbago; that he stayed in Nashville all night, and sat up until about 12 o'clock, returning home the next day, the 28th. On the morning of the 28th he awoke with a cold and lumbago, and in the evening came home and went to bed, and was confined to his room and bed for seven consecutive days. He consulted Dr. Mitchell and told Dr. Mitchell that he was going to take some medicine known as 'black draught,' thinking by this means to clean out his system and thus restore his health. This medicine was composed of two thirds of a pint of whisky and a box of 'black draught,' which was a very strong liver medicine. These were poured together so as to make the whole in quantity above 1 quart. The effect of this medicine was to purge the system. Complainant took a dose of this medicine on the morning of the 3d of December, before supper, and continued this treatment, taking it before each meal until the following evening. The consequence of taking this medicine was to debilitate the system, and this resulted in a very weak physical condition. This condition obtained until Thursday, when complainant was lying on the bed, and had had a short nap, up to about 8 o'clock. Thereupon he called his wife to bring him the

Acci. Asso. 42 L.R.A.(N.S.) 562, on "Injury or disability from strain as within provision as to external, violent, and accidental means." Other related questions are treated in notes cited in the Index to L.R.A. Notes, under the title, "Insurance," subtitle, "Risks and causes of loss, injury, or death."

Nashville Banner, and asked her to turn on the light at the head of the bed so that he might read the paper. Complainant then reached for the paper and raised it above his head, and the light was turned on, when he found he had lost the sight of his left eye. On raising his hands he felt some change had come over his left eye. On consulting a physician he was informed that the loss of his left eye was due to the fact that in his weakened condition resulting from the purging of the 'black draught,' that he raised his hand suddenly to get the paper, and that his blood pressure was strong and rushed to his head, causing a blood rupture of the retina,—that is, causing a little clot of blood to rest on the nerve of the eye or in the retina, thereby destroying his sight. Complainant charges that the loss of his left eye resulted wholly from accidental means."

The demurrer which the chancellor sustained raises the point that the injury or disability suffered was caused by sickness or disease, and not through accidental means, resulting directly, independently, and exclusively of all other causes.

The general rule is that an injury is not produced by accidental means, within the meaning of this policy, where the injury is the natural result of an act or acts in which the insured intentionally engages. A person may do certain acts the result of which produces unforeseen consequences resulting in what is termed an accident; yet it does not come within the terms of this contract. The policy does not insure against an injury that may be caused by a voluntary, natural, ordinary movement, executed exactly as was intended.

Therefore, to determine the matter, we look, not to the result merely, but to the means producing the result. It is not sufficient that the injury be unusual and unexpected, but the cause itself must have been unexpected and accidental. *Re Scarr*, [1905] 1 K. B. 387, 2 B. R. C. 358, 92 L. T. N. S. 128, 21 Times L. R. 173, 74 L. J. K. B. N. S. 237, 1 Ann. Cas. 787; *Clidero v. Scottish Acci. Ins. Co.* (1892) 19 Rettie, 355, 29 Scot. L. R. 303; *Smith v. Travelers' Ins. Co.* (1914) 219 Mass. 147, L.R.A.1915B, 872, 106 N. E. 607; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; *Shanberg v. Fidelity & C. Co.* (C. C.) 143 Fed. 651, affirmed in 19 L.R.A.(N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1; *Lehman v. Great Western Acci. Asso.* 155 Iowa, 737, 42 L.R.A.(N.S.) 563, 133 N. W. 752; *Smouse v. Iowa State Traveling Men's Asso.* 118 Iowa, 436, 92 N. W. 53; *McCarthy v. Travelers' Ins. Co.* 8 Biss. 362, Fed. Cas. No. 8,682; *Niskern v. United Brotherhood, C. J.* L.R.A.1916D.

93 App. Div. 364, 87 N. Y. Supp. 640; *Hastings v. Travelers' Ins. Co.* (C. C.) 190 Fed. 258; *Cobb v. Preferred Mut. Acci. Asso.* 96 Ga. 818, 22 S. E. 976; *Travelers' Ins. Co. v. Selden*, 24 C. C. A. 92, 42 U. S. App. 253, 78 Fed. 285; *Southard v. Railway Pass. Assur. Co.* 34 Conn. 576, Fed. Cas. No. 13,182.

Attention is especially directed to the very excellent notes on the subject in 42 L.R.A.(N.S.) 563, and 1 Ann. Cas. 787. These notes illustrate the subject by statements of the facts.

In the foregoing cases no liability was found, because the injury was not produced by accidental means.

In *Cobb v. Preferred Mut. Acci. Asso.* 96 Ga. 818, 22 S. E. 976, the plaintiff was in a feeble condition, and in carrying his baggage a short distance it was found that his eye was affected, finally resulting in blindness. The plaintiff had not fallen nor received any shock, blow, or jar, and there was nothing unusual in the manner of carrying the baggage or his movement while so doing. It was considered that the means producing the injury were not accidental.

In *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252, a rupture of an artery occurred while the insured was reaching in an ordinary way over a chair to close some window shutters, and he did not fall or lose his balance. Every thing was done as was intended. It was held the rupture was not sustained through accidental means.

The same doctrine is announced in other cases, but a recovery had because the injury was sustained through accidental means. These cases are *Standard Life & Acci. Ins. Co. v. Schmaltz*, 66 Ark. 588, 74 Am. St. Rep. 112, 53 S. W. 49; *Atlanta Acci. Asso. v. Alexander*, 104 Ga. 709, 42 L.R.A. 188, 30 S. E. 939, 4 Am. Neg. Rep. 616; *McGlinchey v. Fidelity & C. Co.* 80 Me. 251, 6 Am. St. Rep. 190, 14 Atl. 13; *Reynolds v. Equitable Acci. Asso.* 59 Hun, 13, 1 N. Y. Supp. 738; *Pervanger v. Union Casualty & Surety Co.* 85 Miss. 31, 37 So. 461; *Bailey v. Interstate Casualty Co.* 8 App. Div. 127, 40 N. Y. Supp. 613; *Rodey v. Travelers' Ins. Co.* 3 N. M. 543, 9 Pac. 348; *Taylor v. General Acci. Assur. Corp.* 208 Pa. 439, 57 Atl. 830; *Stout v. Pacific Mut. L. Ins. Co.* 130 Cal. 471, 62 Pac. 732; *United States Mut. Acci. Asso. v. Barry*, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755.

The following authorities are in conflict with those above cited: *North American Life & Acci. Ins. Co. v. Burroughs*, 89 Pa. 43, 8 Am. Rep. 212; *Horsefall v. Pacific Mut. L. Ins. Co.* 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028; *Young v. Railway Mail Asso.* 126 Mo. App. 325, 103

S. W. 557; *Rose v. Commercial Mut. Acci. Co.* 12 Pa. Super. Ct. 394; *Patterson v. Ocean Acci. & Guarantee Corp.* 25 App. D. C. 46.

Now, looking to the particular facts here alleged, we find the cause alleged to have produced the injury was a natural and ordinary movement. Complainant was lying quietly on the bed, and called to his wife to bring him the Nashville Banner that he might read it. He then reached for the paper and raised it above his head, and the light was turned on, when he found he had lost the sight of his left eye. He was informed by his physician that the loss of the eye was due to the fact that in his weakened condition, resulting from the purgative he had taken, he raised his hand suddenly to get the paper, and that his blood pressure was strong and rushed to his head, causing a blood rupture of the retina, thereby destroying his sight. The weakened condition due to the purgative was not accidental, nor was the excessive blood pressure; both being physical conditions produced from natural causes. The movement of the hand suddenly to get the paper was executed exactly as intended. It was a simple and ordinary movement. The rushing of the blood with excessive pressure,

rupturing the retina, was therefore caused by natural means. While the result was not foreseen, the causes producing that result were not accidental. It is well in line with the cases above cited sustaining the majority rule, which we adopt. This rule affords a reasonable interpretation of the contract.

The position here taken is not in conflict, as we view it, with the opinion of our court in *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 25 Am. St. Rep. 685, 16 S. W. 723, when the facts of that case are properly considered.

We deem it unnecessary to pass upon the next point raised by demurrer, namely, that if the injury may be said to have resulted through accidental means, yet it did not so result "directly, independently, and exclusively of all other causes." The learned chancellor sustained the demurrer in this respect also, and there is strong authority for his position. But, inasmuch as the foregoing is decisive of the case, and the question of proximate cause and what contributing facts would be too remote to be considered as entering into the accidental means producing the injury must depend upon the facts of each case, discussion on that point is omitted.

Affirmed.

WISCONSIN SUPREME COURT.

F. W. COOMBS, Resp.,

v.

SOUTHERN WISCONSIN RAILWAY
COMPANY, Appt.

(— Wis. —, 155 N. W. 922.)

Carrier — duty of passenger to leave vestibule.

A street car passenger cannot recover damages for the attempt of the conductor to eject him from the car because of his refusal to comply with the conductor's request to obey a rule forbidding passengers to stand in the vestibule, if there is in fact standing room in the aisle, although from the vestibule the aisle appears to be filled with passengers.

For other cases, see Carriers, II. h, 2, in Dig. 1-52 N. S.

(January 11, 1916.)

APPEAL by defendant from a judgment of the Circuit Court for Dane County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by an attempted

wrongful ejection of plaintiff from a street car by defendant's servant. Reversed.

Statement by Siebecker, J.:

This is an action to recover damages for injuries alleged to have been caused by an attempted wrongful ejection of plaintiff by one of defendant's conductors from a street car. Plaintiff alleges that his hand was cut and torn, and that he suffered great mortification and injury to his feelings by reason of such unlawful assault and battery.

The defendant operates a street car system in the city of Madison. The plaintiff, a man about forty-four years of age, boarded one of defendant company's "pay as you enter" street cars, at the corner of Ingersoll and Jenifer streets of the city. Five other persons boarded the car at this point. The plaintiff was the last of this group of persons to step into the vestibule of the car. The other passengers paid their fares and passed from the vestibule into the car. The plaintiff, after paying his fare, stepped back into the left-hand portion of the rear vestibule and remained standing there. The conductor asked the plaintiff to step into the car, but the plaintiff indicated that there was no room in the car, and stated that he would remain where he was. The conductor then told plaintiff to step into the car

Note.—As to ejection of passenger for refusal to comply with rule or direction of carrier as to place on car or train, see annotation following this case, post, 542. L.R.A.1916D.

or get off, and that, if plaintiff did neither, he would stop the car and eject plaintiff. The plaintiff made no response to this remark of the conductor, but declined to step into the car. The evidence is not clear as to whether the conductor attempted to eject plaintiff at the next crossing (Brearily street) or at the following crossing (Livingston street). The testimony as to the number of people standing in the aisle of the car varies widely. One witness estimates it as high as from twelve to fifteen; while other witnesses estimate it at a less number. The conductor stopped the car at one of these crossings and told the plaintiff to get inside or he would put him off. Plaintiff refused to step into the car, whereupon the conductor signaled for the motorman to come to the rear platform, and then took hold of plaintiff and attempted to eject him from the car. He did not succeed because of the resistance offered by the plaintiff. The motorman advised letting the matter rest for the present and reporting it to the inspector upon reaching the business district of the city. The conductor then desisted in his effort, and the plaintiff rode about a mile to his destination in the rear vestibule, where the conductor reported the entire matter to the inspector. The evidence tends to show that several passengers got on the car within the next two or three blocks after the plaintiff had boarded the car, while only a possible two left the car, and that all of these passengers found standing room inside of the car. It also appears that there was standing room in the aisle of the car for at least eight to ten more passengers when plaintiff was requested to step into the car, though the aisle appeared to be filled near the entrance where the plaintiff stood.

The court submitted the case to the jury, who rendered a special verdict finding: (1) That Mr. Coombs under the circumstances was not, as a reasonably prudent man, required to step into the car when asked to do so by the conductor; (2) that the conductor used more force than was reasonably necessary to eject plaintiff from the car; (3) that the conductor was actuated by malice and vindictiveness in attempting to eject the plaintiff; (4) that the defendant company ratified such malicious and vindictive action; (5) that such malicious or vindictive action on the part of the conductor was not within the scope of his employment; (6) assessed plaintiff's compensatory damages at \$350; and (7) assessed plaintiff's punitive damages at \$50. The court denied the right to punitive damages, and judgment was entered for the plaintiff in the sum of \$350 compensatory damages, together with the costs and dis-

bursements of this action. From such judgment, this appeal is taken.

Messrs. Jones & Schubring, for appellant:

It is the duty of the person in charge of a car to enforce a rule, and for the passenger to submit to its enforcement, and no liability against the defendant arises from such enforcement.

Yorton v. Milwaukee, L. S. & W. R. Co. 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482, 8 Am. Neg. Cas. 678; *Montgomery v. Buffalo R. Co.* 165 N. Y. 139, 58 N. E. 770, 9 Am. Neg. Rep. 124; *Kiley v. Chicago City R. Co.* 189 Ill. 384, 52 L.R.A. 626, 82 Am. St. Rep. 460, 59 N. E. 794, 9 Am. Neg. Rep. 476; *Dobbins v. Little Rock R. & Electric Co.* 79 Ark. 85, 95 S. W. 794, 9 Ann. Cas. 84; *Central of Georgia R. Co. v. Motes*, 117 Ga. 923, 62 L.R.A. 507, 97 Am. St. Rep. 223, 43 S. E. 990, 14 Am. Neg. Rep. 13.

Where a passenger violates a reasonable rule and the conductor has the right to eject him, and is proceeding to do so in a lawful manner, the passenger has no right to resist, and if in doing so he receives injury, he will have no one to blame but himself.

Yorton v. Milwaukee, L. S. & W. R. Co. 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482, 8 Am. Neg. Cas. 678; *McMillan v. Federal Street & P. V. Pass. R. Co.* 172 Pa. 523, 33 Atl. 560; *Townsend v. New York C. & H. R. R. Co.* 56 N. Y. 295, 15 Am. Rep. 419, 8 Am. Neg. Cas. 531; *Murphy v. Union R. Co.* 118 Mass. 228, 8 Am. Neg. Cas. 405; *Pittsburgh, C. C. & St. L. R. Co. v. Daniels*, 90 Ill. App. 154; *Gulf, C. & S. F. R. Co. v. Moody*, — Tex. Civ. App. —, 22 S. W. 1009; *Ft. Clark Street R. Co. v. Ebaugh*, 49 Ill. App. 582; 6 Cyc. 564; *Hall v. Memphis & C. R. Co.* 15 Fed. 57; *Monnier v. New York C. & H. R. R. Co.* 175 N. Y. 281, 62 L.R.A. 357, 96 Am. St. Rep. 619, 67 N. E. 569, 14 Am. Neg. Rep. 423; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Chicago & E. I. R. Co. v. Casazza*, 83 Ill. App. 421; *Illinois C. R. Co. v. Louthan*, 80 Ill. App. 579; *Pullman Palace Car Co. v. Lee*, 49 Ill. App. 75; *Randell v. Chicago, R. I. & P. R. Co.* 102 Mo. App. 342, 76 S. W. 493; *Peoria & P. Terminal R. Co. v. Hoerr*, 120 Ill. App. 65; *Morrill v. Minneapolis Street R. Co.* 103 Minn. 362, 123 Am. St. Rep. 341, 115 N. W. 395; *Kiley v. Chicago City R. Co.* 189 Ill. 384, 52 L.R.A. 626, 82 Am. St. Rep. 460, 59 N. E. 794, 9 Am. Neg. Rep. 476.

Messrs. Olin, Butler, Stebbins, & Stroud, for respondent:

No rule of defendant justified the conductor in threatening and attempting to eject plaintiff under the circumstances of this case.

Plaintiff could not reasonably be required to force a passage into defendant's car.

Ward v. Chicago, M. & St. P. R. Co. 102 Wis. 215, 78 N. W. 442; *Bass v. Chicago & N. W. R. Co.* 36 Wis. 451, 17 Am. Rep. 495.

Plaintiff was justified in resisting the efforts of defendant's conductor to throw him off the car.

Huggard v. Chicago M. & St. P. R. Co. 158 Wis. 1, 147 N. W. 1020; *Bass v. Chicago & N. W. R. Co.* supra; *English v. Delaware & H. Canal Co.* 66 N. Y. 454, 23 Am. Rep. 69; *Ellsworth v. Chicago, B. & Q. R. Co.* 95 Iowa, 98, 29 L.R.A. 173, 63 N. W. 584, 8 Am. Neg. Cas. 252; *McDonald v. Central R. Co.* 72 N. J. L. 280, 2 L.R.A.(N.S.) 505, 111 Am. St. Rep. 672, 62 Atl. 405, 19 Am. Neg. Rep. 378; *Louisville, N. A. & C. R. Co. v. Wolfe*, 128 Ind. 347, 25 Am. St. Rep. 436, 27 N. E. 606; *Hufford v. Grand Rapids & I. R. Co.* 53 Mich. 118, 18 N. W. 580, 8 Am. Neg. Cas. 430; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 73, 36 L. ed. 71, 12 Sup. Ct. Rep. 356, 8 Am. Neg. Cas. 690.

Resistance on the part of a passenger to an attempted wrongful ejection in no wise prevents his recovery for all indignities, humiliation, and injuries to his feelings which he may have suffered; but such resistance may be considered only in mitigation of damages suffered by reason of such resistance.

Hall v. Memphis & C. R. Co. 15 Fed. 57; *Pennsylvania R. Co. v. Connell*, 112 Ill. 295, 54 Am. Rep. 238; *Kiley v. Chicago City R. Co.* 189 Ill. 384, 52 L.R.A. 626, 82 Am. St. Rep. 460, 59 N. E. 794, 9 Am. Neg. Rep. 476.

Stiebeck, J., delivered the opinion of the court:

The defendant company had adopted the following as one of its regulations for the conduct of its business: "The conductor shall request passengers to enter the car and move forward, endeavoring to keep the rear platform clear at all times."

Mr. Montgomery, vice president and superintendent, testified that this rule was promulgated and enforced to promote safety of passengers and efficiency in service in the conduct of the business. An orderly and expeditious management is essential to carry on a street car business, and the requirements imposed on passengers by this rule tend to promote these objects. *Yorton v. Milwaukee, L. S. & W. R. Co.* 54 Wis. 234, 41 Am. Rep. 23, 11 N. W. 482, 8 Am. Neg. Cas. 678; *Bass v. Chicago & N. W. R. Co.* 36 Wis. 450, 17 Am. Rep. 495. The provisions of the regulation are therefore proper and reasonable, and passengers must conform therewith under all circumstances and conditions, that its requirements can be reasonably enforced. The question arises: Was L.R.A.1916D.

the plaintiff justified in refusing to comply with the conductor's attempted enforcement of the rule at the time here in question? It was held in the *Yorton* Case that the conductor in charge of a railroad passenger train had the right to eject a passenger from the car when such passenger refuses to comply with a reasonable regulation that is sought to be enforced for the proper, safe, and efficient conduct of the business. Responsibility for the enforcement of such regulation must rest with those who are in control of the business. In this case such duty was imposed on the conductor who was in charge of the car, and it devolves upon passengers to comply with the conductor's enforcement of the rule if they can reasonably do so.

"In such cases, as in others, it would not comport with the comfort and convenience of the passengers, nor always with their safety, for some of them to assert their rights with a strong hand. And the safety and comfort of the passengers generally are not to give way to the safety or convenience of one or of a few." *Bass Case*, 36 Wis. 462, 17 Am. Rep. 495.

It is plain that the conductor of the street car in question was vested with authority of the company to enforce the provisions of this regulation, and that it was incumbent on plaintiff to comply with the conductor's request to step into the car, unless the facts and circumstances of the case show that he could not do so. The trial court submitted the inquiry to the jury whether the plaintiff "ought, as a reasonably careful and prudent person, to have entered the car" when the conductor requested him to do so. This direction to the jury is the equivalent of vesting the plaintiff with the right to determine whether or not ordinary care and prudence required him to comply with the regulation under the facts and circumstances, and runs counter to the right and authority of the conductor to enforce the regulation. The facts and circumstances shown by the record did not justify plaintiff to refuse to comply with the request of the conductor to step into the car. It appears without contradiction that the car in question had an inside aisle capacity of standing room for at least thirty passengers, and that, at the most, not to exceed fifteen passengers occupied this space when plaintiff refused to comply with the regulation. It also appears that the four passengers who entered the car with the plaintiff readily passed into the aisle, and that other passengers entered the aisle immediately after plaintiff refused to comply with the conductor's request, and occupy room which had not been occupied by passengers leaving the car. It

is obvious that there was standing room for plaintiff in the aisle of the car when the conductor requested him to step in. Under the conditions it was his duty to comply with the conductor's request or leave the car, and his wilful refusal to do either authorized the conductor to remove him from the car, and the attempted ejection under the circumstances was not an unlawful act on the part of the conductor. It is manifest that the conductor wholly failed

to use sufficient force to overcome plaintiff's resistance, and that plaintiff made no case for a wanton and reckless assault upon him.

It is considered that the evidence fails to establish a cause of action, and that the complaint must be dismissed.

The judgment appealed from is reversed, and the cause remanded to the Circuit Court, with direction to award judgment dismissing plaintiff's complaint.

Annotation—Carriers: ejection of passenger for refusal to comply with rule or direction of carrier as to place on car or train.

Various other questions arising from the ejection of passengers are treated in notes cited in the Index to L.R.A. Notes, under the title, "Carriers," subtitle, "Ejection."

As to duty of carrier to provide passenger with seat, see note to *Cave v. Seaboard Air Line R. Co.* L.R.A.1915B, 915.

Generally speaking, it is the undoubted right of carriers of passengers to make reasonable rules and regulations for the proper conduct of their business and for the safety and comfort of their passengers, and it is equally well established that, for noncompliance with a reasonable rule of the carrier regarding tickets or personal behavior, a passenger may be ejected from the carrier's conveyance, provided such ejection be effected at a proper place and in the proper manner. 5 R. C. L. § 752. If, however, in ejecting a passenger for the violation of a rule or regulation, a servant uses more force than is necessary, the carrier will generally be liable for resulting injuries.

A regulation forbidding passengers to stand upon the front platform being reasonable and proper, it is the duty of a passenger who is standing on the platform to go inside the car, if there is standing room inside, although there are no vacant seats; and if a passenger refuses to comply with such request when there is room inside the car which can conveniently be reached, the servants of the company may lawfully eject him from the car. *Dobbins v. Little Rock R. & Electric Co.* (1906) 79 Ark. 85, 95 S. W. 794, 9 Ann. Cas. 84.

So, a conductor may without excessive force expel a passenger from a street car, who is standing on the platform in violation of a regulation, although the passenger gives as an excuse that he is nauseated and liable momentarily to vomit. *Montgomery v. Buffalo R. Co.* (1900) 165 N. Y. 139, 58 N. E. 770, 9 L.R.A.1916D.

Am. Neg. Rep. 124, affirming (1897) 24 App. Div. 454, 48 N. Y. Supp. 849.

On an appeal in this case, the court of appeals (1900) 165 N. Y. 139, 58 N. E. 770, 9 Am. Neg. Rep. 124, rejected the contention of counsel for plaintiff that, conceding the reasonableness of the rule forbidding passengers to ride on the platform, the question whether or not it was reasonable to enforce it on the particular occasion in view of the plaintiff's condition was a question for the jury. Gray, J., said: "I am unable to assent to the proposition. I think that, if the rule was a reasonable one, the passenger was bound to submit to it, and that it was the duty of the conductor to enforce it. Therefore, in ejecting him from the car upon his refusal to submit, the conductor was acting lawfully in the discharge of his duty. The passenger, by his conduct, had forfeited his right to be carried any further. . . . The plaintiff, if in the physical condition described by him upon the day in question, was not obliged to travel upon the defendant's street car; but if he chose to do so, he was bound to submit to its regulations. He has no sufficient reason in law for complaining because the conductor performed his duty and compelled him to leave the car."

In *COOMBS v. SOUTHERN WISCONSIN R. Co.* ante, 539, the passenger was not justified in refusing to comply with the rule forbidding passengers to stand on the rear platform, although from the vestibule the aisle appeared to be filled with passengers; and the conductor in attempting to eject him wholly failed to use sufficient force to overcome the passenger's resistance, so that no case for a wanton and reckless assault was made out.

In *Ft. Clark Street R. Co. v. Ebaugh* (1893) 49 Ill. App. 582, a passenger, in violation of a rule of the company, took a position on the rear platform of an

electric car when there was plenty of standing room within and the aisle was clear; the conductor told him he must either go in the car or get off, and refused to proceed until the passenger should comply; the latter thereupon left the car, no violence being used toward him. The court said: "It is difficult for us to understand upon what theory the plaintiff is entitled to damages. The rule which he refused to comply with, and because of the enforcement of which he was denied passage on the car, was established for the safety of passengers and the convenience of employees operating the car. It was a reasonable and proper rule. He saw fit to stand out in defiance of it, evidently from sheer stubbornness, or to invite an assault from the conductor. A street car company has the right to require of passengers the observance of all reasonable rules tending to promote the safety and convenience of passengers and the successful conduct of its business. So long as a passenger observes such rules, the company is bound to carry him; but when he wantonly refuses to obey them, the company has the right at once to expel him, using no more force than may be necessary for that purpose. Appellee contends that he had not sufficient knowledge of the rule. We do not think it was necessary for the conductor to have exhibited a rule, or told appellee in terms that the company had adopted such a one."

So, a recovery was denied in *McMillan v. Federal Street & P. V. Pass. R. Co.* (1896) 172 Pa. 523, 33 Atl. 560, where a passenger knowing of the rule forbidding passengers to stand on the platform refused to comply with the conductor's request to go inside the car, where vacant seats were pointed out to him and, upon being asked by the conductor how far he was going, merely said, "Not far," whereupon the conductor put him off, placing his foot in such a position that he could not again get on the car, although he did not strike or kick him. The court said: "The rule of the company was a reasonable one, intended to secure the safety and comfort of passengers. It was the duty of the plaintiff to obey it, and the right of the company to enforce it. Cases might arise in which it would seem that the rule should not be rigidly enforced, or an immediate compliance with it required, as where the passenger was at the point of alighting and his presence for a few moments on the platform would not endanger or inconvenience

anyone. But the necessity for the enforcement of the rule is not to be determined by the passenger. A rule that might be suspended at his will would cease to be a rule. The management of the car in all matters which relate to the conduct of passengers is with the conductor, and ordinarily the enforcement or suspension of a rule must rest with him. A passenger in any event would have no right to complain of the enforcement of a reasonable rule, unless he had stated to the conductor an adequate reason for its suspension in his case. This the plaintiff did not do. He testified that he told the conductor that he was not going far enough 'to justify' him in going into the car, because if he went in and sat down he would have to come right out again; that he would be at his stopping place, and there was no use in his going in; that he 'was not going far enough to go in,' and 'it was not worth while to go in.' When asked by the conductor how far he was going his only reply was, 'Not far.' This was coupled with the assertion that he would not go in. His statement that he was not going far, with his refusal to say how far, gave the conductor no information. He might have meant a square or a mile. That he rode some distance during the controversy before the car was stopped, and afterwards attempted to get on and finish his journey, cast serious doubt upon his good faith, and confirmed the suspicion of want of candor which his previous conduct had indicated. He undertook to make himself the judge of the necessity for the enforcement of the rule. In this he was wrong."

So, where a person was ejected from the platform and steps of a passenger coach, the court, in *Whittington v. Philadelphia, B. & W. R. Co.* (1915) — Del. —, 93 Atl. 563, instructed the jury that if plaintiff refused to pay the customary and usual fare, or refused to comply with the rule of the company that passengers should not stand on the platforms of the cars while the train was in motion, or both, the conductor in charge of the train had the right to eject her from the train, and prevent her from again boarding it, provided in doing so he used no more force than was necessary.

It is held in *Kirk v. Seattle Electric Co.* (1910) 58 Wash. 283, 31 L.R.A. (N.S.) 991, 108 Pac. 604, that a passenger on a street car who refuses to obey a rule forbidding riding on the platform loses his rights as a passenger,

including the right to a transfer to another car.

It seems that a custom on the part of a street railway company to permit passengers to ride in the vestibules of cars is immaterial on the question of due care of a passenger in refusing to obey a direction of the conductor to go inside the car in accordance with a rule of the company, since, upon notice of intention to enforce the rule, the custom ceases to operate; and one who has paid his fare and been received as a passenger on a crowded street car has not, as matter of law, a right to ride in the vestibule against the order of the conductor, until he can with reasonable diligence gain admission inside the car, but he must comply with the request either to go inside or to get off the car. *Liversidge v. Berkshire Street R. Co.* (1911) 210 *Mass.* 234, 36 *L.R.A.(N.S.)* 993, 96 *N. E.* 665.

On the other hand, if a conductor, in ejecting a passenger who is standing on the front platform of a street car in violation of a rule of the company, acts so negligently or maliciously as to injure the passenger, the company will be liable. *Meyer v. Second Avenue R. Co.* (1861) 8 *Bosw. (N. Y.)* 305.

So, without reference to any rule or regulation, a carrier was held liable in *Moritz v. Interurban Street R. Co.* (1903) 84 *N. Y. Supp.* 162, where a motorman struck a passenger violently in the chest as he ordered him off the steps of a street car.

Where a passenger was riding without objection upon the front platform of a street car, and the driver threw him off because he "rang up the conductor," the company was, in *Lyons v. Broadway & 7th Ave. R. Co.* (1890) 32 *N. Y. S. R.* 232, 10 *N. Y. Supp.* 237, held liable; the court observing that the driver was in charge of the front platform of the car, had the power to keep any improper person from it, and had the right to put any disorderly person off it. He was not bound to ask the conductor to do this, or consult him about doing it. If he put the wrong person off, it was a mistake for which the master was liable. Having the power, as servant of the corporation, to expel improper persons from the platform, and the master being liable for his mistakes committed in the exercise of this authority, the defendant is answerable though the act was wilfully done. Nothing is said in this case about any rule forbidding passengers to ride on the platform.
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In *Smith v. Manhattan R. Co.* (1892) 18 *N. Y. Supp.* 759, a passenger, having paid his fare to a certain station, boarded a train by leaping on the rear platform, in violation of a rule of the company; when the train reached the next station he got off to get his valise, which had been tossed on the platform; he then properly entered the train, whereupon servants of the railway company attempted to eject him; the railway company was held liable for the injuries resulting from the attempted ejection, the court stating that, having originally a right to conveyance by that train, and being now on it by no breach of regulation or other misconduct, the attempt to eject him was an utterly inexcusable outrage, for which the defendant might well have been chastised by a much heavier verdict than that of which, without reason, it complains. The court further observed that the adjudication that the wrongful presence of a passenger at a forbidden locality on the vehicle does not forfeit his right to transportation negatives the proposition that his right to carriage when aboard is lost by a breach of regulation in getting aboard.

Where a passenger standing on the back platform of a street car accidentally stepped on the end of the trolley rope, causing the pole to leave the wire, and the conductor thereupon violently assaulted and ejected him from the car, the company was, in *Tanger v. Southwest Missouri Electric R. Co.* (1900) 85 *Mo. App.* 28, held liable, the court stating that, while the mere removal of plaintiff might have been justifiable or lawful, yet when done by excessive force, evidenced by violence and unnecessary beating, it became unlawful, and gave plaintiff a cause of action, though he was without the right to remain longer on the car.

Where a passenger, while occupying a place on a vessel in violation of the regulation established for deck passengers, was ejected therefrom with such force as to seriously injure him, the carrier was, in *New Jersey S. B. Co. v. Brockett* (1887) 121 *U. S.* 637, 30 *L. ed.* 1049, 7 *Sup. Ct. Rep.* 1039, held liable on the ground that it was bound to protect its passengers against the misconduct of its own servants engaged in executing the contract of carriage when acting within the general scope of their employment.
J. D. C.

UNITED STATES SUPREME COURT.

WILLIAM TRUAX, Sr., et al., Appts.,

v.

MIKE RAICH.

(239 U. S. 33, 60 L. ed. —, 36 Sup. Ct. Rep. 7.)

States — suit against state officers.

1. A suit by an alien to restrain the attorney general and county attorney from enforcing, to his injury, an anti-alien labor law which he asserts is repugnant to the Federal Constitution, cannot be regarded as a suit against the state.

For other cases, see *State*, in *Dig.* 1-52 N. S.

Injunction — restraining criminal proceedings.

2. Equity has jurisdiction to restrain the criminal prosecution of an employer under an anti-alien labor law at the instance of an alien employee who alleges that the act violates the Federal Constitution, and that its enforcement will result in his immediate discharge from employment, although such employment may be one at will, rather than for a term.

For other cases, see *Injunction*, I. i, in *Dig.* 1-52 N. S.

Constitutional law — equal protection of the laws — discrimination against aliens.

3. The discrimination against aliens lawfully resident in the state, which is produced by a statutory provision that every employer of more than five workers at any one time, "regardless of kind or class of work, or sex of workers, shall employ not less than 80 per cent qualified electors or native-born citizens of the United States or some subdivision thereof," renders the statute invalid under U. S. Const. 14th Amendment, as denying the equal protection of the laws, and such statute cannot be justified as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction.

For other cases, see *Constitutional Law*, II. a, 2, b, in *Dig.* 1-52 N. S.

(Mr. Justice McReynolds dissents.)

(November 1, 1915.)

A PPEAL by defendants from a judgment of the District Court of the United

Note. — As to prohibiting or restricting employment of aliens, see annotation following *People v. Crane*, post, 569.

As to when action against officers is deemed to be action against the state, see note to *Louisville & N. R. Co. v. Burr*, 44 L.R.A.(N.S.) 189, and later case, *Lankford v. Schroeder*, L.R.A.1915F, 623, and footnote referring to *Lankford v. Platte Iron Works Co.* 235 U. S. 461, 59 L. ed. 316, 35 Sup. Ct. Rep. 173. L.R.A.1916D.

States for the District of Arizona, enjoining the enforcement of the Arizona anti-alien labor law. Affirmed.

The facts are stated in the opinion.

Messrs. Leslie C. Hardy, Wiley E. Jones, Attorney General of Arizona, George W. Harben, J. Addison Hicks, and W. B. Cleary, for appellants:

The servant cannot complain, for the master, of a threatened injury to the latter by public officers of the state of Arizona, and to this extent an injunction against the institution of criminal proceedings against the master at the instance of the servant is contrary to the powers of a court of equity.

McCabe v. Atchison, T. & S. F. R. Co. 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69; *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 47 L. ed. 778, 23 Sup. Ct. Rep. 498.

The law in question is a valid exercise of the police power of the state because it is a law enacted to preserve the safety and welfare of the state and its citizens.

Patson v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *Blythe v. Hinckley*, 180 U. S. 333, 45 L. ed. 567, 21 Sup. Ct. Rep. 390; *McCreedy v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Noble State Bank v. Haskell*, 219 U. S. 104, 575, 55 L. ed. 112, 341, 32 L.R.A.(N.S.) 1062, 1065; 31 Sup. Ct. Rep. 186, 299, Ann. Cas. 1912A, 487.

Messrs. Alexander Britton, Evans Browne, and Francis W. Clements, for appellee:

The 14th Amendment to the Constitution of the United States is not confined to the protection of citizens of the United States, but is universal in its application to all citizens within the territorial jurisdiction without regard to any difference of race, color, or nationality, and the promise of equal protection of the law is equivalent to the pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U. S. 356-369, 30 L. ed. 220-226, 6 Sup. Ct. Rep. 1064; *Barbier v. Connolly*, 113 U. S. 27-31, 28 L. ed. 923-925, 5 Sup. Ct. Rep. 357; *Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 25 L. ed. 980.

Among the rights so guaranteed to resident aliens, as well as citizens, is that of freely contracting to render service and perform labor, and to follow any ordinary lawful vocation. No impediment should be interposed to these rights of everyone, except such as are applied to the same pursuits by others under like circumstances and conditions.

People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798; *Lockner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746-762, 28 L. ed. 585-588, 4 Sup. Ct. Rep. 652; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Powell v. Pennsylvania*, 127 U. S. 678-684, 32 L. ed. 253-256, 8 Sup. Ct. Rep. 992, 1257; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240.

The law of Arizona contravenes the 14th Amendment to the Constitution of the United States, and is not a proper exercise of the police power of the state.

People v. Crane, 165 App. Div. 449, 150 N. Y. Supp. 933; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 23 L. ed. 543.

This is not necessarily a suit in equity to enjoin a criminal proceeding, but in any event it is fully justified in order to prevent the invasion of the rights of property of appellee by the enforcement of an unconstitutional law, the enforcement of which works a direct injury and irreparable harm to him.

Re Sawyer, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441; *McCabe v. Atchison, T. & S. F. R. Co.* 235 U. S. 151, 59 L. ed. 169, 35 Sup. Ct. Rep. 69; *Re Tiburcio Parrott*, 6 Sawy. 349, 1 Fed. 481; *Cummings v. Missouri*, 4 Wall. 320, 18 L. ed. 362; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550.

Mr. Justice Hughes delivered the opinion of the court:

Under the initiative provision of the Constitution of Arizona (art. 4, § 1) there was adopted the following measure which was proclaimed by the governor as a law of the state on December 14, 1914:

An Act to Protect the Citizens of the United States in Their Employment against Noncitizens of the United States, in Arizona, and to Provide Penalties and Punishment for the Violation Thereof.

Be it enacted by the People of the State of Arizona:

Section 1. Any company, corporation, partnership, association or individual who is, or may hereafter become an employer of more than five (5) workers at any one L.R.A.1916D.

time, in the state of Arizona, regardless of kind or class of work, or sex of workers, shall employ not less than eighty (80) per cent qualified electors or native-born citizens of the United States or some subdivision thereof.

Sec. 2. Any company, corporation, partnership, association or individual, their agent or agents, found guilty of violating any of the provisions of this act shall be guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not less than one hundred (\$100) dollars, and imprisoned for not less than thirty (30) days.

Sec. 3. Any employee who shall misrepresent, or make false statement, as to his or her nativity or citizenship, shall, upon conviction thereof, be subject to a fine of not less than one hundred (\$100) dollars, and imprisoned for not less than thirty (30) days. Laws of Arizona, 1915. Initiative Measure, p. 12.

Mike Raich (the appellee), a native of Austria, and an inhabitant of the state of Arizona, but not a qualified elector, was employed as a cook by the appellant William Traux, Sr., in his restaurant in the city of Bisbee, Cochise county. Truax had nine employees, of whom seven were neither "native born citizens" of the United States nor qualified electors. After the election at which the act was passed Raich was informed by his employer that when the law was proclaimed, and solely by reason of its requirements and because of the fear of the penalties that would be incurred in case of its violation, he would be discharged. Thereupon, on December 15, 1914, Raich filed this bill in the district court of the United States for the district of Arizona, asserting, among other things, that the act denied to him the equal protection of the laws and hence was contrary to the 14th Amendment of the Constitution of the United States. Wiley E. Jones, the attorney general of the state, and W. G. Gilmore, the county attorney of Cochise county, were made defendants in addition to the employer Truax, upon the allegation that these officers would prosecute the employer unless he complied with its terms, and that in order to avoid such a prosecution the employer was about to discharge the complainant. Averring that there was no adequate remedy at law, the bill sought a decree declaring the act to be unconstitutional and restraining action thereunder.

Soon after the bill was filed, an application was made for an injunction pendente lite. After notice of this application, Truax was arrested for a violation of the act, upon a complaint prepared by one of the assistants in the office of the county

attorney of Cochise county, and as it appeared that by reason of the determination of the officers to enforce the act there was danger of the complainant's immediate discharge from employment, the district judge granted a temporary restraining order.

The allegations of the bill were not controverted. The defendants joined in a motion to dismiss upon the grounds (1) that the suit was against the state of Arizona without its consent; (2) that it was sought to enjoin the enforcement of a criminal statute; (3) that the bill did not state facts sufficient to constitute a cause of action in equity; and (4) that there was an improper joinder of parties, and the plaintiff was not entitled to sue for the relief asked. The application for an interlocutory injunction and the motion to dismiss were then heard before three judges, as required by § 266 of the Judicial Code [36 Stat. at L. 1162, chap. 231, Comp. Stat. 1913, § 1243]. The motion to dismiss was denied and an interlocutory injunction restraining the defendants, the attorney general and the county attorney, and their successors and assistants, from enforcing the act against the defendant Truax, was granted. 219 Fed. 273. This direct appeal has been taken.

As the bill is framed upon the theory that the act is unconstitutional, and that the defendants, who are public officers concerned with the enforcement of the laws of the state, are about to proceed wrongfully to the complainant's injury through interference with his employment, it is established that the suit cannot be regarded as one against the state. Whatever doubt existed in this class of cases was removed by the decision in *Ex parte Young*, 209 U. S. 123, 155, 161, 52 L. ed. 714, 727, 729, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, which has repeatedly been followed. *Ludwig v. Western U. Teleg. Co.* 216 U. S. 146, 54 L. ed. 423, 30 Sup. Ct. Rep. 280; *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 54 L. ed. 430, 30 Sup. Ct. Rep. 286; *Herndon v. Chicago, R. I. & P. R. Co.* 218 U. S. 135, 155, 54 L. ed. 970, 976, 30 Sup. Ct. Rep. 633; *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 643-645, 55 L. ed. 890, 894, 895, 35 L.R.A.(N.S.) 243, 31 Sup. Ct. Rep. 654; *Philadelphia Co. v. Stimson*, 223 U. S. 607, 620, 56 L. ed. 572, 576, 32 Sup. Ct. Rep. 340; *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 293, 57 L. ed. 510, 517, 33 Sup. Ct. Rep. 312.

It is also settled that while a court of equity, generally speaking, has "no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors" (*Re Sawyer*, 124 U. S. 200, 210, L.R.A.1916D.

31 L. ed. 402, 405, 8 Sup. Ct. Rep. 482), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. *Davis & F. Mfg. Co. v. Los Angeles*, 189 U. S. 207, 218, 47 L. ed. 778, 780, 23 Sup. Ct. Rep. 498; *Dobbins v. Los Angeles*, 195 U. S. 223, 241, 49 L. ed. 169, 177, 25 Sup. Ct. Rep. 18; *Ex parte Young*, supra; *Philadelphia Co. v. Stimson*, 223 U. S. 621, 56 L. ed. 577, 32 Sup. Ct. Rep. 340. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjust defied interference of third persons is actionable although the employment is at will. *Moran v. Dunphy*, 177 Mass. 485, 487, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125; *Berry v. Donovan*, 188 Mass. 353, 5 L.R.A.(N.S.) 899, 108 Am. St. Rep. 499, 74 N. E. 603, 3 Ann. Cas. 738; *Brennan v. United Hatters*, 73 N. J. L. 729, 743, 9 L.R.A.(N.S.) 254, 118 Am. St. Rep. 727, 65 Atl. 165, 9 Ann. Cas. 698; *Perkins v. Pendleton*, 90 Me. 166, 60 Am. St. Rep. 252, 38 Atl. 96; *Lucke v. Clothing Cutters' & T. Assembly*, 77 Md. 396, 19 L.R.A. 408, 39 Am. St. Rep. 421, 26 Atl. 505; *London Guarantee & Acci. Co. v. Horn*, 101 Ill. App. 355, 206 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526; *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, 1 So. 934; *Blumenthal v. Shaw*, 23 C. C. A. 590, 39 U. S. App. 490, 77 Fed. 954. It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe v. Atchison, T. & S. F. R. Co.* 235 U. S. 151, 162, 59 L. ed. 169, 174, 35 Sup. Ct. Rep. 69): that is, that the servant cannot complain for the master, and that it is the master who is subject to prosecution, and not the complainant. But the act undertakes to operate directly upon the employment of aliens, and if enforced would compel the employer to discharge a sufficient number of his employees to bring the alien quota within the

prescribed limit. It sufficiently appears that the discharge of the complainant will be solely for the purpose of meeting the requirements of the act and avoiding threatened prosecution under its provisions. It is, therefore, idle to call the injury indirect or remote. It is also entirely clear that unless the enforcement of the act is restrained the complainant will have no adequate remedy, and hence we think that the case falls within the class in which, if the unconstitutionality of the act is shown, equitable relief may be had.

The question, then, is whether the act assailed is repugnant to the 14th Amendment. Upon the allegations of the bill, it must be assumed that the complainant, a native of Austria, has been admitted to the United States under the Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union. (See *Gegiow v. Uhl*, decided October 25, 1915 [239 U. S. 3, 60 L. ed. — 36 Sup. Ct. Rep. 2].) Being lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws. The description, "any person within its jurisdiction," as it has frequently been held, includes aliens. "These provisions," said the court in *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064 (referring to the due process and equal protection clauses of the Amendment), "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws." See also *Wong Wing v. United States*, 163 U. S. 228, 242, 41 L. ed. 140, 145, 16 Sup. Ct. Rep. 977; *United States v. Wong Kim Ark*, 169 U. S. 649, 695, 42 L. ed. 890, 907, 18 Sup. Ct. Rep. 456. The discrimination defined by the act does not pertain to the regulation or distribution of the public domain, or of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and the citizens of other states. Thus in *McCready v. Virginia*, 94 U. S. 391, 396, 24 L. ed. 248, 249, the restriction to the citizens of Virginia of the right to plant oysters in one of its rivers was sustained upon the ground that the regulation related to the common property of the citizens of the state, and an analogous principle was involved in *Patsone v. Pennsylvania*, 232 U. S. 138, 145, 146, 58 L. ed. 539, 544, 34 Sup. Ct. Rep. 281, where the discrimination against aliens upheld by the court had for its object the protection of wild game with-
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in the states, with respect to which it was said that the state could exercise its preserving power for the benefit of its own citizens if it pleased. The case now presented is not within these decisions, or within those relating to the devolution of real property (*Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; *Blythe v. Hinckley*, 180 U. S. 333, 341, 342, 45 L. ed. 557, 562, 563, 21 Sup. Ct. Rep. 390); and it should be added that the act is not limited to persons who are engaged on public work or receive the benefit of public moneys. The discrimination here involved is imposed upon the conduct of ordinary private enterprise.

The act, it will be observed, provides that every employer (whether corporation, partnership, or individual) who employs more than five workers at any one time, "regardless of kind or class of work, or sex of workers," shall employ "not less than 80 per cent qualified electors or native-born citizens of the United States or some subdivision thereof." It thus covers the entire field of industry with the exception of enterprises that are relatively very small. Its application in the present case is to employment in a restaurant the business of which requires nine employees. The purpose of an act must be found in its natural operation and effect (*Henderson v. New York* [*Henderson v. Wickham*] 92 U. S. 259, 268, 23 L. ed. 543, 547; *Bailey v. Alabama*, 219 U. S. 219, 244, 55 L. ed. 191, 202, 31 Sup. Ct. Rep. 145), and the purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as "an act to protect the citizens of the United States in their employment against noncitizens of the United States, in Arizona." As the appellants rightly say, there has been no subterfuge. It is an act aimed at the employment of aliens, as such, in the businesses described. Literally, its terms might be taken to include with aliens those naturalized citizens who, by reason of change of residence, might not be at the time qualified electors in any subdivision of the United States; but we are dealing with the main purpose of the statute, definitely stated, in the execution of which the complainant is to be forced out of his employment as a cook in a restaurant, simply because he is an alien.

It is sought to justify this act as an exercise of the power of the state to make reasonable classifications in legislating to promote the health, safety, morals, and welfare of those within its jurisdiction. But this admitted authority, with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the

state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Yick Wo v. Hopkins*, *supra*; *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 590, 41 L. ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; *Coppage v. Kansas*, 236 U. S. 1, 14, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240. If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words. It is no answer to say, as it is argued, that the act proceeds upon the assumption that "the employment of aliens, unless restrained, was a peril to the public welfare." The discrimination against aliens in the wide range of employments to which the act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved. It must also be said that reasonable classification implies action consistent with the legitimate interests of the state, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government. *Fong Yue Ting v. United States*, 149 U. S. 698, 713, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the states as chose to offer hospitality.

It is insisted that the act should be supported because it is not "a total deprivation of the right of the alien to labor:" that is, the restriction is limited to those

businesses in which more than five workers are employed, and to the ratio fixed. It is emphasized that the employer in any line of business who employs more than five workers may employ aliens to the extent of 20 per cent of his employees. But the fallacy of this argument at once appears. If the state is at liberty to treat the employment of aliens as in itself a peril, requiring restraint regardless of kind or class of work, it cannot be denied that the authority exists to make its measures to that end effective. *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *New York ex rel. Silz v. Hesterberg*, 211 U. S. 31, 53 L. ed. 75, 29 Sup. Ct. Rep. 10; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. ed. 184, 33 Sup. Ct. Rep. 44. If the restriction to 20 per cent now imposed is maintainable, the state undoubtedly has the power, if it sees fit, to make the percentage less. We have nothing before us to justify the limitation to 20 per cent save the judgment expressed in the enactment, and if that is sufficient, it is difficult to see why the apprehension and conviction thus evidenced would not be sufficient were the restriction extended so as to permit only 10 per cent of the employees to be aliens, or even a less percentage; or were it made applicable to all businesses in which more than three workers were employed instead of applying to those employing more than five. We have frequently said that the legislature may recognize degrees of evil and adapt its legislation accordingly (*Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 207, 46 L. ed. 872, 875, 22 Sup. Ct. Rep. 616; *McLean v. Arkansas*, 211 U. S. 539, 551, 53 L. ed. 315, 321, 29 Sup. Ct. Rep. 206; *Miller v. Wilson*, 236 U. S. 373, 384, 59 L. ed. 627, 632, 35 Sup. Ct. Rep. 342); but underlying the classification is the authority to deal with that at which the legislation is aimed. The restriction now sought to be sustained is such as to suggest no limit to the state's power of excluding aliens from employment if the principle underlying the prohibition of the act is conceded. No special public interest with respect to any particular business is shown that could possibly be deemed to support the enactment, for, as we have said, it relates to every sort. The discrimination is against aliens as such in competition with citizens in the described range of enterprises, and in our opinion it clearly falls under the condemnation of the fundamental law.

The question of rights under treaties was not expressly presented by the bill, and, although mentioned in the argument, does not require attention, in view of the in-

validity of the act under the 14th Amendment.
Order affirmed.

Mr. Justice McReynolds, dissenting:

I am unable to agree with the opinion of the majority of the court. It seems to me plain that this is a suit against a state, to which the 11th Amendment declares "the judicial power of the United States shall not be construed to extend." *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269. If *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932,

28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, and the cases following it support the doctrine that Federal courts may enjoin the enforcement of criminal statutes enacted by state legislatures whenever the enjoyment of some constitutional right happens to be threatened with temporary interruption, they should be overruled in that regard. The simple, direct language of the Amendment ought to be given effect, not refined away.

That the challenged act is invalid I think admits of no serious doubt.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,
Appt.,
v.

CLARENCE A. CRANE, Respnt.

(214 N. Y. 154, 108 N. E. 427.)

Constitutional law — right to raise question of constitutionality of statute.

1. A contractor, under prosecution for violation of a statute forbidding the employment of alien laborers, may raise the question of the constitutionality of the statute on the ground that it interferes with the rights of such laborers.

For other cases, see Action or Suit, I. c; Statutes, I. c, in Dig. 1-52 N. S.

Same — forbidding employment of aliens — equal protection of law.

2. Forbidding the employment of aliens on public work does not unconstitutionally deprive them of their liberty without due process of law or deny them the equal protection of the laws.

For other cases, see Constitutional Law, II. a, 2, b; II. b, 4, b, (2) in Dig. 1-52 N. S.

Treaty — exclusion of aliens from public work.

3. A provision of a treaty that the citizens of each of the high contracting parties shall have liberty to carry on trade and generally to do anything incident to or necessary for trade upon the same terms as natives, and shall receive protection and security for person and property, and enjoy in this respect the same rights and privileges as are granted to natives, does not prevent a state from forbidding the employment of citizens of the foreign contracting party on public work.

For other cases, see Treaties, in Dig. 1-52 N. S.

Note. — As to prohibiting or restricting employment of aliens, see annotation following this case, post, 589.

The question who may raise the objection that a statute contains an unconstitutional discrimination is considered in the note to *Pugh v. Pugh*, 32 L.R.A.(N.S.) 954. L.R.A.1916D.

Constitutional law — giving money in aid of individual.

4. To forbid the employment of alien labor on public works in order to better the condition of citizen laborers does not violate a constitutional provision against giving the money of the state or municipality to individuals or private undertakings; at least, where another constitutional provision empowers the legislature to fix the wages of all employees upon the public works.

For other cases, see Public Money, II. b, in Dig. 1-52 N. S.

Statute — doubt as to constitutionality — effect.

5. In case of doubt as to the existence of conflict between a statute and the Constitution, the statute will prevail.

For other cases, see Statutes, I. c, in Dig. 1-52 N. S.

(Collin, J., dissents.)

(February 25, 1915.)

APPEAL by the people from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment of the Court of Special Sessions, First Division, of New York City convicting defendant of employing aliens as laborers in the performance of a contract for the construction of a municipal sewer, in violation of the Labor Law. Reversed.

The facts are stated in the opinion.

Messrs. Robert S. Johnstone and George Z. Medalle, with Mr. Charles Albert Perkins, for appellant:

If the state has a right to prohibit certain things, it has the right to determine how it shall make the prohibition effective, —even to the extent of declaring that one who violates the statute shall be guilty of a penal offense and subject to imprisonment. The means by which the state may compel obedience to its lawful mandates rest entirely within its discretion.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107, 111, 53 L. ed. 417, 428, 430, 29 Sup. Ct. Rep. 220; *Coffey v. Harlan County*, 204

U. S. 639, 662, 51 L. ed. 666, 668, 27 Sup. Ct. Rep. 305; Shevlin-Carpenter Co. v. Minnesota, 218 U. S. 57, 66-68, 70, 54 L. ed. 930, 934-936, 30 Sup. Ct. Rep. 663; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; People v. D'Antonio, 150 App. Div. 109, 134 N. Y. Supp. 657; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129.

It is not necessary to the validity of a penal statute that the legislature should declare on the face of it the policy or purpose for which it is enacted.

People v. West, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; Lochner v. New York, 198 U. S. 45, 57, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133.

The individual as an employer of labor, and the state as an employer of labor, stand on the same footing.

People v. Orange County Road Constr. Co. 175 N. Y. 90, 65 L.R.A. 33, 67 N. E. 129; People v. I. M. Ludington's Sons, 74 Misc. 363, 131 N. Y. Supp. 550; People v. Marcus, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 118, 110 App. Div. 255, 97 N. Y. Supp. 322.

The state for itself and for each of its separate governmental agencies has the right to declare that, with respect to works of a public nature done by contract, the person contracting to do that work shall only employ such persons as the state may direct, and to place a restriction, if it sees fit to do so, upon the classes of persons who may be employed by the contractor.

People v. I. M. Ludington's Sons, 74 Misc. 363, 131 N. Y. Supp. 550; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; Patson v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; People ex rel. Simon v. Bradley, 207 N. Y. 592, 101 N. E. 766.

With reference to a municipality, statutory regulations may be regarded as upon the same footing as they would be where the state itself is concerned.

Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, L.R.A.1916D.

85 N. E. 1070; People v. Morris, 13 Wend. 325; Darlington v. New York, 31 N. Y. 164, 88 Am. Dec. 248; Demarest v. New York, 74 N. Y. 161; Mt. Pleasant v. Beckwith, 100 U. S. 514, 525, 25 L. ed. 699, 701; Cooley, Const. Lim. 7th ed. 266-268.

A state, by requiring a contractor with it or any of its municipalities or other subordinate agencies, to restrict the hours of labor to not more than eight hours a day, does not deprive any person of liberty or property without due process of law.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; Lemieux v. Young, 211 U. S. 489, 53 L. ed. 295, 29 Sup. Ct. Rep. 174; People v. Lührs, 195 N. Y. 377, 25 L.R.A.(N.S.) 473, 89 N. E. 171; People ex rel. Lewisohn v. O'Brien, 176 N. Y. 253, 68 N. E. 353, 15 Am. Crim. Rep. 97; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599.

An express stipulation not to employ "aliens" in the contract is unnecessary.

People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Medina v. Dingledine, 211 N. Y. 24, 104 N. E. 1118.

If, in undertaking to do public work for the city, the state exacted as a condition that defendant should not employ aliens, he could waive any general constitutional right, and did so by accepting the service or privilege, knowing the conditions there- to attached by the statute.

People v. Rosenheimer, 209 N. Y. 115, 46 L.R.A.(N.S.) 977, 102 N. E. 530, Ann. Cas. 1915A, 161; Ex parte Kneeder, 243 Mo. 632, 40 L.R.A.(N.S.) 622, 147 S. W. 983, Ann. Cas. 1913C, 923; Bertholf v. O'Reilly, 74 N. Y. 509, 30 Am. Rep. 323; Ryan v. New York, 177 N. Y. 271, 69 N. E. 599; People ex rel. McLaughlin v. Police Comrs. 174 N. Y. 450, 95 Am. St. Rep. 596, 67 N. E. 78; Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070.

There is no invalid classification.

Com. v. Hana, 195 Mass. 262, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514; Trageser v. Gray, 73 Md. 250, 9 L.R.A. 780, 25 Am. St. Rep. 587, 20 Atl. 905; Patson v. Pennsylvania, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281, 231 Pa. 46, 79 Atl. 928; Geer v. Connecticut, 161 U. S. 519, 529, 530, 533, 40 L. ed. 793, 797, 798, 16 Sup. Ct. Rep. 600; McCready v. Virginia, 94 U. S. 391, 24 L. ed. 248; Kohl v. Lehlback, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; State v. Travelers' Ins. Co. 70 Conn. 590, 66 Am.

St. Rep. 138, 40 Atl. 465; *Bloomfield v. State*, 86 Ohio St. 253, 41 L.R.A.(N.S.) 726, 99 N. E. 309, Ann. Cas. 1913D, 629.

The statute is not in conflict with any treaty or with the 14th Amendment.

Geofroy v. Riggs, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Chisholm v. Georgia*, 2 Dall. 419, 435, 1 L. ed. 440, 447; *Prevost v. Grenaux*, 19 How. 7, 15 L. ed. 574; *Jones v. Meehan*, 175 U. S. 1, 32, 44 L. ed. 49, 62, 20 Sup. Ct. Rep. 1; *Hauenstein v. Lynham*, 100 U. S. 483, 487, 25 L. ed. 628, 629; *Chirac v. Chirac*, 2 Wheat. 259, 4 L. ed. 234; *Blythe v. Hinckley*, 180 U. S. 333, 340, 341, 45 L. ed. 557, 561, 562, 21 Sup. Ct. Rep. 390; *United States v. Rauscher*, 119 U. S. 407, 418, 30 L. ed. 425, 428, 7 Sup. Ct. Rep. 234, 6 Am. Crim. Rep. 222; *Head Money Cases (Edye v. Robertson)* 112 U. S. 580, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Com. v. Patsone*, 231 Pa. 46, 79 Atl. 928, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281.

Laws are not unconstitutional merely because they affect property and property rights in existence at the time of the taking effect thereof, and even though they place restrictions upon its use, and impair and diminish its value.

Health Dept. v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Tenement House Dept. v. Moeschon*, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 Ann. Cas. 439, 203 U. S. 583, 51 L. ed. 328, 27 Sup. Ct. Rep. 781; *McIntosh v. Johnson*, 211 N. Y. 265, L.R.A.1915D, 603, 105 N. E. 414; *Re Hering*, 133 App. Div. 293, 117 N. Y. Supp. 747, 196 N. Y. 218, 89 N. E. 450; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Eberle v. Michigan*, 232 U. S. 700, 707, 58 L. ed. 803, 806, 34 Sup. Ct. Rep. 464; *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

Mr. James F. McKinney, with Messrs. Edward M. Grout and Paul Grout, for respondent:

Section 14 of the Labor Law is void because it contravenes §§ 1 and 6 of article I. of the Constitution of the state of New York.

People v. Warren, 13 Misc. 615, 34 N. Y. Supp. 942; *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *Meyers v. New York*, 58 App. Div. 534, 69 N. Y. Supp. 529; *Ryan v. New York*, 177 N. Y. 271, 69 N. E. 599; *People v. Budd*, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. L.R.A.1916D.

670; *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

It is also unconstitutional in that it applies to contracts already in existence at the time of its enactment as well as to those subsequently executed, and that it makes acts penal which are otherwise innocent and harmless.

People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; *Wynchamer v. People*, 13 N. Y. 378; *Green v. Shumway*, 39 N. Y. 418; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *People v. West*, 106 N. Y. 293, 60 Am. Rep. 452, 12 N. E. 610; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *People v. Bowen*, 182 N. Y. 1, 74 N. E. 489; *People v. Hawkins*, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People ex rel. Duryea v. Wilber*, 198 N. Y. 1, 27 L.R.A. (N.S.) 357, 90 N. E. 1140, 19 Ann. Cas. 626.

The law is void because in contravention of art. 4, § 2, of the 5th and 14th Amendments of the United States Constitution, and the provisions of various treaties existing with foreign nations.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 23 L. ed. 543; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Chy Lung v. Freeman*, 92 U. S. 275, 23 L. ed. 550; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *Sinnot v. Davenport*, 22 How. 227, 16 L. ed. 243; *Re Baldwin*, 27 Fed. 187; *Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.)* 223 U. S. 1, 56 L. ed. 327, 38 L.R.A.(N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *McCulloch v. Maryland*, 4 Wheat. 316, 405, 4 L. ed. 579, 601; *Gandolfo v. Hartman*, 16 L.R.A. 277, 49 Fed. 181; *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; *People v. King*, 110 N. Y. 418, 1 L.R.A. 293, 6 Am. St. Rep. 389, 18 N. E. 245; *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652.

If the law is void as to the citizens of any alien nation, it is void as to all aliens.

Wynehamer v. People, 13 N. Y. 378; Lewis's Sutherland, Stat. Constr. §§ 299, 300; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; United States v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; Trade Mark Cases, 100 U. S. 82, 25 L. ed. 550; Poindexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Baldwin v. Franks, 120 U. S. 679, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763; Rathbone v. Wirth, 150 N. Y. 459, 34 L.R.A. 408, 45 N. E. 15; Lawton v. Steele, 119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878.

The contract agreement to comply with the law falls with the law itself.

People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; Knowles v. New York, 176 N. Y. 430, 68 N. E. 860; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39; Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365.

Mr. Jeremiah A. O'Leary, amicus curiæ.

Cardozo, J., delivered the opinion of the court:

The defendant is a contractor with the city of New York. His contract was for the construction of sewer basins. In doing the work, he employed laborers not citizens of the United States. One of them was an Italian. The nationality of the others is not shown. Because of the employment of these aliens, he has been convicted of violating § 14 of the Labor Law (Laws 1909, chap. 36; Consol. Laws, chap. 31). The section reads as follows:

"Section 14. Preference in Employment of Persons upon Public Works.—In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses

of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all subcontractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native-born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than \$50 nor more than \$500, or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment."

The appellate division has held that this statute violates both the state and the Federal Constitution. Its effect, we are told, is to deprive the excluded aliens of their liberty without due process of law, in that they are denied the right to labor on the public works. U. S. Const. 14th Amend. N. Y. Const. art. 1, § 6. The effect also is, we are told, to deny to the excluded aliens the equal protection of the laws. U. S. Const. 14th Amend. It is true the defendant is not within the excluded classes. Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 545, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359. He is charged, however, with a crime, and the crime is said to have been the refusal to discriminate, and nothing else. The laborers whom he has employed are within the excluded classes; and, if they had a right to serve, he on his side had a right to employ. To refuse to give effect to an unlawful discrimination, and to do this at the instance of those against whom the discrimination is aimed, cannot constitute a crime. The question whether this statute does discriminate against aliens in violation of the Constitution is therefore, we think, before us.

The moneys of the state belong to the people of the state. They do not belong to aliens. The state, through its legislature, has given notice to its agents that in building its public works it wishes its own moneys to be paid to its own citizens, and, if not to them, then, at least, to citizens of the United States. The argument is made that in thus preferring its own citizens in the distribution of its own wealth it denies to the alien within its borders the equal protection of the laws.

The people, viewed as an organized unit, constitute the state. Penhallow v. Doane, 3 Dall. 54, 100, 1 L. ed. 507, 526; Texas

v. White, 7 Wall. 700, 720, 19 L. ed. 227, 235. The members of the state are its citizens. *United States v. Cruikshank*, 92 U. S. 542, 549, 23 L. ed. 588, 590; *Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627. Those who are not citizens are not members of the state. Society thus organized is conceived of as a body corporate. Like any other body corporate, it may enter into contracts, and hold and dispose of property. In doing this it acts through agencies of government. These agencies, when contracting for the state, or expending the state's moneys, are trustees for the people of the state. *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110. It is the people—i. e., the members of the state—who are contracting or expending their own moneys through agencies of their own creation. Certain limitations on the powers of those agencies result from the nature of the trust. *Ibid.* Since government, in expending public moneys, is expending the moneys of its citizens, it may not, by arbitrary discriminations having no relation to the public welfare, foster the employment of one class of its citizens and discourage the employment of others. It is not fettered, of course, by any rule of absolute equality; the public welfare may at times be bound up with the welfare of a class; but public welfare, in a large sense, must, none the less, be the end in view. Every citizen has a like interest in the application of the public wealth to the common good, and the like right to demand that there be nothing of partiality, nothing of merely selfish favoritism, in the administration of the trust. But an alien has no such interest; and hence results a difference in the measure of his right. To disqualify citizens from employment on the public works is not only discrimination, but arbitrary discrimination. To disqualify aliens is discrimination, indeed, but not arbitrary discrimination; for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.

The power of a state to discriminate between citizens and aliens in the distribution of its own resources is sanctioned alike by decisions of the courts and by long continued practice. Neither aliens nor the citizens of other states are invested by the Constitution with any interest in the common property of the people of this state. *McCready v. Virginia*, 94 U. S. 391, 394, 24 L. ed. 248. It has been held, therefore, that a state may deny to aliens, and even to citizens of another state, the right to plant oysters or to fish in public waters. *L.R.A.1916D.*

Ibid.; *People v. Lowndes*, 130 N. Y. 455, 462, 29 N. E. 751; *Com. v. Hilton*, 174 Mass. 29, 45 L.R.A. 475, 54 N. E. 302. It may restrict to its own citizens the enjoyment of its game. *Geer v. Connecticut*, 161 U. S. 519, 529, 40 L. ed. 793, 797, 16 Sup. Ct. Rep. 600; *Patson v. Pennsylvania*, 232 U. S. 138, 145, 58 L. ed. 539, 544, 34 Sup. Ct. Rep. 281. It may discriminate between citizens and aliens in its charitable institutions, or in other measures for the relief of paupers. *Freund, Pol. Power*, § 712; *State Charities Law (Laws 1909, chap. 57)* § 17. It may make the same discrimination in the distribution of its public lands (*McCready v. Virginia*, *supra*); its mines (*Justice Min. Co. v. Lee*, 21 Colo. 260, 52 Am. St. Rep. 216, 40 Pac. 444, 18 Mor. Min. Rep. 220); its forests; or other natural resources. It may deny to aliens the right to hold or inherit real estate, except where the right has been secured by treaty. *Blythe v. Hinckley*, 180 U. S. 333, 341, 45 L. ed. 557, 562, 21 Sup. Ct. Rep. 390. The origin of this last disability is historical (1 *Pollock & M. History of English Law*, 445), but the policy underlying it is akin to the policy that underlies the others. The principle that justifies these discriminations is that the common property of the state belongs to the people of the state, and hence that, in any distribution of that property, the citizen may be preferred.

To defeat this law it must, therefore, be held that the Constitution gives to the state a narrower liberty of choice in the expenditure of its own moneys than in the use or distribution of its other resources. I can find no justification for the supposed distinction. The construction of public works involves the expenditure of public moneys. To better the condition of its own citizens, and, it may be, to prevent pauperism among them, the legislature has declared that the moneys of the state shall go to the people of the state. The equal protection of the laws is due to aliens as to citizens (*Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Lem Moon Sing v. United States*, 158 U. S. 538, 547, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 967); but equal protection does not mean that those who have no interest in the common property of the state must share in that property on the same terms as those who have an interest.

In saying this, I assume that the purpose of the statute is not to promote efficiency in the doing of the work, but to discriminate in the distribution of the public wealth in favor of the citizen. There may be forms of employment where efficiency would be promoted by the employment of citizens, and, if the statute were restricted to such

employments, its validity would not be doubtful. Just as the state may confine to citizens the right to hold public office, so, on the same ground, it may confine to citizens the right to serve the state in any way, whenever there is a relation between the exclusion of aliens and the promotion of efficiency. There are many lines of service where it is conceivable that the employment of citizens will make for a stable administration. If the government were to take over the railroads, there would be force in the argument that the trains should be run by citizens on whose loyalty the government might depend in times of national disaster. We have grown accustomed to the government's administration of the mails, and none of us doubts that the service is one from which aliens may be excluded. In all these branches of employment it is not difficult to discover some relation between citizenship and efficiency. The prohibition of alien labor in this statute is, however, unrestricted. It applies to the most temporary and occasional service, and to the lowest grades of labor. Even in those cases, it is for the legislature, according to the people's claim, to determine whether some relation exists between efficiency and citizenship; between loyalty in service and service by the loyal. Such tests of fitness have a fair relation to permanent positions where a spirit of allegiance to the employer may be cultivated. It seems far-fetched, however, to apply them to the task of day laborers excavating for sewers or digging trenches for a subway. The relation in such circumstances is so remote that we may consider it illusory. At least I shall so assume for the purpose of this discussion. The statute has been frankly defended at our bar as a legitimate preference of citizens, not to promote the efficiency of the work, but to promote the welfare of the men preferred; and from that aspect it will be frankest and safest for us to view it. To concede that such a preference was intended is not to condemn the statute as invalid. The state, in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens, rather than that of aliens. Whatever is a privilege, rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike. "The relief of the poor—the care of those who are unable to care for themselves—is among the unquestioned objects of public duty." *Brewer, J., in State ex rel. Griffith v. Osawkee Twp.* 14 Kan. 424, 19 Am. Rep. 99. The modern state everywhere is mindful of that duty. It has extended its bounty

in large measure, though not without some discrimination, to aliens; but it would not trench upon their rights under the Constitution if it were to confine its bounty to its citizens. As it may discriminate between citizens and aliens in relief, so also it may discriminate in employment. When payment for public works is to be made from public funds, it may prefer in employment its own citizens, since to them the legislature may believe that the first duty is owing. *United States v. Realty Co.* 163 U. S. 427, 440, 41 L. ed. 215, 219, 16 Sup. Ct. Rep. 1120. Everywhere throughout the world the state, in its relation to the laborer, is assuming a larger obligation; but it cannot be that it owes this obligation to citizens and aliens in equal measure. In Great Britain there was enacted in 1908 a statute providing for old-age pensions, restricted, it may be noted, to British subjects. 8 Edw. VII. chap. 40, § 1. In the same Kingdom there was enacted in 1911 a statute providing for insurance against unemployment. 1 & 2 Geo. V. chap. 55. In our own country the workmen's compensation laws that have been adopted in many states are phrases of the same world-wide movement. We are not concerned at this time with the validity of these measures for the alleviation of the laborer's lot. We mention them as illustrations of an expanding consciousness in the modern state that relief against unemployment, both after the event and before it, is part of the state's function. In one of our states the courts have sustained a law providing for state help to farmers. *State v. Nelson County*, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33. How far the state will go beyond its own citizens in thus applying its own resources to the betterment of conditions the legislature must say. Preferences to relieve against pauperism after it has become an accomplished fact do not violate the rights of aliens. Preferences to avert a threatened pauperism, or to render pauperism impossible, stand on the same footing. In each instance the state announces as its public policy that the common property shall be used for the benefit of its common owners.

The argument is made, however, that there is a distinction between the right of government to exclude aliens from its own employment and the right to exclude aliens from employment by independent contractors. The ruling of the Supreme Court of the United States in *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, and in *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589, goes far to invalidate the distinction. The first case considered a statute of Kansas prohibiting the

employment of laborers for more than eight hours a day on any public work. The statute was held valid in its application to laborers in the service of contractors. The second case sustained a like statute, passed by Congress, to regulate employment on public works in the District of Columbia. The presence of an independent contractor, interposed between the state and the laborer, did not check the power of the government to prescribe the hours of labor. But, without reference to those decisions, the distinction is inadequate. In a real and substantial sense, it is the money of the state that is paid to the laborers, though the distribution is made through the medium of contractors. That money constitutes the fund out of which the wages of laborers are payable. This is not only true as an economic and social fact; it is true also as a statement of the legal rights of those concerned. The state (lien law, Laws 1909, chap. 38, § 5) has given to any laborer employed by a contractor in the construction of a public improvement a lien for the value of his labor upon the moneys of the state applicable to that improvement. The state has thus defined the channels through which the payment must be made. It has assumed a direct obligation not only to its own employees, but also to the employees of contractors on its works. To say that the latter class of employees receive not the state's moneys, but those of the contractors, is to put form above substance. The great problems of public law do not turn upon these nice distinctions. The fundamental powers of the state and the fundamental rights of man are built upon a broader basis. The truth and substance of the situation is that the contractor's employees are doing the state's work, and are paid out of the state's moneys; and this truth ought not to be obscured by distinctions between contractors and servants established to fix the gradations of civil liability.

I do not ignore what was said in *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129. There is a suggestion in that case, but not a ruling, that a distinction exists between employees of the state and those of a contractor in respect of the state's power to regulate the hours of labor. The later case of *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, has obliterated the distinction, and so it was conceded in *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39. It is now perceived that all persons engaged on the public works, from the highest officers to the lowest laborers, through all the gradations of contractors and subcontractors,

are, in a very vital sense, in the service of the state. The state has a legitimate concern in the selection of the men to be employed from one extreme of the official hierarchy to the other. Whether they are called officers or employees does not matter. The power of the legislature depends upon the substance of things, and not upon names and labels.

To hold that this statute violates the Federal Constitution would be to ignore the contrary judgment expressed in the Constitutions and legislation of many other states. There is a like provision in the Constitution of Arizona (article 18, § 10), a Constitution which was approved (so far as this provision is concerned) by joint resolution of Congress (37 Stat. at L. 39, No. 8). There are like provisions in the Constitution of Idaho (art. 13, § 5), and in that of Wyoming (art. 19, § 1), which were also approved by Congress. There is a like provision, restricted, however, to Chinese, in the Constitution of California (art. 19, § 3). There are like provisions applicable to all aliens in the statutes of Massachusetts (Acts of 1909, chap. 514, § 21), New Jersey (Compiled Statutes of New Jersey 1910, p. 3023, § 15), Pennsylvania (2 Purdon's Dig. 13th ed. p. 2172, § 8), and California (act No. 127, General Laws of California 1906). Legislation similar in purpose may be found in Montana (Rev. Code, § 2250), Nevada (Rev. Laws of Nevada 1912, § 3483), Oregon (Laws of Oregon, § 6267), and Hawaii (Acts of Congress, Rev. Laws 1905). Unless the case against this statute is a clear one, the courts may not ignore this concurrence of opinion. *Lemieux v. Young*, 211 U. S. 489, 493, 53 L. ed. 295, 299, 29 Sup. Ct. Rep. 174.

In thus holding that the power exists to exclude aliens from employment on the public works, we do not, however, commit ourselves to the view that the power exists to make arbitrary distinctions between citizens. We do not hold that the government may create a privileged caste among the members of the state. *Smith v. Texas*, 233 U. S. 630, 638, 58 L. ed. 1129, 1133, L.R.A. 1915D, 677, 34 Sup. Ct. Rep. 681, Ann. Cas. 1915D, 420. We do not hold that it may discriminate among its citizens on the ground of faith or color. *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664, 3 Am. Crim. Rep. 515; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Rogers v. Alabama*, 192 U. S. 226, 231, 48 L. ed. 417, 419, 24 Sup. Ct. Rep. 257. A citizen may not be disqualified because of faith or color from service as a juror. *Strauder v. West Virginia*, supra. For like reasons we assume that he may not be disqualified, because of faith or

color from serving the state in public office or employment. It is true that the individual, though a citizen, has no legal right in any particular instance to be selected as contractor by the government. It does not follow, however, that he may be declared disqualified from service, unless the proscription bears some relation to the advancement of the public welfare. *Strauder v. West Virginia*, supra, 100 U. S. at page 305, 25 L. ed. 664. The legislature has unquestionably the widest latitude of judgment in determining whether such a relation exists, but we are not required to hold that there is no remedy against sheer oppression. Where the line must be drawn we do not now determine. We do not say that the legislature could single out A and B by name, and declare that, though citizens, they should never be employed on any public work. It may well be that such disqualification would be illegal under the 14th Amendment of the Federal Constitution, in that it would deny to the citizens thus arbitrarily excluded the equal protection of the laws, and illegal also under our state Constitution, which provides (art. 1, § 1): "No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."

This opinion has failed of its purpose if it has failed to demonstrate that those provisions are without application to the exclusion of aliens from the enjoyment of the state's resources.

It must also be evident that nothing in this opinion gives countenance to the view that the government may deny to aliens the right to engage in any private trade, or calling on terms of equality with citizens. *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064; *Re Tiburcio Parrott* (C. C.) 6 Sawy. 349, 1 Fed. 481. If the calling is one that the state, in the exercise of its police power, may prohibit either absolutely or conditionally by the exaction of a license, the fact of alienage may justify a denial of the privilege. *Patson v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; *Com. v. Patson*, 231 Pa. 46, 79 Atl. 928; *Com. v. Hana*, 195 Mass. 262, 11 L.R.A. (N.S.) 799, 22 Am. St. Rep. 251, 81 N. E. 149, 11 Ann. Cas. 514; *Bloomfield v. State*, 86 Ohio St. 253, 99 N. E. 309, 41 L.R.A. (N.S.) 726, Ann. Cas. 1913D, 629; *State v. Travelers' Ins. Co.* 70 Conn. 590, 600, 66 Am. St. Rep. 138, 40 Atl. 465. There must, however, be some relation in such cases between the exclusion of the alien and the protection of the public welfare. But, subject only to the exercise of the police power, it

is true that, in dealings between man and man, the alien and the citizen trade and labor on equal terms. It is a denial of the equal protection of the laws when the government, in its capacity as a lawmaker, regulating, not its own property, but private business, bars the alien from the right to trade and labor. It is not a denial of the equal protection of the laws when the government, in its capacity as proprietor, issuing a mandate to its own agents (*United States v. Martin*, 94 U. S. 400, 24 L. ed. 128; *Carter, Law, Its Origin, Growth, and Functions*, p. 230), bars the alien from the right to share in the property which it holds for its own citizens.

Because the state may thus discriminate in favor of the citizen in regulating employment on its public works, it does not follow, however, that it may exclude aliens from the enjoyment of those works after they have been completed. Aliens may use the public highways as freely as citizens. Aliens may use the railroads and other agencies of transportation as freely as citizens. The reason is that the right to move about from place to place within the state is incidental to the right to live within the state. There are probably many other public works so intimately related, if not to life, at least to health and comfort, that merely arbitrary or oppressive discrimination against the alien in regulating their use would be a denial by the state of the equal protection of the laws. To attempt to draw the line in advance is futile. The question must in each case be whether the use is one that is reasonably incidental to life under modern conditions in a civilized state, or whether it is rather a privilege which the state may grant or may withhold, to be employed by the state on the public works, and to receive payment out of the public purse, is, I think, a privilege, rather than a right. *Atkin v. Kansas*, supra, 191 U. S. at page 223, 48 L. ed. 158, 24 Sup. Ct. Rep. 124.

The argument is made that, if the statute is not invalid as in conflict with the 14th Amendment of the Constitution, it is invalid as in conflict with treaties between the United States and foreign nations. Typical of these treaties is the one with Italy. It provides: "The citizens of each of the high contracting parties shall have liberty to travel in the states and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established. The citizens of each of the high contracting par-

ties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives, on their submitting themselves to the conditions imposed upon the natives." [17 Stat. at L. 846, arts. 2, 3].

This treaty, in my judgment, does not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys.

The argument is also made that discrimination between citizens and aliens may increase the cost of public works by limiting the supply of labor, and that to do this in order to better the condition of our laborers is to violate restrictions of the Constitution of the state. Article 8, § 9, of the state Constitution provides that "neither the credit nor the money of the state shall be given or loaned to or in aid of any association, corporation or private undertaking."

Article 8, § 10, provides: "No county, city, town or village shall hereafter give any money or property, or loan its money or credit to or in aid of any individual, association or corporation, or become directly or indirectly the owner of stock in, or bonds of, any association or corporation; nor shall any such county, city, town or village be allowed to incur any indebtedness except for county, city, town or village purposes. This section shall not prevent such county, city, town or village from making such provision for the aid or support of its poor as may be authorized by law."

The money that goes to laborers on public works is not given or loaned in aid of individuals within the meaning of these provisions. It is paid for service rendered. That is the direct and primary purpose of the payment. The primary and direct purpose being legal, the payment does not become illegal because a collateral and secondary purpose may be to protect a large class of the community against the peril of pauperism. In the long run, the payment may be found to have lessened the public burdens rather than to have increased them. *Noble State Bank v. Haskell*, 219 U. S. 104, 110, 111, 55 L. ed. 112, 116, 117, 32 L.R.A. (N.S.) 1062, 31 Sup. Ct. Rep. 186, Ann. Cas. 1912A, 487. The same argument was made against the validity of the statute for an eight-hour day. It was said that the result would be to increase the cost for the benefit of favored classes. The legislature is, now empowered by the Constitution to fix the wages and salaries of all employees upon the public works. This authority em-
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braces the direct increase of expense by increasing salaries beyond the minimum fixed by competition. It must also embrace the indirect increase of expense by regulations of employment tending to diminish competition.

I have not overlooked, though I have not attempted to analyze, the decisions of this court in which the statutes governing the hours of labor on public works were the subject of discussion. *People ex rel. Rodgers v. Coler*, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; *Ryan v. New York*, 177 N. Y. 271, 69 N. E. 599; *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39. The specific proposition there decided has ceased to be law in this state. So far as it was founded on the theory of a conflict between the statute and the Federal Constitution, it was overruled by the United States Supreme Court in *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124. So far as it was founded on the theory of a conflict between the statute and the Constitution of this state, it was superseded by the amendment of the Constitution in 1905. Const. art. 12, § 9; *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 193 N. Y. 148, 24 L.R.A. (N.S.) 201, 85 N. E. 1070. The earlier cases are no longer authorities, therefore, for any proposition actually decided. Their reasoning may still instruct, but no longer control, us. They were decided in nearly every instance by a bare majority. In at least one instance a majority did not unite in anything more than the result. It would serve no useful purpose to review the varying opinions at this time. It is enough to say that they are not decisive of the case at hand.

This statute must be obeyed unless it is in conflict with some command of the Constitution, either of the state or of the nation. It is not enough that it may seem to us to be impolitic or even oppressive. It is not enough that in its making great and historic traditions of generosity have been ignored. We do not assume to pass judgment upon the wisdom of the legislature. Our duty is done when we ascertain that it has kept within its power. *Bertholf v. O'Reilly*, 74 N. Y. 509, 515, 30 Am. Rep. 323; *People v. Gillson*, 109 N. Y. 389, 398, 4 Am. St. Rep. 465, 17 N. E. 343; *Atkin v. Kansas*, supra. "It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."

Holmes, J., in Missouri, K. & T. R. Co. v.

May, 194 U. S. 267, 270, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638, 639.

If doubt exists whether there is a conflict between the statute and the Constitution, the statute must prevail. *Barrett v. Indiana*, 229 U. S. 26, 31, 57 L. ed. 1050, 1053, 33 Sup. Ct. Rep. 692; *People v. Gillson*, *supra*. These guiding principles are not to be honored by lip service only. Mischiefs and hardship, it is said, will follow the enforcement of this law. If that is so, we cannot help it. To correct those evils, if they shall develop, will be the province of legislation. The statute does not withhold from the alien the rights secured to him by the Constitution; and we must enforce it as the law.

The judgment of the Appellate Division should be reversed, and the judgment of conviction affirmed.

Chase, Hogan and Miller, J., concur.

Willard Bartlett, Ch. J., concurring:

Whatever may be my own views as to the wisdom or fairness of the statute before us, I am entirely clear that it is constitutional, and that the question is settled by the decision both of the United States Supreme Court and of this court.

These decisions establish the proposition that the state in the prosecution of a public work stands in just the same position as an individual; that it may prescribe the conditions on which it will contract for such work; and that it may make the violation of his contract on the part of the contractor a criminal offense. It is so held in *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124, 128, where the Supreme Court of the United States said that "no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do."

This language was quoted with approval by this court in *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070, and the doctrine therein declared thus received the sanction of all the judges who sat in that case.

In *Ellis v. United States*, 206 U. S. 246, 256, 51 L. ed. 1047, 1052, 27 Sup. Ct. Rep. 600, 601, 11 Ann. Cas. 589, which involved the validity of a Federal labor law, it was held that "the government, purely as contractor, in the absence of special laws, may stand like a private person, but by making a contract it does not give up its power to make a law."

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And in the exercise of this power it may declare a violation of his contract by the contractor to be a crime. In answer to a suggestion that the purpose of the statute was to secure to labor certain advantages in conditions over which Congress has not general control, Mr. Justice Holmes said that the existence of such a motive would not render a law unconstitutional which was otherwise valid, and that the power which Congress has over the mode in which contracts with the United States shall be performed could not be limited by a speculation as to motives.

However subsequent legislation or adjudications may have modified the effect of the decision in *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 90, 65 L.R.A. 33, 67 N. E. 129, 131, it still remains true, as was said by Judge Cullen in that case, that "if the state itself prosecutes a work it may dictate every detail of the service required in its performance,—prescribe the wages of workmen, their hours of labor, and the particular individuals who may be employed. . . . The state in this respect stands the same as its citizens."

How great the rights of private citizens are in their status as employers is aptly illustrated by *Jacobs v. Cohen*, 183 N. Y. 207, 2 L.R.A.(N.S.) 292, 111 Am. St. Rep. 730, 76 N. E. 5, 5 Ann. Cas. 280, where this court held that the contract between an employer and a labor union whereby the employer agreed for a certain period to employ only members of the union was not violative of public policy or otherwise forbidden by law. In the opinion we reiterated the assertion made in *National Protective Asso. v. Cumming*, 170 N. Y. 315, 341, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369, 377, that every man has a right "to carry on his business in any lawful way that he sees fit. He may employ such men as he pleases, and is not obliged to employ those whom, for any reason, he does not wish to have work for him."

It seems to me that the only constitutional prohibition which can be relied upon with any confidence to invalidate the statute forbidding the employment of aliens upon the public works of this state is the provision of the 14th Amendment to the Federal Constitution, which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

If it is a denial of the equal protection of the laws for an employer of labor to refuse to afford a designated class of persons an opportunity to work for him, it must be conceded that this statute was enacted in disregard of the constitutional provision thus invoked.

I can find no reason to suppose, however,

that the 14th Amendment was designed to limit or restrict the rights of a state as an employer of labor. Other employers, individual or corporate, possess the undoubted and absolute right to withhold employment from whomever they see fit. The Constitution could hardly have been intended to deprive the states of equality with private employers in this respect; yet, if the 14th Amendment invalidates the statute in question, the great railroad corporation which is erecting its new building in Albany to-day may refuse to allow aliens to work upon it, while the state of New York, in repairing the capitol, must give aliens an equal opportunity with citizens to aid in its reconstruction.

The statute is nothing more, in effect, than a resolve by an employer as to the character of his employees. An individual employer would communicate the resolve to his subordinates by written instructions or by word of mouth. The state, an incorporeal master, speaking through the legislature, communicates the resolve to its agents by enacting a statute. Either the private employer or the state can revoke the resolve at will. Entire liberty of action in these respects is essential unless the state is to be deprived of a right which has heretofore been deemed a constituent element of the relationship of master and servant; namely, the right of the master to say who his servants shall (and therefore shall not) be.

If the alien labor law under consideration is violative of the 14th Amendment, the preference given to veterans by the Constitution of the state of New York must likewise be invalid. Const. of New York, art. 5, § 9. Appointments and promotions in the civil service of the state and of all civil divisions thereof, including cities and villages, are thereby required to be made according to merit and fitness to be ascertained as far as practicable by examinations, which, so far as practicable, shall be competitive; "provided, however, that honorably discharged soldiers and sailors from the Army and Navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made." Here is a preference in the public service based wholly upon a status acquired half a century ago, and a preference of one class of citizens over all others. There could not be a clearer case of discrimination. I think that the Federal Constitution permits such discrimination; but I should not think so if it be held that the statute in question here is in conflict with the 14th Amendment.

The differences of opinion upon the pres-

ent appeal are necessarily radical, and depend upon the question whether the denial of an opportunity to work for the state is a denial of the equal protection of the laws. For the reasons which I have briefly stated, in addition to those set forth so clearly and cogently in the opinion of my Brother Cardozo, I think this question must be answered in the negative. I do not believe that either the 14th Amendment or any other of the constitutional provisions relied upon by the respondent was designed to limit the right of the state to choose its own servants.

Seabury, J., concurring:

This case in no way involves the right of private citizens to employ aliens in private work. It presents only the question of the right of the state to exclude aliens from employment upon its public works. The distinction is vital, and must be kept in mind throughout the discussion of this case.

I concur in the opinion that the statute is constitutional. I agree that, because of the public character of the work to which the statute relates, the discrimination against aliens is not an arbitrary discrimination. I agree also that the law cannot be upheld upon the ground that it is designed to promote efficiency upon the public works of the state. The present case, as I view it, does not involve merely the right of the state to prescribe the manner in which its public money may be distributed. The money expended for public works would necessarily be expended whether citizens or aliens were engaged in constructing them. The money paid by the state for this purpose is not a gratuity, but is paid as compensation for services rendered, and the rendering of these services creates a public value at least equal to the money expended. The distribution of public money for this purpose is only an incident of the state's exercise of its right as proprietor and owner of its public works. This case involves the right of the state as owner or proprietor to exclude aliens from working upon its public works, and to accord to its own citizens a preference in being employed upon such public works, over other citizens of the United States. No citizen, as an incident of citizenship, has any right to be employed upon public works. If to be employed upon public works is in any sense a right or privilege under the state Constitution (article 1, § 1), it is equally so under the provisions of the 14th Amendment to the Federal Constitution. Thus, if the right to be employed on public works is a right or privilege incident to citizenship, the state might discriminate against aliens, but it could not, under the pro-

visions of the Federal Constitution, discriminate in favor of its own citizens against citizens of another state. Yet the state may discriminate as between its own citizens and citizens of a sister state, and even in favor of some of its citizens and against others as to the use that shall be made of its own property. *People v. Lowndes*, 130 N. Y. 455, 29 N. E. 751; *Haney v. Compton*, 36 N. J. L. 507; *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600; *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Com. v. Hilton*, 174 Mass. 29, 45 L.R.A. 475, 54 N. E. 362; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248. No citizen has any constitutional right or privilege to be employed upon public work, or any immunity against discrimination in this respect, either under article 1, § 1, of the Constitution of the state, or under the 14th Amendment to the Federal Constitution. The legislature has the right to prescribe who shall work upon its public works. Public works are public property. As such, they belong wholly to the sovereign power of the state. The manner in which they shall be built is within the function of the sovereign power to prescribe. This regulation and control is a part of the police power of the state. The police power of the state is not limited to exerting control over private property to promote the general welfare. It is by virtue of this power that the state possesses the exclusive right to construct and control its public property. I am aware that objection has been made to the use of the term "police power" to include the regulation by the state of its internal affairs, on the ground that it uses the terminology that has often been associated with the regulation of private affairs external to the state. Notwithstanding this objection, the nature of the power exerted is the same, whether it is exercised over the public property of the state itself or over the private property of the citizen. The highest judicial authority exists for applying the term "police power" to both public and private property. *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *People v. Kerr*, 27 N. Y. 188, 213; *Haney v. Compton*, 36 N. J. L. 507. In *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252, 258, the Supreme Court of the United States, speaking of the police power, said: "We may, not improperly, refer to that power the authority of the state to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public highways, turnpike

roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps."

Questions of great difficulty may present themselves as to how far the state may impose restraints or limitations upon the exercise of individual rights over private property, but no such questions are presented as to public property. Public property is in its very nature subject to social control. The authority of the state over all public works and public undertakings is supreme, and this is so whether the public works are undertaken directly by the state or by a municipality or any other agency of the state. Just as the individual may, generally speaking, do what he will with his own, so the state may exercise a like control over public property. In the same way that private property is subject to individual control, so public property is subject to governmental control. The provisions of the state and Federal Constitutions guarantying liberty and property refer to individual liberty and private property. They do not confer upon the individual, be he citizen or alien, the right to interfere with the use that the state may make of its public property or any regulation which it may prescribe as to the manner in which its public works shall be built. The constitutional safeguards which surround the liberty of the individual confer upon him no right or liberty to engage in public work. The statute under consideration does not involve governmental interference with individual liberty. The attempt of the contractors engaged in public work to deprive the state of the right to prescribe the conditions upon which the work shall be done is the assertion of the right of individual interference with the government. The manner in which public works shall be built is a matter wholly within the sphere of social, as distinguished from individual, control. We cannot lose sight of the fact that there are these separate and distinct spheres of action. It may not be possible to draw with precision the line of demarcation between them, but we all nevertheless recognize that there is a line of demarcation to be drawn. As we deny to the state the right to intrude into the individual sphere of action and to prescribe what we shall believe, and, except where the public welfare is involved, what we shall publish, or to supervise private morals, so the state denies to the individual the right to intrude within its social sphere of action and insist that he has a right to be employed upon its public works. The right of state control springs from the public or social character of the work. Owing to the narrow sphere to which the state's activities have, in the past, been

limited, the assertion of the state's right of public property seems to have been confined principally to unappropriated lands, waters, wild beasts, fishes, and birds, but over those things to which the state's right of property attached the old books recognized the proprietary right of the sovereign power, which carried with it the right to discriminate either against subjects or foreigners. Grotius, *Rights of War & Peace*, bk. 2, chap. 2, § 5. In recent times the state's proprietary interests have been greatly extended. Over those interests it enjoys the right of a proprietor or owner. The public property of the modern state is not inconsiderable. It owns its highways, harbors, canals, aqueducts, bridges, markets, libraries, art galleries, and many other valuable possessions. Over all these things and others of a like nature the state is now proprietor and owner. Its sphere of ownership is being constantly extended. Formerly the functions represented by the public properties enumerated above were left entirely to individual initiative, as, indeed, were also such functions as the Army, Navy, police, and courts of justice now perform. The performance of these services is necessary to the enjoyment of modern social life, and the welfare of the citizenship of the state depends upon their proper administration. The uses to which these public properties shall be put are to be determined by the legislature, subject only to the Constitution. There are, generally speaking, no provisions of the Constitution that impose limitations upon the exercise of the legislative power over these properties, except such as are inherently attached to the exercise of the police power. Nor is it apparent that this extension of the state's activity has in any way violated the liberty of the citizen. The exercise by the state of these activities may in a negative sense have restricted the liberty of some, but in a positive sense the freedom of all has been increased on account of them. In the building of the state's public work we have an example through the exercise of the powers of government of the organized co-operation of our citizenship. In its capacity of owner and proprietor, the state is not hampered by restrictions as to the manner in which it shall cause its public works to be constructed. There are many uses to which an owner or proprietor may put his property which do not violate the rights of others. The state in its capacity of proprietor or owner may make such use of its own public property as it deems conducive to the social well-being. In the use that it makes of such property it is not required to refrain from discrimination. The largest measure of benefit may sometimes

result from discrimination. Whether or not discriminations made in regard to public property sustain a relation to the public welfare is for the legislature, and not the courts, to determine. The modern state, through the ownership of its public property, affords opportunities for public co-operation. The motive which actuates it is service, not profit. Its service, to be effective, must be rendered where it is needed, and in rendering it it is not obliged, in the use of its public property, to secure immediate equality of benefits to all; it is sufficient if the ultimate result be to promote the general welfare. The public property or commonwealth should, of course, be used to promote the general welfare, but the restraints or checks to which government is by constitutional provisions subjected, when it acts in reference to private property, have no application where it acts in relation to public property. Within this sphere and in regard to this public property, government is free to prescribe such regulations as will best promote the general welfare. Where the state has, in a particular sphere, replaced private enterprise, as it has replaced it in the control and building of its public works, it cannot effectively accomplish its purpose if it is to be hampered by the same restraints which are imposed upon it when it exercises its authority over private property. Where it acts in its capacity of proprietor or owner in reference to its own public property, these restraints can only serve to hamper and embarrass the state in the exercise of its rights of ownership. If, in the exercise of the police power, the state may regulate private property to promote the general welfare of its citizens, a fortiori it may, by virtue of that power, exercise control over its own public property.

Public works, like other public property, are within the police power of the state. The character of the work to which the statute under consideration applies being public, the statute itself is an exercise by the sovereign of its police power. The statute being an exercise of the police power of the state, it necessarily follows that the provisions of the 14th Amendment of the Federal Constitution and article 1, § 1, of the Constitution of this state, so far as they guarantee the right of individual liberty and property, are without application. As Mr. Justice Field said: "No one has ever pretended, that I am aware of, that the 14th Amendment interferes in any respect with the police power of the state." *Bartemeyer v. Iowa*, 18 Wall. 129, 138, 21 L. ed. 929, 932.

In *Olsen v. Smith*, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52, it was held

that, although state laws concerning pilotage are a regulation of commerce, they fall within that class of powers which may be exercised by the states until Congress has seen fit to act upon the subject. In that case the argument was made that the right of a person who is competent to perform pilotage services to render them is an inherent right guaranteed by the 14th Amendment, and that, therefore, all state regulations providing for the appointing of pilots and restricting the right to pilot to those duly appointed was repugnant to the 14th Amendment. In reply to this contention Mr. Justice White said: "But this proposition in its essence simply denies that pilotage is subject to governmental control, and therefore is foreclosed by the adjudications to which we have previously referred." 195 U. S. 344, 49 L. ed. 230, 25 Sup. Ct. Rep. 55.

The state has, generally speaking, the right to employ upon public work whom it will, and to prescribe such conditions as it sees fit to prescribe. It has the right to employ certain citizens to the exclusion of others, and the citizens not so employed are not in any legal sense unlawfully discriminated against. As was said by Mr. Justice Harlan in *Atkin v. Kansas*, 191 U. S. 207, 222, 48 L. ed. 148, 157, 24 Sup. Ct. Rep. 124, 127: "It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern."

In replying to the contention that a state regulation as to the manner in which public work should be performed was a violation of the liberty of the employee and employer, Mr. Justice Harlan said: "It is sufficient to answer that no employee is entitled, of absolute right and as a part of his liberty, to perform labor for the state; and no contractor for public work can excuse a violation of his agreement with the state by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do." 191 U. S. 223, 48 L. ed. 158, 24 Sup. Ct. Rep. 124, 128.

If the legislature can lawfully discriminate between citizens as to whom it will employ upon its public works, it follows that it can also discriminate as between

citizens and aliens. The whole matter as to how public works shall be built rests entirely within the police power of the state. The recognition of this principle seems to me to solve many of the difficulties that otherwise attach to this case. It is manifest that aliens, as well as citizens, are subject to the exercise of the police power. Nor can it be correctly contended that any treaty that exists between the United States and any foreign government excludes the citizens of that government who reside here from the operation of the police power of the state. If the police power includes, as has been said, "the power to govern men and things" (*Munn v. Illinois*, 94 U. S. 113, 125, 24 L. ed. 77, 84), that power does not become less potent when it is applied exclusively to public property being used for public purposes. So far as those trades or callings which are subject to governmental regulations are concerned, it is settled that the state may refuse to grant to aliens, because of the fact of alienage, a license to engage in them. *Patson v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281; *Com. v. Patson*, 231 Pa. 46, 79 Atl. 928; *McCreedy v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *State v. Travelers' Ins. Co.* 70 Conn. 590, 66 Am. St. Rep. 138, 40 Atl. 465; *Re O'Neill*, 90 N. Y. 584; *Re Opinion of Justices*, 122 Mass. 594; *Bloomfield v. State*, 86 Ohio St. 253, 41 L.R.A. (N.S.) 726, 99 N. E. 309, Ann. Cas. 1913D, 629. If the state may debar aliens from participating in those private occupations or trades which are subject to governmental regulation, as has been held in the cases cited, there is no room for the argument that it cannot debar aliens from working upon its own public works which are wholly subject to its control. In the assertion by the state of its right to control the manner in which public work shall be constructed, it is immaterial whether the public work is done directly by the state or by a municipality or independent contractor. *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124; *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589; *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 72 N. E. 464, 1 Ann. Cas. 39. If the work was private, and the public welfare in no way involved, it is clear that the legislature could not deny to the individual employer the right to employ aliens. *Yick Wo v. Hopkins*, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064. If the work was private, and the exclusion of aliens was, in fact, necessary to the protection of the public welfare, such exclusion would be within the police power. *Ibid.* Where the work, as in the case under consideration, is

public, and, therefore, wholly subject to the police power, the exclusion of aliens need not be shown to sustain any relation to the public welfare in order to be valid. In such case, the exclusion is merely an incident of that social control to which such public works are, in all respects, subject. The fact that the state may exercise complete control over its public works or other public property does not carry with it the right to use its public property so as to violate the rights of either its citizens or aliens to life, liberty, or property. The state, no less than the individual, is obligated to so use its public property, except when it acts to promote the general welfare, as not to impair the rights of others. For this reason it cannot lawfully exclude either citizens or aliens from its public highways, or deny to either the right to participate in the benefits of those public utilities which it may own and operate, and upon the equal administration of which the welfare and happiness of others depend. The limitations to which the state is subject in the construction and use of its public works are only those to which the police power is subject. These restraints it is not now necessary to consider, as they have no application to the exclusion of aliens from working upon public work. It is sufficient, I think, to point out that discriminations on account of race or religion that sustain no relation to the general welfare are not within the police power.

In my opinion, the judgment of the appellate division reversing the judgment of conviction should be reversed, and the judgment of conviction affirmed.

Collin, J., dissenting:

This appeal requires us to determine whether or not § 14 of the labor law is a constitutional enactment. The section is:

"Section 14. Preference in Employment of Persons upon Public Works.—In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void. All boards, officers, agents or employees of cities of the first class of the state, having the power to enter into contracts which provide for the expenditure of public money on public works, shall file in the office of the commissioner of labor the names and addresses

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of all contractors holding contracts with said cities of the state. Upon the letting of new contracts the names and addresses of such new contractors shall likewise be filed. Upon the demand of the commissioner of labor a contractor shall furnish a list of the names and addresses of all subcontractors in his employ. Each contractor performing work for any city of the first class shall keep a list of his employees, in which it shall be set forth whether they are naturalized or native-born citizens of the United States, together with, in case of naturalization, the date of naturalization and the name of the court where such naturalization was granted. Such lists and records shall be open to the inspection of the commissioner of labor. A violation of this section shall constitute a misdemeanor and shall be punishable by a fine of not less than \$50 nor more than \$300, or by imprisonment for not less than thirty nor more than ninety days, or by both such fine and imprisonment." Laws of 1909, chap. 36 (Consol. Laws, chap. 31), § 14.

The defendant, in constructing sewer basins pursuant to a contract between the city of New York and himself, employed persons who were not citizens of the United States, one of whom came from Italy. The judgment of the court of special sessions of the city convicting him of a misdemeanor therein was reversed by the appellate division solely for errors of law.

The question before us, necessitating, as it does, a decision concerning fundamental civic principles, is of unusual gravity. With the wisdom or unwisdom, the justice or injustice of the enactment, or the practical effects of our decision, we have no concern; those matters are within the legislative power, and are not subject to review by us. This court has neither the inclination nor the power to encroach upon the legislative department of the government of the state or assume any part of its functions or responsibilities. The measure of our duty is exhausted in ascertaining the legislative intention expressed in the enactment, and determining and declaring with cold neutrality that it either does or it does not ignore and transcend the limits which the people of the state, conscious that free government consists largely in rigid restrictions upon itself imposed and acquiesced in by the governed, have placed by the Constitution upon themselves and their representatives. State and people are inseparable ideas; for the state is the form in which the people have become organized.

The statute, through the intent expressed by it, if valid, prohibits the state and all the counties, towns, cities, and villages thereof, and all contractors with the state

or any of those municipalities, from employing all persons not born or naturalized in and subject to the United States (U. S. Const. art. 14, § 1)—all aliens—in the construction of public works; that is, fixed works for public use. *Ellis v. Grand Rapids*, 123 Mich. 567, 82 N. W. 244; *Ellis v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589. It, in form, deprives contractors with the state or any municipality of the right to employ aliens, and it deprives all aliens of the right of being subjects of employment, of the right to offer their labor for wages, in such construction. Its purpose, avowedly, is to promote the welfare of wage-earning citizens by destroying competition from aliens in the construction of all public work within the state. The briefs and arguments of the counsel are in accord with those conclusions.

The respondent asserts that the enactment is in conflict with, and therefore void under certain provisions of, the state and Federal Constitutions. Of those, we cite the following:

"No person shall . . . be deprived of life, liberty or property without due process of law." N. Y. Const. art. 1, § 6.

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. art. 14, § 1.

While the immediate inducement to and purpose in the adoption of this article of the United States Constitution was the protection of the liberty and property of colored persons, it is effective as a guaranty, additional to those of the state Constitutions, against encroachment by the legislatures of the states upon the fundamental and constitutional rights of any person. *Holden v. Hardy*, 169 U. S. 366, 382, 42 L. ed. 780, 787, 18 Sup. Ct. Rep. 383. It is established, beyond useful questioning or discussion, that aliens, equally with citizens, are under and protected by the constitutional guaranties invoked by the defendant here. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *State v. Montgomery*, 94 Me. 192, 80 Am. St. Rep. 386, 47 Atl. 165, 15 Am. Crim. Rep. 117; *Com. v. Hana*, 195 Mass. 262, 11 L.R.A.(N.S.) 799, 122 Am. St. Rep. 251, 81 N. E. 140, 11 Ann. Cas. 514. Within their operation citizen and alien are legal equals, and alienage is not and cannot be a basis or justification of differentiation or discrimination between them.

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state is plenary, except as they have abridged it by the state Constitution or consented to its restriction by the Federal Constitution. That power is vested in the legislature. The statute under consideration is valid unless it transcends the constitutional restrictions already quoted; if it overpassed them, it was and is as inoperative and impotent, as to persons lawfully assailing it, as if nonexistent. Whether it did or did not is to be determined upon the general object or purpose sought therein by the legislature and its efficiency to effect it. The purpose of a statute impugned as unconstitutional must be determined from the natural and legal effect of the language employed, and whether it is or is not repugnant to constitutional provisions must be determined from its natural effect when put into operation. *Lochner v. New York*, 198 U. S. 45, 64, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 259, 268, 23 L. ed. 543, 547. The statement already made of the intent and the general purpose to be effected by the statute under consideration need not be repeated.

Constitutional law has always deemed and declared the right to sell or purchase labor a part of the individual liberty and property safeguarded by the constitutional provisions I have quoted. Refraining from referring to the many judicial expressions of the principle, I quote the most recent of those of the United States Supreme Court: "The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money." *Coppage v. Kansas*, 236 U. S. 1, 14, 59 L. ed. 441, 446, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240, 243.

We have said: "Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation. All laws, therefore, which im-

pair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except as such laws may be passed in the exercise by the legislature of the police power, which will be noticed later), are infringements upon his fundamental rights of liberty, which are under constitutional protection." *Re Jacobs*, 98 N. Y. 98, 106, 50 Am. Rep. 636.

The principle has been frequently applied. *Bertholf v. O'Reilly*, 74 N. Y. 509, 515, 30 Am. Rep. 323; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *People v. Hawkins*, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *People ex rel. Tyroler v. Warden*, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; *People v. Williams*, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764. Any person who is banned by a statute from employment in the construction of the public works within the state is deprived of liberty and property; any person who is likewise banned from employing any other person in such construction is likewise affected. To constitute the deprivation, the inhibition of the statute need not include employment upon the construction of all works within the state. It need not be universal. The deprivation exists when the right to offer one's labor or services, or the right to employ the labor or services of another, upon a specified work or at a specified place or time, is destroyed. *People v. Williams*, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798; *People v. Hawkins*, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; *Re Tiburcio Parrott*, 6 Sawy. 349, 1 Fed. 481. The § 14 effects such deprivation, and is unconstitutional and invalid, unless there are conditions or legal principles justifying it. The appellants assert that there are.

The appellants assert, and as the chief and predominant support of their position, that the state has the right to declare, in the form of a statutory enactment, whom it and the municipalities will not employ, and contractors with them shall not employ, upon public works and in public undertakings, and is in this respect as free and untrammelled as the individual employer. This claim is unrelated to, and seeks no basis L.R.A.1916D.

or justification in, the police power of the state. It is oblivious of the existence of the police power. It rests exclusively upon the principle that the state is the owner and proprietor, as the guardian and trustee for the people, of the public works, undertakings, and institutions, and, as such proprietor, has the right to control, manage, and conduct them under such conditions, in such mode, and with such employees and appointees as it will, exercising without limit, as may the individual employer, its judgment, choice, or caprice. The authority directly relied upon to uphold the claim is *Atkin v. Kansas*, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124.

In the *Atkin* Case was involved the validity under the Constitution of the United States of the statute known as the eight-hour law of Kansas. The law (speaking generally, but with sufficient exactness) constituted eight hours a day's work for persons employed by or on behalf of the state or a municipality, the current rate of per diem wages in the locality where the work was performed, the minimum wage to be paid, and the requirement or allowance of more than eight hours' work per calendar day an offense. It provided, further, that persons employed by contractors with the state or a municipality or their subcontractors should be deemed employees of the state or the municipality. *Atkin*, in constructing a pavement in Kansas City, under a contract with it, permitted a person employed by him to work ten hours each calendar day, and by a court of Kansas was adjudged guilty of a violation of the statute. The supreme court of Kansas and the Supreme Court of the United States affirmed the judgment. The decision of the United States Supreme Court is expressly limited to the facts of that case. It was grounded in the two principles it enunciated: (a) The construction of the pavement was done by the state through a governmental agency and was of a public character; and (b) being of a public character, the statute, in regulating, as to those undertaking it, the mode in which and the conditions upon which it should be executed, did not infringe the personal liberty of *Atkin* or his employees, and expressed a public policy with which the courts had no concern. The court said: "We rest our decision upon the broad ground that, the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights

of others; and that has not been done." 191 U. S. 224, 48 L. ed. 158, 24 Sup. Ct. Rep. 128.

Chief Justice Fuller and Justices Brewer and Peckham dissented from this decision. See also *United States v. Martin*, 94 U. S. 400, 24 L. ed. 128.

The *Atkin Case* does not authorize or decide the claim of the appellants. It does not reach the basal element of the § 14. The section destroys absolutely the liberty of aliens to contract to work, their right to tender and sell their labor and services, and the right of the contractors to hire them or buy their labor, in and for constructing any public works. It does not fix the hours of each day through which an alien laborer may work, or his compensation; it declares that an alien shall not be permitted to be a laborer, and deprives him of the right to exercise the choice and freedom of being willing or unwilling to work upon public works under regulations enacted by the state, and the contractors of the right to employ him. Undoubtedly, no one has an inherent right to work or perform work for the state, which may in the regular and orderly administration and management of its affairs and institutions, in its proprietary capacity, contract as and with whom it chooses, except as restricted by the Constitution, to which it is not superior in any capacity. In the erection of a new capitol, for instance, it could select its architects, its decorators, its contractors, and its superintendent, and thereby reject the applications of those who were not selected. This, however, differs substantially and inherently from a statutory enactment that in the construction of any public building by or for the state or a municipality only persons residing in the city of Albany shall be engaged or employed. In the absence of the statute every person would be free to offer his labor and ability as he willed, and accept the terms, regulations, and conditions fixed by the employer, whether state, municipality, or contractor; with the statute every person residing elsewhere than in Albany would be deprived of that freedom, and to that extent of his liberty and property. The reasonable range and effect of a principle under discussion aids in determining its validity. The state is the proprietor of its educational, penal, and charitable institutions equally with its public works. The claim of the appellants, if sustained, would establish that it may declare by statutes (apart from the constitutional civil service provisions) that in the administration of those institutions, and of its public works and affairs, only the registered electors of a designated party, or only unmarried persons, or only white per-

sons, or Protestants or Catholics, or persons born in this state, shall be employed or appointed, or that certain designated citizens shall not be employed, or that goods or products made or grown by corporations of this state shall not be purchased. The illustrations might be multiplied. The state may not, by virtue of its proprietorship, destroy by a statute the right of any person to tender for sale and sell his labor or services, upon such terms as he deems proper, in the construction of public works or in the administration of public institutions, or the right of a person contracting to construct public works, to buy the labor or employ the person. The claim of the appellants that the state may with arbitrariness, as an untrammelled proprietor, forbid by statute the employment in the construction of public works of designated persons, or a designated class of persons, is ill founded, and does not justify the infringement, worked by the § 14, of the personal rights of liberty and property guaranteed to the defendant and the alien class by the state and Federal Constitutions.

The appellants assert further that the § 14 is supportable as a reasonable exercise of the police power of the state,—a power inherent in the state, which the state did not surrender when becoming a member of the United States under the Federal Constitution, and which is exercisable for the preservation or promotion of the public health, safety, morals, and general welfare or the prevention of fraud or immorality. While the protection of the liberty and property of the individual is a main purpose of a government and the Constitution, no person or property is immune from the power of the legislature to impose restraints and burdens upon either as required by the public safety or welfare. The cases are numerous and familiar in which the courts have held that the legislature of the states may, by virtue of the police power, limit the enjoyment or control of property and the right of making contracts. Whenever, however, it is sought to justify or support a statute by invoking the police power, it must appear that it reasonably and fairly tends, in a perceptible and clear degree, towards one or more of the objects of that power; and, while it is within the general scope of legislative power to determine whether or not there is, in a given condition, necessity for its exercise, it is within the judicial power and duty to determine whether or not the legislative determination bears any reasonable relation to the public health, safety, or morals. Unless such relation exists, the determination must be deemed by the courts arbitrary and unjustified by the police power. *Health Dept. v.*

Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A. (N.S.) 707, 79 N. E. 836; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Chicago, B. & Q. R. Co. v. McGuire*, 219 U. S. 549, 55 L. ed. 328, 31 Sup. Ct. Rep. 259; *Parks v. State*, 159 Ind. 211, 59 L.R.A. 190, 64 N. E. 862; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *McLean v. Arkansas*, 211 U. S. 539, 53 L. ed. 315, 29 Sup. Ct. Rep. 206; *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240. It is argued that the section is within the police power because its natural effect, by interdicting competition from the alien class, increases to citizens the likelihood of employment and increased wages. The argument is both ill founded and pernicious. The constitutional provisions in question were wisely intended to, and do, safeguard the liberty and the property of the aliens lawfully residing in the United States. Under and to the extent of these provisions, aliens are on an equal footing with citizens. It would be unreasonable to assert that the public welfare would be promoted by assuring and compelling unemployment to a class or to classes or to parts of classes of workers in order that those not banished from the right of being employed might have fuller employment and larger compensation. It is argued, too, that there is a danger, or a danger to be apprehended, in allowing aliens to work upon the public works, because they, through loyalty to the governments to which they owe allegiance, may destroy or diminish the efficiency or safety of those works. The argument is insubstantial, and common knowledge and experience refute it. Persons of unbalanced, evil, or uncivilized minds do not form a definable societal class. Each class is infested with them, and the law must deal with them as their acts make necessary. In the construction of by far the greater part of the public works, opportunities for the commission of the apprehended acts would not exist, and in the alien, as in the other classes of the state, the number of those who would commit them is an undiscoverable and insignificant minority. Obviously, there are civil positions and offices, and public works of a military, naval, or analogous nature, or periods of conflict in regard to which aliens may, under the police power, be banned or restrained. Section 14 has not a relation, in substance or intent, to any of those positions or conditions, and the state or a municipality may, in the absence of the statute, L.R.A.1916D.

deny at any time, and, at least, when conditions justify recourse to the police power, may by contract bind those contracting with them to deny employment to members of a dangerous group or class. I do not perceive in the arguments of counsel, or conceive apart from them, any possible relation of the section to the police power.

The further claim of the appellants that the defendant, by undertaking the work, waived the guaranty of the Constitution, is not tenable. The transaction between the city and the defendant was a matter of contract. The city, through specifications and proposals, requested bids for their fulfillment, and accepted that made by the defendant. If the statute was valid, it encumbered, through legislative power, and not through a meeting of the minds of the parties, the contract made; if invalid, it was, as to the defendant, a nullity.

The respondent urges that the section is repugnant to the Federal Constitution, as denying to aliens the equal protection of the laws. The primary question in discussing this assertion is: What is the purpose of the statute? The answer manifestly is, as we have already stated, the promotion of the welfare and prosperity of certain wage earners by forbidding the employment in the construction of public works of other wage earners.

The second question is: Is the purpose constitutionally lawful? We hold it is not, for the reasons stated, and, being thus invalid, no arbitrary classification or discrimination between the laborers of the state effecting the unequal protection of the laws can make it more invalid. If it were valid because the state has the power, arbitrarily and in accord with its unfettered and unbiased will, to prohibit the employment of a class in the construction of its public works, by the same token, it has the power, with like paramountcy, to designate the prohibited class, which could not with reason allege a lack of equal protection of the laws. If it were declared valid because within the police power, it could not be declared invalid on the ground that the equal protection of the law to those whom the exercise of that power had lawfully classified and barred had been invaded. Where the purpose of a statute is lawful, the question might arise whether a classification of persons or things, adopted as a part of the prescribed means for effecting it, is legal and justifiable. *Billings v. Illinois*, 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272; *Patson v. Pennsylvania*, 232 U. S. 138, 58 L. ed. 539, 34 Sup. Ct. Rep. 281.

A review of the relevant decisions will disclose that the courts frequently assume that the "due process of law" clause is the

equivalent of "the equal protection of the laws" clause. In *Holden v. Hardy*, 169 U. S. 366, 382, 42 L. ed. 780, 787, 18 Sup. Ct. Rep. 383, 384, the court said: "As the three questions of abridging their immunities, depriving them of their property, and denying them the protection of the laws, are so connected that the authorities upon each are, to a greater or less extent, pertinent to the others, they may properly be considered together."

Professor Willoughby writes: "It would seem, however, that the broad interpretation which the prohibition as to 'due process of law' has received is sufficient to cover very many of the acts which, if committed by the states, might be attacked as denying equal protection. Thus it has been repeatedly declared that enactments of a legislature directed against particular individuals or corporations, or classes of such, without any reasonable ground for selecting them out of the general mass of individuals or corporations, amounts to a denial of due process of law so far as their life, liberty, or property is affected." 2 Willoughby, Const. p. 874.

Recent decisions verify this statement. *Coppage v. Kansas*, 236 U. S. 1, 59 L. ed. 441, L.R.A.1915C, 960, 35 Sup. Ct. Rep. 240; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Riley v. Massachusetts*, 232 U. S. 671, 58 L. ed. 788, 34 Sup. Ct. Rep. 469; *People v. Marcus*, 185 N. Y. 257, 7 L.R.A.(N.S.) 282, 113 Am. St. Rep. 902, 77 N. E. 1073, 7 Ann. Cas. 118; *Frank L. Fisher Co. v. Woods*, 187 N. Y. 90, 12 L.R.A.(N.S.) 707, 79 N. E. 836; *People v.*

Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 Ann. Cas. 798; *Chicago v. Hulbert*, 205 Ill. 346, 68 N. E. 786. If the "equal protection of the laws" clause be applied, however, it must be held that the attempted classification of the aliens as a prohibited class is unreasonable and arbitrary, for the reasons which excluded it from the police power, and for such reasons is unconstitutional and void. *People v. Orange County Road Constr. Co.* 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Southern R. Co. v. Greene*, 216 U. S. 400, 54 L. ed. 538, 30 Sup. Ct. Rep. 287, 17 Ann. Cas. 1247; *Lindsley v. Natural Carbonic Gas Co.* 220 U. S. 61, 55 L. ed. 369, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912C, 160; *State ex rel. Richards v. Hammer*, 42 N. J. L. 435, 440.

In view of what has been written it is not necessary to determine whether or not the section is repugnant to the existing treaty between the United States and Italy.

My conclusion is that the § 14 unconstitutionally attempted to deprive the defendant, as the contractor and employer of labor, and the alien class, as the vendors of their labor, of liberty and property, and is void.

The judgment should be affirmed.

Affirmed by the Supreme Court of the United States, November 29, 1915, in 239 U. S. 195, 60 L. ed. —, 36 Sup. Ct. Rep. 85.

Annotation—Prohibiting or restricting employment of aliens.

As to power of the state, under the 14th Amendment to the Federal Constitution, to deny to aliens the right to engage in a lawful occupation, see note to *Com. v. Hana*, 11 L.R.A.(N.S.) 799; also subdivision "Aliens," page 281, of note in 40 L.R.A.(N.S.) 279.

PEOPLE v. CRANE, ante, 550, was affirmed by the United States Supreme Court in (1915) 239 U. S. 195, 60 L. ed. —, 36 Sup. Ct. Rep. 85, the decision following that in another case—*Heim v. McCall* (1915) 239 U. S. 175, 60 L. ed. —, 36 Sup. Ct. Rep. 78,—decided at the same time, in which substantially the same constitutional questions were raised. In the *Heim's Case*, a taxpayer attempted to enjoin the Public Service Commission for the First District of New York from declaring certain contracts for the construction of subways in New York city L.R.A.1916D.

forfeited for violation of the anti-alien labor law in that state. Each contract contained a provision that it should be void if the law was not complied with. The taxpayer sought an injunction on the ground that the law was unconstitutional and violated treaty provisions, and that the threatened forfeiture would result in a delay in the work, increase the cost to the city, and cause it irreparable damage. A demurrer to the bill was sustained. The Federal Supreme Court, affirming (1915) 214 N. Y. 629, 108 N. E. 1095, held that the application of the provision of the New York anti-alien labor law to contracts for the construction of subways in New York city, and the extent to which they affect the corporate rights of the city or of the subway contractors, are local questions not open for review in the Federal Supreme Court

on writ of error to a state court; that § 14 of this law (set out in *PEOPLE v. CRANE*), does not abridge the privileges and immunities of the citizens of the several states contrary to article 4, § 2, of the Federal Constitution, or the freedom to contract secured by the 14th Amendment, or result in the taking of property without due process of law, or in the denial of the equal protection of the laws in violation of the 14th Amendment; also that the law does not violate the treaty with Italy set out in *PEOPLE v. CRANE*.

It was held, also, in *Crane v. New York* (1915) 239 U. S. 195, 60 L. ed. —, 36 Sup. Ct. Rep. 85, that the distinction made between aliens and citizens in the New York anti-alien labor law did not offend against the 14th Amendment as violating the principle of classification.

The decision in *Heim v. McCall* (U. S.) supra, in the Federal Supreme Court was based largely upon the authority of *Atkin v. Kansas* (1903) 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, upholding the constitutionality of a statute making it a criminal offense for a contractor for a public work to permit or require an employee to perform labor upon that work in excess of eight hours each day. As applicable to the case before it, the court quoted from the *Atkin Case* as follows: "Instead of undertaking that work directly, the state invested one of its governmental agencies with power to care for it. Whether done by the state directly or by one of its instrumentalities, the work was of a public, not private, character. If, then, the work . . . was of a public character, it necessarily follows that the statute . . . does not infringe the personal liberty of anyone. . . . It cannot be deemed a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the court has no concern."

The decisions in *TRUAX v. RAICH* (U. S.) ante, 545, and *PEOPLE v. CRANE*, present clearly the distinction, as regards the right of a state to restrict the em-

ployment of aliens, between cases where such employment is in private business and where it is on public works. In the former case, it was held that the restriction in question denied the equal protection of the laws guaranteed by the 14th Amendment; that to deprive aliens, merely because of their alienage, of the opportunity of earning a livelihood, would be the equivalent to the assertion of the right to deny them entrance and abode in the state; while in the latter case, the right of a state to prohibit the employment of aliens on public works is upheld chiefly on the ground that the discrimination relates to the distribution of the common property or resources of the people of the state, the enjoyment of which may be limited to its citizens as against both aliens and citizens of other states; that the state and its agents are acting in a proprietary capacity as an ordinary employer of labor, and that the discrimination is within the police power.

The grounds of the decision in the state court in *PEOPLE v. CRANE*, which are apparently substantially the same as those on which the Federal decisions rest, are indicated in the following excerpts from the opinions: "The moneys of the state belong to the people of the state. They do not belong to aliens. . . . The principle that justifies these discriminations is that the common property of the state belongs to the people of the state, and hence that, in any distribution of that property, the citizen may be preferred. . . . The equal protection of the laws is due to aliens as to citizens . . . but equal protection does not mean that those who have no interest in the common property of the state must share in that property on the same terms as those who have an interest. . . . It is a denial of the equal protection of the laws when the government, in its capacity as a lawmaker regulating not its own property, but private business, bars the alien from the right to trade and labor. It is not a denial of the equal protection of the laws when the government, in its capacity as proprietor, issuing a mandate to its own agents . . . bars the alien from the right to share in the property which it holds for its own citizens. . . . The statute is nothing more, in effect, than a resolve by an employer as to the character of his employees. An individual employer would communicate the resolve to his subordinates by written instructions or by word of mouth. The state, an incorporeal master, speaking through

the legislature, communicates the resolve to its agents by enacting a statute. . . . As we deny to the state the right to intrude into the individual sphere of action and to prescribe what we shall believe, and, except where the public welfare is involved, what we shall publish, or to supervise private morals, so the state denies to the individual the right to intrude within its social sphere of action and insist that he has a right to be employed upon its public works. . . . The state in its capacity of proprietor or owner may make such use of its own public property as it deems conducive to the social well-being. In the use that it makes of such property it is not required to refrain from discrimination. . . . Public works, like other public property, are within the police power of the state. . . . If the work was private, and the public welfare in no way involved, it is clear that the legislature could not deny to the individual employer the right to employ aliens. . . . If the work was private, and the exclusion of aliens was, in fact, necessary to the protection of the public welfare, such exclusion would be within the police power. . . . Where the work, as in the case under consideration, is public, and, therefore, wholly subject to the police power, the exclusion of aliens need not be shown to sustain any relation to the public welfare in order to be valid."

The New York anti-alien labor law, considered in *PEOPLE v. CRANE*, was held constitutional in *People v. I. M. Ludington's Sons* (1911) 74 Misc. 363, 131 N. Y. Supp. 550, and not in conflict with treaties between the United States and England, Spain, and Italy.

The New York statute of 1870 as amended by the Laws of 1894, making it a crime for a contractor with a municipal corporation for the construction of public works to employ an alien as a laborer on such work, was held in *People v. Warren* (1895) 13 Misc. 615, 34 N. Y. Supp. 942, to be in conflict with the state and Federal Constitutions and with the provisions of the treaty between the United States and Italy.

The constitutional and statutory provisions in California against the employment by any corporation, in any capacity, of Chinese or Mongolians, were held in *Re Tiburcio Parrott* (1880) 6 Sawy. 349, 1 Fed. 481, to violate the 14th Amendment, and also that provision of the treaty with China that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, L.R.A.1916D.

immunities, and exemptions in respect to travel or residence as may be enjoyed by the citizens or subjects of the most-favored nation.

It was held, also, in *Re Tiburcio Parrott* (Fed.) supra, that the provisions could not be upheld as a legitimate exercise of the reserved power of the state to alter or repeal all laws concerning corporations.

Although the suit to enjoin a municipality from enforcing the law prohibiting the employment of Chinese laborers on the improvement of streets and public works was dismissed on other grounds, the court was of the opinion, it appears, in *Baker v. Portland* (1879) 5 Sawy. 566, Fed. Cas. No. 777, that the law violated the provision of the treaty with China indicated above. The court said it was true that the act did not undertake to exclude the Chinese from all kinds and fields of employment; but that if the state, notwithstanding the treaty, could prevent Chinese from working upon street improvements and public works, it was not apparent why it might not prevent them from engaging in any kind of employment or working at any kind of labor.

A statute making it unlawful for any county, or municipal or private corporation, to give employment to any alien who has failed, neglected, or refused, prior to the time of such employment, to become naturalized or to declare his intention to become a citizen of the United States, was held in *Re Case* (1911) 20 Idaho, 128, 116 Pac. 1037, to be repugnant to Art. IV. of the Federal Constitution, and to the 14th Amendment, as operating, as applied to a private corporation, to deprive it of liberty and property without due process of law and as denying to it the equal protection of the laws. The court said: "A state legislature, by legislative enactment or otherwise, has no authority to deprive a person of the right to labor at any legitimate business, or to deny any person within the jurisdiction of the United States the equal protection of the laws, or to prohibit a corporation that has a right to do business in the state to employ any person, whether alien or native, in the prosecution of any legitimate business. It is suggested that a corporation is not a 'person' within the meaning of that word as used in said 14th Amendment to the Constitution, and that, as corporations are organized under the laws of a state, the state may enact such laws as it may deem best for the control of such corporations, and has full

authority to deprive them of the right to employ aliens. Those contentions are fully met by the decision of the Supreme Court of the United States in *Gulf, C. & S. F. R. Co. v. Ellis* (1896) 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, in which case it is held that corporations are 'persons' within the provisions of said 14th Amendment, and that a state has no more power to deny to them the equal protection of the law than it has to deny it to individual citizens."

In *Re Case (Idaho)* supra, the alien was employed, it appears, by a paving company in order to carry out its contract with the municipal authorities for street paving; but the court said that the complaint did not charge a violation of the provisions of the statute relating to employment on public works, but merely that, as superintendent of a private corporation, the petitioner knowingly gave employment to aliens.

In *Chicago v. Hulbert* (1903) 205 Ill. 346, 68 N. E. 786, it was held that an assessment for local improvements was not invalid by reason of failure of the contractor to comply with a statute forbidding the employment by a city or contractor under it of other than native-born or naturalized citizens, or those who have in good faith declared their intentions to become citizens of the United States, when such employees are to be paid in whole or in part out of any funds raised by taxation,—as the statute was void. The court dismissed the point with the observation that, "a similar law was enacted by ordinance in the city of Chicago, and we have repeatedly held that such law is invalid, as it is in contravention of the Constitution and the right of individuals to contract. The statute in question is void upon the same grounds, and neither the city nor the contractor was under any obligation to observe it."

A municipal ordinance making it a misdemeanor for any person when having labor performed for the purpose of carrying out a contract with the city, to demand, receive, or contract for more than eight hours of labor in one day from any person, or to employ Chinese labor, was held void in *Ex parte Kubach* (1890) 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; but the extent to which the decision was affected by the clause prohibiting the employment of Chinese labor is not clear. The court said that the ordinance was simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and L.R.A.1916D.

was a direct infringement of the right of such persons to make and enforce contracts; and quoted the rule laid down by Cooley on Constitutional Limitations that it is not competent to forbid any person or class of persons, whether citizens or resident aliens, from offering their services in a lawful business, or to subject others to penalties for employing them.

It was held in *Fraser v. McConway & T. Co.* (1897) 82 Fed. 257, that a statute which imposed upon all employers of foreign-born unnaturalized male persons over twenty-one years of age a tax of 3 cents per day for each day such person was employed, and authorized the employer to deduct the tax from the wages of the employees, violated the 14th Amendment, in that it denied to such employees the equal protection of the law. The court said that the statute "imposes upon these persons burdens which are not laid upon others in the same calling and condition. The tax is an arbitrary deduction from the daily wages of a particular class of persons. Now, the equal protection of the laws declared by the 14th Amendment to the Constitution secures to each person within the jurisdiction of a state exemption from any burdens or charges other than such as are equally laid upon all others under like circumstances. . . . It is idle to suggest that the case in hand is one of proper legislative classification. A valid classification for the purposes of taxation must have a just and reasonable basis, which is lacking here."

The statute involved in *Fraser v. McConway & T. Co.* (Fed.) supra, was subsequently held unconstitutional by the supreme court of Pennsylvania as violating the 14th Amendment of the Federal Constitution and also the uniform rule of taxation required by Pa. Const. art. 9, § 1. *Juniata Limestone Co. v. Fagley* (1893) 187 Pa. 193, 42 L.R.A. 442, 67 Am. St. Rep. 579, 40 Atl. 977.

Among possibly other cases of that kind, see the recent decision in *Lillard v. Melton* (1915) — S. C. —, 87 S. E. 421, holding that a statute which provided that in the improvement of highways in a county all laborers employed, with the exception of officers, superintendents, and skilled mechanics who cannot be obtained in the county, shall be actual residents of the county, did not violate the state Constitution or the 14th Amendment to the Federal Constitution. The court said: "There is an absence of any penalty to enforce this provision, thereby indicating a legislative intent to

make the same purely suggestive or directory. Conceding, however, that the provision was mandatory, the objection could not be sustained, as no citizen of one county has the legal right to demand that he shall be employed upon the public works of another, and certainly the legislature, in directing the use or disposition of the public property or funds of the state or county, raised by taxation upon the people of either, has the power to limit the benefits to be derived therefrom to the residents of either. Such is plainly the conclusion reached by the United States Supreme Court in the case of *TRUAX v. RAICH* (U. S.) ante, 545."

As to constitutionality of statutes limiting hours of labor on public works, see notes to *Keefe v. People*, 8 L.R.A. (N.S.) 131; *People ex rel. Williams Engineering & Contracting Co. v. Metz*, 24 L.R.A. (N.S.) 201; and *Com. v. Casey*, 34 L.R.A. (N.S.) 767.

As to constitutionality of legislative limitation generally of hours of labor, see note to *Miller v. Wilson*, L.R.A. 1915F, 829, and earlier notes therein referred to.

And as to discrimination against non-residents, by statute or municipal ordinance imposing license or occupation tax, see note to *State v. Williams*, 40 L.R.A. (N.S.) 279. R. E. H.

IDAHO SUPREME COURT.

STATE OF IDAHO, Appt.,

v.

H. D. MORRIS, Respt.

(— Idaho, —, 155 Pac. 296.)

Sunday — moving picture show — religious entertainment.

A religious phonographic lecture given in good faith, without charge, in a theater, and illustrated by moving pictures, for the religious instruction of the audience, is not within a statute making it unlawful to keep open inter alia theaters, moving picture shows, and playhouses on Sunday.

For other cases, see *Sunday*, III. a, in Dig. 1-52 N. S.

(February 23, 1916.)

APPEAL by the state from a judgment of the District Court for Ada County acquitting defendant, after conviction in the justice's court, of keeping open and operating a moving picture show on Sunday. Affirmed.

The facts are stated in the opinion.

Note. — The applicability of Sunday laws to moving picture shows is discussed in the note to *Re Hull*, 30 L.R.A. (N.S.) 465, treating generally of the amusements that are prohibited by Sunday laws. See also later cases, *State v. Penny*, 30 L.R.A. (N.S.) 1155, and *State ex rel. Temple v. Barnes*, 37 L.R.A. (N.S.) 114, on applicability of Sunday laws to moving picture shows.

The question whether a free performance violates the Sunday law is discussed in the annotation to *McLeod v. State*, L.R.A. 1916B, 1130.

Generally as to regulations affecting moving picture shows, see note to *State ex rel. Ebert v. Loden*, 40 L.R.A. (N.S.) 193.

The censorship of moving picture films is discussed in the note to *Bainbridge v. Minneapolis*, L.R.A. 1916C, 224. L.R.A. 1916D.

Messrs. Raymond L. Givens and Evans Paul Barnes, for the State:

The lecture given by defendant was within a statute making it unlawful to keep open a moving picture show on Sunday.

United States v. Buffalo Park, 16 Blatchf. 189, Fed. Cas. No. 14,681; *Economopoulos v. Bingham*, 109 N. Y. Supp. 728; *Ex parte Lingenfelter*, 64 Tex. Crim. Rep. 30, 142 S. W. 555; *Ann. Cas.* 1914C, 765; *Lempke v. State*, — Tex. Crim. Rep. —, 171 S. W. 217; *Rosenberg v. Arrowsmith*, 82 N. J. Eq. 570, 89 Atl. 524.

The state has the inherent right to regulate the course of conduct on the part of the citizens of the state, and where they transgress the statute law such acts will be prohibited even though they are sought to be performed under the guise of religious liberty.

Com. v. Herr, 39 Pa. Super. Ct. 454, 229 Pa. 132, 78 Atl. 68, *Ann. Cas.* 1912A, 422; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *State v. Weiss*, 97 Minn. 125, 105 N. W. 1127, 7 *Ann. Cas.* 932; *State ex rel. Temple v. Barnes*, 22 N. D. 18, 37 L.R.A. (N.S.) 114, 132 N. W. 215, *Ann. Cas.* 1913E, 930; *State v. Neitzel*, 69 Wash. 567, 43 L.R.A. (N.S.) 203, 125 Pac. 939, *Ann. Cas.* 1914A, 899; *Wright v. Kelley*, 4 Idaho, 624, 43 Pac. 565; *Blaine County v. Heard*, 5 Idaho, 6, 45 Pac. 890; *State v. Dolan*, 13 Idaho, 693; 14 L.R.A. (N.S.) 1259, 92 Pac. 995; *Re Jacobs*, 13 Idaho, 720, 92 Pac. 1003.

Messrs. Wyman & Wyman, for respondent:

Penal statutes should be strictly construed.

Ex parte Bailey, 39 Fla. 734, 23 So. 552; *State v. Woodruff*, 68 N. J. L. 89, 52 Atl. 294; *Com. v. Alexander*, 185 Mass. 551, 70 N. E. 1017; *Lewis's Sutherland*, Stat. Constr. 2d ed. 520; *Adams v. Lansdon*, 18 Idaho, 483, 110 Pac. 280; *Re Hull*, 18 Idaho, 475, 30 L.R.A. (N.S.) 465, 110 Pac.

256; Re Bossner, 18 Idaho, 519, 110 Pac. 502.

The illustrated lecture given by defendant was not a moving picture show.

People v. Finn, 57 Misc. 659, 110 N. Y. Supp. 22.

Morgan, J., delivered the opinion of the court:

On August 11, 1914, the above-named respondent, together with two other persons, was arrested upon a warrant issued out of the justice's court of Boise precinct upon a charge of keeping open and operating a moving picture show on Sunday in the city of Boise, Idaho. The record does not disclose what disposition, if any, was made of the cases of the other defendants, but it appears that on November 30, 1914, the respondent, upon an agreed statement of the facts, was, by the justice of the peace, adjudged to be guilty of the crime charged against him. He appealed to the district court, where the case was submitted to the judge without a jury, upon the agreed facts, and where he was adjudged to be not guilty. The case is brought here by the state upon appeal from the judgment last mentioned.

It appears that respondent is a resident and citizen of the city of Boise, where he is engaged in the practice of his profession, that of an osteopathic physician, and that he devotes a portion of his time and means to religious work, and is an active member of the local class of the International Bible Students' Association, which is a branch, or subsidiary organization, of the Watch Tower Bible and Tract Society, a religious corporation. It is agreed: "That among other means employed by the aforesaid society and association, or religious organization, in preaching the gospel, teaching the Bible, and giving Bible lectures, is that known as the 'Photo Drama of Creation,' which consists of a series of Bible lectures, together with pictures and photographic illustrations thereof. That the same is shown in four parts, each part requiring two hours to hear and see the same. It takes up the Divine plan, as set forth in the Bible, from the beginning of Earth's creation and follows the development thereof in orderly manner down to the present date. That the arrangement thereof is as follows: Approximately 100 Bible lectures, or sermons, were carefully prepared, and then dictated, or spoken, into a phonograph, and records or discs thereof made, and afterwards said lectures, or sermons, were and are reproduced by the phonograph. That for the purpose of illustrating these Bible lectures, or sermons, and to enable the mind to more readily grasp the lessons taught thereby, paintings and photographs and photographic scenes of such Bible subjects are reproduced upon a screen

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by means of a stereopticon and cinematograph, or moving picture machine, which pictures, photographs, and photographic scenes relate to and illustrate the subject-matter of the lecture or sermon."

It is further agreed that, prior to the 9th day of August, 1914, the respondent, together with other citizens and residents of Boise who were members of the local class of the International Bible Students' Association, and interested in teaching the Bible and preaching the Gospel to others, procured a building in that city known as the "Majestic Theater" for the purpose of producing therein the Photo Drama of Creation; that the rent for the building was paid by the members of the local class of the association, to which respondent contributed; and that all other expenses in connection therewith were paid by the society, or association, or by the members thereof, in order that the citizens of Boise might have the opportunity of hearing such lectures, or sermons, and of seeing the illustrations thereof. The agreed statement of facts further recites as follows: "That on Sunday, the 9th day of August, 1914, the said Photo Drama of Creation was begun or opened at the building aforesaid and part 1 thereof was given. That on the same day, and just preceding the opening of the Photo Drama of Creation, the local class of the International Bible Students' Association held their regular religious services in said building, namely, the one known as the 'Majestic Theater,' and the defendant was present and participated in said meeting or religious worship. That thereafter and on the same day the defendant, together with others, actively engaged in giving said part 1 of said Photo Drama of Creation in said 'Majestic Theater' building. That the defendant's services in connection therewith were rendered entirely free, without charge or remuneration. That no one having any part therein or connection therewith received a salary, but some of the helpers were paid their actual expenses, which expenses were provided by voluntary contribution as aforesaid by persons interested in the teaching of the Bible as aforesaid, or by said society or association aforesaid. That all the funds of the said society or association are provided by voluntary contributions made by persons interested in the spreading of the Gospel and teaching the Bible as aforesaid."

It is further agreed that the Majestic Theater was one of the regular moving picture houses in Boise and was equipped for moving pictures, but was, at the time, under the exclusive management and control of the society and association heretofore mentioned, and was used in the manner and for the purposes heretofore set forth, and for no other.

The agreed statement of facts further recites: "All the pictures thrown upon the screen, and all the lectures or sermons given, and everything connected with the said Photo Drama of Creation as aforesaid, were clean and moral in character and were highly edifying and instructive. No advertisements of any kind were exhibited. All that was done and performed at the time and place mentioned in the complaint was of a religious nature, and the sole purpose of those connected therewith, including the defendant, was to enlighten and instruct the people, without the hope, expectation, or receipt of pecuniary profit or reward. The audience throughout was quiet, orderly, and reverential, and no applause was allowed or given."

It is agreed that the sole issue to be determined is whether or not the acts done at the time and place mentioned in the complaint in giving the lecture, or sermon, on the phonograph, and in illustrating the same by stereopticon slides and moving pictures, in the light of the religious claims therefor and significance thereof, constitute a violation of § 6825, Rev. Codes, as amended by chapter 99 of the 11th Session of the Idaho legislature (Sess. Laws 1911, p. 342), which provides: "It shall be unlawful for any person or persons in this state to keep open on Sunday any . . . theater, moving picture show, playhouse, dance house, race track, merry-go-round, circus or show, concert saloon, billiard or pool room, bowling alley or variety hall. . . . Any person or persons violating this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than thirty dollars (\$30) nor more than two hundred and fifty (\$250) for each offense and shall be punished by imprisonment in the county jail not to exceed ninety days, and upon a second conviction any license which may have been granted for opening and maintaining any such place of business shall also be rendered void and shall not be renewed within two years next thereafter."

Probably no better definition of the phrase "moving picture show," as used in the statute, can be found than that employed by the learned trial judge in this case. He said: "I think that the robust common sense of the community will say that it is a public exhibition of moving pictures primarily to amuse and entertain, sometimes incidentally carrying with it instructive features. The show is almost always operated for profit, although this is perhaps not an essential element of the definition. It is certain that the pictures are the main element and the pleasure feature predominates; that being L.R.A.1916D.

the connotation of the word 'show.' In other words, it is a public place of amusement, like all the other institutions with which it is grouped in the statute."

There is no doubt that the term "moving picture show" is generally understood to mean a place where motion pictures are exhibited for the purpose of amusement and entertainment, and this is the meaning to be applied to the phrase in determining what was the legislative intent when the statute under consideration was enacted.

This court said (Re Bossner, 18 Idaho, 519, 110 Pac. 502): "It is a well-established rule of law that when words have not a technical meaning or application, or when they have not been so used or employed in the statute, they should then be given their ordinary significance as they are popularly understood."

With this rule in mind it is impossible to conclude that it was the legislative purpose to prohibit the use, on Sunday, of a moving picture machine for the purpose of worship, or religious instruction, as a means of illustrating a sermon or lecture. It is apparent the legislature had in mind the suppression of the evil of conducting certain forms of business on Sunday. This view is strengthened by the fact that it is provided, as a part of the punishment in the event of a second conviction of a violation of the statute, that "any license which may have been granted for opening and maintaining any such place of business shall also be rendered void and shall not be renewed within two years next thereafter."

It cannot be inferred from the agreed facts in this case that respondent and his associates were engaged in the business of conducting a moving picture show in the sense in which that phrase is commonly used. Prior to its amendment this section of the Code was before the court for construction in Re Hull, 18 Idaho, 475, 30 L.R.A.(N.S.) 465, 110 Pac. 256, wherein it was said: "This class of legislation is upheld solely as an exercise of the police power of the state. The prohibition of public amusements on Sunday must therefore rest on the theory that it is necessary either for the protection of the public morals, the public health, or the public peace and safety."

We are in accord with that opinion as well as with that in Re Bossner, supra, wherein it was held, even before the statute was amended so as to expressly include moving picture shows among business enterprises the operation of which on Sunday was prohibited, that such shows came within the inhibition of the statute forbidding the opening or conducting on Sunday of "any theater, playhouse, . . . circus, or show, . . . or any such place of public

amusement;" for it may readily be seen that the legislature might, with entire propriety, consider the conducting of such a business on Sunday detrimental to the public morals or the public peace; but we are unable to reach the conclusion that the use of a moving picture machine for the purpose of illustrating a sermon or religious lecture can be by anyone deemed to be detrimental, in any manner, to the public welfare.

The Constitution of Idaho guarantees to each inhabitant of the state the inalienable right to decide for himself as to the wisdom and righteousness of his mode of worship. It is provided in § 4, art. 1, that "the exercise and enjoyment of religious faith and worship shall forever be guaranteed."

And in § 19, art. 21, as follows: "It is ordained by the state of Idaho that perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship."

The good faith of respondent and his associates in adopting and carrying out their plan of devotional exercises has not been questioned, and it is not for this court to decide that it is, or that it is not, the correct course for them to pursue. We feel that the provisions of the Constitution above quoted prohibit us from deciding that question; and that, in a case like this, where entire good faith is apparent, and where the exercises were not being conducted merely in the name of religion, and as a pretense and subterfuge to cover acts criminal in their nature, we would not presume to decide it if we were not so prohibited.

To place upon the statute under consideration the construction asked for by appellant, and to hold that the use of a moving picture machine on Sunday, for the purpose to which it was put by respondent and his associates, is keeping open or operating a moving picture show in violation of the statute, would be to improperly invoke the police power of the state; for, thus construed and in that particular, the statute

would bear no real or substantial relation to the public health, the public morals, the public peace, or the public safety. Such a construction would also bring the statute into conflict with § 4, art. 1, and § 19, art. 21, of the Constitution, for thereby religious liberty would be denied.

In case of *Grice v. Clearwater Timber Co.* 20 Idaho, 70, 117 Pac. 112, this court, quoting from *Cooley*, Const. Lim. 7th ed. p. 255, said: "Whenever an act of the legislature can be so construed and applied as to avoid conflict with the Constitution and give it the force of law, such construction will be adopted by the courts."

Continuing, it is said in the opinion: "And it is held by many courts that where there is room for two constructions of a statute, both equally obvious and equally reasonable, the court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the Constitution, and designed the act to take effect."

In case of *Chesebrough v. San Francisco*, 153 Cal. 559, 96 Pac. 288, the supreme court of California states the rule to be: "When a legislative provision is capable of two constructions, one consistent, and the other inconsistent, with the provisions of the Constitution, it is a well-recognized principle of construction that the statute should be given that construction which will make it harmonious with the Constitution, and comport with the legitimate powers of the legislature."

Applying that rule to this case, we hold that the use to which respondent and his associates put the moving picture machine and the other property appertaining to the Majestic Theater did not constitute keeping open or operating a moving picture show, as contemplated by § 6825, Rev. Codes, as amended by chapter 99 of the 11th session of the legislature, and the decision of the trial court is accordingly affirmed.

We recommend that the state pay respondent's cost upon appeal.

Sullivan, Ch. J., and Budge, J., concur.

KENTUCKY COURT OF APPEALS.

W. M. GORDON, Appt.,

v.

GEORGE GORDON, Admr., etc., of J. L. Gordon, Deceased.

(168 Ky. 409, 182 S. W. 220.)

Contract — to procure parole — validity.

A contract to aid in securing the parole of a prisoner, which does not contemplate the use of illegal means, but merely the presentation to the board of the necessary L.R.A.1916D.

papers and evidence, is not against public policy, although a statute imposes a penalty on any person who shall for reward aid or assist in procuring a pardon from the governor.

For other cases, see *Contracts*, III. c. 4, in Dig. 1-52 N. S.

(February 10, 1916.)

Note. — As to validity of contract to procure pardon, parole, or commutation of sentence, see annotation following this case, post, 580.

A PPEAL by plaintiff from a judgment of the Circuit Court for Boyle County sustaining a demurrer to a petition filed to recover expenses incurred under an alleged contract to aid in securing the parole of a prisoner. Reversed.

The facts are stated in the opinion.

Messrs. Jay W. Harlan and Henry Jackson, for appellant:

The contract was valid, and not contrary to public policy.

9 Cyc. 494; 1 Page, Contr. p. 661; Timothy v. Wright, 8 Gray, 522; Chadwick v. Knox, 31 N. H. 226, 64 Am. Dec. 329; William Deering & Co. v. Cunningham, 63 Kan. 174, 54 L.R.A. 410, 65 Pac. 263.

Mr. J. W. Rawlings, for appellee:

To allow plaintiff to recover would be against the public policy of the state and government, and would violate § 1370 of the Kentucky Statutes.

McGill v. Burnett, 7 J. J. Marsh. 640; Thompson v. Wharton, 7 Bush, 563, 3 Am. Rep. 306; Brown v. Young, 7 Ky. L. Rep. 664; Basket v. Moss, 115 N. C. 448, 48 L.R.A. 842, 44 Am. St. Rep. 463, 20 S. E. 733.

Mr. George Stone also for appellee.

Miller, Ch. J., delivered the opinion of the court:

The appellant, William M. Gordon, is a son of J. L. Gordon, who died in January, 1914. J. L. Gordon was the father of another son, George Gordon, who was confined in the state penitentiary at Frankfort, in 1909, under a judgment of the Boyle circuit court.

The petition alleges that in 1909 J. L. Gordon employed the appellant to prepare an application and to do what was necessary toward securing the parole of said George Gordon, and agreed and promised to reimburse and pay plaintiff for all the expense that he might incur in that work; that pursuant to said employment, the plaintiff prepared the application for the parole, and, in doing so made many trips to Frankfort, Danville, Harrodsburg, and over the entire county of Boyle, at his own expense.

The petition further alleges that by reason of the plaintiff being required to be absent from home in this work, he was forced to hire a man to work in his place on his farm; that the time consumed in this work and effort to get the parole was the greater part of five years; that he was required to pay for said substituted hand, at least \$1,000; and that his father agreed to pay the plaintiff his expenses, including the hire of the substituted hand.

The plaintiff also alleges that no unlawful means were used by him in said employment, and none were contemplated at the

time of the agreement; that said services so rendered were purely ministerial; that he did not use his personal influence with the paroling powers, and that it was never contemplated that he should do so.

It is further alleged that the agreement did not contemplate and did not include any reward or compensation to plaintiff whatever, but only included and provided for the plaintiff having returned to him his expenses, as above indicated; and that J. L. Gordon, by reason of his age and physical condition, was unable to personally make said trips in the preparation of said petition for a parole.

Upon the death of J. L. Gordon, his son J. T. Gordon qualified as his administrator; and, J. T. Gordon having subsequently died, George Gordon was appointed administrator of his father's estate.

In December, 1914, William M. Gordon brought this action to recover his expenses aggregating \$1,000, and, the court having sustained a demurrer to his petition, upon the ground that the contract was against public policy and void, the plaintiff prosecutes this appeal.

By way of defense, the administrator relies upon § 1370 of the Kentucky Statutes, which reads as follows: "If any person shall, for fee or reward, or the promise thereof, aid or assist in procuring the governor to grant or refuse a pardon, remission or respite of any punishment or fine, he shall be fined not less than twenty nor more than five hundred dollars."

Appellant, however, denies the applicability of the statute, supra, or the doctrine that the contract relied on is against public policy, because, as he contends: (1) The work performed by the plaintiff was to secure a parole, and not a pardon; (2) it was clerical or ministerial, and under the contract the plaintiff was not to be paid for his personal influence; and (3) the money sought to be recovered is not a reward, remuneration, or profit to the plaintiff for his personal services, but is only for money expended and pecuniary loss suffered by reason of expenses and time lost from his own business, by reason of the contract.

It is contended by appellant that there is a radical difference between a contract to procure a pardon from the governor, which is denounced by the statute, and a contract to prepare an application to the board of prison commissioners, for a parole; that a contract to procure a parole is in no respect against public policy, and that the reason which makes a contract to procure a pardon invalid has no application whatever to a contract to prepare and present an application for a parole.

Since the enactment of § 1370 of the Kentucky Statutes, the power of parole has been vested in the state board of prison commissioners, subject to the approval of the governor. Ky. Stat. § 3828. By the terms of that statute the board of prison commissioners must base its action upon the record of the prisoner while confined; the record of his life previous to his confinement, which requires the ascertainment of the sentiment of the people where he formerly resided; and upon his securing, before his parole, a contract for some respectable employment for a period of six months after being liberated. Of course, much of this information can be furnished only through the efforts of some outside person in behalf of the man confined in the penitentiary. Moreover, the parole does not pardon the prisoner; he still remains in the legal control and custody of the board of prison commissioners. The pardoning power remains vested in the governor. It will thus be seen that the action of the paroling board must be based upon the facts specified in the statute, and that many of those facts necessarily must be gathered from outside sources.

There are many acts which the law positively forbids, and for the doing of which some penalty is attached. Whether the prohibition is by the common law or by statute is immaterial. Any agreement which involves the doing of an act which is positively prohibited by the rules of the common law or by statute is illegal and void.

There are also many things which the law does not prohibit, in the sense of attaching penalties, but which are so mischievous in their nature and tendency that on grounds of public policy they cannot be admitted as the subject of a valid contract.

It is probable that a satisfactory or precise definition of public policy has never been given. The courts have, however, frequently approved Lord Brougham's definition of public policy as the principle which declares that no one can lawfully do that which has a tendency to be injurious to the public welfare.

But the notion as to what is injurious to the public welfare at one time may not accord with the notion of a succeeding generation. Public policy, therefore, is variable; and that which is contrary to the policy of the public at one time may become public policy at another time. No hard and fast rule can be given by which to determine what is public policy.

It has been said that a contract is against public policy if it is injurious to the interests of the public, or contravenes some established interest of society, or if it

contravenes some public statute, or is against good morals, or tends to interfere with the public welfare or safety, or, as it is sometimes put, if it is at war with the interests of society, and is in conflict with the morals of the time. *Pueblo & A. Valley R. Co. v. Taylor*, 8 Colo. 1, 45 Am. Rep. 512; *McNamara v. Gargett*, 68 Mich. 454, 13 Am. St. Rep. 355, 36 N. W. 218.

The rule must not be understood to mean that in order that a contract may be declared to be against public policy, it must be inimical to morality. Many contracts which are not immoral are nevertheless void on the ground that they are against public policy. *Kohn v. Milcher* (C. C.) 10 L.R.A. 439, 43 Fed. 641.

In applying this rule, it has been said that contracts are against public policy when they tend to injustice or oppression, restraint of liberty and natural or legal right, or the obstruction of justice, or the violation of a statute, or to interfere with or control executive, legislative, or other official action; or to prevent competition whenever a statute or any known rule of law requires it.

In many jurisdictions, statutes have been passed similar to § 1370 of the Kentucky Statutes, denouncing as unlawful, contracts to procure a pardon from the governor; and if the contract in the case at bar employed the appellant, for a fee or reward, to procure a pardon from the governor, it would be against the public policy of the state, and consequently void.

The reason for the rule, and the exceptions thereto, are stated in 9 Cyc. 493, as follows: "The exercise of the pardoning power committed to the executive should be as free from any improper bias or influence as the trial of the convict before the court; consequently the law will not enforce a contract to pay money for soliciting petitions, signing petitions, using influence to obtain a pardon, or the remission of a forfeiture. But as in the case of lobbying contracts many courts have held that the reason for holding such agreements void fails when no unlawful means of attaining the desired object are contemplated by the contract itself or in fact employed; and such services, when performed at defendant's request, are a good consideration for a subsequent promise to pay. Such agreements would clearly seem to be lawful where the services contracted for are publicly rendered by advocates disclosing their true relation to the subject, and not by private individuals keeping secret the character in which they solicit; but where the compensation is contingent on success, this is a strong circumstance against the validity of the agreement."

In *McGill v. Burnett*, 7 J. J. Marsh. 640, a contract by which McGill's intestate agreed to pay Burnett \$100 in consideration of his services and labor to be performed in and about the management of a petition to the governor, in case of a certain forfeiture, this court said the contract was, in effect, to pay the plaintiff for his management, whether fair or foul, in inducing the governor to remit a forfeiture, and that such contracts tended to obstruct a correct administration of the government, and were void as against public policy. A similar ruling was made in *Brown v. Young*, 7 Ky. L. Rep. 664. See also *Averbeck v. Hall*, 14 Bush, 505, for a ruling similar in principle.

But, under the exception to the general rule, as above stated, the contract will not be held invalid when no unlawful means of attaining the desired object are contemplated by the contract itself, or in fact employed. Thus, the general rule which makes contracts of this character void does not apply in cases in which the party whose pardon is sought to be obtained has not been convicted of crime by a legally constituted tribunal having the constitutional right to try and punish the offender, as where the trial of a prisoner by a military court is unauthorized by law and forbidden by the Constitution, and its sentence is consequently a nullity.

Where, under such circumstances, a person undertakes by the use of his personal influence with the military commander, to save the unfortunate man from the impending danger of threatened execution, or unauthorized and illegal imprisonment, his act cannot be regarded as an agreement to obstruct the proper administration of the government, or to defeat the ends of public justice. 6 R. C. L. 767.

The reasons which sustain the general rule and the statute, *supra*, apply only in cases in which the party whose pardon is sought to be obtained has been convicted of crime by a legally constituted tribunal having the constitutional right to try and punish the offender. Thus, in *Thompson v. Wharton*, 7 Bush, 503, 3 Am. Rep. 306, Solon Thompson was arrested in 1865 by the Federal military authorities. In the following June he was tried by a military court upon the charge of being a guerrilla, and was convicted and sentenced to suffer death. Wharton, a Louisville lawyer, had been employed prior to the trial to defend Thompson for an agreed fee, and, on the day fixed for Thompson's execution, a new contract was made with Wharton; he agreeing, by proper proceedings before the commanding general, without whose approval the sentence of the military court could not be carried into execution, to prevent the

infliction of the adjudged punishment, and, if possible, to procure the discharge of Thompson, in consideration of a further fee of \$300, to be paid only in event of his success.

In March, 1866, Thompson was discharged from custody, and Wharton sued to collect his fee. Upon the trial the court was asked to instruct the jury that if they believed from the evidence that the sole consideration for the execution of the note sued on was the agreement of Wharton to use his personal influence with the commanding general to secure the pardon of Thompson, or to have his punishment commuted, the agreement was contrary to public policy, and void.

But the court, speaking through Judge Lindsay, cited *McGill v. Burnett*, *supra*, and held that the rule there announced did not apply, and should not control in cases where the conviction was unauthorized by law and forbidden by the Constitution, as in Thompson's Case.

In the course of the opinion, Judge Lindsay said: "Under these circumstances the appellee undertook, by the use of his personal influence with the military commander, to save the unfortunate man from the impending danger of threatened execution or unauthorized and illegal imprisonment. Such an act cannot be regarded as an agreement to obstruct the proper administration of the government, nor to defeat the ends of public justice. The object sought to be accomplished, as well as the means to be resorted to, were entirely defensible, whether regarded from a legal or moral standpoint; and, such being the case, it is difficult to perceive how the contract constituting the consideration of the note can be regarded as contravening public policy."

Again, in *Rau v. Boyle*, 5 Bush, 254, Rau & Rieke, who were Confederate sympathizers, had purchased a quantity of tobacco in Western Kentucky, which had been seized by General Payne, the Federal military commander, at Paducah, under pretense of military authority. While their tobacco was thus wrongfully withheld from them, Rau & Rieke made a written contract with John Boyle, by which the latter undertook to procure the release of the tobacco, Boyle to have one half of it for his services.

By a subsequent contract with John and J. T. Boyle, Rau & Rieke were to buy tobacco and cotton on speculation and ship the same under a permit then held by Boyle from Major General Burbridge, of the United States Army, or under other permits which he might thereafter obtain, and the profits realized from said purchases were to be equally divided between Rau & Rieke

and the Boyles. Boyle succeeded in procuring the release of the tobacco which had been seized by General Payne, and other tobacco was bought and shipped under the second contract above referred to. The Boyles were Union men, and had held positions in the United States Army, which they resigned before John Boyle undertook this agency to get the tobacco released.

In answer to the suit of Boyle & Boyle upon the contracts, Rau & Rieke contended that their agreements with Boyle & Boyle were mere promises to pay them for their loyalty, and for the exercise of their influence with officers of the United States government, and consequently were illegal as against public policy. But the court overruled this defense, holding that since Rau & Rieke had been unlawfully deprived of their tobacco, and their only remedy seemed to be the use of moral means, the court could not say that the employment of Boyle & Boyle to effectuate the purpose was either contrary to law or against public policy.

It will thus be seen that the strict rule of the statute has not been applied by this court in similar cases when the reason for the rule has ceased to exist.

Furthermore, the case before us does not come within the scope of the statute, and it has none of the features which would render it immoral or against public policy. The contract sued on was for the procurement of a parole, not a pardon; it is for

reimbursement of expenses incurred, not for a fee or compensation; and the petition expressly states that the contract did not contemplate the use of any personal influence with any officers of the state in procuring the parole.

While we would uphold the integrity of the statute wherever it is applicable, under the authorities cited there is nothing in the contract before us which violates any rule of public policy. *William Deering & Co. v. Cunningham*, 63 Kan. 174, 54 L.R.A. 410, 65 Pac. 263; *Chadwick v. Knox*, 31 N. H. 226, 64 Am. Dec. 329; *Moyer v. Cantieny*, 41 Minn. 242, 42 N. W. 1060; *Stroemer v. Van Orsdel*, 74 Neb. 132, 4 L.R.A. (N.S.) 212, 121 Am. St. Rep. 713, 103 N. W. 1053, 107 N. W. 125; *Denison v. Crawford County*, 48 Iowa, 211; *Hunt v. Test*, 8 Ala. 713, 42 Am. Dec. 659; *Trist v. Child* (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; and *Wright v. Tebbitts*, 91 U. S. 252, 23 L. ed. 320, contain interesting and valuable discussions of the question; and support the conclusion here reached.

The plaintiff might have been required, upon motion, to file a bill of particulars, showing his claim in detail; but that defect in the petition did not go to the merits of the plaintiff's claim, and a bill of particulars may yet be required.

Judgment reversed, with instructions to overrule the demurrer to the petition, and for further proceedings.

Annotation—Validity of contract to procure pardon, parol, or commutation of sentence.

As to validity of contract by an attorney to secure suspension of criminal law as to offenses thereafter committed, see note to *Arlington Hotel Co. v. Ewing*, 38 L.R.A. (N.S.) 842.

Though there is some conflict of opinion, contracts entered into to obtain a pardon or commutation of sentence have generally been upheld where the services contemplated are not other than the proper presentation of the case before the pardoning power. Where, however, personal interest enters into the success of the contract, or the use of personal influence is contemplated, the general rule is that the contract is illegal as against public policy, and so unenforceable.

A contract entered into by an attorney to procure a pardon by the proper use of legitimate means is not illegal or against public policy. *Formby v. Pryor* (1854) 15 Ga. 258; *Meadow v. Bird* (1867) 22 Ga. 246; *Moyer v. Cantieny* L.R.A.1916D.

(1889) 41 Minn. 242, 42 N. W. 1060; *Chadwick v. Knox* (1855) 31 N. H. 226, 64 Am. Dec. 329; *Bremsen v. Engler* (1883) 17 Jones & S. (N. Y.) 172; *Newbold v. McCrorey* (1916) — S. C. —, 87 S. E. 542.

Nor is such a contract illegal because compensation is made contingent on success. *Moyer v. Cantieny* (1889) 41 Minn. 242, 42 N. W. 1060.

A distinction should be made between an employment of this kind and a contract to procure a pardon made by a person who is not an attorney; such a contract would be objectionable because it would appear on its face that the means to be employed were influence or personal solicitation, or some others equally objectionable, while in this case the employment is to perform services in the line of the employee's profession which for any other object would be unobjectionable. *Bremsen v. Engler* (1883) 17 Jones & S. (N. Y.) 172.

And in *Chadwick v. Knox* (1855) 31 N. H. 226, 64 Am. Dec. 329, the court said that "a person in prison can do little to aid himself in bringing his case to the consideration of the executive. For everything that must be done without the walls of the prison the convict is compelled to rely on the assistance of those who have their liberty. Such assistance may be afforded from motives of charity and compassion, or the motive may be in part kindness and in part an expectation that the party relieved will be ready to afford a suitable compensation for the services and expenses; or the party in prison may employ another to do such acts as may be rightfully and properly done for his relief, and contract to pay him for his services and to repay him his expenses. Such a contract, if the parties contemplate only a resort to legal and proper measures, is free from any just exception, and binding upon the parties."

So, also, in *Moyer v. Cantieny* (Minn.) supra, the court stated that "it would be proper and often expedient that an attorney at law examine the case upon which the conviction was based to see whether, notwithstanding the final judgment of the law, the case may not be of such a nature as to justify the exercise of the extraordinary power of pardon. He may direct investigations to the discovery of facts bearing upon the question of guilt not discoverable at the time of the trial. The attention of prosecuting officers and of the judge who tried the cause may be directed to newly discovered facts or to any of the circumstances of the case, and their recommendations in favor of a pardon may be sought. Whatever considerations may properly affect the action of the executive may be urged upon his attention."

And in *Houlton v. Dunn* (1895) 60 Minn. 26, 30 L.R.A. 737, 51 Am. St. Rep. 493, 61 N. W. 698, in referring to and quoting from *Moyer v. Cantieny* (Minn.) supra, the court as dictum said: "To the reasons given by the court in this case we may add that the statute expressly provides that a person convicted of crime may by petition apply to the governor for pardon. Such petitioner is usually one who is confined to some prison and unable to present the petition personally to the governor. Not only this, but it is very seldom that such a petition is made by one learned in the law; and it is therefore a legal right which a prisoner has under such circumstances to employ an attorney to prepare his petition, present it to the governor for pardon, and

have such argument made in behalf of the petitioner as may be pertinent and advisable. As a petition and pardon are authorized by law, the presentation of a petition duly and legally prepared, accompanied by a legal argument in behalf of the petitioner showing the illegality of his confinement, or its injustice, and that public interests would not be violated by the granting to him of a pardon, cannot be a proceeding contrary to public policy, and certainly a contract for such purpose should not be declared void."

On the contrary, a contract by an attorney to procure a pardon was held to be against public policy and void in *Brown v. Young* (1886) 7 Ky. L. Rep. 664.

Nor, it was held, could there be a recovery on quantum meruit for what an attorney might legally do, having for his end the procuring of a pardon, when the contract is to procure a pardon without limiting the services to such as can be legally contracted for. (Ky.) Ibid.

So, also, an agreement to obtain a commutation of sentence was held to be illegal and void in *Kribben v. Haycraft* (1858) 26 Mo. 396. The court stated that the distinction between such an agreement and an agreement to obtain a pardon, which is contrary to public policy and void, is nominal, the principle being the same in both cases, and all the considerations that uphold the propriety and wisdom of the rule in one case applying to the other.

But an agreement by an attorney to use his personal influence with the commanding general to secure the pardon of his client, who had been convicted by a military tribunal of being a guerrilla, or to have his punishment commuted, was held in *Thompson v. Wharton* (1870) 7 Bush (Ky.) 563, 3 Am. Rep. 306, not to be contrary to public policy and void, as the conviction had been illegal, the military courts having had no jurisdiction.

In *McGill v. Burnett* (1832) 7 J. J. Marsh. (Ky.) 640, an agreement to pay one a certain sum "in consideration of his services and labor to be performed in and about the management of a petition to the governor in case a certain forfeiture described in the contract was remitted by him" was held illegal and unenforceable. The court said that "the contract is in effect to pay the plaintiff for his management, whether fair or foul, in inducing the governor to remit a forfeiture. Such contracts tend to obstruct a correct administration of the government. He who labors for the re-

ward promised will be induced to use his influence for the money he is to obtain, when as a patriot and citizen he should only act for the good of his country and under an impartial sense of justice tempered with mercy. We can readily imagine the dangers likely to result from the corrupt artifices of mercenary managers in procuring pardons and remissions."

So, also, in *Hatzfield v. Gulden* (1838) 7 Watts (Pa.) 152, 32 Am. Dec. 750, it was held that a contract to secure signers to a petition for pardon was illegal and unenforceable, especially where, as in this case, it appeared that the party was acting not from pity nor from the sense that the punishment was too severe, nor from friendship to the prisoner, but for his own gain and emolument. The court stated that it was not necessary to say whether, after the whole transaction is closed, a person who incidentally paid some postage, or who under special circumstances carried a petition the signatures to which were spontaneously made, may not receive his actual expense and daily pay, but that it would be a very special case, however, to justify even this, and added that this was not such a case, and it did not wish to see advertisements that pardons will be obtained at the lowest price nor anything which approaches to it, and that generally all contracts to change the course of trials or the effects of trials, whether to obtain the liberation of a prisoner by money to the jailors or to obtain a pardon by the use of money directly or indirectly, must be void.

Promissory notes executed by one convicted of rape and made payable to prosecutrix and to her attorneys, part of the consideration being that she should sign a petition for a pardon, were illegal and void as against public policy. *Haines v. Lewis* (1880) 54 Iowa, 301, 37 Am. Rep. 202, 6 N. W. 495.

So, also, an agreement that for a pecuniary consideration a person will withdraw opposition to the granting of a pardon to one who has been convicted of a crime, and will, by solicitation and the exercise of personal influence, endeavor to induce the pardoning authority to grant one, contravenes public policy and is void. *William Deering & Co. v. Cunningham* (1901) 63 Kan. 174, 54 L.R.A. 410, 65 Pac. 263. The court distinguished between the services of persons legally employed to prepare a petition, to collect evidence showing the right to a pardon, and submit the same, together with proper arguments, either oral or in

writing, to the governor or other authority granting pardons, and the services contracted for in the present case, which were personal influence and lobby services, not by anyone skilled in such work, but by those who had been instrumental in securing the conviction, and the withdrawal of their opposition to the granting of the pardon which had been applied for, and stated that the purchase of personal influence to obtain a pardon, or to control the operations of any department of the government, is immoral and pernicious in tendency, and cannot receive the sanction of courts.

And a mortgage to secure promissory notes which represented the amount the mortgagor had defrauded the mortgagee, but which was given on consideration that the mortgagee without improper means would obtain a nolle prosequi from the governor of an indictment for conspiracy to defraud found against the mortgagor, was held in *Willey v. Collier* (1854) 7 Md. 273, 61 Am. Dec. 346, to be against public policy and void. The court said: "There is no doctrine better settled than that agreements to obtain executive clemency by means of pardons or writs of nolle prosequi cannot be enforced. The reasons are obvious. They are designed to protect the exercise of this power from abuse through the intervention of designing persons, and although in the particular instance no improper influences may have been resorted to, the public interest in such question requires that the principle should be enforced in all cases. It may sometimes as between the parties be unjust to a claimant who has rendered valuable service for another in his distress, but rules of law founded on public policy and the safety of society will not be set aside to sustain such individual demand."

There is much danger of abuse in the exercise of the pardoning power and in granting writs of nolle prosequi, arising from the manner in which such applications are generally presented. They were, before the adoption of the present Constitution, preferred and acted on *ex parte*, the governor necessarily relying on the imperfect, not to say false, lights that such circumstances might afford. It is easy to perceive that this danger is greatly increased where the party urging the application is unknown to the executive, the paid agent of the accused, or is acting under the strongest inducements to varnish or misrepresent the facts by reason of his own interest in the success of the measure. No class of cases presents a more striking illustra-

tion than that to which the presentment mentioned in this record belongs. If it be understood as the law of the state that such compromises are binding and may be enforced, we may anticipate an increase in number of presentments for raising money under false pretenses and for conspiracies to defraud, found at the instance of persons defrauded, hoping thereby ultimately, as here expected, to secure the payment of their claim against the offenders."

And in *Norman v. Cole* (1800) 3 Esp. (Eng.) 253, it was held that an action would not lie to recover money deposited for the purpose of being paid to one who had access to persons of influence, for his services in using his influence to procure a pardon for one sentenced to death, by representing in favorable terms the case and character of the one so sentenced. The court stated that "where a person interposes his interest and good offices to secure a pardon, it ought to be done gratuitously, and not for money; the doing an act of that description should proceed from pure motives, and not from pecuniary ones."

But a release from all liability for damages, given by one convicted of illegal liquor selling, under a statute the constitutionality of which was doubted, in consideration that the releases and others would take steps to procure a pardon, was held in *Timothy v. Wright* (1857) 8 Gray (Mass.) 522, not to be illegal as contrary to public policy. The court stated that "the release itself shows that the liquors had been seized and

destroyed under a judicial decision as a legal penalty against the releasor; but that doubts had arisen whether that law was constitutional. If it was not, then he might have a suit for damages against the magistrates, the complainants, the executive officers who actually executed the judgment and destroyed the liquors. The purpose of this release was to quiet their claims for extreme damages. But at the same time that the liquors were adjudged to be destroyed as a penalty for a violation of law, by force of the same law he was subjected to a personal penalty by imprisonment. Now it seems to us that it would be right and fit for those who were acquainted with all these circumstances, on being satisfied that the convict would relinquish this extreme claim for pure damages against those who acted, as they supposed, under the justification of the law and in conformity with their duty, to apply to the executive to pardon the convict from the whole or part of the personal penalty; and that it would not be wrong or against public policy for the executive to receive and take such representations into consideration in the exercise of his high prerogative."

One who has paid money under an illegal contract to secure a pardon cannot after the contract is executed recover such money back. *O'Reilly v. Cleary* (1879) 8 Mo. App. 186.

Otherwise, however, if the contract is unexecuted. *Adams Exp. Co. v. Reno* (1871) 48 Mo. 264. J. H. B.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA

v.

E. T. BASS, Appt.

(— N. C. —, 87 S. E. 972.)

Municipal corporation — ordinance — erection of stables — application.

1. A municipal ordinance forbidding the erection of a stable nearer the house of a neighbor than of the owner applies to stables in course of erection.

For other cases, see *Municipal Corporations*, II. c. 1, in *Dig. 1-52 N. S.*

Note. — For stable as a nuisance, see notes to *Oshler v. Levy*, 17 L.R.A. (N.S.) 1025, and *Douglas v. Greenville*, 49 L.R.A. (N.S.) 958, and notes on analogous questions there referred to.

The different phases of the general subject of municipal control over nuisances are treated in notes that may be found by consulting the Index to L.R.A. Notes, under the title, "Municipal Corporations," subtitle, "Nuisance."

Same — police power — location of stables.

2. The police power of a municipal corporation does not extend to the passage of an ordinance merely forbidding the erection of a stable nearer the house of a neighbor than of the owner.

For other cases, see *Municipal Corporations*, II. c. 4, c, in *Dig. 1-52 N. S.*

(Clark, Ch. J., dissents.)

(March 1, 1916.)

APPEAL by defendant from a judgment of the Superior Court for Nash County, convicting him of erecting a stable nearer

ject of municipal control over nuisances are treated in notes that may be found by consulting the Index to L.R.A. Notes, under the title, "Municipal Corporations," subtitle, "Nuisance."

to the house of his neighbor than to his own, in alleged violation of a town ordinance. Reversed.

Statement by Brown, J.:

This is an indictment, tried November term, 1915, for violating the following ordinance of the town of Nashville: "No person or persons, firm or corporation shall build or cause to be erected any privy, stables or stalls nearer to a neighbor's residence than it is to the owner's; and no privy shall be constructed nearer than 25 feet of any public street, under penalty of twenty-five (25) dollars for each offense. Each day's continuance of such privy, stables or stalls after notice by the sanitary officer shall constitute a separate offense."

The defendant was convicted, and, from the judgment pronounced, appealed.

Messrs. T. T. Thorne and A. C. Bernard, for appellant:

The court will not take judicial notice of the existence of a town charter or grant of corporate powers. The rule is: "That judicial notice will be taken by the court of knowledge of the facts of uniform, natural occurrence, immemorial usage, historical sanction, or general notoriety."

12 Am. & Eng. Enc. Law, 151; Hughes v. Craven County, 107 N. C. 598, 12 S. E. 465; Durham v. Richmond & D. R. Co. 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1.

An ordinance must be "impartial, fair, and general." It would be unreasonable and unjust to make, under the same circumstances, an act when done by one person penal, and when done by another not so.

Barger v. Smith, 156 N. C. 323, 72 S. E. 376, 160 N. C. 205, 75 S. E. 1098.

A stable is not a nuisance per se.

Dargan v. Waddill, 31 N. C. (9 Ired. L.) 244, 49 Am. Dec. 421; Hyatt v. Myers, 73 N. C. 237; Privett v. Whitaker, 73 N. C. 556.

It must be shown and found as a fact by a jury that such stables must have been so built, so kept or used, as to destroy the comfort of persons owning and occupying adjoining premises, or impair the value of such premises as places of habitation.

Thomason v. Seaboard Air Line R. Co. 142 N. C. 300, 55 S. E. 198.

Assuming the town had a charter, it had no authority, from another view, to pass the ordinance in question.

State v. Ray, 131 N. C. 814, 60 L.R.A. 634, 92 Am. St. Rep. 795, 42 S. E. 960; State v. Webber, 107 N. C. 962, 22 Am. St. Rep. 920, 12 S. E. 598; State v. Thomas, 118 N. C. 1121, 24 S. E. 431; State v. Dannenberg, 150 N. C. 799, 63 S. E. 946; State L.R.A.1916D.

v. Darnell, 166 N. C. 300, 51 L.R.A.(N.S.) 332, 81 S. E. 338.

Messrs. T. W. Bickett, Attorney General, and T. H. Calvert, Assistant Attorney General, for the State:

The courts will take judicial notice of municipal charters.

Chamberlayne, Et. § 623; Dill. Mun. Corp. § 231.

Testimony offered by the defendant, tending to show the motive or reasons of the board of commissioners in adopting the ordinance, was properly excluded.

McQuillin, Mun. Ord. §§ 161, 162; Dill. Mun. Corp. §§ 680, 681; Title Municipal Corporations, 28 Cyc. 375.

A stable, though not a nuisance per se, may become a nuisance, and therefore is a proper subject of municipal regulation.

McQuillin, Mun. Ord. § 450; Dill. Mun. Corp. § 692; Title Nuisances, 29 Cyc. 1181; Oehler v. Levy, 17 L.R.A.(N.S.) 1025, note; Dargan v. Waddill, 31 N. C. (9 Ired. L.) 244, 49 Am. Dec. 421.

An ordinance delegating to the owners of one half the ground in any block the power to determine whether a livery stable may be erected thereon or not is invalid, as an unconstitutional delegation of legislative power.

St. Louis v. Russell, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; State v. Tenant, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387.

Whether or not an ordinance is unreasonable is a question for the court.

Small v. Edenton, 146 N. C. 527, 20 L.R.A.(N.S.) 145, 60 S. E. 413; McQuillin, Mun. Corp. §§ 726, 728, 729.

Brown, J., delivered the opinion of the court:

The defendant was convicted of erecting his stable nearer the house of his neighbor than to his own, the evidence being that it was located 14 feet 7 inches from Mrs. Collin's residence and three times that distance from his own residence.

The contention that the ordinance does not apply to a stable in course of construction cannot be maintained. In Privett v. Whitaker, 73 N. C. 554, it was held that a municipal ordinance forbidding the erection of a wooden building within certain limits applied to a building the erection of which had been commenced at the time the ordinance was adopted. Stables are not per se nuisances at common law, to be abated regardless of the manner in which they are kept. Dargan v. Waddill, 31 N. C. (9 Ired. L.) 244, 49 Am. Dec. 421.

Nevertheless, the possibility that they may become nuisances, together with their objectionable character when located very

near to dwellings, places them in the category of buildings the location of which may be designated and controlled by reasonable ordinances enacted by the municipality in which they are situated. *St. Louis v. Russell*, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; *McQuillin*, Mun. Ord. § 450, 29 Cyc. 1171; *Dill. Mun. Corp.* 692.

It is contended that this ordinance is invalid because it is unreasonable and not uniform, in that it does not afford protection to all citizens alike, and is not reasonably appropriate for the accomplishment of any legitimate object falling within the police power of the state. 6 R. C. L. § 226. The objection is well taken, as the ordinance manifestly fails to accomplish any purpose properly falling within the scope of the police power. *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann. Cas. 1175; 6 R. C. L. § 226, and notes. Its purpose is presumed to be to improve the health of the inhabitants of the town, as well as to minister to their comfort. It fails conspicuously to accomplish such purpose, as, under it, stables may be kept with impunity obnoxiously near any number of dwellings if they are equally as near the dwelling of the owner of the stables. Thus it is put within the power of the owner to annoy his neighbor at will if he is willing to endure the same annoyance himself.

An ordinance, to be valid, must be uniform in its application to all citizens, and afford equal protection to all alike. It must not discriminate in favor of one person or class of persons over others. To be valid, it must furnish a uniform rule of action. *State v. Tenant*, 110 N. C. 612, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387. It must operate equally upon all persons, as well as for their equal benefit and protection, who come or live within the corporate limits. 1 *Dill. Mun. Corp.* § 380; *State v. Pendergrass*, 106 N. C. 664, 10 S. E. 1002; *State v. Summerfield*, 107 N. C. 898, 12 S. E. 114.

The learned attorney general, with his usual candor, admits that the ordinance is void as a municipal regulation, and in his brief states the legal objections to it so strongly that we quote in extenso: "The consideration that raises a grave doubt about the constitutionality of the ordinance is that the commissioners of the town, who are by statute clothed with the power and duty of exercising their judgment in the enactment of measures for the protection of the public health, have not exercised any judgment at all, and have not declared what, in their opinion, is the shortest distance from a residence a stable should be permitted, but it is left to each citizen to

determine that question for himself, with the obligation that when he has determined it, he must afford to his neighbor the same protection he does himself. In this view of the case, there would seem to be two fatal objections to the validity of the ordinance: First. That it is a clear delegation of legislative power to an individual. This court has held in *State v. Tenant*, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387, that a board of aldermen itself cannot be vested with any discretion in the enforcement of an ordinance upon the ground that there would be no general or uniform rule of action, and it would seem to follow that it cannot be left to the judgment, taste, or whim of an individual to say how far a stable must be from a residence. In *St. Louis v. Russell*, supra, it is held that an ordinance delegating to the owners of one half the ground in any block the power to determine whether a livery stable may be erected thereon or not is invalid, as an unconstitutional delegation of legislative power. The authorities in support of the proposition are reviewed on pages 727 and 728 of 20 L.R.A., *State v. Tenant*, supra, being among the cases cited."

Again he says: "The second objection to the validity of the ordinance is that it necessarily results in a standard devoid of any element of equality or uniformity, both of which elements are essential to a valid ordinance. The practical result of the enforcement of the ordinance would be a standard as variable as the sizes of the different lots in a town and as the judgment and taste of the individual citizens. Under the ordinance there could be a hundred stables within 50 feet of a residence and none of them be obnoxious to the ordinance, and at the same time there could be a hundred other stables more than a hundred feet from any residence and all of them a violation of the ordinance. The owner of a large lot could build his stable 300 feet from his residence, but if it happened to be within 250 feet of a residence of another, he would be subject to indictment; but if he moved up his stable so that it would be 100 feet from his own residence and 110 feet from a dozen other residences, he would 'clear the law.' The proposition that a stable 250 feet from a single residence is a menace to the public health, while the same stable moved to a point within 110 feet of a dozen residences would not be a menace to the public health, has in it elements of unreasonableness worthy of the of the serious consideration of this court."

What is so well said by Clark, J., in *State v. Hord*, 122 N. C. 1094, 65 Am. St.

Rep. 743, 29 S. E. 952 (sustaining an ordinance prohibiting a resident from keeping a hogpen within 100 yards of his neighbor's residence), is peculiarly applicable to this case: "The object of the ordinance is not to prevent a man from injuring himself by keeping his hogpen too near his own house, for that is a matter he can remedy at will, but to protect the public against a nuisance which they have no power to prevent except through the authority of a town ordinance acting on the offender."

The ordinance now under consideration is the converse of that. Under this ordinance one may injure his neighbor if, from necessity or caprice, he is willing to endure the same injury himself.

That the reasonableness or validity of a town ordinance is a matter of law for the court, and not the jury, to decide, is well settled. *Small v. Edenton*, 146 N. C. 527, 20 L.R.A.(N.S.) 145, 60 S. E. 413; *McQuillin*, Mun. Ord. §§ 726-729.

The motion to dismiss is allowed.

Reversed.

Clark, Ch. J., dissenting:

The ordinance does not provide that "anyone can erect a stable on his lot provided it is not nearer to his neighbor's residence than to his own."

If this were the language of the ordinance, then the criticism of it would be in point that it might be too near his neighbor. But the ordinance provides merely that "no person shall erect a privy, stables, or stalls nearer to a neighbor's residence than to his own."

It does not lie in the defendant's mouth to complain that the ordinance is not more restrictive upon him than it is. If the defendant should erect a stable or other nuisance nearer to his neighbor's residence than it should be, he is liable for a nuisance. *State v. Wilkes*, 170 N. C. —, 87 S. E. 48. This ordinance does not authorize him, under any circumstances, to place his stables or other nuisance nearer to a neighbor's residence than it should be. It is not requisite that the town commissioners shall pass ordinances in the exact wording that this court would use. Our only jurisdiction is to hold them invalid if unreasonable. There is nothing unreasonable in an ordinance providing that one "shall not place a stable or other nuisance nearer to a neighbor's residence than to his own." This is merely placing in an ordinance the Golden Rule enunciated in Galilee long centuries ago. It is nothing against the validity of the ordinance that it does not go further and restrict the defendant as to the distance from a neighbor's residence in which the stables can be placed. This court can-

not, by mandamus, compel the town authorities to make such ordinance. The ordinance is unobjectionable as far as it goes. It might go further. In *State v. Hord*, 122 N. C. 1092, 65 Am. St. Rep. 743, 29 S. E. 952, it was held that at common law, as well as under the statute, the town commissioners could forbid a citizen from keeping a hogpen within 100 yards of the residence of another, without prescribing the distance from his own residence. Certainly, therefore, it cannot be unreasonable to prescribe that he shall not keep a nuisance any nearer to his neighbor than to himself. In *State v. Hord*, supra, it was said: "It is an anomaly that the defendant, who had disobeyed the ordinance forbidding him to commit a nuisance upon the public, should be complaining that the town did not go further and forbid him being a nuisance to himself. He could refrain from that without official help."

In this case, it is equally an anomaly that the defendant, who has disobeyed the ordinance forbidding him from putting his stables nearer a neighbor's residence than his own, should be complaining that the town did not go further and prescribe a definite distance from his neighbor's house within which he could not put the stables, even though it should be an equal distance from his own house. He could refrain from doing that without official help, and if he put it near enough to his neighbor's residence to be a nuisance, he would be liable for such nuisance (*State v. Wilkes*, supra), and this ordinance does not purport to give him authority to do so. In *State v. Rice*, 168 N. C. 635, 39 L.R.A.(N.S.) 266, 74 S. E. 582, the court held that an ordinance was not insufficient because it did not go further and prescribe the number of hogs or pigs, the condition or size of the pens where they are kept. The court said: "Courts cannot run a race of opinion upon points of right, reason, and expediency against the lawmaking power. No act of the legislature can be declared void or unconstitutional unless it conflicts with some provision of the Constitution. Nor can any ordinance of any municipal corporation within the power conferred by the legislature, and not in conflict with the laws and the Constitution of the state, be impeached in a court for unreasonableness. A critical examination of cases holding police regulations void because unreasonable will disclose that the attempted police regulations violated some constitutional guaranty. The right asserted by some courts to declare municipal ordinances invalid because unreasonable is limited to ordinances passed under the implied or incidental powers of the municipality."

Our people have the inestimable right of "local self-government." As this court has often said, we cannot, "without making ourselves a tyranny of five men," assume supervision over boards of county commissioners or the boards of town commissioners, to set aside their regulations and orders within the powers conferred by the statute unless, as is said above, "the attempted police regulations violate some constitutional guaranty." This ordinance does not violate any constitutional guaranty, and is within the authority conferred upon the town by Revisal, § 2929.

The government of Nashville is committed to the commissioners elected by the voters thereof, and not to us. We can interfere only when the town authorities enact an ordinance which violates their authority under the Constitution and statutes, and not merely when the ordinance does not go as far as it might do, as in this instance. As was said in *State v. Rice*: "It is not our province to review the action of the board of sanitation within the limits of their powers."

As was said in *State v. Hord*, *supra*, the ordinance is uniform; for it applies to all citizens alike under the same conditions.

On its face, there is nothing in this ordinance that violates the Constitution or the statutes, or that is beyond the powers conferred upon the town commissioners. There is no evidence that the facts, in this particular case, have made it oppressive to the defendant. It is not the province of the courts to govern, but only to set aside, ordinances when shown to be beyond the authority of the town commissioners. When, as in this case, an ordinance which is within their powers does not go as far as we think it might have done, it is for the people of the town of Nashville, and not for us, to procure an addition to the ordinance, or to elect a new board that will amend it. The people of the town know local conditions and requirements better than we do, and are competent to govern themselves through their local officials, elected by themselves to voice their wishes in local matters. As the defendant has violated the ordinance as is written, certainly he cannot contend that he is not guilty because the ordinance might have prohibited him further to the protection of his neighbor.

OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC RAILWAY COMPANY et al., Pliffs. in Err.,

v.

H. N. MEDLEY.

(— Okla. —, 155 Pac. 211.)

Libel — letter to employee.

The following service letter, issued by a railroad company to a former employee upon his discharge: "To Whom It may Concern:—This is to certify that Mr. H. N. Medley has been employed at Enid, Oklahoma, on the Chicago, Rock Island, & Pacific Railway, as car repairer, from July 25, 1909, to January 17, 1910, when he was discharged for being an agitator and creating trouble in the ranks of our car men at Enid. Service unsatisfactory on this account,"—is not libelous per se.

For other cases, see *Libel and Slander*, I. o, in *Dig.* 1-52 N. S.

(February 1, 1916.)

Headnote by DUDLEY, C.

Note.—The liability growing out of the giving or refusing of information affecting the character or reputation of a servant, including the liability for defamatory statements, is considered at length in the note to *Wabash R. Co. v. Young*, 4 L.R.A. (N.S.) L.R.A.1916D.

ERROR to the Superior Court for Garfield County to review a judgment in plaintiff's favor in an action brought to recover damages for delay in and failure to issue to plaintiff a service letter, and issuance to him of a false one, and for libel for publication of such false letter. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. C. O. Blake, B. J. Roberts, W. H. Moore, J. G. Gamble, and K. W. Shartel, for plaintiffs in error:

The service letter issued by the defendant company to plaintiff was not libelous per se.

Wabash R. Co. v. Young, 162 Ind. 102, 4 L.R.A. (N.S.) 1091, 69 N. E. 1003; *Tennessee Coal, Iron & R. Co. v. Kelly*, 163 Ala. 348, 60 So. 1008.

Whatever publication in fact existed was privileged, and neither of the defendants can be held in damages therefor.

Newell, Slander & Libel, 2d ed. § 114, p. 515; *Remington v. Congdon*, 2 Pick. 310, 13 Am. Dec. 431; *Beeler v. Jackson*,

1091. And as to liability for libel or slander in such case, see also the subsequent cases, *Sunley v. Metropolitan L. Ins. Co.* 12 L.R.A. (N.S.) 91; *Christopher v. Akin*, 46 L.R.A. (N.S.) 104; and *Doane v. Grew*, L.R.A.1915C, 774.

64 Md. 589, 2 Atl. 916; *Billings v. Fairbanks*, 136 Mass. 177; *Howland v. George F. Blake Mfg. Co.* 156 Mass. 543, 31 N. E. 656; *Miller v. Donovan*, 16 Misc. 453, 39 N. Y. Supp. 820; *Brown v. Elm City Lumber Co.* 167 N. C. 9, L.R.A.1915E, 275, 82 S. E. 961; *Schoepflin v. Coffey*, 162 N. Y. 12, 56 N. E. 502; *Rosenbaum v. Roche*, 46 Tex. Civ. App. 237, 101 S. W. 1164; *Massee v. Williams*, 124 C. C. A. 492, 207 Fed. 222; *Hubbard v. Cowling*, 36 Okla. 603, 129 Pac. 714.

It was error to submit to the jury the question whether the publication, if any, of the language contained in the service letter given to the plaintiff, was privileged.

Tuohy v. Halsell, 35 Okla. 61, 43 L.R.A. (N.S.) 323; 128 Pac. 126; *Hubbard v. Cowling*, 36 Okla. 603, 129 Pac. 714; *Spencer v. Minnick*, 41 Okla. 613, 139 Pac. 130; *Bodine v. Times-Journal Pub. Co.* 26 Okla. 135, 31 L.R.A. (N.S.) 147, 110 Pac. 1096.

Messrs. H. G. McKeever and Frederick L. Brimi for defendant in error.

Dudley, C., filed the following opinion:

This is an appeal from the superior court of Garfield county. On December 30, 1910, the defendant in error Medley commenced this action in said court against the plaintiffs in error and the defendant in error Taylor to recover damages: (1) For their delay in and failure to issue him a true and proper service letter or clearance card; upon his discharge from the service of the railroad company, and the issuance to him of a false service letter or clearance card; and (2) for libel for the publication of such false service letter. We shall refer to the parties as they were in the trial court.

The amended petition contains two counts, one for damages for the delay in and failure to issue said service letter and the issuance to him of a false one, and the other for libel for the publication of such false letter. The issues were joined and the case tried to the court and jury, resulting in a judgment in favor of the plaintiff, and against the defendants the railroad company and Bassett, for the sum of \$1,000, for libel for the publication of said service letter, from which they have appealed.

At the conclusion of the taking of testimony the plaintiff dismissed the action as against Taylor, and the trial court sustained a demurrer to the plaintiff's evidence on the first count, as against the railroad company and Bassett, and withdrew the same from the jury.

The salient facts necessary to be considered to determine the question presented are: Bassett is in the employ of the defendant company as foreman of its roundhouse at Enid; Taylor is also in its employ, as super-

intendent of motive power, residing at Shawnee; Medley is a car repairer by trade, and entered the employ of said company as such at Enid, on July 25, 1909, and continued in its employ as such until January 17, 1910, when he was discharged for being an agitator and creating trouble in the ranks of the company's men at Enid. In February, following his discharge, a service letter was prepared by Taylor, showing when he entered the company's employ, his discharge, and the reasons therefor. This letter was not mailed nor delivered to Medley, but remained in Bassett's office at Enid. It was prepared upon Medley's request; Bassett sent word to Medley that the service letter was ready for him; he, however, did not call for it at that time; he learned, through Osborn, an employee of the company, that the letter had been issued, and, upon inquiry as to what it was, Osborn said to him that it was a "peach," and that he should get it. Later Medley mentioned to Taylor that he was entitled to his service letter, but had not received it. Following this, and on October 13, 1910, Taylor, as superintendent of motive power, issued and mailed to him the following service letter:

To Whom It May Concern:—

This is to certify that Mr. H. N. Medley has been employed at Enid, Oklahoma, on the Chicago, Rock Island, & Pacific Railway, as car repairer, from July 25, 1909, to January 17, 1910, when he was discharged for being an agitator and creating trouble in the ranks of our car men at Enid. Services unsatisfactory on this account.

C. M. Taylor, (L), Supt. Motive Power.

Following the receipt of this letter, and on October 24, 1910, Medley wrote Taylor with reference to the same, requesting an investigation of the truth of the charges therein stated. Thereupon Taylor sent his letter to Embury, master mechanic of the defendant company, with request that he go to Enid and investigate the charges. Embury did this, and in the course of his investigation talked with various employees of the company at Enid, who had formerly worked with Medley, with reference to his conduct and demeanor while in the company's employ at Enid. During this investigation some of the employees of the company saw a copy of said service letter. Embury satisfied himself, as a result of this investigation, that the statements in the service letter were true and correct, and so advised Medley. Medley and Bassett were members of the Brotherhood of Car Men at Enid; Medley was chairman of the grievance committee, and his duties were to settle controversies between the foreman and em-

ployees. He preferred charges against Bassett and others in connection with his discharge. The record is not clear as to what became of these charges.

The essential question presented for determination is whether or not the service letter is libelous per se. The language used in the letter is clear and unambiguous; hence it was a question of law for the court to say whether or not the letter was libelous per se. *Lodine v. Times-Journal Pub. Co.* 26 Okla. 135, 31 L.R.A.(N.S.) 147, 110 Pac. 1096; *Spencer v. Minnick*, 41 Okla. 613, 139 Pac. 130; *McKenney v. Carpenter*, 42 Okla. 410, 141 Pac. 779. This it did, and advised the jury that it was libelous per se. The correctness of this instruction is properly presented and challenged here. In determining whether or not the letter is libelous per se, the words used therein should be given their plain, natural, popular, and obvious meaning and use. *Hubbard v. Cowling*, 36 Okla. 603, 129 Pac. 714; *Spencer v. Minnick*, supra; *Smith v. Gillis*, — Okla. —, 151 Pac. 869. Our statute, § 4956, Rev. Laws 1910, defines libel as follows: "Libel is a false or malicious unprivileged publication by writing, printing, picture, or effigy or other fixed representation to the eye, which exposes any person to public hatred, contempt, ridicule or obloquy, or which tends to deprive him of public confidence, or to injure him in his occupation. . . ."

We are concerned only with the words, "to injure him in his occupation." Is the letter libelous per se within the meaning of this portion of the statute? In *Newell on Slander & Libel*, 3d ed. § 174, discussing this question, it is said: "Next to imputations which tend to deprive a man of his life or liberty, or to exclude him from the comforts of society, may be ranked those which affect him in his office, profession, or means of livelihood. To enumerate the different decisions upon this subject would be tedious, and to reconcile them impossible; yet they seem to yield a general rule sufficiently simple and unembarrassed, namely, that words are actionable which directly tended to the prejudice of anyone in his office, profession, trade, or business."

Discussing this question further, the author, in § 175, says: "It by no means follows that all words to the disparagement of an officer, professional man, or trader will for that reason, without proof of special damage, be actionable in themselves. Words to be actionable on this ground, must touch the plaintiff in his office, profession, or trade. They must be shown to have been spoken of the party in relation thereto, and to be such as would prejudice him therein. They L.R.A.1916D.

must impeach either his skill or knowledge, or his official or professional conduct."

In the case of *N. S. Sherman Mash Co. v. Dun*, 28 Okla. 447, 114 Pac. 617, in construing the foregoing section of our statute, it is said: "The alleged libel does not impute to the plaintiff any fraud, dishonesty, misconduct, or incapacity in the management of said business, or in connection therewith, or in any other relation of life. The fact that a man may be engaged in business and yet have a limited capital is neither an imputation against his business reputation, nor does it in any manner reasonably subject him to public scandal, scorn, or ridicule. This seems to be the test as to whether such publication is libelous per se; for when words are uttered falsely of a person in reference to his profession or business, such as to hold him out to contempt or ridicule, thereby tending to bring him or his business into disrepute, such publication may be considered as libelous per se."

The plaintiff, in his petition, ascribes no peculiar or special meaning to the words used in the service letter. Considering them in their plain, natural, popular, and obvious sense, are they libelous per se, within the meaning of our statute? We think not. They do not impeach his skill or ability as a car repairer, neither do they impute any fraud, dishonesty, misconduct, or incapacity in his trade. They certainly do not subject him to public hatred, contempt, ridicule, or obloquy, or deprive him of public confidence. Considering the language of this letter, in connection with the facts and circumstances under which it was issued, and the occasion for its issuance, one would infer that the plaintiff was a labor agitator, and as such caused trouble among the company's men with whom he worked; but, be this as it may, no special meaning is ascribed to the language used, and we are unable to see under what theory this letter could be regarded as libelous per se. We have had many agitators in the history of this country,—not only labor agitators, but others. In fact most of the modern legislation, both for the protection of the laboring man and the improvement and betterment of society, has been due largely to agitators. The potential force of labor unions and labor organizations is due to a great extent to labor agitators. We think it would be going too far to hold that the language used in this letter is libelous per se.

We have searched in vain for precedents, and the nearest one we find is that of the case of *Wabash R. Co. v. Young*, 162 Ind. 102, 4 L.R.A.(N.S.) 1091, 69 N. E. 1003, wherein it was held: "It is not libelous per se to accuse one of being a member of a labor union and a labor agitator."

The facts in this case are similar to the facts in the case at bar, and the rule thus announced is quite applicable. The following authorities support, in principle, the rule we announce: *McKenney v. Carpenter*, supra; *Kee v. Armstrong B. & Co.* — Okla. —, 151 Pac. 572; *Tennessee Coal, Iron & R. Co. v. Kelly*, 163 Ala. 348, 50 So. 1008; *Nichols v. Daily Reporter Co.* 30 Utah, 74, 3 L.R.A.(N.S.) 339, 116 Am. St. Rep. 796, 83 Pac. 573, 8 Ann. Cas. 841; *Labor Review Pub. Co. v. Galliher*, 153 Ala. 364, 45 So. 188, 15 Ann. Cas. 674. In the case of *Tennessee Coal, Iron & R. Co. v. Kelly*, 163 Ala. 348, 50 So. 1008, it was said in the syllabus:

"It is not libel per se to charge that plaintiff had made trouble at defendant's mines, or that he had run negroes out of

their homes; such conduct not necessarily being a crime."

Having reached the conclusion that the service letter is not libelous per se, the trial court committed prejudicial error in advising the jury to the contrary.

Said service letter not being libelous per se, there can be no recovery, even though it is false, without the allegation and proof of special damages. *Sherman Mach. Co. v. Dun*, supra; *McKenney v. Carpenter*, 42 Okla. 410, 141 Pac. 779; *Kee v. Armstrong, B. & Co.* — Okla. —, 151 Pac. 572.

The judgment of the trial court should be reversed, and the cause remanded.

Per Curiam:

Adopted in whole.

UTAH SUPREME COURT.

STATE OF UTAH

v.

HARLEY MEWHINNEY, Appt.

(43 Utah, 135, 134 Pac. 632.)

Criminal law — right to attorney — notification.

1. A recital in the transcript of proceedings before a magistrate in a criminal case that accused waived the services of an attorney shows that he was apprised of his right to the aid of counsel.

For other cases, see *Criminal Law*, II, b, in *Dig. 1-52 N. S.*

Same — failure to reduce testimony to writing — waiver of examination.

2. An information charging murder cannot be quashed for failure of the committing magistrate to reduce the testimony against accused to writing, as required by statute, if, as permitted by the Constitution, a preliminary examination was waived.

For other cases, see *Indictment*, etc., IV, in *Dig. 1-52 N. S.*

Appeal — overruling challenge to jury.

3. There is no error in overruling chal-

lenges for cause to jurors who are impartial and conscientious men.

For other cases, see *Appeal and Error*, VII, m, 7, b, in *Dig. 1-52 N. S.*

Appeal — rejecting evidence — prejudicial error.

4. It is not prejudicial error for the court to state, in sustaining an objection to a question which assumes a fact rather than asks a question, that it implies something that is not of record, not evidence in the case.

For other cases, see *Appeal and Error*, VII, m, 6, in *Dig. 1-52 N. S.*

Evidence — articles taken from accomplice.

5. Articles taken from the accomplice of one accused of murder, upon his arrest soon after the commission of the crime, are admissible in evidence against accused.

For other cases, see *Evidence*, V, in *Dig. 1-52 N. S.*

Criminal law — test of responsibility for crime.

6. The test of insanity in a murder case is the capacity to distinguish between right and wrong with respect to the criminal act in issue, without regard to the existence of will power to overcome or resist the im-

-Note. — As to effect of statutory declaration that murder committed by certain means, or in commission of felony, shall be murder in first degree, upon right of jury to pass upon degree, see annotation following this case, post, 610.

As to right to full jury box before exercising right to peremptorily challenge jurors, see pages 831 et seq. of the annotation following *Blankenship v. State*, L.R.A. 1916A, 814, on "Right of accused in criminal case to full panel from which to select jury."

The admissibility against defendant of documents or articles taken from him is discussed in the notes to *State v. Edwards*, 59 L.R.A. 467; *State v. Fuller*, 8 L.R.A. L.R.A. 1916D.

(N.S.) 762; and *People v. Campbell*, 34 L.R.A.(N.S.) 58; and see later case, *State v. Sutter*, 43 L.R.A.(N.S.) 399.

For weakness of mind as affecting responsibility for criminal act, see note to *Rogers v. State*, 10 L.R.A.(N.S.) 999. As to irresistible impulse as an excuse for crime, see notes to *State v. Harrison*, 18 L.R.A. 224, and *Smith v. State*, 27 L.R.A.(N.S.) 461; and see later case, *Oborn v. State*, 31 L.R.A.(N.S.) 966. For kleptomania as a defense to burglary or larceny, see note to *State v. Riddle*, 43 L.R.A.(N.S.) 150.

Generally as to character and reputation of the deceased as affecting homicide, see note to *State v. Feeley*, 3 L.R.A.(N.S.) 351.

pulse to commit the act, if the only evidence of insanity is a few general guesses, based upon a few isolated facts which, in and of themselves, do not necessarily point either to insanity or to any serious mental derangement.

For other cases, see Criminal Law, I. b, in Dig. 1-52 N. S.

Homicide — to avoid apprehension for theft — kleptomania as defense.

7. One cannot avoid liability for murder committed to avoid apprehension for theft if he could distinguish between right and wrong with respect to murder, although he had not the will power to resist the temptation to steal.

For other cases, see Criminal Law, I. b, in Dig. 1-52 N. S.

Appeal — restricted instruction on insanity — prejudice.

8. Failure of the court to enlarge on the different phases of insanity and mental weakness in charging the jury in a murder case is not prejudicial error where the only evidence of insanity is a few general guesses, based on a few isolated facts which, in and of themselves, do not necessarily point either to insanity or to any serious mental derangement.

For other cases, see Appeal and Error, VII. m, 4, a, (1), in Dig. 1-52 N. S.

Homicide — degree — submission to jury.

9. Where the statute makes a homicide committed in furtherance of robbery murder in the first degree, the court need not submit to the jury the question of murder in the second degree, in a prosecution for a crime so committed, although the statute also provides that the degree of the crime must be found by the jury whenever a crime is distinguished into degrees, since the statute does not segregate murder committed in an attempt to commit robbery into degrees.

For other cases, see Trial, III. c, in Dig. 1-52 N. S.

Criminal law — homicide — instruction — absence of evidence.

10. The court need not, in a prosecution for homicide, alleged to have been committed in the perpetration of a robbery, charge upon the effect of an abandonment of the attempt to rob before commission of the homicide, if there is no evidence to support such theory.

For other cases, see Trial, III. c, in Dig. 1-52 N. S.

Appeal — instructions — average instead of good character.

11. It is not prejudicial error to instruct in a criminal case that when a man is charged with the commission of crime, the law presumes that he is a man of average character, instead of using the word "good," if the court instructs, "and the failure to call witnesses to prove his general good character raises no presumption against it."

For other cases, see Appeal and Error, VII. m, 4, a, (1), in Dig. 1-52 N. S.
L.R.A.1916D.

Trial — instructions — right to recommend life imprisonment.

12. It is not error for the court, in calling to the attention of the jury in a murder case their statutory privilege of recommending life imprisonment instead of death for one convicted of murder in the first degree, to state that, "in considering this question, you are not restricted by any rule of law or public policy, but are entitled to decide the question from such considerations as may appeal to you as reasonably and conscientiously entitled to be weighed in determining the giving or withholding of such recommendation."

For other cases, see Appeal and Error, VII. m, 4, a, (1), in Dig. 1-52 N. S.

(Straup, J., dissents.)

(May 9, 1913.)

APPEAL by defendant from a judgment of the District Court for Salt Lake County convicting him of murder in the first degree. Affirmed.

The facts are stated in the opinion.

Messrs. S. P. Armstrong and H. J. Brothers, for appellant:

Even a statute cannot permit defendant to waive a constitutional right.

Dempsey v. People, 47 Ill. 323; People v. McKay, 18 Johns. 212; Burley v. State, 1 Neb. 385; Nomaque v. People, Breese (Ill.) 109, 12 Am. Dec. 157; Hopt v. Utah, 110 U. S. 574, 579, 28 L. ed. 262, 265, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417.

The test of criminal responsibility is not only accused's knowledge of the nature and consequences of his act, but also his will power to control his action, and to resist the impulse to commit the act.

1 Clevenger, Med. Jur. 21-26; State v. Peel, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; Wheeler v. State, 168 Ind. 667, 63 N. E. 975; State v. Keerl, 29 Mont. 508, 101 Am. St. Rep. 579, 75 Pac. 363; Mathley v. Com. 120 Ky. 389, 86 S. W. 988; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231; State v. Lyons, 113 La. 959, 37 So. 890; Lowe v. State, 118 Wis. 641, 96 N. W. 417; Davis v. United States, 165 U. S. 373, 378, 41 L. ed. 750, 754, 17 Sup. Ct. Rep. 360.

The law presumes that the accused is a man of good character, not of average character.

Mullen v. United States, 46 C. C. A. 22, 106 Fed. 892; Cluck v. State, 40 Ind. 263; Whart. Crim. Ev. 9th ed. § 62; People v. White, 24 Wend. 520.

Defendant was entitled to instructions on murder in the second degree and manslaughter.

Hopt v. Utah, 110 U. S. 574, 28 L. ed. 262,

4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *People v. Thiede*, 11 Utah, 241, 39 Pac. 837.

The nature of the crime should be distinctly and specifically charged, under whatever class of murder the charge is made, and the allegations must be proved or the indictment is not sustained.

People v. White, supra.

The instructions requested on deliberation and premeditation should have been given.

State v. Thorne, 39 Utah, 208, 117 Pac. 58.

The right of the jury, or their power to make the recommendation, or the exercise of their discretion in making or withholding it, was unlimited and uncircumscribed.

Ibid.

Even under statutes that distinguish murder into degrees, and that require the jury to find the degrees, the court must instruct as to the different degrees, and leave the jury to find thereon; it is not proper, where there is no evidence of manslaughter, to instruct on manslaughter, although included in the charge of murder.

Clark v. Com. 123 Pa. 555, 16 Atl. 795; *State v. Lucas*, 124 N. C. 825, 32 S. E. 962; *Brown v. Com.* 76 Pa. 319.

The statute requiring the jury to find the degree, where the crime is divided into degrees, prohibits the court from imperatively instructing as to the degree to be found; and the statute applies in all cases, including murder committed in attempt to commit other felonies.

Brown v. State, 109 Ala. 70, 20 So. 103; *Hopt v. Utah*, 110 U. S. 582, 28 L. ed. 266, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *State v. Phinney*, 13 Idaho, 307, 12 L.R.A. (N.S.) 935, 89 Pac. 634, 12 Ann. Cas. 1079; *Rhodes v. Com.* 48 Pa. St. 396; *Lane v. Com.* 59 Pa. 371; *Shaffner v. Com.* 72 Pa. 60, 13 Am. Rep. 649; *McMeen v. Com.* 114 Pa. 300, 9 Atl. 878; *Com. v. Frucci*, 216 Pa. 84, 64 Atl. 879; *State v. Dowd*, 19 Conn. 388; *Adams v. State*, 29 Ohio St. 412; *Robbins v. State*, 8 Ohio St. 131; *Beaudien v. State*, 8 Ohio St. 634; *State v. Lindsey*, 19 Nev. 47, 3 Am. St. Rep. 776, 5 Pac. 822; *State v. Brown*, 40 La. Ann. 725, 4 So. 897, 41 La. Ann. 410, 6 So. 670; *State v. Clark*, 46 La. Ann. 704, 15 So. 83; *State v. Thomas*, 50 La. Ann. 148, 23 So. 250; *Washington v. State*, 125 Ala. 40, 28 So. 78; *Gafford v. State*, 125 Ala. 1, 28 So. 406; *Thomas v. State*, 150 Ala. 31, 43 So. 371; *People v. Woods*, 147 Cal. 265, 109 Am. St. Rep. 151, 81 Pac. 652; *People v. Campbell*, 40 Cal. 129; *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477; *State v. Locklear*, 118 N. C. 1154, 24 S. E. 410; *Com. v. Sheets*, 197 Pa. 69, 46 Atl. 753.

Messrs. A. R. Barnes, Attorney Gen-
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eral, E. V. Higgins and George C. Buckle, Assistant Attorneys General, for the State:

The true test on the question of sanity is whether the accused was, at the time of the act, and with reference to such act, capable of distinguishing between right and wrong.

Whart. Homicide, 3d ed. §§ 537, 539; Whart. & S. Med. Jur. 5th ed. 175; *People v. Calton*, 5 Utah, 458, 16 Pac. 902; *Smith v. State*, 95 Miss. 786, 27 L.R.A. (N.S.) 461, 49 So. 945, Ann. Cas. 1912A, 23.

The failure to call witnesses to prove defendant's general good character raised no presumption against his character; likewise, the failure to call witnesses to prove his general good character raised no presumption in favor of it.

Whart. Crim. Ev. 10th ed. § 62.

When the homicide is committed immediately after the robbery or attempted robbery, and apparently for the purpose of preventing detention, the crime is first degree murder.

Whart. Homicide, 3d ed. § 126, p. 186; *State v. Williams*, 28 Nev. 395, 82 Pac. 353.

If an abandonment existed, it was brought about by fear of detection and capture; and this being so, the killing was equally first degree murder.

Whart. Homicide, 3d ed. p. 188; *State v. Gray*, 19 Nev. 212, 8 Pac. 456.

If there are circumstances in the case, which, to the minds of the jury, would justify a recommendation that the defendant be imprisoned for life, in case of a verdict of murder in the first degree, it is the right of the jury to make such a recommendation.

State v. Romeo, 42 Utah, 46, 128 Pac. 530; *Valentine v. State*, 77 Ga. 471; *Cyrus v. State*, 102 Ga. 616, 29 S. E. 917; *People v. Bawden*, 90 Cal. 195, 27 Pac. 204; *People v. Olsen*, 80 Cal. 122, 22 Pac. 125; *People v. Brick*, 68 Cal. 190, 8 Pac. 858; *Brown v. State*, 109 Ala. 70, 20 So. 103; Whart. Homicide, 3d ed. p. 1056.

Frick, J., delivered the opinion of the court:

Appellant was charged with, and, upon a trial by a jury in the district court of Salt Lake county, convicted of, murder in the first degree. The court, in due time, entered judgment sentencing appellant to suffer death. He appeals from that judgment.

Numerous errors are assigned. Before proceeding to a consideration of the assignments relating to the alleged errors occurring at the trial, we shall dispose of those

which relate to the quashing of the information and the impaneling of the jury.

Counsel for appellant at the proper time interposed a motion to quash the information filed in the district court against him upon the grounds: (1) That the magistrate before whom the original complaint was filed, and before whom appellant was taken after his arrest, did not inform or advise him "of his rights to the aid of counsel;" and (2) because "the testimony of the, or any of the, witnesses against him was not reduced to writing by the magistrate." The first ground is clearly untenable. The transcript of the proceedings before the magistrate affirmatively shows that the appellant "waived the service of an attorney." If this means anything, it means that appellant was apprised of his right to have such services.

In the absence of any showing to the contrary, we must presume that the magistrate performed the duties imposed upon him by our statute. Such is the holding of the courts. *People v. Figueroa*, 134 Cal. 159, 66 Pac. 202. In the case at bar, as we have pointed out, it, however, affirmatively appears that appellant waived any aid or assistance from counsel.

Referring, now, to the second ground of the motion, it is true that Comp. Laws 1907, § 4670, in terms provides that "the testimony of each witness in cases of homicide must be reduced to writing as a deposition, by the magistrate, or under his direction." This section in substantially the same form was in force long before Utah became a state. 2 Comp. Laws 1888, § 4983. It was carried into the Revised Statutes of 1898 as § 4670 of that revision, and is now known by the same number in Comp. Laws 1907, supra. Since said section was originally passed the Constitution of this state was adopted, where, in article 1, § 13, it, among other things, is provided: "Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the state, or by indictment, with or without such examination and commitment." Although the language of § 4670, supra, is positive and without exception that in homicide cases the testimony of the witnesses must be reduced to writing, yet, in view of the constitutional provision that the accused, with the consent of the state, may waive the examination, the statute cannot be given application according to the strict letter thereof. If the accused or the officer representing the state desires an examination to be held, then, of course, witnesses must be heard, and if they are heard, their L.R.A.1916D.

testimony must be reduced to writing, as required by the statute. If, however, no examination is desired, and is expressly or by implication waived, as held by us in *State v. Gustaldi*, 41 Utah, 63, 123 Pac. 897, then there is no need of hearing any testimony, and hence there is none to be reduced to writing. In the case at bar the transcript of the proceedings had before the committing magistrate affirmatively shows that appellant, with the consent of the state, expressly waived the preliminary examination mentioned in the Constitution. This he could do, and, having done so, he likewise must be held to have waived the necessity of the magistrate to hear any testimony with respect to the charge filed against him. There was therefore no testimony to be reduced to writing. Nor can there be any doubt as to appellant's competency to waive the examination, nor as to having done so, since he does not assail the truth of the statements to that effect contained in the magistrate's transcript, as he could have done under the ruling of this court in *State v. Gustaldi*, supra. See also upon this point, *State v. Ritty*, 23 Ohio St. 562. The motion to quash, for the reasons aforesaid, was therefore properly overruled.

It is also insisted that the court erred in refusing to sustain certain challenges for cause that were interposed by appellant's counsel against at least four prospective jurors upon the ground of both expressed and implied bias. It is accordingly urged that appellant was required to remove those jurors from the panel by the exercise of four peremptory challenges, which reduced by that number the quota of such challenges vouchsafed to him by our statute. We have carefully examined all of the testimony of those jurors, given upon their voir dire, and we are satisfied that this case falls squarely within the rule laid down by this court upon this question in the recent case of *State v. Thorne*, 41 Utah, 414, 126 Pac. 236, Ann. Cas. 1915D, 90. The only difference between this and the Thorne Case is that, while there might have been some doubt in our minds with respect to the qualifications of some of the challenged jurors in the Thorne Case, there is no such doubt in this case. If there were, however, the rulings of the trial court fall squarely within what is said in the Thorne Case, supra. Further, by carefully going over the jurors' examination, we are impressed with the fact that they were fair, impartial, and conscientious men, and the trial court was clearly justified in overruling the challenges. This contention, therefore, cannot be sustained.

It is further contended that the court erred in requiring appellant to exercise his

peremptory challenges at times when the jury box was not filled with jurors. The jury was impaneled and the challenges were required to be exercised in the manner stated by Mr. Justice McCarty, in *State v. Riley*, 41 Utah, 225, 126 Pac. 294. We there held that the course of procedure followed in that case was proper. This case is therefore controlled by that one, and this assignment must also fail.

Passing to a consideration of the assignments relating to the alleged errors occurring at the trial, it becomes necessary to state as briefly as possible the controlling facts. From the evidence it is made to appear that the homicide in question occurred while appellant and an accomplice were engaged in the perpetration of or attempt to perpetrate a robbery. The undisputed facts relating to the homicide are substantially as follows: On the afternoon of the 6th day of October, 1911, between 3 and 4 o'clock, a Mrs. Fuller, after meeting one Sol S. Brown, a friend of hers, on the street in Salt Lake City, went with him to her room on the second floor of the Romona rooming house, which is located on the corner of Second East and Second South streets in said city. Mr. Brown wore a large and conspicuous diamond ring on one of his fingers, of the approximate value of \$350. In going upstairs to the room Mrs. Fuller noticed the appellant and his accomplice in the hallway. Within a few minutes after Mrs. Fuller and Mr. Brown had entered the room aforesaid, there was a knock at the door, and Mrs. Fuller went to open it. Upon opening the door she saw two men in the hallway (one of them the appellant) with handkerchiefs tied over the lower portions of their faces. As soon as she had opened the door, they forced their way into the room. One of the men had a revolver in his hand and immediately upon entering the room pointed it at Mr. Brown, and the other remained standing at the door, which he had closed after him. Mr. Brown at once went forward and grappled with the one having the revolver, catching his hand or forearm in such a manner as prevented him from shooting Mr. Brown, and a hard struggle ensued between them. Mr. Brown seemed to hold his own, and the man with the revolver, seemingly, could make no headway in obtaining the coveted prize, the ring. He called to his accomplice, who still stood guarding the door, for help, and said, "Pull the ring off his finger." The accomplice immediately left the door and went to the assistance of the other and in doing so struck Mr. Brown several times on the head with what is termed a "black-jack," inflicting scalp wounds which subsequently bled somewhat freely. The struggle now went on

between the three, but as soon as the one had left the door Mrs. Fuller ran out of the room, down the hallway, and into the street crying for help as she went. Considerable uproar was thus caused, and it was not long before the man who had stood by the door also slipped out of the room, Mr. Brown and the other still continuing the struggle for supremacy, while Mr. Brown was also crying for help. Immediately after the one with the black-jack had left the room, Mr. Brown heard the steps of a man in the hallway, approaching the door, which was now standing ajar. The one with the revolver, who was still continuing the struggle and still trying to obtain the diamond ring, apparently also heard the steps of the approaching stranger, whose name it was afterwards learned was Erickson, and he then also broke away from Mr. Brown, who was becoming quite weak from the blows he had received on his head and the continued struggle, and ran out of the door into the hallway which led downstairs into the street. Immediately after getting outside of the door of the room in which the struggle took place, the one with the revolver was met by Mr. Erickson, who was coming to Brown's assistance, and as soon as he saw Mr. Erickson, and within a very few feet from the door, he raised his revolver and shot Mr. Erickson, the bullet penetrating his chest and passing through a portion of the heart. Mr. Erickson staggered back into a room near by and fell on the floor, and in a few minutes thereafter expired from the effects of the bullet wound. Both of Brown's assailants had in the meantime run down the steps and had reached the street, where they separated. It was only a few minutes afterwards, however, when the one who had the revolver, and who shot Erickson, was apprehended on the street in front of the rooming house while in the act of inducing an expressman, whose express wagon he had climbed onto, to drive him hurriedly away from the place. He was immediately taken to the police station after he was apprehended as aforesaid. A short time after the arrest he was identified as the one with the revolver by both Mrs. Fuller and Mr. Brown, and was further identified as the one who did the shooting, and as being the appellant in this case. The other one was apprehended later on the same day and was also identified by Mrs. Fuller and Mr. Brown as the one who was with appellant and the one who struck Mr. Brown with the black-jack. During the struggle in the room the handkerchiefs were torn from the faces of the two men, and a full view of their features was thus obtained by both Mrs. Fuller and Mr. Brown. There is much other evidence respecting the iden-

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tity of the appellant and his accomplice which we need not refer to here. It must suffice to say that, under the evidence, no other conclusion is permissible than the one arrived at by the jury; namely, that the appellant is the one who had the revolver and who killed Mr. Erickson, and that the killing was done within and as a part of the *res gestæ* of the attempted robbery.

It is contended that the court erred in one of its rulings which it is said trenched upon the province of the jury with respect to an important fact in the case. The matter arose during the progress of the trial and while counsel for appellant was cross-examining the chief of police, who was one of the state's witnesses. The witness had testified that at the time the appellant and his accomplice were brought to the police station some articles, including a cap, came into his possession, which it was shown were either taken from appellant's person when he was brought to the station, or identified at the time as having been in his or his accomplice's possession at the time of the attempted robbery, or immediately thereafter.

Appellant's counsel, Mr. Armstrong, on cross-examination, questioned the witness with regard to the articles aforesaid, and Mr. Farnsworth, the prosecuting attorney, interposed an objection to the method pursued by counsel. The record of the proceeding in this respect reads as follows:

Q. So that you were not very careful in designating these different articles about how they came into your possession?

A. I was reasonably careful, as you see by the tags.

Q. The important one, however, does not seem to be very well designated?

A. Which is the important one?

Q. The cap.

Mr. Farnsworth: We object to counsel making any such assumption as that.

The court: The objection is sustained. It implies something that is not of record, not evidence in the case.

Mr. Armstrong: Exception.

The contention that, in sustaining the foregoing objection, and in making the remark, the court invaded the province of the jury, seems to us untenable. In view that the record discloses that counsel were given every opportunity to lay all the facts before the jury, the matter seems somewhat trivial. While the objection was extremely technical, yet the supposed question to which the objection was sustained was, in its nature, an assumption of a fact by counsel rather than a question to the witness which he was expected to answer. It is very clear L.R.A.1916D.

that no prejudicial error resulted or could result from the court's ruling, and this assignment must therefore be overruled.

The contention that the court erred in admitting in evidence the articles of wearing apparel and other articles found on or taken from appellant's accomplice after the attempted robbery is clearly without merit. Whart. Crim. Ev. 10th ed. § 312, p. 610.

Counsel for appellant strenuously insist that the court erred in charging the jury upon the question of insanity. It may be said that appellant produced some evidence in support of his plea of insanity. It was contended at the trial, and is now insisted, that appellant had acquired the habit of using drugs, such as opium and morphine, and that their use affected his mental capacity. To establish that fact he produced in evidence the depositions of two witnesses of Terre Haute, Indiana, one of whom testified that he was acquainted with appellant from 1900 to 1907, and that during that period of time appellant habitually used "both opium and morphine." When asked what effect the use of those drugs had upon appellant's mental condition as observed by the witness, he said: "The use of drugs seemed to make him very thin and at times dull and stupid." When pressed for further particulars with regard to the effect that the use of the drugs had upon appellant's mind, the witness said, "I am not aware of any specific facts and circumstances." The testimony of the other witness is substantially the same; the only difference being that the other one said that appellant used the drug for a period of about five years between 1900 and 1907. After the year 1907 the witnesses did not come in contact with appellant. Upon substantially the foregoing testimony the two witnesses were permitted to give their opinion with respect to the sanity of appellant, and they both testified that, in their opinion, appellant was insane, and that the insanity was caused through the use of drugs as aforesaid. It also was shown that when appellant was arrested he had some morphine on his person, and that he afterwards called for some, and that the city physician ordered the officers to permit him to have about two grains daily for some time after his arrest. In addition to the foregoing testimony respecting appellant's insanity and the use of drugs, a young doctor who had about three years' experience in the general practice as a physician, and without any further experience, was called as an expert upon the question of insanity. His conclusions regarding appellant's mental condition were mainly based upon the effect that the habitual use of opium or morphine usually has upon the mind.

The doctor, however, did not testify from actual experience, as his answers to the following questions clearly indicate:

Q. And of these alkaloids you say that morphine is the most active and the most detrimental to the faculties of the mind?

A. I have read authorities stating that fact.

Q. You don't state that of your own knowledge as a chemist or anything?

A. No, sir; I could not do that.

Q. Not from your own practical experience, but from your reading of it?

A. Yes, sir.

Upon substantially the foregoing testimony the doctor was permitted to answer a hypothetical question which was propounded to him by appellant's counsel, in which the facts as testified to by the witnesses aforesaid, together with the effect that the use of drugs had on the mind, and appellant's habits with regard to their use, as disclosed by the evidence, and further, that the robbery was attempted in broad daylight, in a well-tenanted apartment or rooming house, and a few other unimportant facts, were recited. The doctor, in answering the question, said that, in his opinion, appellant was insane when he attempted to commit the robbery and when he shot and killed the deceased, Erickson. Upon the part of the state there was abundant testimony to the effect that appellant's conduct and demeanor immediately after the shooting and since then were always normal and rational. A physician who had frequently observed him after the shooting also testified that he did not use morphine in excessive quantities, and did not have the appearance of one who did so, and that, in his judgment, appellant, at the time of the commission of the offense, was and ever since has been sane. Upon the question of insanity the court instructed the jury that, before they could find appellant guilty as charged in the information, they "must be satisfied beyond a reasonable doubt from all the evidence in the case that the defendant at the time of the perpetration of, or attempt to perpetrate, such robbery or burglary, had formed the intent to commit said robbery or burglary, and that he had the mental capacity to distinguish between right and wrong with reference to said robbery or burglary; and, if you should find from the evidence in this case that the defendant at the time in question had not the mental capacity to form an intent to perpetrate a robbery or burglary, then you cannot convict him of murder in the first degree." The court further instructed the jury upon this question that "the test of responsibility for a

criminal act, when insanity is relied upon as a defense, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry; and if, after a fair and conscientious consideration of all the facts and circumstances in evidence, you are not satisfied beyond a reasonable doubt that the defendant had the capacity to distinguish between right and wrong at the time of and with reference to the act in question, then you cannot convict him." The same thought in other forms was repeated in several of the instructions.

It is insisted that the capacity to distinguish between right and wrong with respect to the criminal act in issue is not the true test of mental responsibility. It is contended that, in addition to that test, the jury should also be told that they must find that the accused had the will power to overcome or resist the impulse to commit the act with which he stands charged. Let us assume at the outset that, under certain circumstances where a plea of insanity is interposed as a defense, it may become necessary to charge the jury as contended for by counsel, and that in all cases where such a plea is interposed it would be unobjectionable, although not necessary to do so. And let us assume further that in this case it would not have been at all improper for the court in its charge to have gone farther into the question of insanity along the lines suggested by counsel. The foregoing assumptions are, however, not decisive of the question we are called upon to determine. In reviewing a charge upon any particular subject, as well as in reviewing the requests refused, we must constantly keep in mind the facts and circumstances of the particular case as they are made to appear from the evidence. What meager evidence of insanity there is in this case is limited entirely to generalities. The whole superstructure of the so-called insanity claim is built upon the statements of two laymen, who, for some years prior to 1907 (three years before the murder in question was committed), were acquainted with the appellant, and who testified that during that time—that is, during the time they knew him—he was addicted to the use of morphine, and that the use thereof "at times made him dull and stupid." Basing their opinions upon these meager facts, the two laymen tell us that the appellant was insane. In addition to their opinions, we also have a young doctor, who, after having the foregoing evidence detailed to him, also is willing to venture the opinion that the appellant was insane. There is absolutely no evidence of any actual mental lesions or any mental disease of any kind, or of any

hallucinations or other mental derangement.

All that we have here, therefore, to establish insanity and to overcome the legal presumption of sanity, are a few general guesses based upon a few isolated facts which, in and of themselves, do not necessarily point to either insanity or to any serious mental derangement.

If the evidence in this case, therefore, is considered for the purpose of raising a doubt of the sanity of appellant, it can be considered for no other purpose except to show what may be called simple or general insanity. The existence of mental lesion, disease, or other aberration cannot be assumed or inferred, because there is absolutely no evidence to support such an inference. Under such circumstances, the test of responsibility that is applied by the overwhelming weight of authority is substantially the one given by the district court in this case in its charge to the jury. That test is thoroughly discussed by the authors of the following works: 1 Whart. Crim. Law, 10th ed. §§ 50-55; Whart. Homicide, 3d ed. §§ 537, 539; 1 Whart. & S. Med. Jur. § 175, and cases there cited. See also *People v. Calton*, 5 Utah, 458-460, 16 Pac. 902; 3 Thomp. Trials, 2d ed. §§ 536-541, where the test is approved.

We need not pause here to go over the reasons why the test is deemed a proper and a practical one except in those cases where the evidence discloses some special mental weakness, disease, delusion, or aberration. That the test in a case like the one presented by this record is the proper one impresses us as clearly sound, and this impression is not weakened after considering counsel's argument advanced in behalf of their contention. They, in effect, argue that if appellant was controlled by an irresistible impulse to commit the robbery,—that is, if he did not have the will power to resist the temptation or impulse to rob or steal,—then he should be acquitted, although he possessed the mental capacity to distinguish between right and wrong with respect to the homicide. This, in our judgment, is neither good law nor good sense. Suppose A is charged with the murder of B., which is committed because he is detected by B while he was in the act of committing a robbery or larceny. Upon being tried for the murder, A, however, establishes by indubitable proof that for a long time prior to the commission of the larceny he was a confirmed kleptomaniac; that is, that he was afflicted with that species of insanity which manifests itself in an irresistible impulse or desire to steal; and that he lacked the will power to control or overcome the impulse. Would this L.R.A.1916D.

proof be sufficient to excuse the homicide? We think not. In the assumed case A committed murder for precisely the same reason that appellant killed Erickson,—namely, to avoid apprehension and possible conviction for the attempted robbery. Under such circumstances, the test of mental responsibility, therefore, is not whether the accused is a confirmed thief and has not the will power to resist theft, but it is whether he had the mental capacity to distinguish between right and wrong with respect to the act with which he is charged,—in this case, murder. According to counsel's theory, although the accused may have had ample mental capacity to realize that it was wrong to kill, yet, if he was afflicted with an irresistible impulse to steal, he ought to have been acquitted of both crimes. This, in effect, would be an inducement to every thief to slay everyone who discovered a theft committed by him.

There is nothing in the evidence in this case which would have justified the jury in finding that appellant was afflicted with any mental lesion, disease, or weakness, and hence it was not necessary to go into those matters in the charge in charging upon the general subject of insanity. To hold, therefore, that the court should have charged as contended by counsel, and that the refusal of the court to do so constitutes prejudicial error, is to disregard the evidence and the reasons which require such a charge, and further requires us to assume facts and conditions not directly testified to by anyone nor legitimately deducible from any facts and circumstances that were testified to. The court, in our judgment, in submitting the question of general insanity to the jury, clearly safeguarded all of appellant's rights in that regard.

We repeat that the question here is not the abstract one whether the court could not have properly enlarged upon the different phases of insanity or mental weakness, but the question we have to meet is whether the evidence required the court to so enlarge upon those subjects, and whether, in having failed to do so, the appellant was prejudiced. We are clearly of the opinion that the appellant was not prejudiced, and that the judgment, therefore, should not be reversed upon this ground.

When the cases cited by counsel upon this question are analyzed, it will be found that in all of them there were some facts and circumstances which made the doctrine contended for by them applicable to some extent at least. It must be conceded, however, that there are a few cases which seem to hold that the doctrine is applicable upon a mere general claim of insanity, as was

the case in the case at bar. We cannot yield assent to such a doctrine.

It is further insisted that the court erred in refusing to charge the jury with respect to second degree murder. This question, like the one of insanity, must of necessity, to a large extent, at least, be controlled by our statute when considered in connection with the evidence adduced at the trial. In this connection it is contended that inasmuch as the information was framed upon the theory of a deliberate and premeditated murder, and in view that the court submitted the case to the jury upon that theory as well as upon the statute which provides that murder "committed in the perpetration of or attempt to perpetrate robbery" also constitutes murder in the first degree without deliberation or premeditation, therefore the court should also have submitted the question of second degree murder to the jury. It is true that the court submitted the elements of deliberation and premeditation to the jury. From that it does not follow, however, as contended, that the court should also have submitted the question of an unpremeditated or second degree murder to the jury. Where there was some evidence in this case from which the jury could have found a deliberate and premeditated murder, yet the jury would not have been justified in finding that the murder in question was not committed in an attempt to perpetrate a robbery, and upon the latter question there is not even room for doubt or conflict. Under our statute a murder so committed constitutes murder in the first degree, and legally can constitute nothing else. True, a jury in any homicide case has the power to disregard the evidence, and may find one who is clearly guilty of first degree murder guilty of manslaughter or acquit him.

From this it is assumed that, because a jury may do this, therefore a court must submit all the degrees of murder, and thus give the jury the right to pass upon the several degrees of murder. This contention loses sight of the legal principle involved in the statute just referred to which does not segregate murder committed in the perpetration of or attempt to perpetrate a robbery into degrees. While it is true that, under our jurisprudence, a jury has the power, with or without reason, either to reduce the degree of the crime, if it be divided into degrees, or acquit the accused, it does not follow that a court is bound in effect to charge that they may disregard the law, the evidence, and their oath in arriving at a verdict. Neither is it correct to say that, by not submitting the question of second degree murder in a case where the killing was perpetrated in an attempt to

rob, the court thereby in effect coerces the jury to find the accused guilty of murder in the higher degree. Whether such might be the effect under our statute depends upon the evidence. If the evidence justifies a finding that the murder was committed in the perpetration of or attempt to perpetrate a robbery, it is the duty of the court to charge that, if they find beyond a reasonable doubt that the murder was "committed in the perpetration of or attempt to perpetrate a robbery," they should find the accused guilty of first degree murder, and if the evidence, as in the case at bar, does not justify the jury under their oaths to find otherwise, the court need not submit the question of second degree murder at all, although it might do so without committing error against the accused. In such a case, in merely charging on first degree murder the court does not, as is contended, withhold anything from the jury, but simply charges the law. It is the law that fixes the degree of the offense, and when the facts are not in dispute and clearly show that the murder in question was committed as aforesaid, the jury have neither the legal nor a moral right to refuse to follow the law, and, in refusing to do so, in effect amend or repeal the statute.

Of course, if the jury refuses to be bound by either law or fact, a court is powerless: but the court is not required to partake of the wrong and in effect suggest to the jury that they may do what the law does not sanction. Here again the question is not whether it would have been improper for the court to have charged with regard to murder in the second degree, but the question is whether, under all the facts and circumstances of this case (not some other case), the trial court committed prejudicial error in refusing to so charge. Upon this question we are of the opinion that there was absolutely no evidence, either direct or inferential, which would have justified a finding by the jury other than that the murder in question was committed in an attempt to perpetrate a robbery. If this be correct, why submit a question to the jury upon which an affirmative finding can in no event be justified? Is not the question of whether there is any evidence in support of any essential fact as much a question of law in a homicide case as any other? Must the court in advance abdicate its prerogatives to the jury simply because that jury has the power, and perhaps the inclination, to disregard both law and fact? In this case the jury, however, followed the law, and in passing upon the facts observed their oath, and hence fully discharged their duty. Further, the case was fairly and impartially tried. What plausible reason,

therefore, can an appellate court give for interfering with the verdict and judgment? Again, this case in principle is not distinguishable from *State v. Thorne*, 41 Utah, 414, 126 Pac. 286, Ann. Cas. 1915D, 90, in which we held that under a similar state of facts the court committed no error in refusing to charge on second degree murder.

In passing this point we desire to say that a trial court should, in every case where there is any direct or inferential evidence with respect to the different degrees of murder, charge the jury with regard to all the degrees, and this rule should be followed where there may be any doubt with regard to whether the higher degree is established or not. This is contemplated by our statute which divides crimes into degrees, and which requires the jury to find in the lesser degree in case of doubt. That statute should, however, not be given controlling effect in a case of murder committed in the perpetration of or attempt to perpetrate robbery, because a murder so committed is not divisible into degrees. In such a charge of murder the killing was either committed in the perpetration of or attempt to perpetrate robbery or it was not. If the evidence, as in the case at bar, is clear and undisputed that it was, then the murder is first degree murder and nothing else, and the mere fact that the jury has the power to ignore the evidence and find otherwise does not change the law. In this case the jury was, by force of the evidence, compelled under their oaths to find that the murder was committed in an attempt to perpetrate robbery. By authority of what law or system of logic could they also legally have found that it was not so committed? If they could not have so found without ignoring both law and fact, no prejudicial error could have been committed in not telling them that they might do so.

The following cases are based upon a statute like ours with respect to murder, and it is accordingly held that, if the jury find that the murder was committed in the perpetration of or attempt to perpetrate a robbery, they have no alternative save to find the perpetrator guilty of murder in the first degree: *State v. Gray*, 19 Nev. 212-218, 8 Pac. 456; *State v. Williams*, 28 Nev. 407, 82 Pac. 353, and cases there cited. See also *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744. Some of the very cases that counsel cite to sustain their contention that the court should have charged the jury with respect to second degree murder hold directly to the contrary. For example, in *Davis v. United States*, 165 U. S. at pages 378 and 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 362, Mr. Justice Brewer, in referring to the question now under consideration, said: L.R.A.1916D.

"There was no testimony to reduce the offense, if any there was, below the grade of murder. If the defendant was sane and responsible for his actions, there was nothing upon which any suggestion of any inferior degree of homicide could be made, and therefore the court was under no obligation (indeed, it would simply have been confusing the minds of the jury) to give any instruction upon a matter which was not really open for their consideration." So here: If the jury believed that the appellant fired the fatal shot and that he was mentally responsible, then they had no choice, and it was their sworn duty to find him guilty of murder in the first degree.

It is also contended that the court erred in refusing to charge the jury that, if appellant had abandoned the intention to rob before he shot Erickson, then the killing would not have been committed in an attempt to rob, and therefore, unless it was a "wilful, deliberate, malicious, and premeditated killing," the killing would not have been murder in the first degree. The court properly refused to so charge, if for no other reason than that there was no evidence whatever that appellant had voluntarily abandoned the attempted robbery before he fired the fatal shot. Indeed, the only evidence upon the question is inferential, and that is directly contrary to such a claim. Upon this question the cases last above cited are decisive against counsel's contention.

Counsel for appellant requested the court to charge the jury that one who is charged with a criminal offense is presumed to have a "good character and reputation." The court refused the request in the language proposed, but charged the jury upon that subject as follows: "When a person is charged with the commission of a crime, the law presumes that he is a man of average character, and the failure to call witnesses to prove his general good character raises no presumption against it."

It is now insisted that the court erred in giving the charge aforesaid and in refusing the proffered one. It is contended that the error consists in using the qualifying adjective "average" instead of "good" in defining the presumption with respect to character. It is true that the adjective usually used is "good." Many authorities are, however, to the effect that the law presumes one accused of crime to be possessed of a fair, or ordinarily fair, character. In the case of *Mullen v. United States*, 46 C. C. A. 24, 106 Fed. 894, cited by appellant's counsel on this point, in referring to the presumption now under consideration, it is said: "It is in consonance with the general principle of law that a man is presumed

to stand ordinarily well, and to have at least the average qualities of morality and good conduct."

In *People v. Fair*, 43 Cal. at page 149, Mr. Justice Wallace says that the law presumes everyone possessed with a "character of ordinary fairness." To the same effect is 1 Bishop, *Crim. Proc.* 3d ed. § 1112, and Underhill, *Crim. Ev.* § 76. While perhaps it would have been better if the court had used the phrase "good character," yet, in view of all that the court said in the instruction, the jury could not have been misled by the use of the word "average." It seems clear to us that the appellant could not have been prejudiced from anything said or omitted, and therefore this contention cannot prevail.

Finally it is contended that the court erred in its charge to the jury with respect to their right to recommend life imprisonment in case they found appellant guilty of murder in the first degree. The court, in calling attention to the statute upon that subject which confers the right upon the jury to recommend life imprisonment in case they find appellant guilty of first degree murder, charged as follows: "In considering this question you are not restricted by any rule of law or public policy, but are entitled to decide the question from such considerations as may appeal to you as reasonably and conscientiously entitled to be weighed in determining the giving or withholding of such recommendation."

It is contended that this charge is open to the same objection as the one which we condemned in the case of *State v. Thorne*, 39 Utah, 208, 117 Pac. 58. This contention is not tenable. The court in this case in no way did, nor attempted to, direct or control the judgment of the jury in arriving at a conclusion upon the question of recommendation. That is what was attempted in the *Thorne* Case, and it was that attempt which we condemned. While the trial courts discharge their full duty under the statute when they direct the attention of the jury thereto, and state that thereunder it is their province to make or withhold a recommendation of imprisonment for life in case they find the accused guilty of murder in the first degree, yet the mere fact that a court may say what is said in the instruction in this case cannot have the effect of avoiding the verdict and the judgment based thereon. To so hold would amount to a mere travesty.

In conclusion we desire to say that after a careful examination of the entire record we cannot avoid the conclusion that the appellant has had a full, fair, and impartial trial. Moreover, all of his rights have been carefully safeguarded at all stages of L.R.A. 1916D.

the trial by vigilant and able counsel, who, although acting without any reward or compensation, have manifested a most commendable interest in the prisoner's behalf.

The judgment should be, and it accordingly is, affirmed.

McCarthy, Ch. J., concurring:

I fully concur in the reasoning of and the conclusions reached by Mr. Justice Frick in the foregoing opinion. In view of the importance of the case I am impelled to make the following additional observations:

The information charges, without referring to the burglary or robbery, that the defendant "wilfully, unlawfully, feloniously, deliberately, premeditatedly of his malice aforethought, and with a specific intent to take the life of the said C. L. Erickson," shot and killed him. Second degree murder is included in the charge as alleged. But the evidence without conflict shows that at the time defendant fired the fatal shot he was perpetrating a burglary (*Comp. Laws 1907, § 4336*) and attempting to perpetrate a robbery. The evidence also shows that the burglary, attempted robbery, and homicide were so connected and interwoven, each one with the other two, that they constituted one transaction. *Comp. Laws 1907, § 4161*, provides, among other things, that murder when "committed in the perpetration of, or attempt to perpetrate, any . . . burglary, or robbery, . . . is murder in the first degree." The killing of Erickson was, therefore, under the circumstances as shown by the undisputed evidence, murder in the first degree, unless the defendant was, at the time he fired the fatal shot, insane. Upon this point, as the record now stands, there is no room for doubt. The question upon which there seems to be a difference of opinion is as to whether second degree murder is included in a homicide committed in the perpetration of or attempt to perpetrate a burglary or robbery. In all classes and kinds of intentional murder in which the crime is divided into degrees, the element that distinguishes first degree murder from murder in the second degree is the "premeditation and deliberation with which first degree murder is committed." 2 Bishop, *Crim. Law*, 7th ed. § 728; 21 Am. & Eng. Enc. Law, 157; 21 Cyc. 728. Under § 4161, *supra*, murder committed in the perpetration of any of the felonies therein enumerated is murder in the first degree, regardless of whether the killing is premeditated and deliberate or even intentional. The killing may be accidental, but it nevertheless is murder in the first degree. *State v. Thorne*, 39 Utah, 208, 117 Pac. 58.

I am unable to conceive of a state of facts or circumstances, and certainly none has been suggested, under which a murder committed in the perpetration of or attempt to perpetrate any of the felonies mentioned in § 4161, supra, would or could be less than murder in the first degree. As I have stated, the elements of first degree murder, namely, premeditation and deliberation, that distinguishes first degree murder from second degree murder, are not essential, when the crime is committed in the perpetration of or attempt to perpetrate any one or more of the felonies referred to, to make the crime murder in the first degree. 21 Cyc. 719-723; 21 Am. & Eng. Enc. Law, 167; *State v. Thorne*, supra. The reason for the rule is well stated by the supreme court of California in the case of *People v. Milton*, 145 Cal. 169, 78 Pac. 549, as follows: "In this [referring to the class of murder committed in the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary] the law has said to the malefactor: If in your perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem you shall take the life of a fellow being, intentionally or unintentionally, your crime is murder in the first degree. The killing may be wilful, deliberate, and premeditated, or it may be absolutely accidental. In either case, you are equally guilty. The elements of wilfulness, deliberation, and premeditation are not indispensable to your crime. The murder, under § 187 of the Penal Code, is established, in that the killing is unlawful, it having been perpetrated in the performance or attempt to perform one of these felonies, and the malice of the abandoned and malignant heart is shown from the very nature of the crime you are attempting to commit. Therefore, if, in perpetrating arson, although in the belief that the building is unoccupied, some person within the building, unknown to you, shall lose his life, you are guilty of murder in the first degree. Or if, in burglariously entering premises which you believe to be unoccupied, you shall accidentally take the life of one whose presence is unsuspected by you, still your crime is murder in the first degree. That such is the true meaning and construction of our statute there can be no doubt." *State v. Thorne*, 41 Utah, 414, 126 Pac. 286, Ann. Cas. 1915D, 90; *Morgan v. State*, 51 Neb. 672, 71 N. W. 788; *State v. Young*, 67 N. J. L. 224, 51 Atl. 939.

Counsel for appellant, proceeding upon the theory that second degree murder is necessarily included in a homicide committed in the perpetration of or attempt to perpetrate any of the felonies enumerated in § 4161, supra, argues that in a prosecution

for such murder it is the province of the jury, under § 4892, if the defendant is found guilty, to determine whether he is guilty of first degree or second degree murder. The section referred to reads as follows: "Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

The difficulty with counsel's position is that, under the plain provisions of § 4161, murder committed in the perpetration of or attempt to perpetrate any felony mentioned therein is first degree murder only, and that § 4892 has no application. As I have suggested, there is no conceivable state of facts or circumstances under which this class of murder can be anything less than murder in the first degree. For illustration, take a case in which an incendiary, believing that a certain building is uninhabited and unoccupied, wilfully and maliciously applies the torch to it, and after the structure is enveloped in flames he discovers that it is occupied by a human being who is unable to make his escape therefrom, and the incendiary makes every effort in his power to rescue such party, but is unable to do so. Under such circumstances the killing would be murder in the first degree. I think it is plain that in a homicide belonging to this class there is no line of demarcation that distinguishes it into degrees. If it may be separated into different degrees, where is the line to be drawn between the first and second degree? Is it second degree murder when it appears from the evidence that the defendant, in the commission of or attempt to commit one or more of the felonies mentioned, had no specific intent to take human life, and that the killing was wholly accidental? The question is answered by the statute, which declares that the killing of a human being even under such circumstances is murder in the first degree.

The Texas court of criminal appeals, in construing a statute containing provisions which are substantially the same as §§ 4161 and 4892, supra, said: "The statute, and the decisions construing that statute, have not yet laid down the proposition that the accused firing at the intended victim in cases of robbery and killing another party would reduce that killing to murder in the second degree. The shooting would still be murder in the first degree, because the statute expressly says that all murder in robbery or in perpetration of robbery would be murder in the first degree. *This statute eliminates murder in the second degree in homicides of this character.*" (Italics mine.) *Milo v. State*, 59 Tex. Crim. Rep. 196, 127 S. W. 1025.

True, the jury have the power in this class of homicides to find the accused guilty of any of the lower degrees necessarily included in the charge set forth in the information, or to acquit him. They may do this even though it is conclusively shown by the evidence that he is guilty of murder in the first degree, and there is no evidence tending to reduce the crime to a lower degree. But it does not follow that because a jury have the power to ignore the evidence, and, in violation of their oaths, to bring about a miscarriage of justice by refusing to do their duty, the court should, in its instructions, authorize and in a sense invite them to do so.

I am clearly of the opinion that in this case the court did not err in refusing to instruct the jury on the question of murder in the second degree. As I read the record, and understand the law applicable thereto, second degree murder is not in this case. The defendant, under the undisputed evidence, is either guilty of murder in the first degree or he is not guilty at all of the crime of which he stands convicted. *State v. Thorne*, supra.

Under § 4336 all that was necessary for the state to prove in order to establish first degree murder was that defendant, while he was perpetrating or attempting to perpetrate burglary or robbery, shot and killed Erickson; and the question of whether the killing was deliberate, premeditated, and with malice aforethought, or whether it was unintentional on the part of defendant, was immaterial. The court, by charging the jury that before the defendant could be convicted of murder in the first degree the state must prove beyond a reasonable doubt that the killing was deliberate, premeditated, with malice aforethought, and with the "specific intent to take the life of said C. L. Erickson," imposed upon the state a greater burden to prove first degree murder than the law applicable to the facts required. In other words, the instruction, notwithstanding the evidence conclusively shows that the homicide was committed in the perpetration of burglary and attempted robbery, required the jury, before they could legally convict the defendant of murder in the first degree, to find from the evidence beyond a reasonable doubt that the killing was wilful, deliberate, premeditated, and with malice aforethought. The charge, in this regard, was therefore much more favorable to the defendant than the law and the facts warranted. The contention seems to be that because the court erroneously instructed the jury that in order to convict the defendant of murder in the first degree they must find from the evidence beyond a reasonable doubt that the fatal shot was

fired wilfully, deliberately, premeditatedly, with malice aforethought, and with the specific intent to take the life of Erickson, the court should have committed further error favorable to the defendant and to the prejudice of the state by submitting to the jury the question of second degree murder.

Moreover, as I read and construe § 4161, an instruction on the question of second degree murder would, in effect, have withdrawn from the consideration of the jury the question of whether the homicide was committed in the perpetration of burglary and attempted robbery. The court could not have submitted the question of second degree murder without in effect annulling the statute. It sometimes happens that the rapist, burglar, robber, and incendiary, in perpetrating or attempting to perpetrate one or more of the felonies mentioned in § 4161, kills, without any specific intent so to do, a human being. The killing, as a matter of fact, may be wholly accidental. In such case the killing is not deliberate nor premeditated, but is, nevertheless, murder in the first degree. Take, for example, a case such as I have suggested, in which the court, in defining murder in the first degree, charges the jury in the language of the statute, namely, that "every murder . . . committed in the perpetration of, or attempt to perpetrate any arson, rape, burglary, or robbery, . . . is murder in the first degree." § 4161. It must be conceded that, if the statute is to be given any effect whatever, such instruction correctly defines murder of the first degree when the homicide is committed in the perpetration of or attempt to perpetrate any of the felonies mentioned therein. Now it is apparent that should the court, after giving the instruction suggested, proceed to define second degree murder, it must repeat the language of the statute down to and including the words "in the," and then substitute the words "second degree" for the words "first degree," which would, in effect, annul the statute, and, as I have stated, take from the jury the question of first degree murder.

It is suggested that there is evidence tending to show that defendant was addicted to the use of morphine or opium, and that the use of such drugs had weakened and impaired his mental faculties to such an extent as to render him incapable of deliberation and premeditation, or of forming a design to kill, thereby reducing the crime from first degree to second degree murder. The court carefully and elaborately charged the jury on the question of insanity, and the defendant's rights in that regard were carefully guarded. Upon that issue the court instructed the jury in part

as follows: "An insane person is not criminally responsible under the law for his acts. The words 'insane person' include . . . distracted persons and persons of unsound mind. . . . When evidence is introduced tending to prove insanity sufficient to raise a reasonable doubt of defendant's sanity at the time of the commission of the act, then the presumption of sanity ceases, and the prosecution is bound to prove the sanity of the accused beyond a reasonable doubt. So in this case, if the jury, after considering all the evidence, entertain a reasonable doubt of the sanity of the defendant at the time of the alleged offense, then he must be acquitted. . . . When the evidence is completed, and the case finally submitted to you, the defendant *cannot be convicted of any crime* unless, from all the evidence in the case, taken together, you are satisfied, beyond a reasonable doubt, that the defendant was sane at the time the act in question was committed." (*Italics mine.*) "You are instructed that if you are not satisfied from a careful and conscientious consideration of all the evidence in the case, beyond a reasonable doubt, that, at the time of the commission of the act charged, the defendant knew right from wrong with respect to said act, then you cannot find him guilty of any crime; and so far as this case is concerned, it is not material what caused such insanity."

Assuming, for the sake of the argument, that the defendant, without either deliberation or premeditation, and without forming a design or intent to take human life, fired the fatal shot that killed Erickson,—and we may go a step farther and assume that the weapon was accidentally discharged,—the killing, nevertheless, was, under the statute, murder in the first degree, unless the defendant, at the time he fired the shot, was insane. Of course, if he were insane, he could not legally be convicted of any crime. The jury, however, found against the defendant on the question of insanity.

I have examined the record in this case with more than ordinary care, and am forced to the conclusion that the defendant had a fair and impartial trial, and that he was properly convicted.

Straup, J., dissenting:

Our statute (Comp. Laws 1907, § 4159) defines murder to be "the unlawful killing of a human being with malice aforethought." § 4161 defines the degrees of murder. It is: "Every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing; or committed in the per-

petration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life,—is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree."

The information charged first degree murder thus: That the defendant "wilfully, unlawfully, feloniously, deliberately, premeditatedly, of his malice aforethought, and with the specific intent to take the life of the" deceased, shot and killed him. The facts are referred to by Mr. Justice Frick. The state, as it had the right to do, went to the jury on two theories: One that the defendant, in the commission of, or attempt to commit, a robbery, shot and killed the deceased; the other, that the defendant wilfully, maliciously, deliberately, and premeditatedly, and with the specific intent to take the life of the deceased, and as specifically alleged in the information, shot and killed him. There is ample evidence to support both. The court submitted the case on both, and in such respect charged that, if the jury found that the defendant, in the commission of or attempt to commit a robbery or burglary, shot and killed the deceased, that constituted first degree murder. It further charged that "every murder perpetrated by poison, lying in wait, or any other kind of wilful, deliberate, malicious, and premeditated killing," was also first degree murder. The court in such particular and at some length charged what was meant by the terms "wilful," "deliberate," and "premeditated." It then charged that, before the defendant could be convicted of murder in the first degree, the state must prove beyond a reasonable doubt that "the killing was unlawful;" that it was "deliberate;" that it was premeditated;" that it was "with malice aforethought;" and that it "was with the specific intent to take the life of" the deceased.

The defendant's theory was that, by the habitual and excessive use of morphine and other drugs, his mental faculties were impaired to such an extent as to render him (1) wholly irresponsible for his acts; or (2) incapable of deliberation and premeditation, or of forming or entertaining a design or an intent to kill or rob. Conformably to the first, he requested the court to charge that if the jury found that the defendant, because of an habitual use of such drugs, had become wholly irresponsible for

his acts, they should acquit him; conformably to the second, that if the jury found "that the defendant was intoxicated by the use of morphine or other drugs at the time of the killing, you may take that fact into consideration in determining his condition of mind, though such intoxication may have been voluntary;" that "in this case, if you believe from a preponderance of the evidence that the defendant was addicted to the use of morphine or opium or both, and by reason of the continued and habitual use of either or both of such drugs was brought or left in such weakened mental condition that he was incapable of deliberation and premeditation, as defined in these instructions, he is not guilty of murder in the first degree." The defendant also requested the court to define murder in the second degree and to submit such question to the jury. The court refused to give these requests.

Notwithstanding the charge, that before the jury could convict the defendant of first degree murder the state was required to prove that the killing was unlawful, wilful, deliberate, premeditated, with malice aforethought, and with the specific intent to take the life of the deceased, the court, nevertheless, refused to submit to the jury the question of second degree murder; and, by the charge, bound the jury to convict the defendant of first degree murder, or to find him not guilty. The court submitted to the jury the question of the defendant's insanity or irresponsibility, but with the direction that, "before the defendant can be convicted of murder in the first degree upon the theory" that the deceased "was killed by the defendant while the defendant was engaged in the perpetration of or attempt to perpetrate a robbery or burglary, you must be satisfied beyond a reasonable doubt, from all the evidence in the case, that the defendant, at the time of the perpetration or attempt to perpetrate said robbery or burglary, had formed the intent to commit said robbery or burglary, and that he had the mental capacity to distinguish between right and wrong with reference to said robbery or burglary; and, if you should find from the evidence that the defendant at the time in question had not the mental capacity to form an intent to perpetrate a robbery or burglary, then you cannot convict him of murder in the first degree." The court then, after charging on burden of proof as to the issue of insanity, charged that "the test of responsibility for a criminal act when insanity is relied upon as a defense is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry;" L.R.A.1916D.

and if the jury were "not satisfied beyond a reasonable doubt that the defendant had the capacity to distinguish between right and wrong at the time of and with reference to the act in question, then you cannot convict him."

The refusal of the requests, and the charge in the particulars referred to, present the principal questions for review. The most serious is the refusal to submit to the jury the question of second degree murder, and binding them, as did the court, to either find the defendant guilty of first degree murder or to acquit him. This presents two questions: (1) May the court, in any case upon a charge of first degree murder, and upon a plea of not guilty and a trial, itself, instead of the jury, determine the degree of murder? And (2) if so, is this a proper case in which the court may do so? Because of our recent decision in the case of *State v. Thorne*, 41 Utah, 414, 126 Pac. 296, Ann. Cas. 1915D, 90, where it was held that the court in that case was justified in refusing to submit to the jury the question of second degree murder, I approach the first with some hesitation. While I think the doctrine in the *Thorne* Case is stated too broadly, still, were it not for the second question, and the extent to which it is here carried, I should be inclined to yield assent without further observations.

I have already referred to the statute defining murder and first and second degree murder. Section 4893 of the statute provides that "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged." Section 4892, that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." Section 4906, that "upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree." Here, then, are express statutes which on a plea of not guilty and a trial, require the jury, and on a plea of guilty the court, to determine the degree, whenever a crime is distinguished into degrees. Murder, under the statute, is distinguished "into degrees." The charge here is murder. It is charged in the first degree. Second degree is "necessarily included in" the charge of first degree murder. The one is just as much charged in the information as is the other. I think the statutes referred to are peculiarly applicable to a charge of first degree murder. I see no license to disregard them or to hold them inapplicable to a charge of murder as here charged, a wilful, deliberate, malicious, and

premeditated murder. Under such statutory provisions I think the great weight of authority is that upon an information or indictment for first degree murder, and upon a plea of not guilty and a trial, it is the exclusive province of the jury to determine the degree of murder, not only when the charge or claim is that the murder was wilful, deliberate, and premeditated and with malice aforethought, but also when perpetrated by poison, or done in the commission of or attempt to commit felonies enumerated in the statute defining murder in the first degree. The cases so holding are collected and cited in notes to the case of *State v. Phinney*, 12 Ann. Cas. 1081, and 12 L.R.A. (N.S.) 935. The reasons for the rule are stated in those cases. Other cases in support of the rule are also cited and referred to by the appellant in his brief. The California and Nevada cases cited in the prevailing opinion do not, in my judgment, support a contrary doctrine. In 19 Nev., cited, the question of second degree murder was not withheld from, but was expressly submitted to, the jury. In 28 Nev. and in 141 and 145 Cal., cited, questions of withholding or submitting second degree murder were not involved. Neither is the case of *Davis v. United States*, 165 U. S. 373, 41 L. ed. 750, 17 Sup. Ct. Rep. 360, in point, for there the prosecution was under a statute different from ours; one where homicide was not divided into degrees of murder, as is the case under our statute, and where there was no statute, as we have, "that whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." There, however, are cases supporting a contrary or "minority" rule,—the rule stated in the *Thorne Case*. They are also collected and cited in notes in 12 Ann. Cas. and 12 L.R.A. (N.S.) heretofore referred to. Some of them may be distinguished because of dissimilar statutes. That is especially true of the cases from Nebraska and New Jersey. There seem to be no statutes in those states corresponding with §§ 4892 and 4906 of our statute. Others may be distinguished because no request to charge on second degree murder was asked. However, there are cases there cited, notably from Michigan and Iowa, which apparently support the rule laid down in the *Thorne Case*.

The ruling is here defended and upheld upon the theory that the evidence without dispute shows the murder was committed in the commission of or attempt to commit a robbery; and, since the statute declares a murder so committed to be murder in the first degree, the court was justified in refusing to submit to the jury the question of

second degree murder, and in giving the binding instruction to convict the defendant of first degree murder or to find him not guilty. In this no distinction is drawn between a proper statement of the law and a binding instruction to the jury which takes from them the ascertainment and determination of the degree. Of course a murder committed in the commission of or attempt to commit a robbery, or perpetrated by poison, is, by the statute, declared to be first degree murder; and the jury should be so instructed, and that, if they so find the facts beyond a reasonable doubt, to convict the defendant of first degree murder. So, too, does the statute declare that "any other kind of wilful, deliberate, malicious, and premeditated killing," or "perpetrated from a premeditated design unlawfully and maliciously to effect the death" of a human being, is also first degree murder. Declaring to the jury the law as to what constitutes first degree murder is one thing; withholding from them the right to find second degree murder, when, by the information, second degree as well as first degree is charged, is quite another and different thing. Asserting, as is done, that since the statute declares a "murder committed in the perpetration of or attempt to perpetrate a robbery," etc., is first degree murder, and if the evidence shows the "murder (defined by the statute to be 'the unlawful killing of a human being with malice aforethought') was committed" that way, the court is not required to submit to the jury second degree murder, adds nothing; for the statute as well declares a "murder committed" under other enumerated circumstances is also first degree murder. Yet it is said if the evidence shows a "murder committed" in the perpetration of a robbery, etc., second degree murder need not be submitted to the jury, because the statute defines that to be the first degree murder; but if the evidence shows a "wilful, deliberate, malicious, and premeditated" murder, second degree murder should be submitted, though the statute as well declares that also to be first degree murder. The question is asked, how can a murder committed in the perpetration of a robbery, etc., be second degree murder? As well ask how can a wilful, deliberate, malicious, and premeditated murder be second degree murder? Let the thought be carried a little further by asking: How can a guilty man be innocent? and how can a verdict of not guilty be rendered in either supposed case?

The declaration in an early day of Chief Justice Shaw in a criminal case (*Com. v. Porter*, 10 Met. 263) may not be here amiss: "It is the proper province and duty

of judges to consider and decide all questions of law which arise, and that the responsibility of a correct decision is placed finally on them; that it is the proper province and duty of the jury to weigh and consider evidence, and decide all questions of fact; and that the responsibility of a correct decision is placed upon them. And the safety, efficacy, and purity of jury trial depend upon the steady maintenance and practical application of this principle." The further observation is there made by him that while it is the duty of the court to declare the law and the jury to accept it as so declared, they, nevertheless, in a criminal case by a general verdict "declare the law as well as the fact." And that is our statute. Comp. Laws 1907, § 4876. Every first degree murder involves elements of a wilful, deliberate, malicious and premeditated killing. On the first appeal in the Thorne Case, 39 Utah, 208, 117 Pac. 58, we held that allegations in an information of an unlawful, malicious, deliberate, and premeditated killing are supported by proof of a killing committed in the perpetration of or attempt to perpetrate a robbery, on the theory that a wilful and premeditated intent to commit the felony is transferred from that offense to the homicide actually committed, and is the legal equivalent of and tantamount to the allegations of a wilful, deliberate, and premeditated killing. And on no other theory can such a ruling be upheld.

When, therefore, all the provisions of the statute referred to are considered, I see no reason for holding that when the murder is shown to have been committed without dispute by poisoning, or in the commission of, or attempt to commit, a felony enumerated in the statute defining first degree murder, the degree of murder is for the court; but when the evidence without dispute, and by the most positive and direct testimony, shows the murder to have been committed, not in such manner, but by a wilful, deliberate, malicious, and premeditated killing with malice aforethought,—a murder also defined by the statute to be first degree murder,—the degree is for the jury. Under the statute I do not see wherein the court has any greater license in the one case than in the other to itself, instead of the jury, determine the degree of murder. The statute requiring the jury to "find the degree," where the crime is "distinguished into degrees," makes no such distinction. In considering the power of the court and the province of the jury with respect to the subject in hand, we must bear in mind the well-recognized distinction between our civil and criminal jurisprudence. In a civil case, if all the material allegations of the

complaint are established by evidence without dispute, the court is given the power, and it is its duty, if requested, to direct a verdict for the plaintiff; and though the case under such circumstances should be submitted to the jury, and a verdict nevertheless rendered in favor of the defendant, the court, on its own motion, or upon the plaintiff's, may set the verdict aside, as being against and contrary to the evidence. The court may not do that in a criminal case. Though all the allegations of the information or indictment be established by most direct and positive evidence, wholly without dispute, and though the defendant offered no evidence whatever, the court, nevertheless, may not direct a verdict against him; and if, upon a submission of the case, under such circumstances, a verdict is rendered in favor of the defendant, which manifestly is contrary to and against all the evidence, and wholly unsupported by it, still the court may not, upon its own motion or that of the state, and against the objection of the defendant, set the verdict aside.

Take the case in hand, where it is claimed the evidence without dispute shows first degree murder; and let it further be assumed that the defendant had offered no evidence of any kind, but had rested when the state rested, and the jury had rendered a verdict of not guilty,—a verdict, let it be assumed, in the very teeth of all the evidence,—yet the court could neither on its own motion nor that of the state have interfered with it. This proposition is conceded. What significance is to be attached to it? That the jury in a criminal case, so far as concerns the state, are not only the judges of the credibility of the witnesses and the weight to be given the testimony but are also the exclusive judges of the facts. They, as concerns the state, may or may not decide questions of fact and find a verdict conformably with the evidence. They, in such respect, are given unlimited power, wholly uncontrolled by the court, to decide all questions of fact and render a verdict contrary to the evidence. It may be said the jury in such case would not properly perform their duty. That is not the point. The pertinent question is: May the court in such case influence, coerce, or control the jury, or interfere with their verdict when so rendered, in the very teeth of all the evidence? When a jury in a civil case renders a verdict not conformable with and not supported by the evidence, the court may interfere on its own motion, or that of the party aggrieved. So may it in a criminal case on behalf of the defendant, when a verdict is rendered to his prejudice, not conformable with and not supported by the

evidence, or one against law. But, as concerns the state, the court may not interfere, though the verdict is wholly unsupported by, and is contrary to, all the evidence; and though the jury, in the rendition of it, disregarded both law and evidence.

It is said in some of the cases that, if the evidence without dispute shows first degree murder, the court should not submit the question of second degree to the jury, and thereby permit or give them to understand that they may render such a verdict when there is no evidence to support it. But in such case such a verdict would not be unsupported by evidence. It would not only amply support such a verdict, but would also support a verdict of a higher degree,—of first degree murder. Evidence which would support first degree, of necessity must also support second degree murder. That is the effect of the holding in *People v. Dillon*, 8 Utah, 92, 30 Pac. 150. If, however, the argument is sound and is carried to a conclusion, then why should the court submit a case at all to the jury when the evidence, wholly without dispute, and by the most positive and direct testimony, manifestly shows murder in the first degree committed by the defendant, and no evidence whatever offered by him to controvert it? To say, as is said in some of the cases, the court is required to submit the case to the jury to determine whether the defendant committed the acts constituting the charged offense, is to beg the question; for such a contention assumes some conflict or uncertainty in the evidence, either with respect to the commission of the offense, or as to the person who committed it, or that such questions rest upon inferences and deductions, and not upon positive, direct, and uncontroverted evidence. Let us adhere to the admitted proposition, the conceded premises,—the defendant's guilt of first degree murder, clearly shown by the most positive and direct evidence, wholly without conflict. According to all the cases, no matter how conclusive may be the evidence in favor of the state and against the defendant, the court, nevertheless, upon a plea of not guilty and a trial, is bound to let the case to the jury. If they, in such case, have the unlimited power, wholly uncontrolled by the court, to render a verdict of not guilty, then why have they not the same power to render any other verdict which, on the information or indictment, may be rendered?

It seems somewhat of an anomaly to say that the jury have the unlimited power, wholly uncontrolled by the court, to render a verdict of not guilty, in disregard of all the evidence, but may not render a verdict of second degree murder because the evi-

dence without dispute shows first degree murder. What appears to be a conclusive answer to the contention is this: Had the jury in this case, notwithstanding the court by its charge bound them to render a verdict of first degree murder or to find the defendant not guilty, rendered a verdict of murder in the second degree, what power under our Constitution or the statute had the court, either on its own motion, or that of the state, and against the objection of the defendant, to set the verdict aside? None whatever. This but shows that the jury, so far as concerns the state, had the right and power to render any kind of a verdict which, under the information, could be rendered; and any verdict so rendered could not, against the defendant's objection, be questioned or assailed on the ground that it is against law or the evidence. And if such a verdict had been rendered, and the court were powerless to interfere, then what right had the court in the first instance, on the submission of the case to the jury, against the defendant's requests and objections, to so restrict, direct, and control the jury as was here done? The court may, and it is its duty when requested, to inform the jury of the different verdicts which, on the information or indictment, may be rendered. But the court may not, against the defendant's requests and objections, restrict, direct, or influence the jury as to which of such verdicts should be rendered by them. And as second degree murder is necessarily included on the charge of first degree murder, and as the statute expressly requires the jury, not the court, to determine the degree, where the crime is distinguished into degrees, I think the question of second degree murder ought to have been submitted to the jury.

I have thus considered the question from the standpoint that the evidence without dispute shows murder in the first degree. I shall now consider it from the standpoint that there is evidence to justify a verdict of second degree murder. There is evidence to show that the defendant was addicted to the use of morphine or opium. The controversy in that respect was: To what extent had he used such drugs, and what effect had they upon him? The contention of the defendant was twofold: One, a destruction or impairment of his mental faculties to such an extent as to render him wholly irresponsible for his acts; the other, that his mental faculties were weakened and impaired to such an extent as to render him incapable of deliberation, premeditation, or of forming a design or intent to kill, thereby reducing the crime from first degree to second degree murder. The state contended that the defendant, though addicted to the

use of the drugs, had not used them to such an extent as to render him either irresponsible for his acts, or incapable of deliberation or premeditation or of forming a design or intent to kill. The court submitted the case to the jury on the theory only of whether the defendant was irresponsible for his acts; whether he had the capacity to distinguish right from wrong as to the robbery; whether he was insane. The defendant's evidence as to his insanity or entire irresponsibility was not strong. It, however, is conceded to be sufficient to require a submission of such issue to the jury. No one has questioned that. If it was so sufficient, I do not see why the defendant was not also entitled to go to the jury on the theory of an impairment of his mental faculties by the use of the drugs to such an extent as to render him incapable of deliberation and premeditation, or of forming a design or an intent to kill.

The jury on the evidence, finding that the defendant was not wholly irresponsible, might have reached the conclusion, had they not been directed against it, and had the question of second degree murder been submitted to them, that the defendant's mental faculties, because of an habitual and excessive use of the drugs, nevertheless, were impaired to such an extent as to render his capacity to deliberate and premeditate, or to form a design or an intent to kill, reasonably doubtful, and thus induced to find him guilty of second degree murder. And had such a verdict been rendered, on such a theory, I do not see how it could be said to be against, or unsupported by, evidence, in view of the concession that there was sufficient evidence to carry the case to the jury on the issue of insanity and irresponsibility caused by an excessive and habitual use of the drugs. But the jury were not allowed to consider the effect of such drugs upon the defendant's mind for the purpose of determining whether he had the capacity to deliberate, premeditate, or of forming an intent to kill. And this, notwithstanding the court submitted to the jury the question of first degree murder on two theories: One, that the murder was committed in the commission of or attempt to commit a robbery; the other, that the killing was wilful, deliberate, with premeditation and malice aforethought, and with the specific intent to take the life of the deceased, and as specifically in the information charged. So, though it be claimed that the jury, on the theory that the murder was committed in the commission of or attempt to commit a robbery, could not consider the excessive use of the drugs and the effect they had upon the defendant's mind except to determine whether he was wholly irresponsible, L.R.A.1916D.

they, nevertheless, had the right to consider such use and effect on the theory that the killing was wilful, deliberate, and premeditated. If not, then as well say a jury in a charge of first degree murder could consider the defendant's intoxication or the effects of alcoholism upon him, only for the purpose of determining whether he was insane, or wholly irresponsible for his acts, and not whether he had the capacity to deliberate and premeditate, and in determining whether he was guilty of first or second degree murder. The Thorne Case involved no question as to the defendant's mental capacity or condition. In such respect this case is dissimilar to that. So, upon the evidence, I think the court ought to have submitted to the jury the question of second degree murder.

Now, the defendant requested the court to charge that if the jury found the defendant was addicted to the use of the drugs, they should consider the effect thereof, whatever they might find in such particular, in determining his condition of mind and his capacity to deliberate and premeditate. As has been seen, the court refused this and submitted to the jury the consideration of the effect of such drugs only in determining whether the defendant was capable of distinguishing between right and wrong "with reference to the robbery and burglary" and "the mental capacity to form the intent to perpetrate a robbery or burglary." And it is said this is all that was necessary because the evidence shows the murder was committed in that manner. But that is not the only theory on which the state tried the case and went to the jury, and on which the court, on behalf of the state, submitted it to them. The court also submitted it on the theory of a wilful, deliberate, malicious, and premeditated killing. There, too, is ample evidence to support that. It about as strongly supports the one as the other. And the court, notwithstanding a submission on the theory that the murder was committed in the commission of or attempt to commit a robbery, nevertheless, in most direct and positive terms, unqualifiedly charged the jury that before they could convict the defendant of first degree murder the state was required to prove beyond a reasonable doubt that the killing was unlawful, that it was deliberate, that it was premeditated, that it was with malice aforethought, and that it was with the specific intent to take the life of the deceased. Right or wrong, it was the duty of the jury to accept that. Comp. Laws 1907, § 4876. It must be presumed that they did so. And therefore, by their verdict, must it also be presumed that they found the murder was committed in such

manner They could not have done otherwise without disobeying the charge in such particular. It is said this charge, though no complaint is made of it by either party, and though it is not before us for review, is wrong; and then is it asserted that the claim is made further error should have been committed by submitting second degree murder. The proposition to be demonstrated is: Was or was not the court required to submit to the jury second degree murder? If the conclusion that to submit such question would have been error is to be taken as the major premise of the syllogism, or the negative assumed of the proposition sought to be proved, then, of course, there is nothing to demonstrate. For, when it is once assumed, or the conclusion is reached, that to submit such question would have been error, all argument must cease. No matter what we may think of the charge submitting to the jury the question of a deliberate, malicious, and premeditated murder, and requiring the jury to find that kind of a murder to convict the defendant of first degree murder, it nevertheless, uncomplained of by either party, was given as the law of the case which the jury were required to accept and to render a verdict accordingly; and the presumption that they did so must equally be indulged whether the charge is right or wrong, favorable or unfavorable to the defendant or the state. The information in express terms charged a deliberate, malicious, and premeditated murder. Under that information the state could prove the commission of such a murder or one committed in the perpetration of a felony. It was to its advantage to go to the jury, as it did, on both theories. And since the court submitted to the jury the question of a deliberate, malicious, and premeditated murder, and required the jury to find that the murder was committed in such manner before they could convict the defendant of first degree murder, then, it seems to me, must it necessarily follow that the court ought also to have submitted the question of second degree murder and the effect, if any, the use of the drugs had on the defendant's mental capacity and condition to deliberate and premeditate. To escape this conclusion must it be presumed that the jury did not obey the positive and commanding language of the court as to the finding of a deliberate, malicious, and premeditated murder before they could convict the defendant of first degree murder,—that they did not consider such question so submitted to them, and did not find that the murder was so committed,—or else must there be a different finding made on the record that the murder was not committed in such manner, but in

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the commission of or attempt to commit a robbery? I think we may not do either. We may not in a civil, much less a criminal, case, try it de novo on the record, and treat as found that which may be, or even ought to have been, found.

There is another question of less moment,—the charge with respect to the test of insanity or irresponsibility. The court charged: "The test of irresponsibility for a criminal act, when insanity is relied upon as a defense, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry."

This thought is repeated several times in other portions of the charge. The defendant, by his request, asked the court to also embody the additional element of "sufficient will power to govern his action" and to "resist impulses to commit crime." The refusal to so charge is also complained of.

Insanity or mental unsoundness embraces many different species. In some cases the subject, because of a diseased or disordered mind, lacks intelligence and the power to reason—to think rationally. Such a person is therefore incapable of comprehending the nature and quality of an act done, and of distinguishing between right and wrong with respect to it. When such is the particular form of malady the test is, as was charged: Did the defendant have the capacity to understand the nature and quality of the act, and to distinguish between right and wrong with respect to it? Many cases so hold. But it also is well recognized in medical jurisprudence that one may be capable of understanding the nature and quality of an act and know that it is morally wrong or unlawful, yet, understanding this, may, because of a diseased, impaired, or deranged mind, lack will power and ability to choose and to control conduct, or actions, in the light of his understanding and intelligence. In such case the true test is not capacity merely to distinguish between the rightfulness and wrongfulness of an act committed, but also sufficient will power to choose whether he shall do or refrain from doing it. Many cases so hold. Lack of will power may be caused not only by mania, hallucinations, or irresistible impulses to commit crime, or other maladies impelling violence or impulses to commit crime, but also by maladies of a negative character showing inability to control, to govern generally, to choose, to will. It is common knowledge that that portion of the brain which is concerned with the will may be so diseased or impaired as to destroy will power, and yet the person may not be possessed of mania, hallucinations, or irresistible impulses. I see no

evidence that the defendant was possessed of "irresistible impulses to commit crime," or that his malady was of such a character or took such a form. The court, therefore, was not required to embody such an element in the charge in stating the test of insanity. But I think there is evidence of a malady, if any at all, involving a diseased or an impaired will power. Again, it is common knowledge that the general effect of an excessive and habitual use of morphine and opium is to impair, and in some instances to wholly destroy, will power. It is this faculty which usually is first affected by the use of such drugs. Evidence of this was also given at the trial. We are therefore concerned with a malady which involves not only the faculty to think rationally, and to reason, and the capacity to understand right from wrong, but also

the faculties of the will, the capacity, the power, to choose, to govern, and to control conduct and actions. In view of this I think the court in its charge too much restricted the test, and ought to have charged substantially as was charged and approved in the case of *Davis v. United States*, 165 U. S. 373, 41 L. ed. 750, 17 Sup. Ct. Rep. 360, and in accordance with the doctrine stated in *State v. Reidell*, 9 *Houst. (Del.)* 476, 14 *Atl.* 550, and supported by many other cases, when the particular malady involves or affects will power.

Petition for rehearing denied July 3, 1913.

Petition for writ of certiorari to Supreme Court of the United States denied September 12, 1914.

Annotation—Effect of statutory declaration that murder committed by certain means, or in commission of felony, shall be murder in first degree, upon right of jury to pass upon degree.

This annotation is supplementary to that appended to *State v. Phinney*, 12 L.R.A.(N.S.) 935, on the same subject; and as is the case there, is confined to the question as to the right of the jury to determine the degree of guilt of one on trial for a murder committed by means of poison, lying in wait, or in the perpetration or attempt to perpetrate rape, robbery, burglary, or while committing a felony, which is declared by statute to be murder in the first degree; and does not include the right of the jury to determine the degree where the element of deliberation and premeditation is essential to a conviction of murder in the first degree.

As shown by the earlier note and the following cases, the decisions are not of one accord upon this question, some holding, like *STATE v. MEWHINNEY*, ante, 590, that the statute precludes the jury from determining the degree of guilt, while others hold to the contrary.

The statutory power to convict of a lesser degree of crime than that charged does not apply in case of one charged with murder in the perpetration of a burglary, since such a homicide is murder in the first degree, regardless of intent. *People v. Schleiman* (1910) 197 N. Y. 383, 27 L.R.A.(N.S.) 1075, 90 N. E. 950, 18 *Ann. Cas.* 588.

And where one accused of homicide is guilty of murder in the first degree, if guilty at all, the court should not instruct the jury upon the lesser degrees of the crime. (N. Y.) *Ibid.*

In *State v. Spivey* (1909) 151 N. C. 676, 65 S. E. 995, it appearing that the L.R.A.1916D.

homicide was done only in one of two ways, by lying in wait, or in an attempt to commit arson, the doing of which in either way the statute declared to be murder in the first degree, it was held that a charge that the verdict must be either guilty of murder in such degree or not guilty was proper; and that a statute giving the jury in a murder case the power by their verdict to determine the degree gave them no discretion in the matter.

In *Strong v. State* (1914) — *Ark.* —, 169 S. W. 1189, an instruction in conformity with the proof and with the statute prescribing that "all murder which shall be committed in the perpetration of or attempt to perpetrate arson, rape, robbery," etc., "shall be deemed murder in the first degree," was sustained.

In *Williams v. State* (1891) 30 *Tex. App.* 354, 17 S. W. 408, the refusal of the trial court to charge the jury upon murder in the second degree was sustained because all the evidence showed that the murder was committed in the perpetration of robbery, and a murder so committed is expressly made by statute *per se* murder in the first degree.

But in *Burton v. Com.* (1908) 108 *Va.* 892, 62 S. E. 376, it was decided that on an indictment for murder a verdict for manslaughter would not be set aside at the instance of the accused because the evidence shows "murder by lying in wait," which the statute declares to be murder in the first degree, since other statutes allow juries a certain degree of latitude and discretion in applying the law

to the facts and fixing the degree of guilt of one convicted of crime. The court said: "Our jurisprudence, in this and in other respects, may be amenable to criticism of schoolmen and logicians, but, subjected to the test of actual experience, it has appeared in practice to be well that the law, after framing definitions and formulating rules of conduct, should allow to courts and juries, in their application and enforcement, a certain latitude and discretion. And so it comes to pass that a man may be indicted for murder of the first degree by the various means embraced in the statute, the evidence adduced may tend to the proof of the offense named in the indictment, and none other, and yet the jury, acting under this discretion with which they have been clothed by the law, may find the offender guilty of a less offense. And it is well in practice that it should be so, else, owing to the tenderness of juries and their reluctance to impose the highest penalty, many crimes would go wholly unpunished, and thus the rigor of the law would tend rather to the promotion than to the prevention of crime."

And in *State v. Bobbitt* (1908) 215 Mo. 10, 114 S. W. 511, it was decided that although a homicide occurs in the perpetration of or in the attempt to perpetrate arson, robbery, etc., designated by the statute as murder in the first degree, the defendant may, nevertheless, be tried and found guilty of murder in the second degree.

In *State v. Rogers* (1905) 129 Iowa, 229, 105 N. W. 455, the court, in this connection, said: "Appellant contends that Forney was killed in an attempt to commit robbery, and therefore the perpetrator of the crime was guilty of murder in the first degree, or was entitled to an acquittal, and that the jury should have been so instructed. See Code, § 4728; *State v. Smith* (1897) 102 Iowa, 656, 72 N. W. 279. Even if this were so, it might not follow that submission of the issue as to his guilt of murder in the second degree was an error prejudicial to the defendant. Upon that question the court, in *State v. Bertoch* (1900) 112 Iowa, 195, 83 N. W. 967, where poison was alleged to have been administered, was equally divided." W. W. A.

UTAH SUPREME COURT.

H. T. & C. COMPANY, Resp't.,

v.

J. W. WHITEHOUSE and Wife, Appts.

(— Utah, —, 154 Pac. 950.)

Covenant — warranty — married woman — running with land.

The covenant of a married woman who signs a warranty deed of her husband's real estate merely to convey her dower interest does not run with the land so as to be enforceable by a remote grantee.

For other cases, see Covenants and Conditions, III. c, 2, in Dig. 1-52 N. S.

(January 3, 1916.)

APPEAL by defendants from a judgment of the Judicial District Court for Tooele County in plaintiff's favor in an action brought to recover damages for an alleged breach of warranty of title to certain land conveyed under contract by defendants to a trustee of the plaintiff corporation. Affirmed on condition.

Statement by McCarty, J.:

Plaintiff, a corporation, brought this action to recover damages from defendants

Note. — As to right of remote grantee to sue for breach of covenant when covenantor had neither title nor possession, see annotation following this case, post, 613. L.R.A.1916D.

for the alleged breach of warranty of title to 200 acres of land situated in Tooele county, Utah, which land was, on February 7, 1906, conveyed under contract by the defendants to Theodore Schulte, trustee, for Joseph H. Hurd, J. B. Taylor, and Walter A. Cooke. From a judgment rendered in favor of the plaintiff, defendants prosecute this appeal.

The contract under which the land was conveyed, so far as material here, is as follows:

This agreement made this 29th day of January, A. D. 1906, by and between Jeremiah W. Whitehouse, of Lincoln, Tooele county, Utah, party of the first part, and Theodore G. Schulte, of Salt Lake City, Utah, party of the second part, witnesseth that the party of the first part agrees to sell, and the party of the second part to purchase, all of the following described real property, situate in Tooele county, Utah, namely [describing the land], for the sum of twenty-seven hundred fifty (\$2,750) dollars, payable twelve hundred (\$1,200) dollars cash at the date hereof, receipt of which is hereby acknowledged, and the balance of fifteen hundred fifty (\$1,550) dollars, payable twelve hundred (\$1,200) dollars on or before August 1, 1906, and three hundred fifty (\$350) dollars on or before October 1, 1906. The party of the second part also agrees to pay the balance due the state of Utah on the said southeast quarter

and the east half of the southwest quarter of section 20, in township 3 south of range 3 west, Salt Lake meridian.

It is hereby further mutually understood and agreed that the aforesaid premises shall be conveyed by warranty deed, and that the party of the first part and his wife will execute such warranty deed, and that the same shall be placed in escrow with some bank or other depository to be agreed upon, to be delivered upon the payment of said sum of fifteen hundred fifty (\$1,550) dollars, balance of the aforesaid purchase price thereof.

In witness whereof the said parties of the first and second part have hereunto set their hands the day and year first above written.

Jeremiah W. Whitehouse.
Theodore G. Schulte.

On September 17, 1906, Schulte, at the request of his beneficiaries, Hurd, Taylor, and Cooke, conveyed to plaintiff by warranty deed the above-mentioned 200 acres of land.

At the time the foregoing contract was entered into and the deeds referred to were executed, the land was, and since October 31, 1904, had been, encumbered by a certain agreement in writing entered into between the defendants and one Catherine Le Vine and Elizabeth R. Pratt, by which the defendants agreed to sell and convey to Le Vine and Pratt, and they agreed to purchase from defendants, for the sum of \$2,000, the 200 acres of land described in the deed herein mentioned from defendants to Schulte. Suit was brought against the Whitehouses in the district court of Tooele county for the specific performance of the last-mentioned contract. Schulte was made a party defendant. The plaintiff herein, grantee and assignee of Schulte, was later on substituted as defendant in lieu of and in the place and stead of Schulte. A trial was had, and from the judgment rendered in favor of the Whitehouses denying specific performance, the cause was brought to this court on appeal. This court, after considering the questions presented by the appeal, remanded the cause, with directions to the trial court to set aside the judgment theretofore rendered and to enter judgment decreeing a specific performance of the last-mentioned contract. For a more detailed statement of the facts concerning the making of that contract, and of the suit brought thereon, we invite attention to the case of *Le Vine v. Whitehouse*, 37 Utah 260, 109 Pac. 2, Ann. Cas. 1912C, 407.

The court in the case at bar found, and the record shows, that the district court, in pursuance of the remittitur and the L.R.A.1916D.

directions of this court in the case above mentioned, rendered and entered judgment against the Whitehouses and the plaintiff herein for a specific performance of the agreement, "adjudging that defendants and each of them (and particularly the plaintiff herein) should execute and deliver to said Le Vine and said Pratt a good and sufficient conveyance in fee conveying the fee simple title to the tract of land (200 acres) described in said agreement, . . . and that thereupon, by virtue of said decree, and the proceedings taken therein, . . . plaintiff herein . . . was evicted and ousted from the possession" of the premises (the 200 acres of land), and ever since has been, and is now, dispossessed of the same.

The court also found, and the evidence supports the findings: "That at the time of entering into the said agreement of January 29, 1906, between the said Theodore G. Schulte and the defendant J. W. Whitehouse, the said 200 acres of land, from the possession of which the plaintiff herein was ousted as aforesaid by the said Catherine E. Le Vine and Elizabeth R. Pratt by virtue of the aforesaid judgment and decree of this court, was valued, and it was agreed that the same should be taken, at and for the sum or price of \$10 per acre, or a total of \$2,000 for the said 200 acres, and that the same was at said time and ever since has been, and still is, of said value, . . . which was paid by the said Theodore G. Schulte and his beneficiaries hereinbefore referred to. That no part of the purchase price paid by the said Schulte and his said beneficiaries to the defendants herein has been repaid to them or either of them, or to the plaintiff herein, and no part of the damage arising by reason of the defendants' breaches of said contract and of the warranty and covenants in said warranty deed conveying the said 200 acres of land, excepting that the plaintiff received from the said Catherine E. Le Vine and Elizabeth R. Pratt the sum of \$517.23, and which was paid on the 16th day of July, 1910, . . . and excepting the further sum of \$100 paid on the 17th day of February, 1911, and \$400 paid on the 5th day of June, 1913, and for which the defendants are entitled to credit upon the amount of said damages suffered by the plaintiff by reason of said breaches of the terms and covenants of said deed and agreement, and that, after crediting all of said sums, there is due to the plaintiff from the defendants, and the plaintiff is entitled to recover from the defendants as damages and for principal and interest, costs, and attorneys' fees suffered, paid out, and expended, the sum of \$1,720.83."

Messrs. Hancock & Barnes, for appellants:

Rescission of a contract cannot be done in part.

Cole v. Smith, 26 Colo. 506, 58 Pac. 1086; Hynes v. Packard, 92 Tex. 44, 45 S. W. 562; Phillips v. Reichert, 17 Ind. 120, 79 Am. Dec. 463; Hoffman v. Kirby, 136 Cal. 26, 68 Pac. 321; Slocum v. Bracy, 55 Minn. 249, 43 Am. St. Rep. 499, 56 N. W. 826; Clifton v. Jackson Iron Co. 16 Am. St. Rep. 621, note; 3 Page, Contr. 2101; 2 Sutherland, Damages, 606; Carter v. Beck, 40 Ala. 599.

The judgment against defendant Ettie Whitehouse is erroneous.

Mygatt v. Coe, 124 N. Y. 212, 11 L.R.A. 650, 26 N. E. 611; Van Amburgh v. Kramer, 16 Hun, 205; 2 Washb. Real Prop. 4th ed. p. 284; Cole v. Hughes, 54 N. Y. 444, 13 Am. Rep. 611; O'Brien v. Evans, 107 Mich. 623, 65 N. W. 571.

Mr. Joseph H. Hurd for respondent.

McCarty, J., delivered the opinion of the court:

There are numerous assignments of error. The only assignment, however, we deem of sufficient importance to consider, is the one in which the findings of fact, conclusions of law, and the judgment are assailed, wherein it is held that Ettie Whitehouse is liable under the covenant of warranty contained in the deed from the Whitehouses to Theodore Schulte executed February 7, 1906.

Plaintiff's evidence shows that Mrs. Whitehouse was not a party to the transactions leading up to, and which culminated in, the making of the contract under which the deed was executed, and that she was not known "at all in the transaction" prior to the execution of the deed. The evidence, without conflict, shows that she signed the deed merely as the wife of Jeremiah Whitehouse, and that she had no title to, or estate in, the land conveyed, except the contingent interest created by Comp. Laws. 1907, § 2826, which, so far as material here, provides: "One third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, and to which the wife had made no relinquishment of her rights, shall be set apart as her property in fee simple if she survive him."

The rule, as declared by the great weight of authority, seems to be that a covenant of warranty by one having neither posses-

sion of, nor title to, the land conveyed, does not run with the land, and that the right to recover on the covenant belongs only to the grantee to whom it is made. In other words, a warranty by one who is a stranger to the title, and not in possession of the land conveyed, is a personal covenant and does not pass to a subsequent grantee, except by assignment. In this case there was no assignment from Schulte to the plaintiff.

In Jones on Real Property, vol. 1, § 942, the author says: "A covenant will not run with the land unless there is either mutuality or succession of interest. Privity of contract is sufficient between the immediate parties, but there must be privity of estate to carry the benefit of the covenant to subsequent owners of the property to which the covenant relates." 11 Cyc. 1100; Mygatt v. Coe, 124 N. Y. 212, 11 L.R.A. 646, 26 N. E. 611; Mygatt v. Coe, 142 N. Y. 78, 24 L.R.A. 850, 36 N. E. 870; Pyle v. Gross, 92 Md. 132, 48 Atl. 713; Bull v. Beiseker, 16 N. D. 290, 14 L.R.A.(N.S.) 514, 113 N. W. 870.

We also invite attention to an instructive note in 14 L.R.A.(N.S.) 514, to the last case cited, in which the annotator cites and reviews numerous decisions wherein the doctrine herein announced is upheld.

We are of the opinion, and so hold, that plaintiff, under the admitted facts, is not entitled to recover against Ettie Whitehouse on her covenant of warranty to Schulte. The cause is therefore remanded, with directions to the trial court that, in case the plaintiff shall, within fifteen days after notice of the remittitur, file with the clerk of the court its consent in writing to a modification of the findings of fact, conclusions of law, and judgment, to conform with the views herein expressed, the judgment will stand affirmed as to Jeremiah Whitehouse, each party to pay his own costs on this appeal. Should plaintiff fail to file with the clerk of the trial court his consent in writing to a modification of the findings of fact, conclusions of law, and judgment within fifteen days after receiving notice of the remittitur, the trial court is directed to grant a new trial; appellants to recover their taxable costs on this appeal.

Straup, Ch. J., and Frick, J., concur

Petition for rehearing denied January 15, 1916.

Annotation—Right of remote grantee to sue for breach of covenant when covenantor had neither title nor possession.

This note is supplemental to the note to Bull v. Beiseker, 14 L.R.A.(N.S.) 514, L.R.A.1916D. where the earlier cases are collected. Since the earlier note only one case in

point besides *H. T. & C. Co. v. WHITEHOUSE*, ante, 611, has been found.

In *Coleman v. Lucksinger* (1909) 224 Mo. 1, 26 L.R.A.(N.S.) 934, 123 S. W. 441, where the defendant, having no title, conveyed to B with covenants of seisin and warranty, and B conveyed to the plaintiff with special warranty, neither B nor the plaintiff ever having been in actual possession of the land, it was claimed by the defendant that, conceding all the covenants were broken when made, and that neither title nor possession passed from the defendant to B nor from B to the plaintiff, then there was no privity of contract between the plaintiff and the defendant, and the

plaintiff could not maintain the action. But it was held that the covenant of seisin ran with the land and that the plaintiff might sue upon it.

While without the scope of this note, an interesting case upon privity in recovery upon covenants is *Merchants' Union Trust Co. v. New Philadelphia Graphite Co.* (1912) — Del. —, 83 Atl. 520, where it was held that a Pennsylvania mortgagee, having no title to the land nor estate in it before sale and entry, had no privity with the lessee of the mortgagor's grantee, nor could it enforce the covenant in his lease to pay rent. B. B. B.

UTAH SUPREME COURT.

CLEOPHA JEPSEN, Appt.,

v.

ANTON JENSEN, Respnt.

(— Utah, —, 155 Pac. 429.)

Fright — recovery for injuries caused by.

1. Damages may be recovered for injuries from fright due to the defendant's wilful, wanton, and malicious acts in using abusive language to plaintiff's husband in her presence, and threatening to kill him with a weapon which defendant pointed at him.

For other cases, see *Fright*, in *Dig. 1-52 N. S.*

Trial — wilful acts — question for court.

2. The court cannot say as matter of law that the acts of one in using abusive language to another and pointing a weapon at him with a threat to kill were not wilful and wanton within the rule permitting recovery for injuries resulting from fright caused by such acts.

For other cases, see *Trial*, II. c, 8, e, in *Dig. 1-52 N. S.*

(February 8, 1916.)

APPEAL by plaintiff from a judgment of the District Court for Box Elder County granting a nonsuit in an action brought to recover damages for alleged injuries from fright due to defendant's wilful, wanton, and unlawful acts. Reversed.

The facts are stated in the opinion.

Messrs. Johnson & Johnson, for appellant:

Note. — The right to recover for physical injury resulting from fright caused by a wrongful act is treated in the notes to *Huston v. Freemansburg*, 3 L.R.A.(N.S.) 49; *Chittick v. Philadelphia Rapid Transit Co.* 22 L.R.A.(N.S.) 1073; and *Conley v. United Drug Co.* L.R.A.1915D, 830.

The right to recover for mental anguish L.R.A.1916D.

Recovery may be had for injuries resulting from fright or terror.

Watkins v. Kaolin Mfg. Co. 131 N. C. 536, 60 L.R.A. 617, 42 S. E. 983, 13 Am. Neg. Rep. 197; *Gulf, C. & S. F. R. Co. v. Hayter*, 93 Tex. 239, 47 L.R.A. 325, 77 Am. St. Rep. 856, 54 S. W. 944, 7 Am. Neg. Rep. 359; *Purcell v. St. Paul City R. Co.* 48 Minn. 134, 16 L.R.A. 203, 50 N. W. 1034.

Where the conduct of the defendant has been wilful and wanton a recovery may be had.

Preiser v. Wielandt, 48 App. Div. 569, 62 N. Y. Supp. 890, 7 Am. Neg. Rep. 558; *May v. Western U. Tele. Co.* 157 N. C. 416, 37 L.R.A.(N.S.) 912, 72 S. E. 1059; *Harless v. Southwest Missouri Electric R. Co.*, 123 Mo. App. 22, 99 S. W. 793; *Green v. Shoemaker*, 111 Md. 69, 23 L.R.A.(N.S.) 667, 73 Atl. 688; *Dunn v. Western U. Tele. Co.* 2 Ga. App. 848, 59 S. E. 189; *Brownback v. Frailey*, 78 Ill. App. 262; *Williams v. Underhill*, 63 App. Div. 223, 71 N. Y. Supp. 291.

Plaintiff's own personal legal rights have been invaded, and it is a cruel and inhuman refinement to say that she is not entitled to recover not only compensation, but exemplary damages.

Lesch v. Great Northern R. Co. 97 Minn. 503, 7 L.R.A.(N.S.) 93, 106 N. W. 955; *Watson v. Dilts*, 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068; *Hill v. Kimball*, 76 Tex. 210, 7 L.R.A. 618, 13 S. W. 59; *Engle v. Simmons*, 148 Ala. 92, 7 L.R.A.(N.S.) 96, 121 Am. St. Rep. 59, 41 So. 1023, 12 Ann. Cas. 740.

caused by an assault, where no bodily injury is inflicted, is discussed in the note to *Small v. Lonergan*, 25 L.R.A.(N.S.) 976.

The question, as affecting specifically a carrier's liability to a passenger, is discussed in the note to *Cheapeake & O. R. Co. v. Robinett*, 45 L.R.A.(N.S.) 433.

Messrs. B. C. Call and George Halverson, for respondent:

The evidence fails to disclose any actionable damages, or any cause of action against the defendant.

Gaskins v. Runkle, 25 Ind. App. 584, 58 N. E. 740; Kalen v. Terre Haute & I. R. Co. 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; White v. Sander, 168 Mass. 296, 47 N. E. 90, 2 Am. Neg. Rep. 573; Spade v. Lynn & B. R. Co. 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566, 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, 5 Am. Neg. Rep. 367; Smith v. Postal Teleg. Cable Co. 174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54; Braun v. Craven, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; Renner v. Canfield, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435; Phillips v. Dickerson, 85 Ill. 11, 28 Am. Rep. 607; Mitchell v. Rochester R. Co. 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; Lee v. Burlington, 113 Iowa, 356, 86 Am. St. Rep. 379, 85 N. W. 618; Nelson v. Crawford, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; Ewing v. Pittsburgh, C. C. & St. L. R. Co. 147 Pa. 40, 14 L.R.A. 566, 30 Am. St. Rep. 709, 23 Atl. 340; Huston v. Freemansburg, 212 Pa. 548, 3 L.R.A. (N.S.) 49, 61 Atl. 1022; Bucknam v. Great Northern R. Co. 76 Minn. 373, 79 N. W. 98, 6 Am. Neg. Rep. 302; Haas v. Metz, 78 Ill. App. 46; Mahoney v. Dankwart, 108 Iowa, 321, 79 N. W. 134, 6 Am. Neg. Rep. 278; Sanderson v. Northern P. R. Co. 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542; Miller v. Baltimore & O. S. W. R. Co. 78 Ohio St. 309, 18 L.R.A. (N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499; Kagy v. Western U. Teleg. Co. 37 Ind. App. 73, 117 Am. St. Rep. 278, 76 N. E. 792.

Frick, J., delivered the opinion of the court:

The plaintiff sued the defendant to recover damages for alleged injuries to her health and nervous system which she alleged were sustained through defendant's wilful, wanton, and unlawful acts. In view that the complaint is assailed as insufficient in substance, we shall set it forth at large. It reads as follows: "Plaintiff complains and alleges: (1) That she now is and was at all the times herein alleged, a married woman, residing with her husband, Reuben Jepsen, and three children, in Mantua, Box Elder county, Utah. (2) That in the nighttime of the 1st day of October, 1914, at about the hour of 8:30 of the evening of said day, the said defendant came to the home of this plaintiff and knocked at the L.R.A.1916D.

door, and when plaintiff opened the same, said defendant entered the room in which she, her said husband, and children were, and then and there wilfully, wantonly, maliciously, and without regard to the rights of this plaintiff, began and did curse and abuse plaintiff's husband, and then and there drew a pistol from his pocket and pointed the same over and across plaintiff's shoulder, and threatened to shoot and kill her said husband; that said defendant remained in said room for a long time, to wit, about fifteen minutes, though often begged and requested by this plaintiff to leave the same, and during all of said time, in a loud and threatening voice, and with vile and abusive language, threatened to shoot and kill her said husband, and after leaving said room said defendant returned and was prevented from re-entering the same only by this plaintiff closing and fastening the doors of said room; that plaintiff about six weeks before had been confined in childbirth, and was still, as a result thereof, in delicate health, all of which defendant well knew. (3) That by reason of said wilful, wanton, and malicious conduct of said defendant, this plaintiff became greatly frightened and terrified, so that at the time said defendant returned to re-enter said room, as hereinbefore alleged, she fell in a swoon or faint, and was attacked by a nervous chill, and her nervous system so gave way and she became prostrated so that she was confined to her bed for the greater part of two days, and ever since said time she has been in a highly nervous state and condition, so that she does not sleep well and is easily disturbed and frightened by any unusual noise or occurrence. (4) That by reason of the said wilful, wanton, and malicious language, acts, and conduct of said defendant, this plaintiff has been damaged in the sum of \$10,000."

Judgment is prayed for the amount of the damages alleged. The defendant answered the complaint, admitting that plaintiff is a married woman, etc., and that he called at her home on the night stated, and denied all other allegations of the complaint. When the case came on for trial, the plaintiff produced evidence that fully supported every material allegation of the complaint. Indeed, the testimony of the plaintiff and that of her husband, given on direct examination, respecting defendant's conduct, threats, and abusive language, is even stronger than the allegations of the complaint. At the conclusion of plaintiff's evidence defendant moved for a nonsuit, the grounds of which, stating them in the language of his counsel, are as follows: "(1) That no actionable damages were shown; (2) that the complaint fails to state a cause of action; and (3) that the evidence

failed to show any cause of action against the defendant."

The court sustained the motion, and plaintiff assigns the ruling as error. In view that we have been forced to find that all of the material allegations of the complaint are amply supported by competent evidence, the first question to be determined is whether the complaint states a cause of action.

Defendant's counsel contend that, inasmuch as the alleged injuries were caused from terror or fright alone, without bodily contact, and that the alleged threats or assault were neither intended to be nor were directed against the plaintiff personally, therefore the case stated in the complaint comes within the rule that no recovery is permitted where the alleged injuries are caused alone by terror or fright. Upon the other hand, plaintiff's counsel contend that this case falls within the rule of wilful or wanton and intentional wrongdoing committed by the wrongdoer. Under such circumstances counsel contend that the authorities permit a recovery, although the alleged injuries or diseases complained of are the result of fright or terror alone. In the case of *Brownback v. Frailey*, 78 Ill. App. 262, the allegations of the complaint were substantially the same as in the case at bar. The only difference between the complaint in that case and the one before us is that the alleged assault and threats in that case were directed against the plaintiff, although her husband, who was absent, seems to have been the inciting cause thereof, the same as here. We can see no legal distinction from the standpoint of civil redress between making an assault upon the plaintiff and making one in her presence upon her husband. The case of *Hill v. Kimball*, 76 Tex. 210, 7 L.R.A. 618, 13 S. W. 59, is very much in point upon that precise question. In that case the assault was not made upon the plaintiff, a woman, but upon others in her presence, and the court there did not discover any reason why she should not recover. In the following cases recoveries were held authorized under facts and circumstances which, in our judgment, cannot legally be distinguished from those in the case at bar, namely: *Preiser v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890, 7 Am. Neg. Rep. 558; *May v. Western U. Teleg. Co.* 157 N. O. 416, 37 L.R.A. (N.S.) 912, 72 S. E. 1059; *Harless v. Southwest. Missouri Electric R. Co.* 123 Mo. App. 22, 99 S. W. 793; *Dunn v. Western U. Teleg. Co.* 2 Ga. App. 845, 59 S. E. 189; *Brownback v. Frailey*, supra; *Williams v. Underhill*, 63 App. Div. 223, 71 N. Y. Supp. 291; *Watson v. Dilts*, 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068; *Hill v. Kimball*, supra; and *Engle v. Sim-* L.R.A.1916D.

mons, 148 Ala. 92, 7 L.R.A. (N.S.) 96, 121 Am. St. Rep. 59, 41 So. 1023, 12 Am. Cas. 740. Counsel for plaintiff have also cited several cases where recoveries are permitted in what are called negligence cases. The negligence in those cases was so gross, however, that the acts may well have been characterized as wanton and wilful. We, however, do not refer to those cases. We do not deem it necessary to review the foregoing cases. We shall, however, make a few excerpts from the opinions to show the principle upon which the decisions are based. In *Preiser v. Wielandt*, 48 App. Div. 569, 62 N. Y. Supp. 890, 7 Am. Neg. Rep. 558, it is squarely held that the general rule that no recovery is permitted for mere fright "does not include cases of wanton wrongs nor apply to acts of trespassers." In *Harless v. Southwest. Missouri Electric R. Co.*, the court, in the course of the opinion, said: "The instructions for plaintiff permitted a recovery for fright, mental suffering, and anguish. The defendant assails the propriety of such instructions on the ground that, where there is no bodily hurt, mental anguish and fright are not elements of damage. That is the law in cases of mere negligence [citing cases]. But in cases where the wrongful act is occasioned by offensive, insulting, and humiliating conduct, or where the act itself is wilful and inhuman, such elements enter into the damages which may be recovered [citing cases]."

In *Dunn v. Western U. Teleg. Co.* 2 Ga. App. 845, 59 S. E. 189, the supreme court of Georgia states the rule in the headnote thus: "While mental suffering, unaccompanied by injury to purse or person, affords no basis for an action predicated upon wrongful acts, merely negligent, yet such damages may be recovered in those cases where the plaintiff has suffered at the hands of the defendant a wanton, voluntary, or intentional wrong the natural result of which is the causation of mental suffering and wounded feelings."

In *Williams v. Underhill* it is said: "A recovery for mental injuries and suffering alone is not precluded in cases of wilful tort."

To that effect is the decision in the *Williams Case*.

The case of *Watson v. Dilts*, 116 Iowa, 249, 57 L.R.A. 559, 93 Am. St. Rep. 239, 89 N. W. 1068, is not distinguishable from the case at bar. The *Watson Case* is distinguished from the case of *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 134, 6 Am. Neg. Rep. 278, cited by the defendant. In the latter case it is pointed out that the *Watson case* was not one merely for negligence, but, like the case at bar, the acts constituted a wilful wrong. Defendant's

counsel, however, insist that their client's acts as they are set forth in the complaint were not wanton and wilful. A conclusive answer to that contention is that whether they were or not is, to say the least, largely, if not entirely, a question for the jury. Can we, can any court, say as a matter of law that the threats, acts, and conduct, say nothing of the grossly vulgar and abusive language used by the defendant as shown by plaintiff's evidence, were not wilful nor wanton? Can we say as a matter of law that to threaten to shoot another with a revolver which the threatener then and there holds in his hand is not a wilful nor a wanton act? Such acts in law constitute an assault. It might just as well be contended that the court can say as a matter of law that any assault with any weapon is not wilful nor wanton. Indeed, a jury, under certain circumstances, might find such acts to have been so wanton and cruel as to call for punitive, as well as actual, damages, as is pointed out in some of the cases before referred to.

We do not mean to be understood as expressing an opinion, or even as intimating, that the acts alleged in the complaint are necessarily such as a matter of fact, but what we mean, and now hold, is that we cannot say as a matter of law that the acts complained of were neither wilful nor wanton. *Prima facie*, the acts complained of and testified to constituted an unlawful assault. We must assume that the defendant intended just what it is said he did. We are not permitted to minimize nor to magnify his acts and conduct. His counsel contend that he went to plaintiff's home for a lawful purpose, and that he was rightfully there. Let this be conceded. That, however, gave him no right to commit an unlawful act after he had arrived there. Suppose one goes to his neighbor upon a mission of mercy, but before he leaves the premises he commits an assault. Is he any the less culpable or responsible for his conduct? We are of the opinion, therefore, that the acts described in the complaint are such as bring this case clearly within the rule that damages may be recovered for injuries to health or for shock to the nervous system, although caused by terror or fright alone, and where there was no actual bodily injury inflicted upon the injured person and none such intended by the wrongdoer. Such acts cannot be considered as merely ordinary negligent acts, for which no recovery from fright alone is, as a general rule, permitted.

Counsel for defendant refer us to the following cases in which it is held that a recovery is not permitted for fright alone without some bodily or physical injury, either direct or indirect, such as *miscar-* L.R.A.1916D.

riage of a pregnant woman, etc.: *Gaskins v. Runkle*, 25 Ind. App. 584, 58 N. E. 740; *Kalen v. Terre Haute & I. R. Co.* 18 Ind. App. 202, 63 Am. St. Rep. 343, 47 N. E. 694; *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; *Smith v. Postal Teleg. Cable Co.* 174 Mass. 576, 47 L.R.A. 323, 75 Am. St. Rep. 374, 55 N. E. 380, 7 Am. Neg. Rep. 54; *Braun v. Craven*, 175 Ill. 401, 42 L.R.A. 199, 51 N. E. 657, 5 Am. Neg. Rep. 15; *Renner v. Canfield*, 36 Minn. 90, 1 Am. St. Rep. 654, 30 N. W. 435; *Mitchell v. Rochester R. Co.* 151 N. Y. 107, 34 L.R.A. 781, 56 Am. St. Rep. 604, 45 N. E. 354, 1 Am. Neg. Rep. 121; *Nelson v. Crawford*, 122 Mich. 466, 80 Am. St. Rep. 577, 81 N. W. 335; *Ewing v. Pittsburgh, C. C. & St. L. R. Co.* 147 Pa. 40, 14 L.R.A. 666, 30 Am. St. Rep. 709, 23 Atl. 340; *Huston v. Freemansburg*, 212 Pa. 548, 3 L.R.A. (N.S.) 49, 61 Atl. 1022; *Mahoney v. Dankwart*, 108 Iowa, 321, 79 N. W. 134, 6 Am. Neg. Rep. 278; *Sanderson v. Northern P. R. Co.* 88 Minn. 162, 60 L.R.A. 403, 97 Am. St. Rep. 509, 92 N. W. 542; *Lee v. Burlington*, 113 Iowa, 356, 86 Am. St. Rep. 379, 85 N. W. 618; *Miller v. Baltimore & O. S. W. R. Co.* 78 Ohio St. 309, 18 L.R.A. (N.S.) 949, 125 Am. St. Rep. 699, 85 N. E. 499; *Kagy v. Western U. Teleg. Co.* 37 Ind. App. 73, 117 Am. St. Rep. 278, 76 N. E. 792. Every one of the foregoing cases was determined upon the theory that the acts complained of constituted merely acts of ordinary negligence, and hence a recovery was denied. While it is true, and that it is so is not remarkable, that there are some cases which seem to hold that in no case can a recovery be had where the injuries are caused alone from fright, yet it is also true that there are some cases which seem to hold that a recovery may be had for fright alone, although the acts complained of constituted merely negligent acts. Such cases are, however, not numerous, and the great weight of authority is reflected in the cases relied on by the plaintiff, most of which we have cited above.

We are of the opinion, therefore, that the complaint states a cause of action, and that the court erred in sustaining the defendant's motion for a nonsuit.

We remark that in arriving at the foregoing conclusion we have not been unmindful of defendant's contention that on cross-examination both the plaintiff and her husband, to some extent, modified their original statements. While, as a general rule, it is true that the testimony of a witness is no stronger than he leaves it on cross-examination, yet, where a nonsuit has been granted on plaintiff's evidence, it is the duty of the court to construe the evi-

dence most favorably to the plaintiff, since it is the province of the jury to say what weight shall be given the plaintiff's evidence as a whole.

For the reasons stated, the judgment is reversed, and the cause is remanded to the

District Court of Box Elder County, with directions to grant a new trial. Plaintiff to recover costs.

Straup, Ch. J., and Loofbourow, D. J., concur.

UTAH SUPREME COURT.

PARLAN McFARLANE, Respt.,

v.

W. P. WINTERS et al., Appts.,

(— Utah, —, 155 Pac. 437.)

Appeal — finding on conflicting evidence — review.

1. The reviewing court cannot interfere with a finding by the jury upon the question of negligence and contributory negligence, where there is substantial evidence to support the finding.

For other cases, see Appeal and Error, VII.

1, 2, a, in Dig. 1-52 N. S.

Master and servant — injury by automobile — liability of owner.

2. The owner of an automobile cannot be held liable for injury caused by the negligence of his son in driving it merely because the son at the time of the injury was using it to convey members of the owner's family to a social function, if the owner himself was not present and the car had been lent by the owner to a stranger for the evening, who had secured the son without the owner's knowledge to act as driver.

For other cases, see Master and Servant, I. b, in Dig. 1-52 N. S.

(February 11, 1916.)

APPEAL by defendants from a judgment of the Judicial District Court for Sanpete County in plaintiff's favor, and from an order denying a motion for new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed as to first defendant; affirmed as to the other.

The facts are stated in the opinion.

Note. — The liability of an owner for injuries by automobile while being used by a servant or a third person for his own business or pleasure is treated in the notes to *Christy v. Elliott*, 1 L.R.A.(N.S.) 215; *Hayes v. Wilkins*, 9 L.R.A.(N.S.) 1035; *Jones v. Hoge*, 14 L.R.A.(N.S.) 216; *Danforth v. Fisher*, 21 L.R.A.(N.S.) 93; *Steffen v. McNaughton*, 26 L.R.A.(N.S.) 382; *Fleischner v. Durgin*, 33 L.R.A.(N.S.) 79; *Riley v. Roach*, 37 L.R.A.(N.S.) 834; *Symington v. Sipes*, 47 L.R.A.(N.S.) 662, and *Reilly v. Connable*, L.R.A.1916A, 957.

The liability of the owner where the automobile is being used by a member of his family is treated in the notes to *McNeal v. L.R.A.1916D*.

Messrs. George Christensen and Samuel A. King, for appellants:

Defendant W. P. Winters was not liable under the facts proven by plaintiff.

Doran v. Thomsen, 76 N. J. L. 754, 19 L.R.A.(N.S.) 335, 131 Am. St. Rep. 677, 71 Atl. 296; *White Oak Coal Co. v. Rivoux*, 88 Ohio St. 18, 46 L.R.A.(N.S.) 1091, 102 N. E. 302, Ann. Cas. 1914C, 1082; *Siegel v. White Co.* 81 Misc. 171, 142 N. Y. Supp. 318; *Fielder v. Davison*, 139 Ga. 509, 77 S. E. 618; *Armstrong v. Sellers*, 182 Ala. 582, 62 So. 28; *Symington v. Sipes*, 121 Md. 313, 47 L.R.A.(N.S.) 662; *Smith v. Burns*, 71 Or. 135, L.R.A. 1915A, 1130, 135 Pac. 200, 142 Pac. 352, Ann. Cas. 1916A, 666; *Fowkes v. J. I. Case Threshing Mach. Co.* — Utah, —, 151 Pac. 53.

Mr. Lewis Larson, for respondent:

Defendant was liable for the injury resulting from his son's negligent operation of the car.

McNeal v. McKain, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; *Ploetz v. Holt*, 124 Minn. 169, 144 N. W. 745; *Kayser v. Van Nest*, 125 Minn. 277, 51 L.R.A.(N.S.) 970; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Marshall v. Taylor*, 168 Mo. App. 240, 133 S. W. 527, 6 N. C. C. A. 313; *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125; *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; *Reichardt v. Shard*, 30 Times L. R. 81; *Collard v. Beach*, 81 App. Div. 582, 81 N. Y. Supp. 619; *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; *Parker v. Wilson*, 179 Ala. 361, 43 L.R.A.(N.S.) 87,

McKain, 41 L.R.A.(N.S.) 775, and *Birch v. Abercrombie*, 50 L.R.A.(N.S.) 59; and these notes will be supplemented in a subsequent volume by annotation following the cases of *Griffin v. Russell*, L.R.A.—, —, and *Sultzbach v. Smith*, L.R.A.—, —.

The question of the owner's liability on the ground or theory of dangerous agency is discussed in the note to *Neubrand v. Kraft*, L.R.A.1915D, 691.

Other questions involving the liability of the owner where the automobile is being used by another are discussed in notes that may be found by consulting the Index to L.R.A. Notes under the title, "Automobiles."

60 So. 150; *Lynde v. Browning*, 2 Tenn. C. C. A. 262; *Allen v. Bland*, — Tex. Civ. App. —, 168 S. W. 35.

Frick, J., delivered the opinion of the court:

The plaintiff sued the defendants to recover damages for alleged injuries to himself and to his horse and buggy. He alleged that the injuries were caused through the negligence of the defendant Glen Winters in negligently driving and managing the defendant W. P. Winters's automobile, and thereby causing a collision with plaintiff's horse and buggy while he was lawfully driving along on a public highway in Sanpete county, Utah. Glen Winters, who is represented by a guardian ad litem, was at the time of the accident a minor eighteen years of age, and is the son of W. P. Winters, who is a physician living at Mt. Pleasant, Utah. The latter used the automobile in question in his practice as a physician and surgeon.

Both defendants denied the alleged negligence, pleaded contributory negligence on the part of the plaintiff, and the doctor also denied liability upon the ground that, under the facts and circumstances, he was not responsible for his son's acts, even though it were conceded that the latter so negligently drove and managed the automobile as to cause the collision and consequential damages resulting therefrom.

After the plaintiff had produced his evidence and rested his case, the defendants made separate motions for a nonsuit. Glen Winters based his motion upon the grounds that the plaintiff had not established negligence on his part, and that the evidence, as a matter of law, established contributory negligence on the part of the plaintiff which caused the accident and consequential damages. W. P. Winters based his motion upon the foregoing grounds and upon the further ground that the plaintiff had failed to produce any evidence authorizing the finding and judgment that he was legally responsible for the alleged negligence of his son, Glen Winters. The court overruled both motions, and after the defendants had produced their evidence it also refused to direct a verdict in favor of the defendants as requested, and submitted the case to the jury against both defendants. The jury found in favor of the plaintiff and against both defendants. The court entered judgment upon the verdict, and both defendants appeal.

The principal errors assigned by Glen Winters are: (1) That the evidence is insufficient to justify a finding of negligence on his part; and (2) that, in view of all the evidence, the plaintiff was guilty of

negligence, as a matter of law, which caused the injury complained of. W. P. Winters also assigned the foregoing errors, and also assigned an additional ground, namely, that there is no evidence whatever justifying a finding that he was legally responsible for his son's acts in driving and managing the automobile at the time and place of the accident.

The evidence respecting the cause of the collision is voluminous and quite conflicting. We could subserve no good purpose either in setting forth the evidence or in stating the facts with regard to how the accident occurred. It must suffice to say that there was sufficient evidence of negligence on the part of Glen Winters in driving and managing the automobile at the time and place to be submitted to the jury for their determination. Their finding upon that subject is therefore conclusive upon us. The same result must follow with regard to the question of plaintiff's contributory negligence. While, if the latter question had been left for us to determine, we might have arrived at a different conclusion, yet, in view that there is substantial evidence in support of the finding of the jury, our views in that regard are quite unimportant.

This disposes of the assignments on the part of Glen Winters as well as of the first two assignments interposed on behalf of Dr. Winters. The doctor's third assignment, namely, that there is not sufficient evidence justifying the verdict or judgment by which he is held responsible for his son's acts, presents more difficulty. We have carefully read the evidence, which is preserved in a bill of exceptions, and we have been unable to arrive at the conclusion that, under the facts and circumstances disclosed by the evidence, the father, under the law, can be held responsible for the acts of the son, which acts, the jury found, caused the accident and the consequential injuries and damages as before stated. It conclusively appeared from the evidence that Dr. Winters was not present at the time and place of the accident, and therefore had no control over the son in driving and managing the automobile, and that he knew nothing concerning the accident until after it had occurred. The plaintiff, however, sought to establish the doctor's liability upon the theory that the automobile was owned by him, that it had theretofore been driven by the son in the father's business affairs, and that at the time of the accident it was being driven by the son in the father's affairs. In other words, the plaintiff seeks to hold the father responsible for the acts of the son upon the theory of principal and agent or that of master

and servant. All the evidence produced by the plaintiff relating to the question now under consideration is, in substance, as follows: The plaintiff and at least two of his witnesses testified that they knew the automobile in question; that it was owned by Dr. Winters, and that he used it in his business of practising medicine; that prior to the accident they on several occasions had seen the son drive the car both when the doctor was in it and when only other members of his family were in the car with the son. Those witnesses, however, all admitted that they had no knowledge with regard to the circumstances or arrangement, if any, under which the son operated the automobile at the times referred to by them. The plaintiff also testified that Glen Winters, Glen's mother, and her little child, and two young ladies or girls, as he called them, were in the car at the time and place of the accident. The plaintiff, in answer to the question of whether he had any conversation with the doctor after the accident occurred, also testified: "Why, Dr. Winters said he had sent the boy over to Spring City with his wife and the girls, and he said they were going to a picnic party of some kind at one of the girls' mother's place, and he said he ought to have went himself, but he sent the boy."

On cross-examination he was asked the following question:

"Isn't it a fact that he [the doctor] told you at the time that the fact was his boy was, at the suggestion of this young lady—that he was driving for this young lady to take her to her mother's home?"

He answered: "He [the doctor] said he [the son] was taking them over to a social over at her [the young lady's] mother's. . . . Why, he simply said that he was taking them over to Spring City to a birthday party."

It was also shown by plaintiff's evidence that Spring City is a country town several miles distant from Mt. Pleasant, where the doctor lived, and that the party in the automobile were on their way to Spring City when the accident occurred. Plaintiff's counsel cites and relies on the following cases as sustaining his contention that the foregoing evidence is sufficient to charge the doctor with responsibility for his son's acts, namely: *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; *Ploetz v. Holt*, 124 Minn. 169, 144 N. W. 745; *Daily v. Maxwell*, 152 Mo. App. 415, 133 S. W. 351; *Marshall v. Taylor*, 168 Mo. App. 246, 153 S. W. 527, 6 N. C. C. A. 313; *Hays v. Hogan*, 180 Mo. App. L.R.A.1916D.

237, 165 S. W. 1125; *Hiroux v. Baum*, 137 Wis. 197, 19 L.R.A.(N.S.) 332, 118 N. W. 533; *Birch v. Abercrombie*, 74 Wash. 486, 50 L.R.A.(N.S.) 59, 133 Pac. 1020; and *Moon v. Matthews*, 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219. It may be said that the three cases cited from the courts of appeal of Missouri, the case from the supreme court of Minnesota, and the one from the supreme court of Washington sustain counsel's contention. The supreme court of Washington lays down the doctrine in the following language: "Ownership of an automobile is prima facie proof that it was in the possession of, and was being driven for, the owner."

The three courts last referred to state the proposition in somewhat different form; but they practically all agree that, where the ownership of an automobile is shown to be in a particular person, such evidence constitutes prima facie proof that the automobile was being used in his business affairs at the time and place when and where an accident was occasioned through the negligence of the person in charge of or driving the automobile. The other cases cited above do not go to the extent claimed for them by counsel. We shall refer to those cases again hereinafter.

It will be observed that from plaintiff's evidence in this case it was made to appear that the automobile in question was, in fact, in the possession and under the control of Glen Winters, the son, so that what must be inferred in this case is that Glen was the servant or agent of his father, and was engaged in the latter's business affairs at the time and place of the accident. Can such an inference be legitimately deduced from the mere fact that Glen was at the time driving an automobile owned by his father? Is not the inference just as natural and quite as strong that Glen was driving the automobile either for his own use or for the use of someone other than the father? Is it not a matter of common knowledge and experience that not only automobiles, but all kinds of vehicles, as well as other instrumentalities, while owned by one person, may nevertheless, at a particular time and place, be in the possession of another person, and may be used by the latter for his, and not for the owner's, benefit? It is certainly going to what we consider undue lengths to hold that, because an automobile, or any other vehicle or instrumentality, is shown to be owned by one person, but is found in the possession and use of another, the only legitimate inference to be deduced from such fact is that such other person is the agent or servant of the owner, and is using the instru-

mentality in the owner's business affairs or for his use and benefit. This court has refused to so hold in the recent case of *Ferguson v Winter*, — Utah, —, 150 Pac. 299, where we expressly held that, where a person on a public street is injured by being run into by a delivery wagon which, it was made to appear, was not driven by the owner, but was at the time of the alleged injury under the control of a third person, the plaintiff was required "to produce evidence that the driver was the servant of the defendant [the owner of the wagon], acting in the course of his employment at the time of the accident, since the mere use of a wagon is not sufficient to hold the owner for injuries caused by the driver." In a more recent case still, *Fowkes v. J. I. Case Threshing Mach. Co.* — Utah, —, 151 Pac. 53, we practically announced the same principle although under somewhat different circumstances. After again carefully going over the cases, and after more thorough reflection upon the fundamental principles involved, we are firm in the opinion that the doctrine laid down in the cases just referred to is sound in reason, conforms to fundamental legal principles, and is supported by the best-reasoned cases upon the subject. It certainly cannot successfully be contended that, because of the mere fact that the instrumentality in question is an automobile, therefore a new rule with regard to how the relationship of principal and agent or master and servant may be established is to be applied. We think it may still be safely affirmed that, where it is sought to hold one person responsible and civilly liable for the torts committed by another, whether such other be the child of the owner or a stranger, it must be made to appear by competent evidence that the relationship of principal and agent or that of master and servant existed between the two at the time the tort was committed, and, in addition to that, that the tortious act complained of was committed in the course of the employment of the servant, or was within the scope of the agency. While the courts which hold to the doctrine announced by the supreme court of Washington do not dispute the foregoing rule, they nevertheless contend that all of the foregoing elements may be inferred from the mere fact of ownership of the automobile which causes the injuries complained of. In our opinion, to so hold constitutes a clear departure from the general principles which control in actions for tort where the master is held responsible for the acts of the servant or for those of his agent, and to that effect, in our judgment, is the clear weight of authority.

In the case of *White Oak Coal Co. v. L.R.A.* 1916D.

Rivoux, 88 Ohio St. 18, 46 L.R.A.(N.S.) 1091, 102 N. E. 302, Ann. Cas. 1914C, 1082, the doctrine is correctly stated by the supreme court of Ohio. It is there held that, where it is sought to hold the owner of an automobile responsible for the negligent acts of the driver, merely to prove the ownership of the automobile, and that the servant of the owner was at the time in charge of it, was not enough. It was accordingly held that "it was incumbent upon the plaintiff below to establish by a preponderance of the evidence that he [the driver] was acting within the scope of his employment."

In *Maier v. Benedict*, 123 App. Div. 579, 108 N. Y. Supp. 228, the rule is stated in the first headnote thus: "The owner of a motor car is not liable for injuries resulting from the negligent driving of the car by his son, merely because of his ownership, or because he permitted his son to drive the car, or because the driver was his son."

In the course of the opinion the court further said: "Liability cannot be cast upon the defendant because he owned the car, or because he permitted his son to drive the car whenever he wished to do so (*Cavanagh v. Dinsmore*, 12 Hun, 468), or because the driver was his son (*Shearm. & Redf. Neg.* 5th ed. § 144). Liability arises from the relationship of master and servant, and it must be determined by the inquiry whether the driving at the time was within the authority of the master, in the execution of his orders, or in the doing of his work,"—citing authorities.

In a case where the owner of an automobile was sought to be held liable for the acts of its employee, namely, *Clark v. Buckmobile Co.* 107 App. Div. 120, 94 N. Y. Supp. 772, it is said: "The mere fact that the persons in charge of the machine at the time of the accident were employees of the defendant does not render defendant liable for whatever they did. Unless they were engaged in the defendant's business at the time the accident occurred, the defendant is not liable for any injuries to the plaintiff resulting therefrom."

To the same effect are *Bourne v. Whitman*, 209 Mass. 155, 35 L.R.A.(N.S.) 701, 95 N. E. 404, 2 N. C. C. A. 318; *Siegel v. White Co.* 81 Misc. 171, 142 N. Y. Supp. 318; *Symington v. Sipes*, 121 Md. 313, 47 L.R.A.(N.S.) 662, 88 Atl. 134; *Moon v. Matthews*, 227 Pa. 488, 29 L.R.A.(N.S.) 856, 136 Am. St. Rep. 902, 76 Atl. 219; *McNeal v. McKain*, 33 Okla. 449, 41 L.R.A.(N.S.) 775, 126 Pac. 742; *Smith v. Jordan*, 211 Mass. 269, 97 N. E. 761; and a large number of cases cited in the foregoing cases. See also the recent case of *Halparin v. Bulling*, 50 Can. S. C. 471, Ann. Cas. 1915D,

474. It is also of some significance that the courts of appeal of Missouri seem to rest their judgments, to a large extent at least, upon the Missouri statute, as is apparent from the opinions in the cases to which we have hereinbefore referred. Moreover, the justices do not agree upon the principles upon which the decisions should be based, as is apparent from the opinion of Mr. Justice Sturgis in the case of *Hays v. Hogan*, 180 Mo. App. 237, 165 S. W. 1125. A mere casual reading of the opinion in the latter case will disclose that the court seeks to distinguish automobiles from other vehicles and instrumentalities. No doubt, such a distinction is sought to be made for the reason that, if it be not made, then the owner of every kind of instrumentality which may cause some injury while in the possession and under the control of another would, by mere inference, be held responsible upon the theory that the instrumentality was at the time of the injury being used for the benefit of the owner by his servant or agent. Such a doctrine, in the ordinary affairs of life, would be monstrous, to say the least. But if it were assumed that a distinction should be made between automobiles and other vehicles and instrumentalities, it should be made by the legislature, the lawmaking power, and not by the courts, who merely declare the law as they find it. We, however, can conceive neither reason nor logic in attempting to make such a distinction. The reciprocal rights and duties of the owners of automobiles and of those who own and use other vehicles on the streets and highways are now well defined and understood. The owner of any kind of vehicle is liable for causing injury through negligence to another who is rightfully using the streets or highways. The reciprocal rights and duties in that regard have been thoroughly settled by the courts. For a collation of the cases see vol. 22, *Case and Comment*, p. 185.

Neither does it work a hardship upon the plaintiff to require him to prove by competent evidence the defendant's connection with the vehicle or instrumentality which it is contended caused the accident, and the relationship of the defendant and the person in whose charge the vehicle or instrumentality was at the time of the accident. As pointed out in *Ferguson v. Winter*, supra, this may be done in various ways. Of course, if the defendant is driving the vehicle, his responsibility is easily shown. If, however, it is driven by another, such other's relationship to the defendant, as well as his connection with the vehicle at

the time, may be shown by him or by any other competent facts from which such relationship and connection may be inferred. There is no reason, therefore, for having recourse to deceptive and misleading inferences.

Nor do the courts sustain the contention that an automobile is inherently a dangerous machine or instrumentality. The everyday knowledge and experience of the ordinary person is quite to the contrary. Everyone who knows anything about the working machinery of the automobile knows that it is more easily managed and controlled than a fractious team or horse on the streets. He also knows that while it is in charge of an ordinarily careful and prudent driver it is just as safe and quite as harmless as any other conveyance used on the public streets. True, accidents occur; but they should not be attributed to the automobile, as such, but to the careless, and oftentimes reckless, drivers. Is it not more in consonance with reason and justice to blame a negligent driver who causes the mischief than it is to condemn the machine which he can, but negligently refuses to, control? Will it not also be more conducive to justice and fair play to apply to the owners of automobiles in our courts of justice the same rules that are applied to the owners of all other instrumentalities, except such as constitute what are known as attractive nuisances and those which are inherently dangerous?

Referring now to those cases referred to by plaintiff's counsel which we have not already distinguished, we specially invite attention to the case of *Moon v. Matthews*, which is cited by him, and to which we have before referred. While the court in that case seems to regard the cases from Missouri with some favor, yet the case of *Sarver v. Mitchell*, 35 Pa. Super. Ct. 69, from which we took the liberty to quote in *Ferguson v. Winter*, supra, is expressly followed. Then, again, the prior case of *Lotz v. Hanlon*, 217 Pa. 339, 10 L.R.A.(N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 Ann. Cas. 731, which is in thorough harmony with our holding in *Ferguson v. Winter*, supra, is also followed in *Moon v. Matthews*. There is nothing in the Pennsylvania cases, therefore, that lends any support to plaintiff's contention. Moreover, in all the cases, with one or possibly two exceptions, the evidence was stronger than in the case at bar, although the courts announced the doctrine we have before stated. All the evidence the plaintiff produced to establish the doctor's responsibil-

ity for the acts of his son, Glen, was that the former owned the automobile, and that the same was at the time being used with his permission or consent by the son. That is not sufficient. Every time an owner lends any article or instrumentality to another, whether for hire or gratuitously, the owner consents to its use by the borrower or bailee. To hold that evidence of that fact is sufficient to fasten liability upon the owner of the instrumentality in case some injury is inflicted upon another by the negligent use of such instrumentality while it is in the possession and under the control of a third person is to revolutionize the law which holds the principal or master liable for the acts of his agent or servant. We are of the opinion, therefore, that the plaintiff produced no evidence which supports the finding of the jury or the judgment of the court as against the defendant W. P. Winters.

If the case be viewed, however, from the evidence submitted by both parties, the result must still be the same. The doctor and the two young ladies who were in the car with Glen at the time of the accident all testified that one of the young ladies was employed by the doctor in his office; that about a week prior to the accident she asked the doctor whether she might take the automobile on the night in question to go to Spring City to attend her mother's birthday party; that the doctor said she might have the car if she could find a suitable driver, and suggested one Lundberg to her. The matter rested there until the evening of the accident. The young lady said she was not acquainted with Lundberg, so she asked Glen Winters to drive the car for her on the evening in question, which he did without the knowledge of the doctor. Just before starting out from home Mrs. Winters, the wife of the doctor, who was away from home during the afternoon, arrived home with her little girl, about five years of age, and the young lady who had obtained permission to use the car, and who had invited the other young woman who was in the car, prevailed on Mrs. Winters to accompany them to the birthday party at Spring City, which she did. All the doctor knew and consented to, therefore, was that the young woman might take the car if she procured a driver. She, without his knowledge, prevailed on Glen Winters to drive the car, and the doctor's wife accompanied the party without the doctor's knowledge. All of this evidence stands unquestioned by anyone. Since it is not in conflict with anything testified to by plaintiff and his witnesses, it stands as the

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uncontroverted evidence in the case. It certainly cannot be said to be in conflict with plaintiff's evidence, since all he proved was that the car was owned by the doctor, and that he consented to its use. All the rest was mere inference which we have held was not proper nor permissible. Upon the uncontradicted evidence, therefore, the doctor cannot be held liable under the law as it is laid down by any court, since the car was not being used by another who was his servant or agent, nor used in his business affairs, nor for his benefit. The facts and circumstances of this case, therefore, also illustrate the fallacy of the rule that mere ownership is sufficient proof of liability on the part of the owner. Under the rule as laid down by the supreme court of Washington, the doctor could be held liable in this case, although the testimony was all to the effect that the car was driven and controlled by one who did not sustain the relationship of either agent or servant to the doctor, and who was using the car, not for his benefit, but for the benefit of a third person. This is so for the reason that, if the evidence is sufficient to take the case to the jury, it is also sufficient to sustain their finding, regardless of the amount of evidence to the contrary. It is needless, therefore, to speak of a "prima facie" case which requires the defendant to explain, since the prima facie case is sufficient, and no amount of explanation can be of any aid to the defendant in case the jury do what they did in this case,—find against the defendant regardless of his undisputed evidence. Nor in this jurisdiction can this court interfere with the jury's finding, although it may be against the great weight of the evidence, so long as there is some substantial evidence in support of the finding. The liability of a defendant would thus be based upon a false and misleading inference which was deduced from the ownership of the car alone.

The judgment against the defendant Glen Winters must, for the reasons stated, be affirmed, and the judgment against W. P. Winters reversed, and the cause remanded to the District Court of Sanpete County, with directions to grant a new trial as against him and to proceed with the case in accordance with the views herein expressed.

It is so ordered; the respondent to recover his costs as against Glen Winters, and W. P. Winters to recover his costs as against the respondent.

Straup, Ch. J., and Loofbourow, D. J., concur.

GEORGIA SUPREME COURT.

EDWARDS & DEUTSCH LITHOGRAPH-
ING COMPANY, Plff. in Err.,

v.

VIDALIA GROCERY COMPANY.

(144 Ga. 514, 87 S. E. 675.)

**Bills and notes — bona fide holder —
break in chain of indorsements.**

The presumption that the holder of a note is such bona fide and for value is not overcome because the note, which is payable to the order of the maker, a corporation, and indorsed by it, was not also indorsed by the person from whom it was obtained by the holder; nor because the plaintiff and the person from whom he obtained it, and the defendant, resided in different states, nor because the note was taken without the collateral recited in the face of the note as having been assigned as a pledge to secure its payment.

For other cases, see Bills and Notes, V. b, in Dig. 1-52 N. S.

(January 12, 1916.)

ERROR to the Superior Court for Toombs County to review a judgment in defendant's favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. D. C. Pattillo and B. P. Jackson, for plaintiff in error:

The holder of a negotiable note is the bona fide holder for value, by presumption of law, and no defense is available against him, except non est factum, gambling, or immoral and illegal consideration, until it is shown affirmatively by defendant that plaintiff is not a bona fide holder for value. Fraud of the holder in procurement of the note, when proved by defendant, is sufficient to negative such presumption.

Headnote by EVANS, P. J.

Note. — It is a well-established rule that mere possession of a negotiable instrument by a transferee, where no indorsement is necessary, imports prima facie that he is the lawful owner and that he acquired it before maturity, bona fide, for value, in the usual course of business, and without notice of any circumstance impeaching its validity. Note to Commercial Bank v. Burgwyn, 17 L.R.A. 326; 3 R. C. L. 1037, § 243; 1 Dan. Neg. Inst. § 812.

In *EDWARDS & D. LITHOGRAPHING CO. v. VIDALIA GROCERY CO.*, the court considered the effect of the specific fact that the immediate transferor of the holder had not indorsed it, and arrived at a conclusion in accord with the well-established rule above referred to. No other cases have been found in which the question is discussed from the angle taken in the principal case. L.R.A. 1916D.

Morrison v. Hart, 122 Ga. 660, 50 S. E. 471; *Bank of Layonia v. Bush*, 140 Ga. 594, 79 S. E. 459; *Bealle v. Southern Bank*, 57 Ga. 274; *Jones v. Dannenberg Co.* 112 Ga. 426, 52 L.R.A. 271, 37 S. E. 729; *Johnson County Sav. Bank v. Roberts*, 125 Ga. 41, 53 S. E. 808; *Harrell v. National Bank*, 128 Ga. 504, 57 S. E. 869; *Taylor v. Cribb*, 100 Ga. 94, 26 S. E. 468; *Grooms v. Olliff*, 93 Ga. 789, 20 S. E. 665; *First Nat. Bank v. Messer*, 136 Ga. 226, 71 S. E. 148; *Bank of Stewart County v. Adams*, 96 Ga. 529, 23 S. E. 496; *Habersham v. Lehman*, 63 Ga. 380; *Paris v. Moe*, 60 Ga. 91; *Rhodes v. Beall*, 73 Ga. 641; *Jenkins v. Jones*, 108 Ga. 556, 34 S. E. 149; *Pate v. Allison*, 114 Ga. 651, 40 S. E. 715; *Walters v. Palmer*, 110 Ga. 776, 36 S. E. 79; *Dickerson v. Burke*, 25 Ga. 225; *Hatcher v. National Bank*, 79 Ga. 542, 5 S. E. 109; *Parr v. Erickson*, 115 Ga. 873, 42 S. E. 240.

It is to be presumed that a note transferred was transferred before due, and that the holder is a bona fide holder for value, and in such case the note itself is evidence of no notice of a defense except such as may appear upon the face of it.

Dickerson v. Burke, 25 Ga. 225; *Howard v. Simpkins*, 70 Ga. 322; *Citizens' Bank v. Greene*, 12 Ga. App. 49, 76 S. E. 795.

The mere fact that the consideration is expressed on the face of the note is not, of itself, notice that the consideration has failed. Nor is a holder from that fact put upon inquiry, and bound to inquire whether the consideration has failed.

Post v. Abbeville & W. R. Co. 99 Ga. 232, 25 S. E. 405; *Pyron v. Ruoha*, 120 Ga. 1060, 48 S. E. 434; *Bank of Commerce v. Barrett*, 38 Ga. 126, 95 Am. Dec. 384; *Hudson v. Best*, 104 Ga. 131, 30 S. E. 688; *Simmons v. Council*, 5 Ga. App. 386, 63 S. E. 238; *Stubbs v. Fourth Nat. Bank*, 12 Ga. App. 539, 77 S. E. 893; *Howry v. Eppinger*, 34 Mich. 29.

This rule is stated sufficiently broad to cover the question discussed in *EDWARDS & D. LITHOGRAPHING CO. v. VIDALIA GROCERY CO.* as to the effect of the fact that an instrument transferable by delivery is not indorsed by the immediate transferor upon the presumption as to the bona fides of the holder, and it seems evident that in at least some of the cases supporting the rule the immediate transferor of the holder had not indorsed the instrument. No attempt has been made, however, to collect cases announcing the rule thus generally.

Upon the substantive question as to what circumstances are sufficient to put a purchaser of a negotiable paper on inquiry in order to secure rights of the bona fide holder, see notes to *Mee v. Carlson*, 29 L.R.A. (N.S.) 351, and *McPherrin v. Tittle*, 44 L.R.A. (N.S.) 395. W. A. E.

Messrs. W. J. De Loach and Hines & Jordan, for defendant in error:

If fraud in the procurement of an instrument is shown, or if it is shown that the instrument was lost or stolen, or that it is founded upon an illegal consideration, or that the instrument is without consideration, this is sufficient to overcome the presumption that the holder is without notice of such defenses, and the burden of proof is then shifted to him to show that he took without notice.

Matthews v. Poythress, 4 Ga. 305; Nell v. Snowden, 5 Ga. 1; Dickerson v. Burke, 25 Ga. 225; Merchants' & P. Nat. Bank v. Masonic Hall, 62 Ga. 283; Sheffield v. Johnson County Sav. Bank, 2 Ga. App. 221, 58 S. E. 386; Tredick v. Walters, 81 Kan. 828, 106 Pac. 1007; Holme v. Karsper, 5 Binn. 469; Lerch Hardware Co. v. First Nat. Bank, 109 Pa. 240; Schultheis v. Sellers, 223 Pa. 513, 22 L.R.A. (N.S.) 1210, 72 Atl. 887; Story, Promissory Notes, 1st ed. § 196; Judson v. Holmes, 9 La. Ann. 20; Vathir v. Zane, 6 Gratt. 246; Goodman v. Harvey, 4 Ad. & El. 870, 6 L. J. K. B. N. S. 260, 6 Nev. & M. 372; Arbouin v. Anderson, 1 Q. B. 498; Bailey v. Bidwell, 13 Mees. & W. 73; Catlin v. Hansen, 1 Duer, 322; Munroe v. Cooper, 5 Pick. 412; Smith v. Braine, 3 Eng. L. & Eq. Rep. 379, 16 Q. B. 244, 20 L. J. Q. B. N. S. 201, 15 Jur. 287; Harvey v. Towers, 4 Eng. L. & Eq. Rep. 531, 6 Exch. 656, 20 L. J. Exch. N. S. 318, 15 Jur. 544; Vallett v. Parker, 6 Wend. 615; McKesson v. Stanberry, 3 Ohio St. 156; Berry v. Alderman, 24 Eng. L. & Eq. Rep. 318, 14 C. B. 95, 2 C. L. R. 691, 23 L. J. C. P. N. S. 34; Gwyn v. Lee, 1 Md. Ch. 445; Case v. Mechanics' Bkg. Asso. 4 N. Y. 166; Joyce, Defenses to Commercial Paper, §§ 123, 381; 2 Am. & Eng. Enc. Law, 395; Hall v. Featherstone, 3 Hurlst. & N. 284, 27 L. J. Exch. N. S. 308, 4 Jur. N. S. 813, 6 Week. Rep. 496; Smith v. Sac County, 11 Wall. 139, 20 L. ed. 102; Chambers v. Faulkner, 65 Ala. 448; Wright v. Brosseau, 73 Ill. 381; Mitchell v. Tomlinson, 91 Ind. 167; Sullivan v. Langley, 120 Mass. 437; Merchants' Exch. Nat. Bank v. New Brunswick Sav. Inst. 33 N. J. L. 170; Crampton v. Perkins, 65 Md. 22, 3 Atl. 300; Meadows v. Cozart, 76 N. C. 450; Battles v. Laudenslager, 84 Pa. 446; Duncan v. Scott, 1 Campb. 100; Clark v. Pease, 41 N. H. 414; Nickerson v. Ruger, 76 N. Y. 279; Roberts v. Lane, 64 Me. 108, 18 Am. Rep. 242; Reamer v. Bell, 79 Pa. 292; Ross v. Drinkard, 35 Ala. 434; Emerson v. Burns, 114 Mass. 348; Knight v. Pugh, 4 Watts & S. 445, 39 Am. Dec. 99; Miller v. Race, 1 Burr. 452; 8 Cyc. 236, 238. L.R.A.1916D.

Evans, P. J., delivered the opinion of the court:

The Edwards & Deutsch Lithographing Company brought an action against the Vidalia Grocery Company, to recover an amount alleged to be due upon a note which was expressed in the following terms:

\$1,000. Montgomery, Alabama, June 21, 1912.

On the 21st day of June, 1913, for value received, we promise to pay to the order of ourselves, the sum of one thousand and no/100 dollars, with 8 per cent interest per annum thereon, and all costs of collection; negotiable and payable at Montgomery Bank and Trust Company, Montgomery, Alabama. As collateral security for the payment of this note the undersigned hereby transfers, assigns, conveys, deposits, and pledges one registered debenture, number three, of the Lewis Bear Drug Company, Inc., for \$1,000, with full power and authority to sell, assign, and deliver the whole or any part thereof, or any substitute therefor, or any addition thereto, either at public or private sale, at the option of the owner or holder of said note or debt, his, their, or its assigns, on the nonperformance of this promise at any time or times thereafter, without advertising or notice, which is hereby expressly waived, and upon such sale the owner or holder thereof may purchase the whole or any part of said securities discharged from any right of redemption or liability of conversion. The undersigned indorsers of this note waive demand, protest, and notice of nonpayment and protest, and hereby waive all claims of exemption to real or personal property, salary, or wages, under the Constitution and statute laws of Alabama, or any other state, as against the debt evidenced hereby, and agrees and contracts with the payee hereof that liability of the debt as shown hereby is not limited or affected by any outside agreement or otherwise in any way; and if unpaid at maturity, agree to pay 10 per cent of the principal and interest as attorneys' fees.

The note was signed, "Vidalia Grocery Co., J. E. French, President," and was indorsed, "Vidalia Grocery Co., J. E. French, Pres." The defendant pleaded failure of consideration, and that it had been induced to sign the note by false and fraudulent representations of the president of the Lewis Bear Drug Company, and that the plaintiff was not a bona fide holder of the note. A verdict was rendered for the defendant. A motion for new trial was overruled, and the plaintiff excepted.

The controlling question is whether the

evidence is sufficient to so affect the bona fides of the holder of the note as to let in the defenses urged against it. The statute provides that "the holder of a note is presumed to be such bona fide, and for value; if either fact is negatived by proof, the defendants are let into all their defenses; such presumption is negatived by proof of any fraud in the procurement of the note." Civil Code 1910, § 4288.

Fraud in its procurement, as used in this section, means the fraud of the holder in procuring the paper, and has no reference to the fraud in the contract out of which the paper arose. *Walters v. Palmer*, 110 Ga. 776, 36 S. E. 79. The plaintiff was not shown to have had actual notice of the circumstances attending the making of the contract in execution of which the note was given, but the defendant says that the circumstances were sufficient to impute notice, under the Code section, which declares that "any circumstances which would place a prudent man upon his guard in purchasing negotiable paper shall be sufficient to constitute notice to a purchaser of such paper before it is due." Civil Code 1910, § 4291.

The defendant contends that the following circumstances are sufficient to overcome the presumption that the plaintiff is a bona fide holder of the note: The plaintiff's taking of the note without the indorsement of the Lewis Bear Drug Company; the widely separated localities of the parties to the transaction, the plaintiff being a corporation doing business in Chicago, the defendant a Georgia corporation, and the Lewis Bear Drug Company being an Alabama corporation doing business in Montgomery, Alabama; and, notwithstanding the stipulation in the note that a certain registered debenture bond of the Lewis Bear Drug Company was assigned as collateral security, the plaintiff's acceptance of the note without the collateral. Referring to the first contention, the effect of the indorsement of the note by the payee, which was also the maker, was to make it as if it had originally been payable to bearer, and no indorsement by a subsequent holder was necessary for the protection of the holder. *Hendrix v. Bauhard*, 138 Ga. 473, 476, 43 L.R.A.(N.S.) 1028, 75 S. E. 588, Ann. Cas. 1913D, 688. We do not think any inference of mala fides is deducible from the fact that a note payable to bearer is not indorsed by an intermediate holder before its delivery to a purchaser. Nor do we think that the commercial business of this country is to be regarded so far provincial as to raise a presumption of mala fides because the parties to the transaction may live in different states. If unfavorable deductions can be made on this account, no L.R.A.1916D.

transaction will be safe against an inference of impurity unless the parties thereto live in the same locality. The last contention (that the note recited that it was secured by a collateral bond, which the plaintiff failed to demand or take at the time of the purchase, as being sufficient information to put it upon inquiry as to the circumstances under which it procured the note) is likewise untenable. The object and intent of the parties in inserting the recital that the note was secured by collateral was not to limit or impair the value of the note, but to add to it. It was not to notify third persons that the collateral would destroy or affect the negotiable character of the note. The principal object was to show that, in addition to the responsibility of the maker, the note was also secured by collateral. This language is neither sufficient to inform third persons nor to put them upon inquiry as to the circumstances under which the note was given. *Pyron v. Ruohs*, 120 Ga. 1060 (6), 1065, 48 S. E. 434; *Howry v. Eppinger*, 34 Mich. 29; *Zollman v. Jackson Trust & Sav. Bank*, 238 Ill. 290, 32 L.R.A.(N.S.) 858, 87 N. E. 297.

The failure of the defendant to show such circumstances as would authorize the submission to the jury of the bona fides of the plaintiff in purchasing the note renders it unnecessary to discuss the various assignments relating to the admissibility of evidence offered to support the plea to the merits.

Judgment reversed.

All the Justices concur, except Fish, Ch. J., absent on account of sickness.

KANSAS SUPREME COURT.

JOHN BUTLER
v.

CITY OF KANSAS CITY, KANSAS, Appt.

(97 Kan. 239, 155 Pac. 12.)

Municipal corporation — governmental duty — pesthouse.

1. Where a municipal corporation maintains a pesthouse for the treatment and isolation of persons who have been exposed to or affected with smallpox, it performs a governmental duty.

For other cases, see Municipal Corporations, II. g, in Dig. 1-52 N. S.

Headnotes by PORTER, J.

Note. — The question of municipal liability as affected by the distinction between governmental and proprietary, or public and private, functions of municipal corporations, is treated in various aspects, and with

Same — defective floor — liability.

2. The rule that the governmental agencies of the state are not liable in an action of tort for either misfeasance or nonfeasance is applied to an action against a city to recover damages for personal injuries resulting from the defective condition of the floor of a pesthouse, where plaintiff, who was affected with smallpox, was confined by the city authorities.

For other cases, see Municipal Corporations, 11. g, 4, in Dig. 1-52 N. S.

(February 12, 1916.)

APPEAL by defendant from a judgment of the District Court for Wyandotte County overruling a demurrer to a petition filed to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. R. J. Higgins, W. H. McCamish, and Lee Judy, for appellant:

In establishing and maintaining a pesthouse, defendant was performing a governmental duty, was acting under the police power of this state, and therefore cannot be liable for injuries to patients who were there for the purpose of being treated for contagious diseases, such as smallpox.

6 McQuillin, Mun. Corp. ¶ 2669, pp. 5496, 5498; Murtaugh v. St. Louis, 44 Mo. 479; Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461; New Kiowa v. Craven, 46 Kan. 114, 26 Pac. 426; Pfefferle v. Lyon County, 39 Kan. 432, 18 Pac. 506; La Clef v. Concordia, 41 Kan. 323, 13 Am. St. Rep. 285, 21 Pac. 272; Williamson v. Louisville Industrial School, 95 Ky. 251, 23 L.R.A. 200, 44 Am. St. Rep. 243, 24 S. W. 1065; Benton v. City Hospital, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836; Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151; Hessin v. Manhattan, 81 Kan. 153, 25 L.R.A.(N.S.) 228, 105 Pac. 44; Stewart v. New Orleans, 9 La. Ann. 461, 61 Am. Dec. 218.

Mr. A. J. Herrod for appellee.

Porter, J., delivered the opinion of the court:

John Butler sued the city of Kansas City to recover damages for personal injuries alleged to have been caused by the city's negligence. The city maintains a pesthouse where persons affected with smallpox are taken for isolation and treatment. The petition alleged that Butler became sick with smallpox and was taken by employees of the city and confined in one of the rooms

or wards of the pesthouse, where each morning he was obliged to start a fire, and that blood poisoning resulted from a splinter of the flooring which entered his bare foot as he walked from the bed to the stove. The petition alleged that the city was negligent in maintaining the floor of the room in a defective and dangerous condition. A demurrer to the petition was overruled. The city elected to stand upon the demurrer and has appealed.

The contention of the city is that in maintaining a pesthouse it was performing a governmental duty under the police power of the state, and therefore cannot be held liable for negligence causing injuries to persons who were in the pesthouse for treatment and isolation while affected with smallpox.

On the same principle, a similar immunity from liability has been held to exist in a case where a county is sued by an inmate of a jail for injuries resulting from negligence in the manner in which the jail was maintained. *Pfefferle v. Lyon County*, 39 Kan. 432, 18 Pac. 506. The decision in that case was placed upon the ground that, in respect to persons committed to its custody, the county was engaged in the performance of a governmental duty for the benefit of the state and possessed the same immunity as the state.

In *Thomas v. Ellis County*, 91 Kan. 443, 138 Pac. 409, it was said: "Counties are mere auxiliary agencies of the state government, and, like the state, are immune from liability on account of damages occasioned by the manner in which they exercise or fail to exercise their governmental powers." Syl. 1.

See also *State v. Lawrence*, 79 Kan. 234, 250, 100 Pac. 485.

The same doctrine was applied in a case of malicious prosecution. *Caldwell v. Prunelle*, 57 Kan. 511, 513, 46 Pac. 949, 950. It was there held that in enforcing a police regulation the officers of the city were exercising a public and governmental function. In the opinion it was said: "For the manner in which they exercise their powers and duties in this respect the city is not liable." p. 513.

The case of *Edson v. Olathe*, 81 Kan. 328, 36 L.R.A.(N.S.) 861, 105 Pac. 521, rehearing denied in 82 Kan. 4, 36 L.R.A.(N.S.) 865, 107 Pac. 539, recognized the distinction between the governmental and proprietary functions of municipal corporations gener-

reference to particular branches of municipal activity, in notes cited in the Index to L.R.A. Notes, under the title, "Municipal corporations," subtitle, "Liability for damages."

L.R.A.1916D.

The note appended to *Columbia Finance & T. Co. v. Louisville*, 25 L.R.A.(N.S.) 88, deals specifically with the question as affecting liability for tort in connection with buildings used by the municipality.

ally, and as affecting property and contract rights. See authorities cited in opinion. Another case more nearly in point as to the facts, and in which the controlling question was the distinction between the liability of a city for an act done by it in its public capacity as a part of the political subdivisions of the state, and its liability for an act done to its private advantage in relation to which the state at large has no interest, is *La Clef v. Concordia*, 41 Kan. 323, 13 Am. St. Rep. 285, 21 Pac. 272. There the plaintiff brought an action to recover damages to his health by the negligent condition of a jail in which he was confined for the violation of a city ordinance. It was held that the city in maintaining the jail stands in the same attitude as counties, and is not liable for injuries resulting from the enforcement of public laws affecting the state at large.

It is a general rule that the governmental agencies of the state are not liable in an action of tort for either nonfeasance or misfeasance. *Fowle v. Alexandria*, 3 Pet. 398, 7 L. ed. 719; *Maximilian v. New York*, 62 N. Y. 160, 164, 165, 20 Am. Rep. 468. Judge Dillon states the law as follows: "The power or even duty on the part of a municipal corporation to make provision for the public health and for the care of the sick and destitute appertains to it in its governmental or public, and not in its corporate, or, as it is sometimes called, private, capacity. And therefore where a city, under its charter and the general law of the state enacted to prevent the spread

of contagious diseases, establishes a hospital, it is not responsible to persons injured by reason of the misconduct of its agents and employees therein." 4 Dill. Mun. Corp. 5th ed. § 1661.

Among the cases cited in the notes which are directly in point, see *Evans v. Kankakee*, 231 Ill. 223, 13 L.R.A.(N.S.) 1190, 83 N. E. 223; *Sherbourne v. Yuba County*, 21 Cal. 113, 81 Am. Dec. 151; *Summers v. Daviess County*, 103 Ind. 262, 53 Am. Rep. 512, 2 N. E. 725; *Richmond v. Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Murtaugh v. St. Louis*, 44 Mo. 479.

In *Barbour v. Ellsworth*, 67 Me. 294, a well person was taken to a hospital for smallpox, where he contracted the disease. Alleging that he had not been suitably or sufficiently cared for, he sued the city for damages, and it was held there was no liability. In *Lynch v. North Yakima*, 37 Wash. 657, 12 L.R.A.(N.S.) 261, 80 Pac. 79; it was held that the city was not liable for the act of a policeman who took a person exposed to smallpox into a building occupied by the fire department, thereby exposing the employees to contagion.

The duty of a municipal corporation to conserve the public health is governmental, and it is not liable for injuries inflicted while performing such duty. 6 McQuillin Mun. Corp. § 2669.

The petition failed to state a cause of action against the city, and the judgment is reversed, with directions to sustain the demurrer

MONTANA SUPREME COURT.

RE APPLICATION OF LEWIS AND CLARK COUNTY, Respt.

INDUSTRIAL ACCIDENT BOARD OF THE STATE OF MONTANA, Appt.

(— Mont. —, 155 Pac. 268.)

Statute — title — workmen's compensation act — application to counties.

1. Counties may be included in the operation of a workmen's compensation act under a title, "An Act Providing for the Protection and Safety of Workmen in All Places of Employment."

For other cases, see Statutes, I. c. 2, in Dig. 1-52 N. S.

Constitutional law — class legislation — compensation to employees of counties.

2. Providing compensation for persons in-

jured while in the employment of a county to the exclusion of those injured while mere inhabitants of the county is not unconstitutional class legislation.

For other cases, see Constitutional Law, II. a, 5, c, in Dig. 1-52 N. S.

Public money — donation to individual — workmen's compensation.

3. Workmen's compensation acts do not provide for charity so as to bring their application to public employees in conflict with a constitutional provision forbidding donation of public funds to individuals.

For other cases, see Public Monies, II. b, in Dig. 1-52 N. S.

Tax — public purpose — workmen's compensation.

4. Compensating county employees for injuries received in the course of their employment is a public purpose within the meaning of a constitutional provision that

Note. — The entire subject of workmen's compensation acts is annotated in L.R.A. 1916A, 23. As to the power of the legis- L.R.A.1916D

lature to impose the provisions of such acts upon a municipal corporation, see footnote to *Wood v. Detroit*, L.R.A.1916C, 388.

taxes shall be collected for public purposes only.

For other cases, see Taxes, I. d, in Dig. 1-52 N. S.

(January 27, 1916.)

APPPEAL by the Industrial Accident Board from an order of the District Court for Lewis and Clark County overruling and setting aside its order refusing the application of said county to become bound by the workmen's compensation law. Affirmed.

The facts are stated in the opinion.

Messrs. J. B. Poindexter, Attorney General, and O. S. Wagner, Assistant Attorney General, for the appellant:

The law is inoperative as to counties, and their attempted inclusion within its provisions is null and void.

Endlich, Interpretation of Statutes, § 161; 36 Cyc. 1171; Miller v. Pillsbury, 164 Cal. 199, 128 Pac. 327, Ann. Cas. 1914B, 886; Sutherland, Stat. Constr. § 120; State ex rel. Holliday v. O'Leary, 43 Mont. 157, 115 Pac. 204; Yegen v. Yellowstone County, 34 Mont. 79, 85 Pac. 740; State v. McKinney, 29 Mont. 375, 74 Pac. 1095, 1 Ann. Cas. 579; State v. Brown, 29 Mont. 179, 74 Pac. 366; State v. Courtney, 27 Mont. 378, 71 Pac. 308; Russell v. Chicago, B. & Q. R. Co. 37 Mont. 10, 94 Pac. 488, 501; State v. Cunningham, 35 Mont. 547, 90 Pac. 755; Evers v. Hudson, 36 Mont. 135, 92 Pac. 462; Hersey v. Neilson, 47 Mont. 132, 131 Pac. 30, Ann. Cas. 1914C, 963; Smith v. Zimmer, 45 Mont. 282, 125 Pac. 420; Stegmaier v. Jones, 203 Pa. 47, 52 Atl. 56; Dailey v. Potter County, 203 Pa. 593, 53 Atl. 498; State ex rel. Patterson v. Douglas County, 47 Neb. 428, 66 N. W. 434; Cunningham v. Northwestern Improv. Co. 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720.

Mr. J. P. Donnelly for respondent.

Holloway, J., delivered the opinion of the court:

This appeal presents the question: Do the provisions of the workmen's compensation law (chapter 96, Laws 1915) apply to counties and county employees? The trial court answered the inquiry in the affirmative, and the Industrial Accident Board appealed.

By specific legislative declarations contained in §§ 3 (e), 6 (gg), and 6 (i) counties and county employees are made subject to the terms of the act, but it is the contention of counsel for appellant that those provisions are to be disregarded as without force or validity, because the title to the act is not sufficiently comprehensive to war-

rrent their inclusion in the body of the measure.

Section 23, art. 5, of the Constitution, provides: "No bill, except general appropriation bills, and bills for the codification and general revision of the laws, shall be passed containing more than one subject which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

Beginning with Hotchkiss v. Marion, 12 Mont. 218, 29 Pac. 823, and continuing down to State ex rel. Cotter v. District Ct. 49 Mont. 146, 140 Pac. 732, this court has repeatedly considered and defined the purposes and limitations of this section of the Constitution, and they need not be restated here. The title to chapter 96, above, is as follows:

"An Act Providing for the Protection and Safety of Workmen in All Places of Employment and for the Inspection and Regulation of Places of Employment in All Inherently Hazardous Works and Occupations; Providing a Schedule of Compensation for Injury to or Death of Workmen and Methods of Paying the Same, and Prescribing the Liability of Employers Who Do Not Elect to Pay Such Compensation; Establishing the Industrial Accident Board, Defining its Powers and Duties; and Providing for a Review of its Awards."

It may be conceded at once that counties and county employees are not included, *eo nomine*, in this title; and we agree with counsel that general legislation is intended primarily for the subjects, and not for the Sovereign, and that the rules of statutory construction require that we enter upon our investigation of the meaning and purpose of a legislative enactment indulging the presumption that the lawmakers intended to legislate upon the rights and affairs of individuals, and that the state or the public will not be deemed to be within the purview of such enactment, unless expressly named or included by fair implication. In their brief, counsel for appellant say: "Theorize as we will, compensation and employers' liability acts are nothing more or less than substitutes for, and intended to supplant, the recognized unsatisfactory and oft-times disappointing and uncertain common-law and statutory tort remedies which furnished the only legal haven of refuge for an injured employee."

At the time chapter 96 was enacted, a county of this state was not liable for damages to its injured employee, and therefore, if counsel are correct in their analysis of the purpose of this act, it would seem to be a justifiable conclusion to be reached by

anyone entertaining the same view and considering the title of this act only, that it was never intended to subject counties or county employees to its provisions. But that counsel has misconceived the object and purpose of the act is quite patent when the history of this character of legislation is considered.

Liability and compensation statutes are not to be grouped together. They are the antipodes of labor legislation, having their foundation in essentially different social and economic ideas. The common law of England and America and the Civil Code of Continental Europe furnished but a single remedy for a servant's injury,—an action for damages in which it was made to appear that the negligence of the master was a proximate cause of the injury. The harshness of the rule was emphasized when there was ingrafted on it the defenses of contributory negligence (*Butterfield v. Forrester*, 11 East, 60, 10 Revised Rep. 433, 19 Eng. Rul. Cas. 189), fellow servant's negligence (*Priestly v. Fowler*, 3 Mees & W. 1, Murph. & H. 305, 7 L. J. Exch. N. S. 42, 1 Jur. N. S. 987, 19 Eng. Rul. Cas. 102; *Murray v. South Carolina R. Co.* 1 McMull. L. 385, 36 Am. Dec. 268), and assumption of risk (*Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, 15 Am. Neg. Cas. 407; *Laning v. New York C. R. Co.* 49 N. Y. 521, 10 Am. Rep. 417, 16 Am. Neg. Cas. 747). With the increased hazards consequent upon the use of high explosives, complicated and dangerous machinery, and the powerful agencies of steam and electricity, the percentage of injured employees having justiciable claims rapidly increased, until relief was sought in liability statutes which modified or eliminated some or all of the common-law defenses. But whether the remedy was sought at common law or under an employers' liability statute, the actionable wrong of the master, or actionable wrong for which the master was liable under the maxim respondent superior, was the gist of the claim for damages and the basis of any right to recover. Experience demonstrated that more than one half of all industrial injuries resulted from inevitable accident or from the risks of the business for which no one could be held responsible; that neither the common law nor employers' liability statutes furnished any measure of relief to more than 12 or 15 per cent of the injured, and that further appreciable improvement from the modification of existing laws could not be expected so long as the element of negligence was the foundation of legal liability.
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Workingmen's insurance and compensation laws are the products of the development of the social and economic idea that the industry which has always borne the burden of depreciation and destruction of the necessary machinery shall also bear the burden of repairing the efficiency of the human machines, without which the industry itself could not exist. The economic loss from vocational disease, industrial accident, invalidity, old age, and unemployment was a subject of serious inquiry among the constituent German states before the days of the Empire, but the credit for crystallizing the sentiment into workable laws will always remain with Bismarck. From the enactment of the sick insurance statute in Germany in 1883, and the fundamental law in 1884, the idea of compensation based only upon the risks of the business and the impairment of earning efficiency spread to other European states, and finally penetrated to this country. The Federal government, thirty-one states, Alaska, Hawaii, and the Canal Zone now have measures for the relief of injured workmen patterned after the German insurance or English compensation plan. Each system seeks the same ultimate end, but by somewhat different means, and "workmen's compensation" is a term sufficiently comprehensive for all practical purposes to include both. The fundamental difference between the conception of liability and compensation is found in the presence in the one, and the absence from the other, of the element of actionable wrong. The common law and liability statutes furnished an uncertain measure of relief to the limited number of workmen who could trace their injuries proximately to the master's negligence. Compensation laws proceed upon the theory that the injured workman is entitled to pecuniary relief from the distress caused by his injury, as a matter of right, unless his own wilful act is the proximate cause, and that it is wholly immaterial whether the injury can be traced to the negligence of the master, the negligence of the injured employee or a fellow servant, or whether it results from an act of God, the public enemy, an unavoidable accident, or a mere hazard of the business which may or may not be subject to more exact classification; that his compensation shall be certain, limited by the impairment of his earning capacity, proportioned to his wages, and not dependent upon the skill or eloquence of counsel or the whim or caprice of a jury; that as between workmen of the

same class who suffer like injuries, each shall receive the same compensation, and that, too, without the economic waste incident to protracted litigation, and without reference to the fact that the injury to the one may have been occasioned by the negligence of the master, and to the other by reason of his own fault.

Confronted with a legislative history covering more than thirty years and extending to practically all of Europe, to many of the European dependencies, and to more than one half of the United States, the members of the legislative assembly of 1915 must be credited with an understanding of compensation measures as they were generally understood at that time, and with an intention to employ terms appropriate to such measures as they were generally employed under like circumstances. In drafting this measure and formulating a title for it, we must assume that the members of the legislative assembly appreciated the fact that they were departing from the rule of liability in favor of the few, to establish a rule of compensation for injured workmen generally,—one which would insure relief without reference to the question of fault, and altogether irrespective of whether, under existing laws, actions for damages would lie. They therefore employed the term "workmen" in the title to this act, in its generic sense, and intended thereby to include the employees of a county as well as the servants of individuals or private corporations engaged in the extra-hazardous occupations enumerated in the act. Since the title selected "fairly indicates the general subject of the act, is comprehensive enough in its scope reasonably to cover all the provisions thereof, and is not calculated to mislead either the legislature or the public," it must be held to be sufficient to meet the requirements of the Constitution above. *Evers v. Hudson*, 36 Mont. 135, 92 Pac. 462. For the history of industrial insurance and workmen's compensation legislation, reference may be had to 24th Annual Report of U. S. Commissioner of Labor 1909, and to *Boyd's Workmen's Compensation*.

We are unable to appreciate much of counsel's argument in support of the contention that this statute is open to the objection that it is obnoxious class legislation. In the absence of any restriction in the Constitution, the legislature was free to establish a measure of duty owing to a public employee different from that owing to a citizen who is not in the public service, and it cannot be contended that a classifica-

tion of workmen based upon the risks of their employment is either arbitrary or unreasonable. If the compensation to be paid to an employee injured in the service of the county is to be treated as charity under an assumed name, then it might be conceded that this measure conflicts with the provisions of § 1, art. 13, of the Constitution; but that is not the conception of compensation statutes.

A county subject to the provisions of this act will, of necessity, be compelled to levy taxes to meet the assessments made upon it under § 40, and this cannot be done unless the purpose to which the money so raised is to be devoted is a public purpose. Section 11, art. 12, of the Constitution, provides: "Taxes shall be levied and collected by general laws and for public purposes only." Whether a particular purpose is "public," as that term is employed above, is not always easy of solution. The power of taxation is a legislative prerogative, and therefore the determination of the question whether a particular purpose is or is not one which so intimately concerns the public as to render taxation permissible is for the legislature in the first instance. 37 Cyc. 720; *State v. Nelson County*, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33; 1 Cooley, Taxn. 182. The general rule of constitutional law that courts will indulge every reasonable presumption in favor of legislation is applicable with peculiar force to the case of a legislative decision upon the purpose for which a tax may be laid. 1 Cooley, Taxn. 185. In §§ 3 (e) and 6 (gg) of this act the legislature has determined that the money to be contributed by a county to the fund for the relief of its injured employees is to be devoted to a public purpose,—an ordinary and necessary county expense. In *Cunningham v. Northwestern Improv. Co.* 44 Mont. 180, 119 Pac. 554, 1 N. C. C. A. 720, we held that a statute which in effect levied a tax upon the coal mining industry to provide an insurance fund for injured miners was a valid exercise of the taxing power, and that the purpose sought to be subserved was a public purpose, within the meaning of § 11 above. It is unnecessary to again review the authorities which support that conclusion. We are satisfied with its correctness, and that the determination of the question in that case is decisive of it in this.

The judgment of the District Court is affirmed.

Brantly, Ch. J., and Sanner, J., concur.

OKLAHOMA SUPREME COURT.

HARRY C. KEISEL, Plff. in Err.,
v.

NANCY E. BALDOCK et al.

(— Okla. —, 154 Pac. 1194.)

Bills and notes — indorsee — defenses.

1. Where the purchaser of a promissory note has notice of its infirmities at the time of the purchase, he takes the same subject to such defenses as may be maintained by reason of such infirmities.

When a negotiable instrument bears on its face such marks of infirmity as would put an ordinarily prudent person upon inquiry, the indorsee of such instrument takes the same subject to such defenses as are maintainable by reason of its infirmities.

For other cases, see Bills and Notes, V. b, 2, in Dig. 1-52 N. S.

Same — statement in indorsement — effect.

2. The holder of three negotiable promissory notes for \$2,500 each purchased property of B for \$6,000, and transferred these notes in payment, but retained an interest in one of the notes to the extent of the excess of the notes above the purchase price of the property, and in transferring one of the notes the special indorsement was preceded by the following memoranda: "Oklahoma City, November 16, 1910. On payment of the within note and interest Mrs. N. E. Baldock is to receive \$1,530 and interest at 6 per cent." And these notes were transferred to C prior to maturity and for value, and the amount of the notes and interest was collected by C. Held, that the above memoranda in effect destroyed the negotiability of the note, and it was sufficient to put the purchaser upon inquiry as to Mrs. Baldock's interest therein, and such purchaser was not a holder in due course, and was liable to Mrs. Baldock for the amount of her interest therein in an action for money had and received.

For other cases, see Bills and Notes, V. b, 2, in Dig. 1-52 N. S.

(December 21, 1915.)

ERROR to the District Court for Oklahoma County to review a judgment in plaintiff's favor in an action for money had and received. Affirmed.

The facts are stated in the Commissioner's opinion.

Headnotes by GALBRAITH, C.

Note. — The question as to what circumstances are sufficient to put a purchaser of negotiable paper on inquiry is discussed at length in the notes to *Mee v. Carlson*, 29 L.R.A. (N.S.) 351, and *McPherrin v. Tittle*, 44 L.R.A. (N.S.) 395. See later case *Security Trust & Sav. Bank v. Gleichmann*, L.R.A.1915F. 1203. L.R.A.1916D.

Messrs. Everest & Campbell, for plaintiff in error:

Plaintiff, having transferred the paper with her unqualified indorsement thereon, which authorized the transferee to sell it or collect it, is without any authority to say that she has any claim or can exercise any claim over the proceeds of the sale of the note or of its collection except such proceeds as came into the hands of F. H. Skirvin, to whom she intrusted the note.

Davies v. Stevenson, 59 Kan. 648, 54 Pac. 679; *Freeman v. Venner*, 120 Mass. 424; *Branch v. Augusta Nat. Bank*, 5 Kan. App. 440, 49 Pac. 344; *Campbell v. Equitable Securities Co.* 12 Colo. App. 544, 56 Pac. 88; *Bank of Welch v. Cabell*, — Okla. —, 152 Pac. 844; *Jenkins v. Sherman*, 77 Miss. 884, 28 So. 726; *Kellogg v. Douglas County Bank*, 58 Kan. 43, 62 Am. St. Rep. 596, 48 Pac. 587; *Fawcett v. National L. Ins. Co.* 97 Ill. 11, 37 Am. Rep. 95; *Leland v. Parriott*, 35 Iowa, 454; *Hook v. Pratt*, 78 N. Y. 371, 34 Am. Rep. 539.

Messrs. Burwell, Crockett, & Johnson, for defendant in error Baldock:

The indorsement on the instrument was sufficient notice of "an infirmity in the instrument or defect in the title of the person negotiating it."

7 Cyc. 949; *Jenkins v. Planters' & Mechanics' Bank*, 34 Okla. 607, 126 Pac. 757; *Stein v. Rheinstrom*, 47 Minn. 476, 50 N. W. 827.

Galbraith, C., filed the following opinion:

Nancy E. Baldock commenced this action in the trial court against the plaintiff in error and defendants in error Floyd H. Skirvin and W. B. Skirvin for money had and received. A jury was waived, and the cause was tried to the court, and a finding made in favor of the plaintiff, and judgment rendered for the amount claimed against the plaintiff in error. From that judgment an appeal has been prosecuted to this court by petition in error and case made.

It appears from the record that the defendant in error Mrs. Baldock was the owner of three promissory notes for \$2,500 each, and secured by real estate mortgage; that she purchased some property from Floyd H. Skirvin for \$6,000, and gave in payment thereof these mortgage notes, after having indorsed the same; that the aggregate amount of the notes was in excess of the purchase price of the property in the sum of \$1,530; that Mrs. Baldock retained an interest in one of the notes for this amount; and that Skirvin also executed his promissory note to her for this amount, and

on the back of one of the notes transferred to him was written this indorsement:

Oklahoma City,
November 16, 1910.

On payment of within note and interest Mrs. Nancy E. Baldock is to receive \$1,530 and interest from date at 6 per cent. Pay to F. H. Skirvin or order.

N. E. Baldock.

Payment of the note was also guaranteed by W. B. Skirvin by written indorsement on the back thereof. Prior to maturity, and for value, Skirvin transferred and indorsed the notes to the plaintiff in error, Keisel, and Keisel collected the notes at maturity, and claims to have been a bona fide holder of the notes, and that, since he acquired them prior to maturity and for value, he took them free from all equities or claims of Mrs. Baldock.

Oral testimony was admitted at the trial, over the objection of the plaintiff in error, to the effect that it was understood between Skirvin and Mrs. Baldock at the time the notes were transferred to Skirvin that he should hold this note in which Mrs. Baldock claimed an interest, and that the same was to be placed in the bank and held until its maturity, and, when collected, the \$1,530 and interest should be paid to Mrs. Baldock. The full amount of this note and interest was collected by Keisel, and this action was to recover the interest claimed in it by Mrs. Baldock to the extent of \$1,530, and interest at 6 per cent.

Keisel's testimony as to how he purchased the notes is as follows:

Q. Did you agree with Floyd H. Skirvin to purchase the notes?

A. I did.

Q. Did you have them in your hands?

A. He came out to the house. I was in bed. I took a couple of the notes; presumed they were all right; just looked at them; saw that they were \$2,500 each, you know. I took up a couple of them; did not look them over. I did not see that indorsement on it.

Q. You did not see the indorsement on there?

A. No, sir.

Q. What did you do then?

A. I gave him a check and put the notes in my safe. I gave him the check. He said make it out to W. B. Skirvin. I made the note payable to W. B. Skirvin, or check, rather.

After Keisel discovered the memoranda on the note in regard to the interest of Mrs. Baldock therein, he went to W. B. Skirvin L.R.A.1916D.

and had the payment guaranteed. Skirvin made a written guaranty on the back of the note as follows:

On account of indorsement in favor of Mrs. Baldock I guarantee the full payment of \$2,500 and interest on this note to H. C. Keisel or order.

W. B. Skirvin.

The assignments of error as set out in the brief of plaintiff in error are as follows: "The assignments of error may be all discussed under two headings: First, it was error for the trial court to admit evidence of the oral agreement and conversations between Mrs. Baldock and her attorney and the Skirvins at the time the note was delivered by Mrs. Baldock to Floyd H. Skirvin, on November 16, 1910; second, the transaction between Mrs. Baldock and Floyd H. Skirvin conferred absolute authority upon the latter to sell and dispose of the note barring the so-called restrictive and conditional indorsement, and under the undisputed evidence Keisel, by the purchase of said note from Floyd H. Skirvin, became the absolute owner thereof, and of all the proceeds thereof, and of the debt evidenced by said note, and the judgment of the trial court should have been in his favor on this account."

The oral testimony as to the understanding of Mrs. Baldock and Skirvin as to what should be done with the note at the time the same was transferred to Skirvin was not competent or relevant as to the plaintiff in error, Keisel, and he was not bound thereby, provided he was a holder of the note in due course. However, this testimony was competent and relevant to show the interest that Mrs. Baldock retained in this note, and the title that Floyd H. Skirvin had to the same, since, if there was an infirmity in his title, and the note bore evidence of this infirmity, the same was passed to Keisel, and he was not a holder in due course. The fact that Keisel purchased the note for value and before maturity did not make him a holder in due course, if at the time he purchased the note he had notice of any infirmity in the instrument or defect in the title of Skirvin thereto. Therefore the question is presented whether or not the indorsement on the back of the note relative to the interest of Mrs. Baldock therein was not sufficient notice to place Keisel upon inquiry as to the character of title that Skirvin had, and to charge him with notice of the infirmity in Skirvin's title, and, in effect, to destroy the negotiability of the note and to make it subject to all the defenses in his hands that it would have been in the hands of Floyd H. Skirvin.

Section 4102, Rev. Laws 1910, defines a "holder in due course" as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: First. That it is complete and regular upon its face; Second. That he become the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; Third. That he took it in good faith and for value; Fourth. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

If Skirvin transferred the note to Keisel "in breach of faith," as provided in § 4105, Rev. Laws 1910, with Mrs. Baldock, Keisel's title to the note was defective and he was not a holder in due course. The general rule as announced by this court in *Jenkins v. Planters' & Mechanics' Bank*, 34 Okla. 607, 126 Pac. 757, in the first paragraph of the syllabus, is as follows: "Where the purchaser of a promissory note has notice of its infirmities at the time of the purchase, he takes same subject to such defenses as may be maintained by reason of such infirmities. When a negotiable instrument bears on its face such marks of infirmity as would put an ordinarily prudent person upon inquiry, the indorsee of such instrument takes same subject to such defenses as are maintainable by reason of its infirmities."

The note involved in that case was payable to a corporation. It was indorsed by the president of the corporation, and placed as collateral security to the bank to secure his individual debt. There was no evidence that the bank taking this note as collateral had any further notice of the note's infirmities than such as was disclosed by the note to the effect that Harper was pledging the company's note to secure his debt. The court held that that was sufficient notice to place the bank upon inquiry, and that they should have ascertained whether or not Harper had authority from the company to use this note as collateral for his own obligation, and, as it did not make that inquiry, it was not a holder in due course, and the same was subject to the same defenses in an action by the bank as it would have been in the hands of the corporation.

In the case of *Stein v. Rheinstrom*, 47 Minn. 476, 50 N. W. 827, the instrument involved was negotiable in form, a warehouse receipt for whisky, and contained the following phrase, "and deliver the same upon payment for the whisky, the United States government and state tax, interest, and charges." The court, in discussing the question, said: "Whether these words should be regarded as equivalent to the words 'upon payment for the whisky' or 'upon pay-

ment of the purchase price of the whisky,' or as equivalent to some other form of expressing the fact that a payment of some part of the price had to be made, is wholly immaterial for the proper disposition of the order appealed from, which must be affirmed. Strictly speaking, the receipts were not negotiable, for they carried upon their face a notice that the whisky would only be surrendered upon the payment of certain charges thereafter to be ascertained. If there was anything doubtful or ambiguous about the language used as to the nature, character, or extent of the claim or lien, a purchaser was put upon his guard and cautioned to inquire. He was thereby notified of an infirmity which would affect him, and this notice was ample to prevent a purchase of the receipts by any person exercising ordinary business prudence and judgment without first investigating. Observing a clause in the receipts which was uncertain, he was bound to learn its meaning, or, failing so to do, to suffer the consequences. The words in question were indefinite and of doubtful import, but palpably a prepayment of some character was required in addition to United States government and state taxes, interest, and charges. It devolved upon the plaintiff, when purchasing, to discover what was intended by their use. The purchaser of what purports to be or is said to be negotiable paper must exercise ordinary prudence in respect to knowledge derived from an inspection of the paper. *Hall v. Hale*, 8 Conn. 336; *Ayer v. Hutchins*, 4 Mass. 370, 3 Am. Dec. 232; see also *First Nat. Bank v. Scott County*, 14 Minn. 77, Gil. 59, 100 Am. Dec. 194."

This case is not in line with the great weight of authority, as will be seen by reference to *Mee v. Carlson*, 22 S. D. 365, 117 N. W. 1033, 29 L.R.A.(N.S.) 351, and the very full note accompanying said report.

We conclude from these authorities that the indorsement on the note in regard to the interest of Mrs. Baldock therein was sufficient to put a reasonably prudent man upon inquiry, and the inquiry would have disclosed the defect in Skirvin's title, and the fact that Keisel bought the note without actual knowledge of this indorsement cannot affect the question, for he is charged with knowledge of this indorsement and everything it necessarily implied. It was certainly notice of the defect in Skirvin's title, and was sufficient to put Keisel on inquiry to find out the interest of Mrs. Baldock, if any, in the note. The fact that he did not see or look for the indorsement before purchasing the note cannot excuse him. The fact that when he did discover this indorsement he carried the note to W. B. Skirvin and secured his guaranty of the payment

is sufficient, at least, to show that the memoranda on the back of the note was sufficient to give notice that Mrs. Baldock had some interest in the note, and that there was a defect in his title. Keisel having taken this note with the knowledge of the infirmity in Skirvin's title, he was not a holder in due course, and the same was subject to the same defenses in his hands that it would have been in the hands of Floyd H. Skirvin, and, he having collected the full amount of the note and interest,

he is liable to Mrs. Baldock for money had and received, to the extent of her interest as found by the trial court.

We therefore recommend that the judgment appealed from be affirmed.

Per Curiam:

Adopted in whole.

Petition for rehearing denied February 15, 1916.

WASHINGTON SUPREME COURT.

RE ESTATE OF EDWARD CONNOLLY,
Deceased.

JOHN FARLEY et al., Respts.,
v.

JAMES HOPKINS, Exr., etc., of Edward
Connolly, Deceased, Appt.

(— Wash. —, 154 Pac. 155.)

Forgery — exact similarity of signatures — effect.

That the purported signature of a man, not given to much writing, to a will, is exactly like a genuine signature, is evidence of forgery, although the will purports to have been made before the genuine signature.

For other cases, see Forgery, in Dig. 1-52 N. S.

(January 10, 1916.)

APPEAL by defendant from a judgment of the Superior Court for Spokane County in favor of contestants in a proceeding to contest an instrument purporting to be the will of Edward Connolly, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Lucius G. Nash and Nuzum, Clark, & Nuzum for appellant.

Messrs. Tolman & King, Luby & Pearson, John B. White, and Fred J. Cunningham for respondent.

Mount, J., delivered the opinion of the court:

The purported will of Edward Connolly, deceased, is contested by one asserting himself to be an heir, and by the state of Washington. The case took the usual turn of such cases, and there is much conflict of testimony.

After very thorough inquiry the trial judge found the will to be a forgery, and

Note. — As to comparison of handwriting for the purpose of showing copying or tracing of signature, see notes to *University of Illinois v. Spalding*, 62 L.R.A. 870, and *Stitzel v. Miller*, 34 L.R.A. (N.S.) 1004. L.R.A.1916D.

held, further, that the right of the state to claim the property under the laws providing for the escheat of property of deceased persons would not be prejudiced by his holding. The witnesses to the will testified that it was executed by the deceased, and its whereabouts is accounted for by the testimony of other witnesses from about the time it was executed until it was offered for probate. On the other hand, there is testimony tending to show that the deceased had not executed a will, and that he had manifested an intent not to do so.

Several experts in handwriting were offered as witnesses, and they concur in the opinion that the purported signature to the will is a forgery. The fact that the experts agree in this case may be attributed to the unusual instance that they were all testifying on the same side of the case.

At least two men who were familiar with the signature of the deceased, and with the deceased and his characteristics, expressed the opinion that the signature was that of Edward Connolly.

We have read the whole of the record with more than our usual care, keeping in hand the several exhibits to which the witnesses were addressing their testimony. We have made the same examinations and comparisons in the same way and with the same instruments employed by the expert witnesses, and, but for the fact that there was offered by the proponents of the will an admitted signature of Edward Connolly, and which became the principal basis for comparison, we would be inclined, notwithstanding the opinion of the experts, to hold that the signature to the will is genuine. But when the two signatures, the one upon the will and the one referred to as exhibit No. 7, are considered, we believe, as the court below must have believed, that the signature upon the will is a tracing of the genuine signature. Edward Connolly was not a man of education, nor was he given much to writing.

It is understood of all men that no two signatures are exactly alike, or so nearly

alike that they will bear a superimposition of one upon the other, and if they do, it is one of the strongest evidences of a forgery. The subject of identity of signatures and the conclusions to be drawn therefrom are learnedly discussed by Mr. Osborn in his finished work on Questioned Documents, chapter XVI. After noting that it is the natural thing for the model to go undiscovered, he says: "Strange as it may seem, however, in many important cases the model writing is actually put in the case to prove the forged writing to be genuine by means of it."

It has so happened in this case. We have the model—the authenticated signature—and the questioned signature. All the books agree that if exactly similar they will prove too much.

"This coincidence of a disputed signature with a genuine one when superimposed against the light has long been held by the courts to be proof of simulation." *Re Burtis*, 43 Misc. 437, 89 N. Y. Supp. 441.

"That an illiterate man, capable of writing his name . . . could, without tracing and painstaking design, produce two signatures so precisely alike," is deemed incredible. *Re Koch*, 33 Misc. 153, 68 N. Y. Supp. 375.

"It is a fact well known, and may be readily verified, that no two signatures, actually written in the ordinary course of writing them, are precisely alike. The character of a person's signature is generally of uniform appearance, and the resemblance between one and another signature of the same person is thus apparent. But the coincidence is seldom, if ever, known, where a genuine signature of a person, when held up to the window pane, superposed over another genuine signature of the same person, is such a facsimile that the one is a perfect match to the other in every respect. . . .

"But where two or more supposed signatures are found to be counterparts, I think the simulation is detected by that circumstance. Genuine signatures will not lap with perfect similarity one over another." *Hunt v. Lawless*, 7 Abb. N. C. 119.

"It does not seem hardly possible that one, without design, can write his name twice so exactly alike, in spaces between and height of the letters, and their slope or angles, as that a tracing of one will accurately measure the other in every respect. Indeed, numerous experiments show that it cannot be done when it is sought to be done. Such a perfect coincidence as in the case of these two signatures in this cause is at L.R.A.1916D.

least highly improbable, and but barely possible, if attainable at all." *Day v. Cole*, 65 Mich. 129, 31 N. W. 823.

And so conclusive is this circumstance that at least one court has followed it to the exclusion of other evidence. It is said: "And for this reason it does not need the testimony of experts to demonstrate that these signatures were not genuine, but tracings. The resemblance in each is so striking that it cannot help but be observed upon a bare inspection, and if a measurement be made from any given point in one, it will be found to correspond to the merest fraction of an inch in the other; in other words, each signature will superimpose the other, a similarity which does not appear in the concededly genuine signatures introduced in evidence, and which, from the very nature of things could not occur." *Re Rice*, 81 App. Div. 223, 81 N. Y. Supp. 68.

We have not overlooked the point that is made that the will antedates by three months the authenticated signature to which we have referred, but we are mindful that it is not likely that one who is disposed to forge a signature would hesitate to endeavor to discount or destroy the evidence of his forgery by dating the forged instrument upon a day when the signature relied upon as a copy was not in existence.

In short, the testimony is conflicting. We have weighed it carefully, and we think that the findings and decree of the trial judge are sustained by a preponderance of the evidence. We have come to this conclusion endeavoring in our own minds to reject entirely the testimony of two of the principal witnesses for the contestants, that is to say, Stephen Doyle and George Morris. The testimony of these witnesses is vigorously assailed by counsel. We believe ourselves that their testimony is so freighted with fabrication as to make them unworthy of belief.

There is no question of law in this case. The trial judge had the advantage of seeing and hearing the witnesses, and of marking their demeanor while upon the witness stand. We find nothing that would sustain a holding that the preponderance of the evidence is not with the contestants.

The decree of the lower court is affirmed.

Morris, Ch. J. and Ellis, Chadwick, and Fullerton, JJ., concur.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT
OF APPEALS.

DAISY GOODING, Appt.,

v.

LEE OTT, State Compensation Commis-
sioner.

(— W. Va. —, 87 S. E. 862.)

Master and servant — workmen's compensation — injury in other state.

1. Where a coal company of this state, with principal offices and tippie and main entrance and the principal part of its mine located in this state, has qualified under the provisions of § 9 of the workmen's compensation act of this state (Laws 1913, chap. 10; Code 1913, chap. 15p, § 9 [§ 665]), as amended by the Acts of the Legislature of 1915, chap. 9, by paying the premiums of liability and by giving notice to miners employed in its mine, etc., as required by said act, the widow of a miner residing in this state and so employed therein, unless employed wholly without the state, and whose injuries resulting in his death were sustained in the course of and resulting from his employment, while temporarily at work in that part of the mine located in an adjoining state, is entitled to participate in the workmen's compensation fund created by said act, notwithstanding the language of § 25 thereof, authorizing disbursements of such fund to employees who "shall have received injuries in this state."

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Statute — workmen's compensation — extraterritorial enforcement.

2. The relation of employer and employee, under said act, being voluntary, and not compulsory, is contractual, the statute becoming an integral part of the contract, and limiting the rights and liabilities of employer and employee, binding upon the parties, and enforceable in other jurisdictions, unless opposed to the public policy thereof, and as all other foreign contracts are enforceable therein.

For other cases, see Conflict of Laws, I. b, in Dig. 1-52 N. S.

(January 25, 1916.)

A PPEAL by petitioner from an order of the State Compensation Commissioner

Headnotes by MILLER, J.

Note.—As to extraterritorial effect of workmen's compensation acts, see annotation following Kennerson v. Thames Towboat Co. L.R.A.1916A, 443.

Generally as to conflict of laws in relation to actions for personal injury or death, see note to Boston & M. R. Co. v. Hurd, 56 L.R.A. 193. Particular phases of the question in relation to actions for death are also considered in notes cited in the Index to L.R.A. Notes, under the title, "Conflict of Laws," subtitle, "Personal injuries; death." L.R.A.1916D.

denying her compensation, in a proceeding under the workmen's compensation act, to obtain compensation for the death of her husband. Reversed.

The facts are stated in the opinion.

Mr. E. A. Bowers, for appellant:

The intention of the lawmakers constitutes the law, and the primary object in the interpretation of a statute is to ascertain and give effect to that intention, although the construction may not be in conformity with the strict letter of the statute.

Bank of Bramwell v. County Ct. 36 W. Va. 341, 15 S. E. 78; State v. Myers, 74 W. Va. 488, 82 S. E. 270; Sutherland, Stat. Constr. § 246.

In considering statutes, every part must be viewed in connection with the whole, so as to make its parts harmonious, if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the legislature intended any part of the statute to be without meaning.

Bank of Bramwell v. County Ct. 36 W. Va. 341, 15 S. E. 78; Wellsburg & S. L. R. Co. v. Pan Handle Traction Co. 56 W. Va. 18, 48 S. E. 746; Old Dominion Bldg. & L. Asso. v. Sohn, 54 W. Va. 109, 46 S. E. 222; Sutherland, Stat. Constr. §§ 238-240, 287.

In searching for legislative intent, it is the duty of the court to consider the object and purpose to be accomplished; the reason and motive which led to its making are most certain means of establishing a statute's true sense.

23 Am. & Eng. Enc. Law, 319; Sutherland, Stat. Constr. § 292; Daniel v. Simms, 49 W. Va. 554, 39 S. E. 690; State v. Baltimore & O. R. Co. 61 W. Va. 367, 56 S. E. 518.

Of two permissible constructions of a statute, one leading to unjust or absurd results and the other to equity and fairness, the latter is to be adopted, upon the presumption that the legislature did not intend the results flowing from the other.

Rider v. County Ct. 74 W. Va. 712, 82 S. E. 1083; Hasson v. Chester, 67 W. Va. 278, 67 S. E. 731; Dickey v. Smith, 42 W. Va. 805, 26 S. E. 373; Old Dominion Bldg. & L. Asso. v. Sohn, 54 W. Va. 101, 46 S. E. 222; Sutherland, Stat. Constr. §§ 322-324; 23 Am. & Eng. Enc. Law, 361.

Courts will so construe statutes as to render them constitutional.

Sutherland, Stat. Constr. § 332; 23 Am. & Eng. Enc. Law, 349-352; Charleston & S. Bridge Co. v. Kanawha County Ct. 41 W. Va. 658, 24 S. E. 1002; State v. Workman, 35 W. Va. 367, 14 L.R.A. 600, 14 S. E. 9; Underwood Typewriter Co. v. Piggott, 60 W. Va. 532, 55 S. E. 664; Coal & C. R. Co. v. Conley, 67 W. Va. 129, 67 S. E. 613.

Messrs. A. A. Lilly, Attorney General,

and Frank Lively, Assistant Attorney General, for appellee:

Workmen's compensation laws do not cover an injury or accident which occurs out of the state enacting such laws, unless there is plain, unequivocal, and direct language in the statute to the contrary.

Gould's Case, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60; Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620; Reynolds v. Day, 79 Wash. 499, L.R.A.1916A, 432, 140 Pac. 681, 5 N. C. C. A. 814; Keyes Davis Co. v. Allerdyce, Decision of Michigan Industrial Board, 1913; Schwartz v. India Rubber, G. P. & Teleg. Works Co. [1912] 2 K. B. 299, 5 B. W. C. C. 390; 81 L. J. K. B. N. S. 780, 106 L. T. N. S. 706, 28 Times L. R. 331.

Laws have no extraterritorial effect.

Bank of Augusta v. Earle, 13 Pet. 519, 10 L. ed. 274; Stevens v. Brown, 20 W. Va. 450; Story, Conf. L. 18.

In all cases of torts, the law of the place where the injury was inflicted governs the remedy, without regard to the law of the forum, or the law of the place where the contract was made.

Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620; Burns v. Grand Rapids & I. R. Co. 113 Ind. 169, 15 N. E. 230.

Miller, J., delivered the opinion of the court:

Petitioner, widow, complains of the order of defendant denying her right of participation in the workmen's compensation fund, on account of the death of her husband, Clyde F. Gooding, a miner, killed by coming in contact with a trolley wire, while employed in the mine of the Davis Coal & Coke Company.

The record shows that the tippie and main works of the Davis Coal & Coke Company are located in Grant county, West Virginia, where deceased resided and was employed to work as a miner, but that at the instant of his death he was operating a motor in a part of the mine which lay in Maryland, and at a point about 400 feet from the dividing line between the two states.

It is conceded that the Davis Coal & Coke Company, a West Virginia corporation, with tippie and works and main offices so located in West Virginia, is of the class of "persons, firms, associations and corporations regularly employing other persons for profit, or for the purpose of carrying on any form of industry or business in this state," as provided by § 9, of the workmen's compensation act, as amended by chapter 9, of the Acts of the Legislature, 1915, entitled to the benefits and protection of said act, and that deceased was, at the time of his injury and death, in the service of said company and employed by it "for the purpose of carry-

ing on" its "industry or business," within the provisions of said act, and not of the excepted class, those "who are employed wholly without this state," as provided by said section.

It is conceded also that the Davis Coal & Coke Company had fully complied with all the requirements of the said chapter, and the rules of the commissioner, promulgated in relation thereto, for the month preceding the injuries and death of decedent, and had paid into the workmen's compensation fund, established under the provisions of said act, "the premiums of liability" prescribed thereby, being the "prescribed percentage of the total earnings of all employees subject to this act for such preceding month," including the earnings of said decedent, as required by § 24 of said act, and that 10 per cent thereof was deducted from the pay of said employees, including that of decedent, as likewise provided in said section, and had in all other respects complied with the requirements of said act.

That the petitioner, the widow of deceased, is one of the beneficiaries or dependents of deceased, entitled to share in the distribution of said compensation fund, is conceded, unless denied that right by some other provision of the law. The reasons assigned by the defendant for rejecting her claim are, first, that by § 25 of said act he is authorized to disburse said workmen's compensation fund only to employees, or their dependents, who "shall have received injuries in this state in the course of and resulting from their employment;" second, that this act can have no extraterritorial force or effect, and as the deceased sustained his injuries resulting in his death, within the boundary of the state of Maryland, petitioner is not entitled to participate in said fund, wherefore her claim was denied.

It is contended on behalf of the petitioner that this construction of § 25 of the statute is too narrow, and is not in harmony with other provisions of the act, or with the humanitarian objects and purposes thereof to relieve classes of employers and employees falling within its provisions. It is conceded by the attorney general, arguendo, that, under the original act of 1913, there could have been no doubt of petitioner's right to participate in the fund, because, by § 18, it was specifically provided that "a mine worker shall be deemed to be wholly employed in the state in which the tippie or principal mine entrance of the mine in or about which he works is situate;" but that the omission of this provision in the amendment of 1915 evidenced an intention on the part of the legislature to deny to an employee, though not wholly employed but injured outside

of the state, all relief or benefits of the fund to which he and his employer contributed and are required to contribute, not upon a proportion of his wages, but upon the whole amount of the wages earned by him.

Considering the objects and purposes of the statute, already indicated, and all the terms and provisions thereof, we think the commissioner has given too narrow a construction to § 25 of the act. True, this section does apparently limit the right to such persons "as shall have received injuries in this state," and true it is that the amendment of § 18, in 1915, defining a mine worker, was wholly omitted; but it is also true that the provision of § 9, of the act of 1913, admitting employees to the benefits of the fund unless "employed wholly without this state," remains in this section, as amended in 1916. Besides, by the amendment of said § 18, there was omitted that other provision of the original act, authorizing the employer, where an employee was employed partly within and partly without the state, to apportion the pay of such employee earned within and without the state in ascertaining the percentage of wages to be paid into the compensation fund. By the amendment, omitting this provision, an employer cannot now, on penalty of losing the entire benefit of the act, deduct any proportion of the wages of an employee earned without the state.

The question is presented, What did the legislature intend by these amendments? Was it intended to deprive both employer and employee of the protection provided by the act when the injuries of the employee should occur just across the line in another state, and where, as in this case, the tippie and principal works are all located within this state? We cannot think so. So construed the statute would impose unequal burdens upon and give unequal protection to mine owner and miner from whom premiums are exacted. They would both be liable for benefits not received. We think it quite clear that the amendments must have had some other purpose. We can see that employers and Commissioner may have found it difficult under the original act to apportion the wages so as to determine the proper amount of premiums to be paid, and that though "tippie or principal mine entrance" was located in this state, it may have been difficult to determine whether the act applied when the mine itself, where the miners were employed, was wholly outside of the state, and where the employers and employees also resided outside the state. Such we understand to be the actual mine condi-

tions existing in some parts of the state. If so, these furnished ample justification for the amendments, and we ought not for this reason give the statute as amended a construction which would be out of harmony with other provisions of the act, and will work gross injustice to those required to contribute to the compensation fund.

That the legislature had the power to extend the benefits and privileges of the act to employers and employees outside the state is well settled. *Mulhall v. Fallon*, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; *Gould's Case*, 215 Mass. 480, 102 N. E. 693, Ann. Cas. 1914D, 372, 4 N. C. C. A. 60; 1 *Bradbury, Workman's Compensation*, 42. And, while there is some conflict, it is held by high authority, and we think by the weight of authority, that when right of action for injuries or death by wrongful act is given by the state where the injuries are sustained, such right may be enforced in another state, unless the law conferring the right is opposed to some public policy of the state of the forum. *American Radiator Co. v. Rogge*, 86 N. J. L. 438, 92 Atl. 85, 7 N. C. C. A. 144, and note 148, and cases.

The other reason of the Commissioner for rejecting petitioner's claim, based on the general principle that a statute can be given no extraterritorial effect, and is binding on neither employee nor employer, we think should not be affirmed. It is true that the courts of some of the states, notably Massachusetts, in the early history of workmen's compensation statutes, took this view, all of these decisions being controlled largely by the particular statutes involved. These cases are all collated and reviewed in elaborate notes to *Re Gould*, 4 N. C. C. A. 60, and *American Radiator Co. v. Rogge*, 7 N. C. C. A. 144 et seq., and most of which are also reviewed and criticized by Mr. Bradbury, 1 *Bradbury, Workman's Compensation*, 2d ed. 34 et seq. Up to the time Mr. Bradbury wrote his second edition, the cases relied on as supporting the conclusion of the Commissioner, and cited in the text, were *Re Gould*, supra; *Keyes Davis Co. v. Allerdyce*, Michigan Industrial Acci. Board, April, 1913; *Ruling of Wisconsin Industrial Commission*, the question not in actual litigation; and the English cases of *Hicks v. Maxton* (1907) 124 L. T. Jo. 135, 1 B. W. C. C. 150; *Tomalin v. S. Pearson & Son* [1909] 2 K. B. 61, 2 B. W. C. C. 1, 78 L. J. K. B. N. S. 863, 100 L. T. N. S. 685, 25 Times L. R. 477; and *Schwartz v. India-Rubber, G. P. & Teleg. Works Co.* [1912] 2 K. B. 299, 5 B. W. C. C. 390, 81 L. J. K. B. N. S. 780, 106 L. T. N. S. 706, 28 Times L. R. 331.

The cases taking the opposition view were *Deeny v. Wright & C. Lighterage Co.* 36 N. J. L. J. 121; *Re Schmidt*, Claim No. 6; *Ohio State Lia. Bd. Awd.* July 10, 1912; *Ops. Atty. Gen. Mch.* 1914.

Of the leading case relied on by the attorney general, *Re Gould*, supra, Mr. Bradbury, receding from the views expressed by him in the first edition of his work, at page 50, of the second edition cited, says: "The supreme judicial court of Massachusetts certainly stands very high. Its decision will have very great weight;" but, says he, "The author cannot help expressing a feeling of regret that its decision in *Gould's Case*, supra, was not the other way." And in a note this writer further says: "In spite of this justification of the views formerly expressed, it is asserted without hesitation by the author that he believes he gave too broad an application to the decisions under the British compensation act. He believes that the opinion expressed by Mr. Justice Martin in *Deeny v. Wright & C. Lighterage Co.* 36 N. J. L. J. 121, is more in conformity with the spirit and the necessities of the development of the compensation principle in the American states. This is especially true as to elective laws, and, to prevent difficulty, the same principle should be incorporated in every compulsory statute. That there is ample justification for such a course both on legal grounds and considerations of expediency the author has endeavored to show in the text."

And at page 56, the same author, in his text, says: "Therefore, partially receding from the position taken in the first edition of this work, although that position has been sustained by eminent authority, it is believed that the doctrine which must be established finally will be, in effect, that the law of the place where a contract of employment is made will govern the rights and liabilities of employees and employers to claim and to pay compensation."

A distinction has been noted in some of the authorities between cases arising under compulsory statutes and those controlled by statutes, as in New Jersey, and we think in this state, which are optional. Where the statute compels submission by the employer and employee, there is no contract, as a general rule, enforceable outside of the state. But where, as in New Jersey and in this state, the statute makes acceptance optional, and the parties freely enter into the contract of employment with reference to the statute, the statute should be read into the contract as an integral part thereof, binding the parties, and enforceable in any jurisdiction, the same as any other contract. Such is the holding, and L.R.A.1916D.

we think the correct holding, with reference to workmen's compensation statutes generally, of the New Jersey cases of *Deeny v. Wright & C. Lighterage Co.*, and *American Radiator Co. v. Rogge*, supra, as well as the case of *Sexton v. Newark Dist. Teleg. Co.* 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569, 578.

The pivotal question then is, Does a contract of employment, with reference to our statute, amount to a contract between employer and employee to be bound by the provisions of the act, when the employee is not employed wholly without the state? Section 22 of the act provides, that when the employer has complied with the act, and has given notice as required, the continuation in the service of such employer with such notice shall be deemed a waiver by the employee, and by the parents of any minor employee, of right of action against the employer protected by the act. Prior to the enactment of workmen's compensation laws, right of action for injuries and death given by statute, English and American, was treated as *ex delicto*, and not as arising out of contract. But employment under these new compensation acts, when elective, and not compulsory, and voluntarily entered into, are treated as contracts of employment, to be interpreted and enforced as all other contracts, and as binding upon the parties for injuries or death sustained in any place to which such contracts of employment extend the rights of the parties. 1 *Bradbury, Workman's Compensation*, 44 et seq. The author here reviews among cases, the case of *Schweitzer v. Hamburg American Packetfahrt Actien Gesellschaft*, 149 App. Div. 900, 134 N. Y. Supp. 812, and the New Jersey and other cases cited herein.

It is true, as argued by the attorney general, that the Massachusetts statute, construed in *Re Gould*, supra, contained no limitation as to time or place of employment, or injuries sustained, and it is argued from this that that statute was stronger against his position than ours, which, by § 25, limits the benefits of the workmen's compensation fund to those sustaining injuries in this state. But, as we have construed the statute as a whole and with reference to all its parts, including the definition of who is an employee within the meaning of the statute, to include those employees whose employment is not wholly without the state, the statute becomes an express recognition of the right of employees who and whose employers are required to contribute to the compensation fund upon the basis of the entire wages paid the employee, we think our statute is stronger in favor of the right of such em-

ployees to participate in the fund, than if it was silent as to time and place of employment or of injuries sustained.

As the questions considered herein are so fully covered by the authorities cited, it becomes unnecessary to extend this opinion into a further review of the decided cases. And it is sufficient to say that we turn our decision upon the proper construction of our own statute, and upon the theory of a contract, express or implied, between employer and employee, accepting the provi-

sions of the statute, and as extending its benefits and liabilities to persons so related and to employees or their dependents injured as the decedent was in this case.

For these reasons we are of opinion to reverse the order of the Compensation Commissioner, and to direct that this decision be certified to him as provided by § 43 of the workmen's compensation act, for further action by him in the premises as required thereby.

MASSACHUSETTS SUPREME JUDICIAL COURT.

RE CLARA C. VON ETTE, Widow of George C. Von Ette, Deceased, Employee.
GLOBE NEWSPAPER COMPANY, Employer.

CASUALTY COMPANY OF AMERICA, Insurer, Appt.

(223 Mass. 56, 111 N. E. 696.)

Master and servant — workmen's compensation — finding of Industrial Accident Board.

1. A finding by the Industrial Accident Board that the death of a workman found dead on the ground after he was known to have gone upon the roof of a building, under circumstances indicating that he had fallen therefrom, was accidental, cannot be said to have been unwarranted where no evidence indicated any other cause of death. *For other cases, see Appeal and Error, VII. 1, 4, in Dig. 1-52 N. S.*

Same — fall from roof — course of employment.

2. A fall by a workman to his death from a roof to which he had gone, with the acquiescence of the employer, to get air and cool off because of the oppressive heat in the room where he was employed, may be found to have arisen out of and in the course of his employment within the operation of a workmen's compensation act, even

though he went unnecessarily near the edge of the roof.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

(February 29, 1916.)

APPEAL by insurer from a decree of the Superior Court for Suffolk County awarding compensation to claimant in a proceeding by her under the workmen's compensation act to recover compensation for the death of her husband. Affirmed.

The facts are stated in the opinion.

Messrs. Peabody, Arnold, Batchelder, & Luther, and Samuel H. Batchelder, for appellant:

On all the evidence the employee's widow is not entitled to compensation.

Herrick's Case, 217 Mass. 111, 104 N. E. 432, 4 N. C. C. A. 554; Fisher's Case, 220 Mass. 581, 108 N. E. 381; Lee v. Stag Line, 107 L. T. N. S. 509, 56 Sol. Jo. 720, 5 B. W. C. C. 660; Sponatski's Case, 220 Mass. 526, L.R.A.1916A, 333, 108 N. E. 466, 8 N. C. C. A. 1025; 25 Harvard L. Rev. 420, 421.

Mr. C. L. Carr for appellee.

Crosby, J., delivered the opinion of the court:

This is an appeal from a decree entered in the superior court under the workmen's

Note.—The English cases construing the phrase "arising out of and in the course of the employment" are discussed at pages 40 et seq., of the annotation in L.R.A.1916A, 23, on the general subject of workmen's compensation acts; and the American cases construing this provision, including its applicability to injuries received while the employee is not actually at work, will be found at pages 232 et seq., of that note. Various specific phases of the general question as to the applicability of the act where the employee is not actually at work when injured are treated in the annotation following Hopkins v. Michigan Sugar Co. L.R.A.1916A, 314, on "Recovery of compensation for injury to employee received while L.R.A.1916D.

on the street;" annotation following Zabriskie v. Erie R. Co. L.R.A.1916A, 317, on "Injuries received while seeking toilet facilities as 'arising out of' the employment;" annotation following Re Sundine, L.R.A. 1916A, 320, on "Injuries received while procuring refreshment as arising out of and in the course of the employee's employment;" annotation following Re Brightman, L.R.A. 1916A, 322, on "Recovery of compensation for injuries received while trying to save personal belongings from loss;" annotation following De Constantin v. Public Service Commission, L.R.A.1916A, 331, on "Recovery of compensation for injuries received while going to and from work."

compensation act. The facts as disclosed by the evidence are briefly as follows:

George C. Von Ette, the deceased, was in the employ of the Globe Newspaper Company, in Boston, as a compositor. He met his death on the night of June 21, 1914. He went to work on the evening of June 21st, and his employment for that night would have been finished at a quarter before 2 o'clock the next morning. He was last seen alive about 11 o'clock. His dead body was found the next morning at a quarter before 4 o'clock upon the ground six stories below the floor where he worked. The injuries which caused his death resulted from falling from the roof of the building adjoining the room in which he worked. When the deceased left his home to go to work that night, he told his wife that he would be at home on the 2 o'clock car the next morning. He was apparently in good health; he was cheerful in disposition, and there was no evidence tending to show any trouble between him and his wife. He was apparently contented and happy. He made an appointment with one of his fellow workers to visit the new fish pier on the next day. He also made arrangements to attend a recital on the following Monday evening to be given by his sister. It was a common practice of the workmen employed in the room with the deceased to go upon the roof of a building on the employer's premises for the purpose of getting fresh air, the compositor's room where the men worked being very warm in the summer time, the temperature sometimes being 110 degrees, and warmer than the temperature outside.

The arbitration committee found "that on the morning of the 22d of June the employee went from the room in which he was working to the roof, it being a hot night and he being in need of fresh air; and while on the roof he accidentally slipped and fell to the ground below, where he met his death. . . . From the room to the roof below there is a stairway of iron as used in ordinary fire escapes."

There was an iron railing which extended along the edge of a part of the roof, but there was no railing on that side of the roof at the place above where the body of the deceased was found.

The committee further finds "that on the night the employee met with the injury, following the custom which had prevailed in the establishment, he went upon the roof; that it was a hot night; that the ventilation in the room where he worked was poor, and he went out to get the fresh air; that the building adjoining on the roof of which the employee went was the property of the employer. There is no evidence in the L.R.A.1916D.

case pointing to any other reason for his going upon the roof except . . . to get away from the heat and get into the fresh air, and we further find that in so doing he was within the scope of his employment, and that the injury arose out of and in the course of his employment."

The Industrial Accident Board took two views of the premises, one in the daytime and the other at night, and made a decision based upon their observations taken at the views, upon the evidence heard and reported by the arbitration committee, and upon other evidence presented at the hearing on review. The record contains all of the evidence presented to the committee and to the board.

One of the office rules of the employer posted on the premises was as follows: "No employee shall leave the composing room during working hours except on office business without permission of the man in charge."

The Board finds that there was an established custom among the employees, known to the employer, to go upon the roof for the purpose of obtaining fresh air, and that it was an incident of the employment of the deceased to go upon the roof. The Board also finds as follows: "That some time towards midnight of June 21st or early in the morning of June 22d the employee went from the room in which he was working, the room being hot and the work being slack, to the roof of the Devonshire street building, which is a part of the Globe premises, he being in need of fresh air and it being customary to use this roof for that purpose, and that while on this roof he accidentally walked over the edge or became dizzy and slipped off into the areaway and fell to his death. We find that on going upon said roof he was acting within the scope of his employment, and that his death was the result of injuries arising out of and in the course of his employment. We find that he did not commit suicide and that he was not under the influence of liquor."

The insurer contended that the findings made by the committee and by the Board were not warranted, and requested the Board to rule that, as matter of law, no compensation could be awarded. Whether this ruling should have been given depends upon the questions: (1) Did the deceased voluntarily take his own life or was his death the result of a condition of intoxication or was it due to his accidentally falling from the roof? (2) If the injury and death resulting therefrom were due to an accident, did the injury arise out of and in the course of the employment of the deceased?

If the deceased met with his injury by reason of his serious and wilful misconduct, no compensation can be awarded, and it may be conceded that if he voluntarily took his life, or if his fall from the roof was due to a condition of intoxication, the ruling requested should have been given. It has been held repeatedly that in cases arising under the act, in order that an award of compensation may be made the burden of proof rests upon the claimant to show by a preponderance of the evidence that an injury occurred, and that it arose out of and in the course of the employment. The determination of these issues cannot be left to speculation, surmise, or conjecture. If the evidence upon the questions involved is slender, but is sufficient to satisfy a reasonable man, a case has been made out in favor of the claimant. A finding of the Industrial Accident Board is not to be set aside if warranted by the evidence, although we might feel that a different conclusion would have been reached by us if we had been called upon to decide the question in the first instance. If this claimant were required to prove all the facts and circumstances attending her husband's death by direct evidence, it is plain that her claim would fail, but she is not limited to such proof. She may show the existence of such facts as would warrant the inference that her husband did not commit suicide, and did not meet with his death as the result of intoxication. *Com. v. Doherty*, 137 Mass. 245; *Com. v. Kennedy*, 170 Mass. 18, 25, 48 N. E. 770; *Colburn v. Spencer*, 177 Mass. 474, 59 N. E. 78; *Bigwood v. Boston & N. Street R. Co.* 209 Mass. 345, 35 L.R.A. (N.S.) 113, 95 N. E. 751; *Sponatski's Case*, 220 Mass. 526, L.R.A.1916A, 333, 108 N. E. 466, 8 N. C. C. A. 1025. There was no evidence of suicide, and therefore the presumption against the commission of a crime is enough to support the finding on that point. *Com. v. Mink*, 123 Mass. 422, 25 Am. Rep. 109; *Sponatski's Case*, 220 Mass. 526, L.R.A.1916A, 333, 108 N. E. 466, 8 N. C. C. A. 1025; *Furnivall v. Johnson's Iron & Steel Co.* 5 B. W. C. C. 43. There was no evidence to show that he was under the influence of liquor. The board having found that the employee did not commit suicide and was not under the influence of liquor, and no other cause of death having been suggested except that he accidentally fell off the roof, we cannot say that the finding of the Board that his death was accidental was not warranted.

The insurer further contends that the evidence does not warrant a finding that the employee's death arose out of and in the course of his employment. If we assume that it would be a violation of the L.R.A.1916D.

rule to go upon the roof during working hours without seeking permission, for the purpose of obtaining fresh air, the question is whether the rule was in force at the date of Von Ette's death, or whether it had been waived by the employer. There was ample evidence of a general practice of the men who worked in the composing room to go upon the roof to get fresh air and cool off on hot nights, and that such practice was known to the employer. We are of opinion that the Board was warranted in finding that the rule was not in force, but had become a dead letter at the time of the accident. *McNee v. Coburn Trolley Track Co.* 170 Mass. 283, 49 N. E. 437; *Sweetland v. Lynn & B. R. Co.* 177 Mass. 574, 51 L.R.A. 783, 59 N. E. 443; *Boyle v. Columbian Fire Proofing Co.* 182 Mass. 93, 98, 64 N. E. 726; *Brady v. New York, N. H. & H. R. Co.* 184 Mass. 225, 68 N. E. 227; *Cutts v. Boston Elev. R. Co.* 202 Mass. 450, 456, 89 N. E. 21; *Crowley v. A. O. H. Widows' & Orphans' Fund*, 222 Mass. 228, 110 N. E. 276.

The question whether the injury arose out of and in the course of the employment is one of some difficulty; a majority of the court are unable to say that the finding of the Board was wrong. The accident happened upon the premises of the employer, and we think, in view of the practice which might have been found to exist under which the men went upon the roof for fresh air, that the act of the deceased in going there on a warm night was not necessarily outside his employment, but could have been found to be incidental thereto. An injury to a workman may arise out of and in the course of his employment even if he is not actually working at the time. *Sundine's Case*, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616; *Boyle v. Columbian Fire Proofing Co.* 182 Mass. 93, 64 N. E. 726; *Blovelt v. Sawyer* [1904] 1 K. B. 271, 73 L. J. K. B. N. S. 155, 68 J. P. 110, 52 Week. Rep. 503, 89 L. T. N. S. 658, 20 Times L. R. 105, 6 W. C. C. 16; *Moore v. Manchester Liners* [1910] A. C. 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527.

The fact that the unprotected place upon the roof where it is found the deceased fell off is 23 feet away from the foot of the stairway is not decisive against the claimant. He could have been found to be rightfully upon the roof, and was not bound to remain at the foot of the stairs or on any particular part of the roof. We cannot say as matter of law that the Board was not warranted in finding that the injury arose out of and in the course of the employment even if the deceased fell from the roof at a place 23 feet from the stairway. We cannot say that

the Board has drawn inferences which no reasonable man could draw, and for that reason we cannot set aside its findings. Upon principle, aside from authority, the findings of the Industrial Accident Board were warranted; the conclusion which we have reached is abundantly supported by the decisions of the English courts. *Marshall v. The Wild Rose* [1910] A. C. 486, 79 L. J. K. B. N. S. 912, 103 L. T. N. S. 114, 26

Times L. R. 608, 54 Sol. Jo. 678, 3 B. W. C. C. 514; *Fletcher v. The Dutchess* [1911] A. C. 671, 81 L. J. K. B. N. S. 33, 55 Sol. Jo. 598, 4 B. W. C. C. 317, 105 L. T. N. S. 121.

We have examined all the questions raised by the appeal, but do not discover any reversible error. A majority of the court are of opinion that the entry should be, decree affirmed.

MINNESOTA SUPREME COURT.

GUST VIITA, Resp.,
v.

JAMES FLEMING, Impleaded, etc., Appt.

(— Minn. —, 155 N. W. 1077.)

Evidence — care of physician.

1. Assuming that the relation of patient and physician existed between plaintiff and defendants, the evidence was sufficient to justify the jury in finding that the physician failed to exercise toward the patient that degree of care and skill which the law requires.

For other cases, see Evidence, XII. d, in Dig. 1-52 N. S.

Physician — contract with employer — relation to servant.

2. Plaintiff's employer had an arrangement with defendants, physicians, who operated a hospital in Cloquet, by which the employer deducted a certain sum each month from the pay of each employee, and turned over the sums so deducted to defendants, who agreed, for such compensation, to care for and treat all injured employees which the employer should send to them. Plaintiff was injured, and was taken to defendants' hospital and treated by them under this arrangement. It is held that the relation of patient and physician existed between plaintiff and defendants, and that the

latter owed plaintiff the duty to exercise ordinary care and skill in treating him.

For other cases, see Physicians and Surgeons, II. in Dig. 1-52 N. S.

Same — settlement between master and servant — effect.

3. A settlement between plaintiff and his employer under the workmen's compensation act, by which the employer was released from all claims on account of the injury to plaintiff, did not operate as a settlement or release of any claim for malpractice which plaintiff might have against the physician who treated him.

For other cases, see Release, II. b, in Dig. 1-52 N. S.

Damages — excess.

4. The damages awarded are not excessive.

For other cases, see Damages, III. i, 4, in Dig. 1-52 N. S.

Evidence — rulings — error.

5. Certain rulings of the trial court on the admission of evidence held not erroneous.

For other cases, see Evidence, XI. h, in Dig. 1-52 N. S.

Appeal — instructions — duty of physician.

6. The trial court refused to instruct the jury, as requested, that defendant was bound to possess and exercise only the reasonable degree of care and skill possessed and exercised by physicians and surgeons in similar localities to that in which defendant practised, and is protected from the charge of negligence if he adopts and uses in performing an operation the method in use among competent surgeons in the locality in which the operation takes place. In its general charge the court instructed the jury the defendant was required to exercise such reasonable care and skill as an ordinary physician or surgeon in good practice would exercise under like circumstances, and that among the circumstances to be considered was the location of the physician in Cloquet, rather than in Duluth, St. Paul, or some other place. It is held that the court, in refusing to give the requested instructions, and giving, instead, the instruction quoted, committed no reversible error.

For other cases, see Appeal and Error, VII. m, 4, in Dig. 1-52 N. S.

Headnotes by BUNN, J.

Note. — For liability of physician to person treated under employment by a third person, see annotation following this case, post, 650.

As to the effect of settlement with, or release of, employer under workmen's compensation act, as affecting the liability of third persons, see annotation in L.R.A. 1916A, 225; and see also later case of *Ross v. Erickson Constr. Co.* L.R.A.—, —.

The degree of care and skill which a physician or surgeon must exercise is discussed generally in the note to *Whitesell v. Hill*, 37 L.R.A. 830. For the bearing on that question of the locality and extent of the practice, see also later cases, *Burk v. Foster*, 59 L.R.A. 277, and *Dorris v. Warford*, 9 L.R.A. (N.S.) 1090. L.R.A.1916D.

Appeal — conduct of counsel.

7. While the jury was being selected, defendant's attorney testified that a certain company was interested in the defense of the case. Defendant was then sworn and asked if this was true. Held, that it was not prejudicial error to overrule an objection to this question, but the conduct of plaintiff's counsel in asking the question is disapproved.

For other cases, see Appeal and Error, VII. m, 3, a, in Dig. 1-52 N. S.

(January 21, 1916.)

APPEAL by defendant Fleming from an order of the District Court for Carlton County denying a motion for judgment notwithstanding the verdict, or for a new trial, in an action brought to recover damages for alleged malpractice, which had resulted in a verdict in plaintiff's favor. Affirmed.

The facts are stated in the opinion.

Messrs. Abbott, MacPherran, Lewis, & Gilbert, for appellant:

A physician need not use any particular method. If there is more than one method of treatment recognized by the profession, he may use either.

De Long v. Delaney, 206 Pa. 226, 55 Atl. 965; *Lorenz v. Booth*, 84 Wash. 550, 147 Pac. 31; *Marchand v. Bellin*, 158 Wis. 184, 147 N. W. 1033; *Miller v. Toles*, 183 Mich. 252, L.R.A.1915C, 595, 150 N. W. 118.

So long as the language used in a legislative act or constitutional provision is not ambiguous, departure from its natural meaning is not justified by any consideration of its consequences or of public policy.

Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651; *Rodgers v. United States*, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582; *Ex parte Rickey*, 31 Nev. 82, 135 Am. St. Rep. 651, 100 Pac. 134; *United States v. Musgrave*, 160 Fed. 700.

The mere fact that some other cause co-operated with the act of the employer to produce the injury does not absolve the employer from liability. His original act, concurring with some other cause, and both operating proximately in producing the injury, makes him liable whether the other cause was one for which the employer was responsible or not.

29 Cyc. 496; *Pratt v. Chicago, R. I. & P. R. Co.* 107 Iowa, 287, 77 N. W. 1046; *Logansport v. Smith*, 47 Ind. App. 64, 93 N. E. 883; *Louisville & N. R. & Lighting Co. v. Hynes*, 47 Ind. App. 507, 91 N. E. 962; *Sweet v. Perkins*, 196 N. Y. 482, 90 N. E. 50.

One injured by the joint or successive wrongs of several parties, so long as the wrongs of the several parties have contributed to the same injury, may elect to pro-

ceed against any or all persons contributing to the injury. And the action is maintainable for the damages suffered by reason of the injury sustained.

Glinger v. Chesapeake & O. R. Co. 128 Ky. 736, 15 L.R.A.(N.S.) 998, 109 S. W. 315; *Cooley, Torts*, 2d ed. p. 153.

The damage sustained by reason of an injury must be fixed, and whenever the injured party accepts any sum as compensation for damages arising from an injury sustained from one of several persons, each of whom contributed to that injury, either after judgment and satisfaction or upon settlement, the same is in full satisfaction of the damages, and all others contributing to that injury are discharged.

Cooley, Torts, 2d ed. p. 159; *Siegel, C. & Co. v. Treka*, 218 Ill. 559, 2 L.R.A.(N.S.) 647, 109 Am. St. Rep. 302, 75 N. E. 1053, 19 Am. Neg. Rep. 166; *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091; *Glinger v. Chesapeake & O. R. Co. supra*; *Stedman v. O'Neil*, 82 Conn. 199, 22 L.R.A.(N.S.) 1229, 72 Atl. 923.

Defendant cannot interpose the defense that the damage was enlarged or augmented by the treatment of the physician who treated the injury.

2 *Thomp. Neg.* 1091; *St. Louis & S. F. R. Co. v. Doyle*, — Tex. Civ. App. —, 25 S. W. 461; *Thompson v. Louisville & N. R. Co.* 91 Ala. 496, 11 L.R.A. 146, 8 So. 406; *Collins v. Council Bluffs*, 32 Iowa, 324, 7 Am. Rep. 200; *Rice v. Des Moines*, 40 Iowa, 638; *Pullman Palace Car Co. v. Bluhm*, 109 Ill. 20, 50 Am. Rep. 601; *Stover v. Bluehill*, 51 Me. 439.

Mr. Andrew Nelson, for respondent:

The evidence was amply sufficient to warrant the jury in finding that the defendant was guilty of malpractice in improperly setting the fractured bones of plaintiff's left leg, and in allowing them to unite in an improper manner.

McGray v. Cobb, 130 Minn. 434, 152 N. W. 262, 153 N. W. 736; *Jacobs v. Cross*, 19 Minn. 523, Gil. 454; *Getchell v. Hill*, 21 Minn. 464; *Getchell v. Lindley*, 24 Minn. 265; *Sawyer v. Berthold*, 116 Minn. 441, 134 N. W. 120; *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813, 87 Minn. 197, 91 N. W. 487; *Staloch v. Holm*, 100 Minn. 276, 9 L.R.A.(N.S.) 712, 111 N. W. 264.

The relation of physician and patient existed between defendant and plaintiff, and defendant was not the servant or agent of plaintiff's employer.

Gaffney v. Sederberg, 114 Minn. 319, 131 N. W. 333; *Wood v. Johnson*, 117 Minn. 267, 135 N. W. 746; *Lawrence v. Fox*, 20 N. Y. 268.

The damages awarded plaintiff were reasonable, and only a fair compensation for

the injuries which he has suffered at the hands of the defendant.

Sawyer v. Berthold, 116 Minn. 441, 134 N. W. 120.

It was not error to allow plaintiff to interrogate Dr. Fleming in regard to whether any indemnity insurance company was interested in the defense.

Heydman v. Red Wing Brick Co. 112 Minn. 158, 127 N. W. 561; *Spoonick v. Backus-Brooks Co.* 89 Minn. 354, 94 N. W. 1079; *Antletz v. Smith*, 97 Minn. 217, 106 N. W. 517; *Viou v. Brooks-Scanlon Lumber Co.* 99 Minn. 97, 108 N. W. 891, 9 Ann. Cas. 318.

A physician is required to use such reasonable care and skill as is usually given by physicians and surgeons in good standing, without reference to locality.

Gillette v. Tucker, 93 Am. St. Rep. 657, note; *Gramm v. Boener*, 56 Ind. 497; *Getchell v. Hill*, 21 Minn. 464; *Martin v. Courtney*, 75 Minn. 261, 77 N. W. 813, 87 Minn. 199, 91 N. W. 487; *Henslin v. Wheaton*, 91 Minn. 220, 64 L.R.A. 126, 103 Am. St. Rep. 504, 97 N. W. 882, 1 Ann. Cas. 19, 15 Am. Neg. Rep. 352; *McGray v. Cobb*, 130 Minn. 434, 152 N. W. 262, 153 N. W. 736.

Mr. George B. Sjosellus also for respondent.

Bunn, J., delivered the opinion of the court:

Defendants were partners as physicians and surgeons at Cloquet, Minnesota. Plaintiff claims that defendant Dolan, who died after this action was commenced, was guilty of negligence and want of skill in his treatment of an injury received by plaintiff. The trial resulted in a verdict of \$2,000 against defendant Fleming, who appeals from an order denying his motion in the alternative for judgment notwithstanding the verdict or a new trial. It is contended that the verdict is not justified by the evidence. The various grounds for this contention will be noticed later. The facts are not much in dispute, and the evidence justified the jury in finding them to be as follows:

Plaintiff was in the employ of Johnson-Wentworth Company in skidding logs near Cloquet. February 5, 1914, while engaged in this employment, his left leg was fractured between the knee and ankle. Defendants operated a hospital at Cloquet, and were there engaged in the practice of their profession. Johnson-Wentworth Company and defendants had an arrangement by which the company deducted 75 cents per month from the pay of each employee, and turned this over to defendants, who agreed for this compensation to care for and treat injured employees which the company should send to them. Plaintiff, after his injury,

received a ticket from his employer, presented it to defendants, and was taken into the hospital and treated. Upon this state of facts defendant bases a claim that the relation of physician and patient did not exist.

Defendant Dolan attended plaintiff. The injured leg was put in a plaster cast and allowed to so remain for a period of eleven days. The cast was then removed, and a new one put on. Soon after this plaintiff observed that his left foot turned outward, and called Dr. Dolan's attention to this condition, which, however, continued to exist during his eleven weeks' stay at the hospital, and existed at the time of the trial. The cause of this eversion of the foot was imperfect approximation of the fractured ends of the bones. Plaintiff claimed, and the evidence tended to show, that this failure to get a straight union was due to the omission of defendants to apply an extension weight to the injured limb. Negligence is also claimed in respect to their failure to use a "fracture box" or to take an X-ray photograph for the purpose of diagnosis. The evidence leaves no doubt that there was a poor result, and the inquiry on this branch of the case is whether the finding that this was due to negligence or want of skill on the part of Dr. Dolan is sustained by the evidence.

June 1, 1914, plaintiff and his employer, Johnson-Wentworth Company, agreed upon a settlement for the injuries received by plaintiff in the accident, and petitioned the court for its approval under the terms of the workmen's compensation act. The court approved the settlement agreed upon, which contained the provision that, when all payments thereunder have been made, "the employer shall be and hereby is released from all claims on account of said injury, under said act or otherwise." The claim here is that this settlement released the employer, and also the defendant, from all liability for negligence in the treatment of plaintiff's injury.

The principal contentions of defendant, as indicated in the above statement of facts, are: (1) Assuming that the relation of physician and patient existed, the evidence is not sufficient to justify the jury in finding that the physician failed to exercise that degree of care and skill which the law requires; (2) the relation of physician and patient did not exist; (3) the settlement between plaintiff and his employer bars this action; (4) the damages are excessive. It is further claimed that there were prejudicial errors in certain rulings on the admission of evidence, and in refusing to give certain instructions requested by defend-

ant. There is also a claim of misconduct of counsel.

1. We have said that there is little doubt that there was a poor result. There was not a good union of the fractured ends of the bones. This resulted in a permanent eversion of the left foot, and the ankle and knee joints no longer operate on the same plane. In consequence of these conditions plaintiff tires very easily, and suffers considerable soreness due to the twisting of the limbs in opposite directions. His earning capacity is materially and permanently lessened. Two experienced and apparently reputable physicians and surgeons stated positively that the result was not good, and gave their opinion that the treatment given plaintiff was improper, and not good surgery. They testified that a fracture box should have been employed to hold the limb in a proper position, and an extension weight applied to draw down and overcome muscular contraction, which caused the overlapping of the fractured ends in this case. They also criticized the failure of Dr. Dolan to take an X-ray photograph to determine whether the approximation of the bones was correct. Defendants' experts gave opinions to the effect that the treatment was proper. The question was quite plainly one for the jury to decide, and we feel wholly unwarranted in saying that the jury was palpably wrong in believing the expert testimony of plaintiff's witnesses, rather than that of defendants' witnesses. We need not repeat what was said in *Sawyer v. Berthold*, 116 Minn. 441, 134 N. W. 120, to the effect that an expert witness may base his opinion on the result alone, and in the case at bar the opinions of the experts that the treatment was improper were based on the testimony as to what the treatment actually was, as well as upon the poor result achieved. We must hold, assuming that the relation of physician and patient existed, that the evidence sustains the finding of the jury that the physician failed in his legal duty toward the patient, and that this was the cause of the poor result. We do not see that *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813, id. 87 Minn. 197, 91 N. W. 487, or *Staloch v. Holm*, 100 Minn. 276, 9 L.R.A.(N.S.) 712, 111 N. W. 264, are at all decisive of the present case, or that anything said in those leading cases is of assistance to the defendant here. We fully appreciate the elements which the surgeon has to contend with in the treatment of his patient, and the injustice often involved in a charge of malpractice. The cases referred to so fully discuss these features, as do cases from other jurisdictions cited by defendant, that we can add nothing of value. The present case is simply one of conflict-

ing expert testimony, with nothing in the facts as to the treatment, or in the probability or probative force of the evidence for defendant, that would make the granting of a new trial anything less than a usurpation of the functions of the jury.

2. The contention that the relation of physician and patient did not exist between defendant and plaintiff is based upon the facts hereinbefore stated as to the arrangement under which plaintiff was admitted to the hospital and treated by defendants. We see nothing in these facts to justify a decision that defendants did not owe plaintiff the duty to use ordinary care and skill in treating his injury. It is true that *Johnson-Wentworth Company*, under the terms of the compensation act, was required to provide medical and surgical treatment to the injured employee during the first ninety days of his disability and to an amount not exceeding \$100. But we are unable to see how this changes the relationship between the injured employee and the physician or surgeon employed, or affects the duty of the latter to the former. It may be true in a sense that Drs. Fleming and Dolan were the agents of the employer for the purpose of minimizing the results of the injury and shortening the period of disability. Even if it be conceded that the employer might be liable for the negligence of the physicians on this theory of agency, this is no reason why the physicians are not liable directly to the patient. It is not material that plaintiff did not know the physicians, engage their services himself, or pay for the services in the ordinary way. Plaintiff, in fact, paid for medical and surgical treatment, and it surely can make no difference that this was by monthly deductions from his wages. Indeed, it is the law that the fact that a physician or surgeon renders services gratuitously does not absolve him from the duty to use reasonable care, skill, and diligence. 30 Cyc. 1573, and cases cited. In *Du Bois v. Decker*, 130 N. Y. 325, 14 L.R.A. 429, 27 Am. St. Rep. 529, 29 N. E. 313, it was held that a physician employed by a city to treat patients in an almshouse will not be released from liability to a patient therein for failure to exercise ordinary care and skill, although he is paid by the city, and not by the patient. We do not think that *Johnson-Wentworth Company* would be liable for any malpractice or negligence on the part of the physicians it employed to treat its employees. Its duty was discharged when it selected a competent physician. *Youngstown Park & F. Street R. Co. v. Kessler*, 84 Ohio St. 74, 36 L.R.A.(N.S.) 50, 95 N. E. 509, and cases cited in the note to this case as reported in *Ann. Cas.* 1912B, 933.

It seems clear that the physicians in the case at bar owed plaintiff the duty to exercise ordinary care and skill in treating his injury, and that he has the same rights and remedies that any patient has against his physician.

3. We need add little to what is said in the preceding paragraph in order to dispose of the argument that the settlement under the workmen's compensation act by which the employer was released from "all claims on account of said injury" operated as a settlement and release of any claim the employee might have against the physicians for malpractice. The employer, as we have seen, was not liable to the employee for the negligence of the physicians. It was not required to compensate plaintiff for damages sustained by their malpractice, and the settlement did not purport to include any such element. This is not contrary to the well known rule, existing before the compensation act, that where one is injured by the negligence of another, and uses due care in the selection of a physician or surgeon, the wrongdoer is liable for all the proximate results of his own act, although the injury has been aggravated by improper treatment by the physician. It by no means follows that the one whose negligence causes the original injury is liable for the negligence of the physician employed to treat it, and it is clearly not true that the physician is not liable to the patient for such negligence. When it appears, as it clearly does here, that there is a liability on the part of the physician to the patient, it is a strain to hold that a settlement between the injured man and the wrongdoer for the injury by the accident, whether made under the compensation act or outside of it, includes the claim that the injured man has against his physician for a separate and subsequent injury. Defendant cites numerous cases to support his contention, among others *McNamara v. U. S. F. & G. Co.* Case No. 159, June 9, 1914, 1 Dec. Ind. A. C. Cal 138; *Favera v. Board*, 1 Dec. Ind. A. C. C. B. D. Cal. 225; *Smith v. Cord Taton Colliery Co.* 2 W. C. C. 121; *Shirt v. Calico Printers' Asso.* 2 B. W. C. C. 342; and *Beadle v. Milton*, 114 L. T. N. S. 550, 5 W. C. C. 55. The only one of these cases that has anything to say to the point involved in the present case is *Beadle v. Milton*, and what is said in that case is plainly obiter dictum. In *Humber Towing Co. v. Barclay*, 5 B. W. C. C. 142, and *Rocca v. Stanley Jones & Co.* 7 B. W. C. C. 101, both decided subsequently to *Beadle v. Milton*, the dictum in the latter case is plainly overruled. The *Humber Towing Company* and the *Rocca Cases* distinctly hold that an employer is not liable under L.R.A.1916D.

the English compensation act for disability caused by the negligence of a physician who treats the injury. On the authority of these cases, as well as from the language of the compensation act, it must be held that *Johnson-Wentworth Company* was not liable for the disability caused by defendants' negligence, and that the settlement between that company and plaintiff did not include his claim against defendants for malpractice. What has been said also disposes of the claim of error in refusing certain instructions on the subject requested by defendant.

4. We need not further discuss the evidence in order to justify the conclusion we reach that the verdict is not excessive within the rules that guide this court in the consideration of this question.

5. It was not error to permit questions to the experts in regard to the propriety of taking X-ray photographs. While it is true that this was not specifically alleged as a charge of negligence, the complaint contained a general allegation of negligent treatment, and we think this evidence was properly received; at least, as against the general objection, "incompetent, irrelevant, and immaterial."

Error is assigned in sustaining an objection to a question asked of defendant as to whether the treatment by a certain other physician of a fracture in another case was similar to that employed by Dr. Dolan in the case at bar. That this ruling was proper is plain, but it is perhaps not so clear that the trial court was right in refusing to permit defendant to testify that, judging from his observation and experience in the vicinity of Cloquet, the treatment applied by Dr. Dolan was that used by physicians of ordinary care, skill, and caution in and about the vicinity of Cloquet. We think, however, that the ruling should be sustained on the ground that the standard of care and skill was too limited by the question. It is not the law that defendants' conduct of the case is to be judged by the degree of skill and care exercised by other physicians in the same village, and we hold that there was no error in sustaining the objection. The question is further discussed in the next paragraph. As to the other rulings on the admission of evidence that are assigned as error, we find nothing to merit special mention.

6. The trial court refused to give the instruction requested by the defendant, which was to the effect that defendant was bound to possess and exercise only that reasonable and ordinary degree of care and skill possessed and exercised by physicians and surgeons engaged in the same general line of practice in similar localities to that in

which defendant practised, and is protected from the charge of negligence if he adopts and uses, in performing an operation, the methods in use among competent surgeons in the locality in which the operation takes place. In its general charge the court instructed the jury that the defendant Dolan was required to exercise such reasonable care and skill as an ordinary physician or surgeon in good standing would exercise under like circumstances, and that among the circumstances to be considered was the location of the physician in Cloquet, rather than in Duluth, St. Paul, or some other place.

The decisions in this state do not touch upon the question of the locality in which the physician or surgeon practises as affecting the degree of care and skill he is required to possess and exercise. *Getchell v. Hill*, 21 Minn. 464; *Martin v. Courtney*, 75 Minn. 255, 77 N. W. 813; id. 87 Minn. 197, 91 N. W. 487; *Henslin v. Wheaton*, 91 Minn. 219, 64 L.R.A. 126, 103 Am. St. Rep. 504, 97 N. W. 882, 1 Ann. Cas. 19, 15 Am. Neg. Rep. 352; *Staloch v. Holm*, 100 Minn. 276, 9 L.R.A.(N.S.) 712, 111 N. W. 264; *McGray v. Cobb*, 130 Minn. 434, 152 N. W. 262, 153 N. W. 736. But we do not understand that these cases commit this court to the rule that locality is immaterial. The authorities elsewhere quite uniformly agree that some consideration must be given to the question of locality, although there is a wide divergence in the views of different courts as to what the correct rule is. In *Pelky v. Palmer*, 109 Mich. 561, 67 N. W. 561, it was said that the character of the locality or neighborhood in which a physician or surgeon practises has an important bearing upon the requisite degree of skill. In *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363, the court states that a country surgeon is not bound to the exercise of that high degree of art and skill possessed by eminent surgeons living in large cities and making a specialty of the practice of surgery, but only to that reasonable degree of learning and skill ordinarily possessed by others learned in his profession. Some cases seem to state the law as in the refused instructions; that is, that the physician or surgeon is held only to that degree of skill and learning possessed by physicians and surgeons of the particular locality where he practises. *Pike v. Honsinger*, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 760; *Gates v. Fleischer*, 67 Wis. 504, 30 N. W. 674. Other cases require the exercise of that degree of learning and skill which physicians and surgeons practising in similar localities or communities ordinarily possess. *Whitesell v. Hill*, 101 Iowa, 629, 37 L.R.A. 830, 70 L.R.A.1916D.

N. W. 750, 2 Am. Neg. Rep. 134; *Small v. Howard*, supra; *Gramm v. Boener*, 56 Ind. 497; *Burk v. Foster*, 114 Ky. 20, 59 L.R.A. 277, 69 S. W. 1096, 1 Ann. Cas. 304, *McCracken v. Smathers*, 122 N. C. 799, 29 S. E. 354. See note to *Whitesell v. Hill*, 37 L.R.A. 830; note to *Gillette v. Tucker*, 93 Am. St. Rep. 657. We think it is plainly correct that the locality in which the physician or surgeon practises must be considered in determining whether he has the requisite skill and learning, but we do not think that he is bound to possess and exercise only that degree of skill and learning possessed by other practitioners in the same locality, if by that is meant the same village or city. If the same general locality is meant, as, for instance, the Northwest, or the state, no fault could be found with such a rule. But in these days the physician or surgeon in a village like Cloquet is not hampered by lack of opportunity for advancement. Frequent meetings of medical societies, articles in the medical journals, books by acknowledged authorities, and extensive experience in hospital work, put the country doctor on more equal terms with his city brother. He would probably resent an imputation that he possessed less skill than the average physician or surgeon in the large cities, and we are unwilling to hold that he is to be judged only by the qualifications that others in the same village or similar villages possess. The instructions requested provided too narrow a standard, and the court was justified in refusing them, and giving, instead, the instruction that among the circumstances to be considered was the location of the physician in Cloquet, rather than in Duluth, St. Paul, or some other place.

7. The claim of misconduct of counsel is based upon the action of counsel for plaintiff on the examination of prospective jurors in calling defendant to the stand and asking this question: "And is it true, what counsel has just testified to, namely, that a certain company is interested in the defense of this case?"

Defendant objected, the objection was overruled, and the ruling is assigned as error. We are unable to see any chance that defendant was prejudiced by the ruling, as the fact that defendant was insured was admitted. But we wish to express our emphatic disapproval of the conduct of plaintiff's counsel in calling the witness and asking this question after counsel for defendant had admitted the fact. An answer to the question could add nothing, and could serve no legitimate purpose.

Order affirmed.

Annotation—Liability of physician to person treated under employment by a third person.

As to liability for negligence of attendants furnished by relief departments towards which employees contribute, see notes to *Phillips v. St. Louis & S. F. R. Co.* 17 L.R.A.(N.S.) 1167, and *Texas C. R. Co. v. Zumwalt*, 30 L.R.A.(N.S.) 1206.

And as to the duty and liability of one, other than a physician or surgeon, who contracts to provide medical or surgical attention to another, see *Youngstown Park & F. Street R. Co. v. Kessler*, 36 L.R.A.(N.S.) 50, and note.

The relationship of physician and patient between a physician and one whom he treats under employment by a third person is considered in its relation to privileged communications in the notes to *Woods v. Lisbon*, 16 L.R.A.(N.S.) 886, and *McGuire v. Chicago & A. R. Co.* L.R.A.1915F, 888.

VITA v. FLEMING, ante, 644, is supported by the other cases passing upon the liability of a physician to a patient when he is employed by a third party.

Thus, in *Carpenter v. Walker* (1910) 170 Ala. 659, 54 So. 60, Ann. Cas. 1912D, 863, 2 N. C. C. A. 371, an action by a minor, by his next friend, against a physician employed by the minor's father, the court said that the action for malpractice is essentially in tort, and hence it is immaterial by whom the physician is employed.

In *Harriott v. Plimpton* (1896) 166 Mass. 585, 44 N. E. 992, it is held that where a physician undertook, upon request of and for compensation to be paid by another, to examine plaintiff and report whether he was diseased, he was bound to have the ordinary skill and learning of a physician, and to exercise ordinary diligence and care; and failure in these respects, to the injury of plaintiff, would make him answerable to plaintiff in damages.

In *Hales v. Raines* (1910) 146 Mo. App. 232, 130 S. W. 425, in which a physician was held liable for injury to a person's hand by X-ray treatment, the court says: "The case being in tort, it can make no difference whether the defendant was employed by plaintiff to treat him, or whether the plaintiff's contract was with the hospital in which defendant was interested, and defendant was assigned by the hospital association to treat the plaintiff."

In *Burnham v. Stillings* (1911) 76 N. H. 122, 79 Atl. 987, an action by plaintiff for alleged negligent treatment of

himself while a patient in the public ward of a hospital at a time when the defendants had charge of the patients in that ward, there being no contract between the plaintiff and the defendants, so that they owed him no duty because of or in any way springing from contract, it was held that they owed plaintiff the duty not to do anything they either knew or ought to have known would injure him; and having, with his assent, undertaken to treat the plaintiff, they were bound to exercise care in what they did, and were liable if their failure to exercise due care resulted in injury to him.

In *Du Bois v. Decker* (1891) 130 N. Y. 325, 14 L.R.A. 429, 27 Am. St. Rep. 529, 29 N. E. 313, it is held that a physician employed by a city to treat patients in an almshouse will not be relieved from liability to a patient therein for failure to exercise ordinary care and skill, although he is paid by the city, and not by the patient.

Where one whose automobile had injured plaintiff brought his physician to examine plaintiff, and the physician examined him and prescribed for him, and gave directions to his mother regarding the treatment he should receive at her hands, the relation of physician and patient existed so that the physician would be liable for negligent treatment. *Coss v. Spaulding* (1912) 41 Utah, 447, 126 Pac. 468.

In *Gladwell v. Steggall* (1839) 5 Bing. N. C. (Eng.) 733, 8 Scott, 60, 8 L. J. C. P. N. S. 361, 3 Jur. 535, an action ex delicto against a physician for negligent treatment of plaintiff, it was held to be immaterial whether the physician was employed by plaintiff or her father.

In *Pippin v. Sheppard* (1822) 11 Price (Eng.) 400, an action by a married woman and her husband against a surgeon for damages sustained because of improper and unskilful treatment of the wife, a demurrer to the declaration on the ground that it was not stated or alleged, nor did it appear therefrom, by whom the defendant was retained and employed as a surgeon, was overruled and judgment given for the plaintiff, the court saying: "If a stranger had sent the defendant as a surgeon to cure this woman, undertaking to pay him for his attendance, he would not be entitled to recover or sue for damage and injury done to her in consequence of the surgeon's negligence and want of skill. From the necessity

of the thing, the only person who can properly sustain an action for damages for an injury done to the person of the patient is the patient himself, for damages could not be given on that account

to any other person, although the surgeon may have been retained and employed by him to undertake the cure. The party employing the surgeon can have nothing to do with this action." R. L. S.

RHODE ISLAND SUPREME COURT.

WILLIAM E. ANDERSON

v.

CRESCENT GARMENT COMPANY et al.

(— R. I. —, 96 Atl. 425.)

Slavery — convict labor.

The contracting by the state of the labor of a convict who is to remain under its control does not, although the state alone is to receive compensation for the service, violate a constitutional provision forbidding slavery.

For other cases, see *Slavery*, in *Dig. 1-52 N. S.*

(January 25, 1916.)

CERTIFICATION by the Superior Court for Providence and Bristol Counties for determination by the Supreme Court of a question arising in an action brought by plaintiff, an ex-convict, to recover wages from the defendant garment company, who hired his labor and services from the state under a contract with the state board of control and supply. Negative answer returned.

The facts are stated in the opinion.

Messrs. Fred A. Otis, George Gordon Battle, and Karl W. Kirchwey, for plaintiff:

The status of plaintiff, while forced to work for defendant without compensation, was slavery within the meaning of the Rhode Island Constitution.

Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726, 25 Sup. Ct. Rep. 429; *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *Slaughter-House Cases*, 16 Wall. 36, 72, 21 L. ed. 394, 407; *Kent, Com.* 247-250.

If there is any distinction between slavery and involuntary servitude, the status of the plaintiff came within the former class.

Slaughter-House Cases, supra; *Bailey v. Alabama*, 219 U. S. 219, 241, 55 L. ed. 191, 201, 31 Sup. Ct. Rep. 145; *Clyatt v. United States*, 197 U. S. 207, 49 L. ed. 726, 25 Sup.

Ct. Rep. 429; *Re Peonage Charge*, 138 Fed. 686; *Peonage Cases*, 136 Fed. 707; *United States v. Clement*, 171 Fed. 974; *Jameson v. McCoy*, 5 Heisk. 108.

This court would not be justified in reading an exception against convicts into the antislavery provision of the Rhode Island Constitution.

Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529; *Gage v. Currier*, 4 Pick. 399; *Hopt v. Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202, 4 Am. Crim. Rep. 417; *Boyd v. United States*, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524; *Callan v. Wilson*, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301; *Thompson v. Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620; *Weeks v. United States*, 232 U. S. 383, 58 L. ed. 652, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177.

The statute authorizing the board of control and supply to make the present contract is therefore invalid.

Henderson v. New York (Henderson v. Wickham), 92 U. S. 259, 268, 23 L. ed. 543, 547; *Chy Lung v. Freeman*, 92 U. S. 275, 278, 281, 23 L. ed. 550-552; *Missouri v. Lewis (Bowman v. Lewis)*, 101 U. S. 22, 32, 25 L. ed. 989, 992; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Home Ins. Co. v. New York*, 134 U. S. 594, 598, 33 L. ed. 1025, 1029, 10 Sup. Ct. Rep. 593; *Minnesota v. Barber*, 136 U. S. 313, 319, 320, 322, 323, 34 L. ed. 455, 457-459, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 82, 34 L. ed. 862, 863, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Maxwell v. Dow*, 176 U. S. 581, 602, 44 L. ed. 597, 605, 20 Sup. Ct. Rep. 448, 494; *McCray v. United States*, 195 U. S. 27, 60, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 Ann. Cas. 561; *Dobbins v. Los Angeles*, 195 U. S. 223, 240, 49 L. ed. 169, 176, 25 Sup. Ct. Rep. 18; *Lochner v. New York*, 198 U. S. 45, 64, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133; *Bailey v. Alabama*, 219 U. S. 219, 241, 55 L. ed. 191, 201, 31 Sup. Ct. Rep. 145; *Quong Wing v. Kirkendall*, 223 U. S. 59, 63, 64, 56 L. ed. 350, 352, 32 Sup. Ct. Rep. 192; *Ho Ah Kow v. Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546.

Plaintiff is entitled to recover the reasonable value of his services from the contractor in an action on quantum meruit.

Lightly v. Clouston, 1 Taunt. 112, 9 Re-

Note.—As to constitutional objections to convict labor contracts, see annotation following this case, post, 660.
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vised Rep. 713; *Foster v. Stewart*, 3 Maule & S. 191, 15 Revised Rep. 459; *Culberson v. Alabama Constr. Co.* 127 Ga. 599, 9 L.R.A. (N.S.) 411, 56 S. E. 765, 9 Ann. Cas. 507; *Thompson v. Howard*, 31 Mich. 309; *James v. Leroy*, 6 Johns. 274; *Stockett v. Watkins*, 2 Gill & J. 326, 20 Am. Dec. 438; *Keener, Quasi-Contr.* 189, 438, 440; *Woodward, Quasi-Contr.* §§ 285, 286; *Patterson v. Prior*, 18 Ind. 440, 81 Am. Dec. 367; *Patterson v. Crawford*, 12 Ind. 241; *Abbott v. Fremont*, 34 N. H. 432; *Greer v. Critz*, 53 Ark. 247, 13 S. W. 764; *Peter v. Steel*, 3 Yeates, 250; *Tennessee Coal, Iron & R. Co. v. Butler*, 187 Ala. 51, 65 So. 804.

Messrs. **Herbert A. Rice**, Attorney General, and **Zechariah Chafee, Jr.**, for defendants:

The decision of the constitutional question is unnecessary, because the plaintiff cannot recover in this action even if the statute be unconstitutional and prison contract labor held to be slavery.

Price v. Neal, 3 Burr. 1354, 1 W. Bl. 390; *Thompson v. Bronk*, 126 Mich. 455, 85 N. W. 1084; *Sloss Iron & Steel Co. v. Harvey*, 116 Ala. 656, 22 So. 994; *Tennessee Coal, Iron & R. Co. v. Cotton*, 116 Ala. 669, 23 So. 1007; *Maltby v. Harwood*, 12 Barb. 473; *Williams v. Finch*, 2 Barb. 208; *Alfred v. Fitzjames*, 3 Esp. 3; *Franklin v. Waters*, 8 Gill, 322; *State use of Clements v. Van Lear*, 5 Md. 91; *Livingston v. Ackeston*, 5 Cow. 531; *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892; *Payne's Appeal*, 65 Conn. 397, 33 L.R.A. 418, 48 Am. St. Rep. 215, 32 Atl. 948; *Graham v. Stanton*, 177 Mass. 321, 58 N. E. 1023.

The letting of prison labor by the state under contract is not slavery within the Rhode Island Constitution.

Nelson v. People, 33 Ill. 390; *Heirn v. Bridault*, 37 Miss. 209; *Civil Rights Cases*, 109 U. S. 3, 22, 27 L. ed. 835, 843, 3 Sup. Ct. Rep. 18; *Bynum v. Bostick*, 4 Desauss. Eq. 265; *Brandon v. Planters' & M. Bank*, 1 Stew. (Ala.) 340, 18 Am. Dec. 48; *Beaty v. Judy*, 1 Dana, 101; *Jarman v. Patterson*, 7 T. B. Mon. 644; *State v. Hannah*, 10 La. Ann. 131; *Westbrook v. State*, 133 Ga. 578, 26 L.R.A. (N.S.) 591, 66 S. E. 788, 18 Ann. Cas. 295; *St. Louis, I. M. & S. R. Co. v. Hydriek*, 109 Ark. 231, 160 S. W. 196; *De Lacy v. Antoine*, 7 Leigh, 438; *Cunningham v. Bay State Shoe & Leather Co.* 25 Hun, 210; *St. Louis, I. M. & S. R. Co. v. Boyle*, 83 Ark. 302, 12 L.R.A. (N.S.) 317, 103 S. W. 744, 13 Anh. Cas. 167; *Barrington v. Logan*, 2 Dana, 432; *Miller v. Dwilling*, 14 Serg. & R. 442; *Slaughter-House Cases*, 16 Wall. 36, 69, 21 L. ed. 394, 406; *Cooley, Const. Lim.*, 7th ed. p. 423; *Nugent v. Arizona Improv. Co.* 173 U. S. 338, 43 L. ed. 721, 19 Sup. Ct. Rep. 461; *Bucka-*

lew v. Tennessee Coal, Iron & R. Co. 112 Ala. 146, 20 So. 606; *Hodges v. United States*, 203 U. S. 1, 17, 51 L. ed. 65, 69, 27 Sup. Ct. Rep. 6; *Topeka v. Boutwell*, 53 Kan. 20, 27 L.R.A. 593, 35 Pac. 819; *Mason & T. Co. v. Main Jellico Mountain Coal Co.* 87 Ky. 467, 9 S. W. 391; *Kennedy v. Meara*, 127 Ga. 68, 56 S. E. 243, 9 Ann. Cas. 396; *Re Dassler*, 35 Kan. 678, 12 Pac. 130; *Peonage Cases*, 123 Fed. 671; *Robertson v. Baldwin*, 165 U. S. 275, 282, 41 L. ed. 715, 717, 17 Sup. Ct. Rep. 326; *Monroe v. Meuer*, 35 La. Ann. 1192; *Chicago v. Williams*, 254 Ill. 360, 98 N. E. 666.

Messrs. **Irving Champlin**, **James Harris**, and **John C. Knowles** also for defendants.

Johnson, Ch. J., delivered the opinion of the court:

This case is before this court on a constitutional question certified by the superior court under Gen. Laws 1909, chap. 298, § 1.

The action is in assumpsit on quantum meruit. The question certified is raised by the third count of the declaration, which alleges in substance that the plaintiff, on October 10, 1910, was convicted of entering a shop in the nighttime with the intent to commit larceny, was sentenced to a term of three years' imprisonment at hard labor in the state prison in the county of Providence, and was there imprisoned from October 10, 1910, to and including June 25, 1913; that on December 24, 1912, a contract was entered into between defendant and the board of control and supply, pursuant to § 21 of chapter 825 of the Public Laws of 1912, which transferred to the board of control and supply all the power and authority previously vested in the board of state charities and corrections over the labor of prisoners and other inmates of state institutions, "with power in said board to sell the products of such institutions, and make such contract respecting the labor of the prisoners and inmates of such institutions as said board may deem proper," and provided that "all orders, agreements, and contracts made by said board with respect to said labor shall be observed and obeyed by the officers in charge of the prisoners and other inmates of such institutions;" that pursuant to said contract the labor and services of the plaintiff were furnished to the defendant, and accepted and hired by it, and the plaintiff was employed by the defendant and for its benefit without the plaintiff's consent and against his will, from January 1, 1913, to and including June 25, 1913; that during that period the plaintiff was compelled, by force and threats, against his will, to perform labor and services in accordance with

the provisions of the said contract, and by his labor and services manufactured shirts in accordance therewith, and the profits from his said labor and services were received and retained by the defendant, subject only to the payment to the state of Rhode Island, pursuant to the terms of the said contract, of the sum of 50 cents per dozen shirts manufactured through the plaintiff's labor and services; that the reasonable value of the said services was \$3.50 per day, and that no part of the value of the said labor and services or the product thereof, and no compensation whatever therefor, was ever paid to the plaintiff. It is further alleged: "That said § 21 of said act, in authorizing and giving to the said board power to make such contracts respecting labor of the prisoners as said board may deem proper, is unconstitutional, in that it is repugnant to, and in violation of, article 1, § 4, of the Constitution of Rhode Island, and such contract between the said state by the said board, and the defendant, the Crescent Garment Company, is therefore illegal, null, and void."

A fictitious promise by the defendant in consideration of the promise to pay the plaintiff the reasonable value of his services, amounting to the sum of \$1,000, and the breach of that promise, are then alleged. The contract in question is made a part of the third count, and annexed thereto as "Exhibit A." Its material provisions are: The state agrees to furnish, and the company agrees to accept and hire, the labor and services of not less than 250 inmates of the Rhode Island state prison and of the Providence county jail. The contract, however, provides that if the state can furnish more or cannot furnish so many as 250, the company shall accept the services of such number as can be furnished; it being understood that all available inmates shall be furnished. Such inmates are to be employed in the factory within the prison in making shirts, with machinery and materials furnished by the company, which is to pay to the state 50 cents per dozen for all shirts manufactured under the contract. It is provided that the working day shall last from "7 or 7:30 A. M. to 12 noon, and from 1 P. M. to 4:30 or 5:30 P. M., and on Saturday from 7 or 7:30 A. M. to 12 noon." The company is to employ a superintendent and assistants, subject to the approval of said board, and said employees are always to be subject to such rules and regulations as said board may prescribe. The 6th section is as follows: "Sixth. The party of the second part further agrees to impart all needful instructions to said inmates employed hereunder in the manufacture of said shirts, and to employ at its own ex-

pense a superintendent and such other assistants as may be necessary to impart such instructions and to direct and superintend the manufacture of said shirts, but the employment of said superintendent and said assistants shall be subject to the approval of the board of control and supply, on behalf of the party of the first part, and said superintendent and assistants shall at all times be subject to such rules, regulations, and limitations as said board of control and supply may from time to time prescribe, the said board of control and supply reserving the right to deny admission to or to eject from said factory any person whom said board may for cause regard as objectionable, or whom said board may deem guilty of any violation of the rules of said prison or of any breach of conduct therein; and it is understood and agreed that said party of the first part shall at all times have the right to control and govern said inmates, to regulate their conduct, and to assign the tasks to be performed under this agreement, and further to make and institute all rules and regulations for the proper discipline and guidance of said inmates, and at any time to change the same, and further to forbid and prevent any work, or any manner or method of performing the same, that may be deemed injurious to the health, dangerous to the person, or subversive of prison discipline."

When it appeared that the third count of the declaration brought in question the constitutionality of § 21 of chapter 825 of the Public Laws of 1912, the superior court certified the case to this court for the determination of the constitutional question.

It is necessary first to consider whether the determination of the constitutional question is necessary for the disposition of the case. The plaintiff alleges that pursuant to said contract the labor and services of the plaintiff were furnished to the defendant and accepted by it; that he was employed by the defendant, and that he was compelled by force and threats against his will to work for the defendant. He does not allege that he was so compelled to labor by the defendant, and that allegation cannot be inferred for him. The compulsion of which he complains, therefore, must have been exercised by the state, and if the statute was invalid the wrong done the plaintiff in compelling him to work for the defendant was done by the state. If, however, the contract made under said § 21 reduced the plaintiff to the condition of slavery, it may be argued that the defendant would be liable to an action of assumpsit upon a tort committed by it in receiving said labor. In so receiving the labor of the plaintiff, was the defendant guilty of a breach of

duty which it owed to said plaintiff? If so, did said breach of duty violate a right of the plaintiff? Clearly there was neither a breach of duty nor a violation of right, unless said contract and its enforcement reduced the prisoner to the condition of a slave. He could not have been the slave of the defendant, for under the contract the control over him was reserved to the state. If the state was the master of the plaintiff as a slave, it clearly only became such by virtue of the contract with the defendant and the carrying out of the same, as prior thereto it was simply the custodian of a convict sentenced to the state prison for a definite term at hard labor. If the state thus became the master of the slave, the wrong done the plaintiff by the defendant could only consist in entering into said contract and receiving under it the labor of the plaintiff, and thereby assisting in the completion of the transformation of the condition of the plaintiff from that of a convict into that of a slave.

Where the labor of a convict has been received by a contractor under a contract which was illegal, either through want of authority to make the contract, or a void commitment, or holding to labor after a valid commitment had expired, it has been held that the law will raise an implication of a promise upon the basis of the tort so committed by the contractor. Thus, in *Greer v. Critz*, 53 Ark. 247, 13 S. W. 764, the statute placed the management and control and the hiring of convicts under the jurisdiction of the county courts. Under a contract with the judge of the county court, in vacation of the court, the convict was delivered to the contractor to work out his fine, and worked for the contractor under said contract. The court held that there was no power or authority given by the statute to the judge of the county court, in vacation of said court, to make a contract for that purpose, which could be done alone by the order of the court itself, and held that the defendant, being a party to the contract, was bound to know of this lack of authority, and that as he had the benefit of the plaintiff's services he was obliged to pay for them. In *Patterson v. Crawford*, 12 Ind. 241, a person was convicted and sentenced to the penitentiary by a court which had no jurisdiction, and was compelled by the warden to labor for a contractor. The court (page 244) said: "That the defendant knew of the labor charged in the complaint, and assented to it, is a proposition which the facts appearing in the record will not allow us to doubt; and for aught that appears in the defense in question, he did know that Armstrong had not been legally convicted. The defend-

ant, being lessee of the state prison, and entitled by law to the labor of all those legally imprisoned, and of no others, had a right to know, and was, in our opinion, bound to know, who were legally in the warden's custody. But there is really nothing in the second defense inconsistent with the fact of the work having been done for the defendant at his request, and with his knowledge of all the circumstances."

In *Patterson v. Prior*, 18 Ind. 440, 442, 81 Am. Dec. 367, the court said: "At the time the appellee was convicted and sent to the penitentiary, the court of common pleas had no jurisdiction in that behalf; hence the conviction and judgment were nullities, and furnish the appellants no protection for the tort committed in confining him in the penitentiary. *Patterson v. Crawford*, supra. The appellants must be presumed to have known the law, and that they had no legal right to imprison the appellee, or cause him to labor. That they may have been responsible to him in some form cannot be doubted. They undoubtedly committed a tort, and the question here is whether the tort can be waived, and an action maintained on an implied assumpsit? We will first examine this question so far as it relates to *Patterson*. He, it seems, was the lessee of the penitentiary, and received all the benefit of the appellant's labor. He must be presumed to have assented to the performance of the labor, and, being benefited thereby, the law implies a promise to pay what it is reasonably worth. . . . In our opinion, so far as *Patterson* is concerned, the tort may be waived, and an action be maintained on the implied assumpsit. The case, however, is entirely different as to *Miller*, the warden of the penitentiary. He received no benefit of the plaintiff's labor, and, not having been benefited, there is, as to him, no consideration to support an implied assumpsit to pay."

In *Tennessee Coal, Iron & R. Co. v. Butler* (June 4, 1914) 187 Ala. 51, 65 So. 804, the court said: "Alex Butler was convicted of petit larceny. He was sentenced to hard labor for one hundred ten days as punishment for the crime. The costs in the cause amounted to \$29.35, and he was sentenced to additional hard labor for the county until the costs were paid at the rate of 40 cents per day. Under the law the defendant was entitled to work out his costs at the rate of 75 cents per day, instead of at the rate of 40 cents per day. When, therefore, the prisoner had performed hard labor for the county for the period for which he was sentenced as punishment for his crime, and had also performed additional hard labor for a sufficient number of days at the rate of 75 cents per day to

pay his costs, he was then entitled to his discharge, and any further imprisonment of the prisoner became illegal. *Ex parte Haley*, 1 Ala. App. 528, 56 So. 245. The judgment of the court sentencing the prisoner to hard labor showed the above situation. *Ibid.* . . . The law definitely fixed the exact date upon which this convict's term expired, and any labor which the appellant required him to perform after that date was without warrant of law, at a time when the appellant had no legal right to the custody of the convict, and at a time when the law may well raise an implied contract to pay him for the value of his services."

In the case at bar, the convict was not delivered to the contractor. The defendant, therefore, could not become the master, even though the making and enforcement of the contract made the plaintiff a slave. The only possible master in such case would be the state, which retained the control of the convict. If the defendant was guilty of a tort, therefore, it could only be in receiving from the state the labor of the convict, who had been made a slave by the contract into which defendant had entered with the state.

If the plaintiff was so made a slave, and the defendant, knowing him to be a slave, so received his labor, we think such conduct on the part of the defendant would constitute a tort, upon which the law would raise an implication of a promise to pay therefor. Would he be bound to have that knowledge? We are unable to say that he would not be so bound. The plaintiff's case rests entirely upon his assumption that by the contract made under the statute and its enforcement he was made a slave. That can only be determined by the decision of the constitutional question certified. We will therefore consider the constitutional question.

Section 4 of article 1 of the Constitution reads: "Slavery shall not be permitted in this state." We do not need to follow the elaborate arguments of plaintiff's counsel to come to the conclusion that the clause of the Rhode Island Constitution under consideration had the same effect upon slavery as the 13th Amendment to the Federal Constitution, and that slavery as a legal status ceased to exist within this state upon its adoption. And we have no doubt that, like the 13th Amendment, said provision of the Rhode Island Constitution, while designed to forbid slavery as it existed in this country and as it had existed in Rhode Island, doubtless applies equally to all races of men.

Was the aforesaid condition of the plaintiff slavery? *Black's Law Dictionary*, 2d ed. p. 1092, gives the following definitions: L.R.A.1916D.

"Slave. A person who is wholly subject to the will of another; one who has no freedom of action, but whose person and services are wholly under the control of another. Webster. One who is under the power of a master, and who belongs to him, so that the master may sell and dispose of his person, of his industry, and of his labor, without his being able to do anything, have anything, or acquire anything, but what must belong to his master. La. Civ. Code, art. 35."

"Slavery. The condition of a slave; that civil relation in which one man has absolute power over the life, fortune, and liberty of another."

In 3 *Bouvier's Law Dictionary*, 3082, a slave is defined as: "One over whose life, liberty, and property another has unlimited control. Every limitation placed by law upon the absolute control modifies, and to that extent changes, the condition of the slave. In every slaveholding state of the United States the life and limbs of a slave were protected from violence inflicted by the master or third persons."

Webster's New International Dictionary defines a slave as: "A person held in bondage to another; one held as a chattel; one whose person and services are under the control of another as owner or master."

The *Century Dictionary* gives the following definitions:

"Slave. A person who is the chattel or property of another and is wholly subject to his will."

"Slavery. (1) A state of servitude; the condition of a slave; bondage; entire subjection to the will and commands of another; the obligation to labor for a master without the consent of the servant; the establishment of a right in law which makes one person the absolute master of the body and the service of another. (2) The keeping or holding of slaves; the practice of keeping human beings in a state of servitude or bondage."

In *Douglass v. Ritchie*, 24 Mo. 177 (1857), the court said: "Our system of slavery resembles that of the Romans rather than the villenage of the ancient common law, and hence both the community and the courts have looked to the Roman rather than to the old common law of England for rules applicable to it. [Citing cases.] Under the former law, slaves were things, and not persons; they were not subjects of civil rights, and, of course, were incapable of owning property or of contracting legal obligations; they and all that appertained to them belonged to their master, and they were under his dominion. In a word, slavery was then defined to be 'an institution by which one man is made the

property of another.' Just. Inst. lib. 1, tit. 3. And such undoubtedly is our African slavery; and accordingly the slave's incapacity to be the subject of civil rights,—as to own property, or contract a legal obligation,—which flows from the nature of the institution, is adopted by our people in practice and recognized in the decisions of our courts."

In *Westbrook v. State*, 133 Ga. 578, 582, 583, 26 L.R.A. (N.S.) 591, 66 S. E. 788, 791, 18 Ann. Cas. 295, a convict had been convicted of murder, and the case was before the supreme court on exceptions. The court said: "Upon conviction the convict may lose his liberty for the time being, and may be required to perform hard labor, but he does not lose security of his person against unlawful invasion. The security of person, except as expressly provided by statute, remains his right; and if it be unlawfully invaded, he may resist such unlawful invasion as if there had been no conviction."

133 Ga. 584: "Our attention has been called to the case of *Jim v. State*, 15 Ga. 535, where it was held: 'The homicide of his master, overseer, or lawful employer, by a slave, in resistance to an assault made upon him, must be either justifiable homicide or murder.' But we think a convict stands upon a different footing from a slave, and his rights are not so restricted as it was ruled in that case with respect to a slave. The convict occupies a different attitude from the slave toward society. He is not mere property, without any civil rights, but has all the rights of an ordinary citizen which are not expressly or by necessary implication taken from him by law. While the law does take his liberty, and imposes a duty of servitude and observance of discipline for the regulation of convicts, it does not deny his right to personal security against unlawful invasion."

In *Laws of Rhode Island 1798*, page 807, an act relative to slaves and their manumission for support, it is provided:

"Section 8. And be it further enacted that no person born within this state on or after the 1st day of March, A. D. 1784, shall be deemed or considered a servant for life, or a slave; and that all servitude for life, or slavery of children to be born as aforesaid, in consequence of the condition of their mothers, be and the same is hereby taken away, extinguished, and forever abolished.

"Section 9. And be it further enacted that every child born on or after the said 1st day of March, A. D. 1784, whose mother is or shall be a slave, shall be supported and maintained by the owner of the mother, until such child arrive at the age of twenty. L.R.A.1916D.

one years: Provided the owner of the mother shall, during that time, hold her in slavery."

These sections without change appear in *Public Laws 1822*, page 443, and were in force until 1844. The expressions used in said § 8, "a servant for life, or a slave," and "all servitude for life, or slavery," indicate clearly that slavery and servitude for life were considered interchangeable expressions. Moreover, the use of the word "owner" in § 9 shows that slavery was considered to be the ownership of one human being by another. The word "slave," as used in the above statute, clearly meant a person held under the well-known institution of slavery. The members of the convention living under this statute would naturally have it in mind when they used the word "slavery" in the Constitution, and would use it with the same meaning. The rights of a prisoner in Rhode Island are far wider than those of a slave. A slave had no property rights whatever, and could neither sue nor be sued, except that he might sue to enforce his freedom. In *Cobb on Slavery*, p. 235, it is said: "Of . . . the right of private property the slave is absolutely deprived."

And (page 238): "A slave cannot take by descent, there being in him no inheritable blood."

The rights of a prisoner in Rhode Island in regard to property and access to the courts are as follows: *Gen. Laws 1909*, chap. 354, § 35: "No conviction or sentence for any offense whatsoever shall work corruption of blood or forfeiture of estate."

Section 36 provides that every person convicted of murder or arson is civilly dead.

Section 53: "No person who shall be sentenced to imprisonment in the state prison shall have any power, during his imprisonment, to make any will or any conveyance of his property or of any part thereof."

These statutes are construed and the whole subject discussed in *Kenyon v. Saunders*, 18 R. I. 590, 26 L.R.A. 232, 30 Atl. 470 (1894), where it was held that a man in prison for a term of years for felony has such an interest in the personal estate of his wife, if she died intestate, as to entitle him to contest the validity of the will, although he could not administer on her estate, and that he was entitled to prosecute an appeal from the decree of the probate court admitting his wife's will to probate, and to give the bond required by statute in order to take an appeal. *Stiness, J.*, said: "If it should be held that his conviction deprives him of the right to appeal, then he would thereby also be deprived

of the power ever to enforce his right to the property itself. . . . A convict is neither civilly dead, nor deprived of his rights of property; and, if this be so, he should be entitled to enforce such right when it is necessary to do so."

The opinion goes on to hold that the convict may give a valid appeal bond. Thus, a convict can have an interest in property, while a slave cannot; a convict can sue, while a slave cannot. This distinction remains, whether or not the convict's labor is subject to a contract. While his rights are considerably limited because of his imprisonment, he still retains many important rights which a slave lacks. Employment of prisoners at hard labor existed before the adoption of the Constitution. Section 10 of chapter 8 of "An Act Concerning Crimes and Punishments," passed February 3, 1838 (Pub. Laws 1822-44, p. 981), provided: "Every person who shall be sentenced to imprisonment for life, or the term of one year or more, for any one offense, shall be imprisoned in the state prison at Providence, and there kept at hard labor, in separate confinement."

While no contracts for the labor of convicts have been shown before 1842, when our Constitution was drafted, the act concerning crimes and punishments, chap. 10, § 1, enacted February 3, 1838 (Pub. Laws 1822-44, p. 999), provides that the inspectors of the state prison "shall advise with the warden as to the purchase of necessary supplies and provisions for the convicts and materials to be manufactured by them, and as to the sale of all articles made in the said prison; . . . nor shall they be in any way interested in any contract for the supplies of the same, or the labor of the convicts."

The Constitution was drafted by the convention November 5, 1842, and by its provisions was to go into effect, if adopted, on the first Tuesday of May, 1843. June 27, 1845, the general assembly passed an act providing that "the keeper of each county jail, except the jail in the county of Providence, shall be allowed in full for his services under this act, 50 per cent of all the profits on the labor done under his care and oversight by persons committed to such jail." Pub. Laws 1844-57, p. 625.

The first act specifically providing for letting the services of prisoners by contract is Public Laws of Rhode Island, 1844-57, p. 672 (January, 1847), § 4 of which provided: "The warden, under the direction of the inspectors, may let the services of the prisoners to contractors for the kinds of work before specified."

A similar provision is included in every subsequent revision of the statutes to and L.R.A.1916D.

including Gen. Laws 1909, chap. 360, §§ 9, 12. Thus, although the validity of prison labor contracts has never been before our courts, it has been repeatedly recognized by legislatures during a period of certainly sixty-eight years. During all that time it had never been publicly questioned until the present suit was brought. While such protracted, continuous, and thorough acquiescence is not conclusive, it is a strong argument; and the settled opinion and practice of many legislatures are entitled to serious consideration before it is overthrown, even though it has not the authority of a judicial decision.

The plaintiff's counsel cite definitions of slavery from *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18. In *Plessy v. Ferguson*, 163 U. S. at page 542, 41 L. ed. 257, 16 Sup. Ct. Rep. 1140, slavery was defined as follows: "Slavery implies involuntary servitude,—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services."

In *Hodges v. United States*, 203 U. S. at page 17, 51 L. ed. 69, 27 Sup. Ct. Rep. 8, it was said: "A reference to the definitions in the dictionaries of words whose meaning is so thoroughly understood by all seems an affectation, yet in Webster 'slavery' is defined as 'the state of entire subjection of one person to the will of another.'"

In *Civil Rights Cases*, 109 U. S. at page 22, 27 L. ed. 843, 3 Sup. Ct. Rep. 29, the court said: "The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution."

In their argument plaintiff's counsel select the definition from *Plessy v. Ferguson*, supra, as the "most careful and accurate one to be found in the books." In commenting upon it they pass by the first part, viz., "Slavery implies involuntary servitude,—a state of bondage; the ownership of mankind as a chattel,"—and say: "According to this definition the elements of slavery are: (1) The control of the labor and services of a person (2) for the

benefit of another; and (3) the absence of a legal right in the former to the disposal of his own person, property, and services. We submit that these elements clearly exist under the contract by which the plaintiff was compelled to work for the defendant in the present case: (1) The labor and services of the plaintiff were controlled directly by the contractor, and he was compelled by force and threats, against his will, to perform the tasks assigned to him. (2) The benefit or profit from his services accrued to the contractor, subject to the fixed payments to the state; the plaintiff himself was entitled to no benefit from those services. (3) The plaintiff was without legal right, under the contract, to dispose of his person, property, or services, either by working for the state, some other contractor, or himself, or by not working at all. As to his person and services this is clear. His right to the disposal of his property was equally nonexistent; a convict may not make a will or any conveyance of his property or any part thereof during his imprisonment. *Kenyon v. Saunders*, 18 R. I. 590, 592, 26 L.R.A. 232, 30 Atl. 470; R. I. Pub. Stat. chap. 248, § 52."

The statement that the labor and services of the plaintiff were controlled directly by the contractor is not borne out by the allegations of plaintiff's declaration, or by the provisions of the contract annexed thereto. The compulsion alleged in the third count of the declaration is not set out as that of the defendant. As to the benefit or profit from his services, his labor was a part of his sentence, and was furnished to the contractor by the state for a compensation fixed in the contract. His inability to dispose of his person or services did not arise from the contract, but from his status as a convict under sentence in prison. His services, being a part of his sentence, could not be disposed of or controlled otherwise than by the state. His disabilities in regard to the disposal of his property are due to the provisions of the statutes, applicable alike to all convicts, and were not imposed by the contract made under said § 21 of chapter 825 of the Public Laws of 1912.

Plaintiff's counsel say in their brief: "It may finally be contended that our reasoning carries us too far, and, if adopted, would lead to the result that the state cannot compel convicts to labor for itself, either without compensation or at a compensation fixed by the state. That problem is not now before this court. The only question now under consideration is whether uncompensated contract labor by convicts is within the constitutional prohibition; any additional questions of this nature may be dealt with when they arise. Hence we need L.R.A.1916D.

neither affirm nor deny that either of the situations suggested would violate the constitutional prohibition. At the same time, it is proper to call the court's attention to the clear distinction which exists between the status of a convict who is obliged to work for the state and that of the convict who is compelled to labor for anyone to whom the state sees fit to let or sell his services. The former is slavery as defined in *Plessy v. Ferguson*, supra: 'A control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services.' But the latter is slavery in the strictest sense of the word; it is chattel slavery such as existed in the South prior to 1870. The distinctive feature of that slavery was 'the ownership of mankind as a chattel,' involving as it did a right in the owner to lease or sell his slave at will. Here the state stands in the place of owner, and the contractor is the lessee or purchaser for a term of years, of the services of the convict. This amounts in substance to a disposal of the convict himself, since it entails of necessity the practical control of the convict's person, as well as his services, by the lessee's agent. It is true that the latter has not an absolute power over the convict's person. Neither did the lessee of a slave in antebellum days; he was obliged to use reasonable care and moderation in the treatment and discipline of the slave hired by him, and was liable to the owner for any injury resulting from an abuse of his power."

Plaintiff's counsel have thus furnished a definition of the kind of slavery they seek to establish, not "the status of a convict who is compelled to work for the state," which they claim is slavery as defined in *Plessy v. Ferguson*, supra, but "that of the convict who is compelled to labor for anyone to whom the state sees fit to let or sell his services." Of this they say: "The latter is slavery in the strictest sense of the word; it is chattel slavery such as existed in the South prior to 1870. The distinctive feature of that slavery was 'the ownership of mankind as a chattel,' involving as it did a right in the owner to lease or sell his slave at will."

The condition of slavery sought to be established is a synthetic slavery, made up from the incidents inherent in the condition of being a convict lawfully under sentence and the fact that said convict was compelled to work pursuant to the contract made under the statute. As we have seen, the alleged direct control by the contractor is not present. The plaintiff's inability to dispose of his person, property, and services is in no way due to the contract of which he

complains, but is an incident of his condition as a convict. Then, on the other hand, there are present rights which are not those of a slave, as the right to sue and to enter into a contractual obligation in the necessary prosecution of his suit, and in short all the rights of an ordinary citizen which are not necessarily taken from him by reason of his condition as a convict. The condition of alleged slavery which he has constructed fills the requirements of no definition which has been cited, not even the one he selects as the most accurate one to be found in the books. That requires "a state of bondage,—the ownership of mankind as a chattel." That portion of the definition he passes by, and depends upon the remaining portion, viz.: "At least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services." Of the portions thus selected, the words "the control of the labor and services of one man for the benefit of another" constitute the sum total of material for the construction of the condition of slavery claimed, as "the absence of a legal right to dispose of his own person, property, or services" is incident to his legal status as a convict under sentence for a term in state prison, and does not in any way result from the contract. As to said first part of said selected portion of the definition, his counsel seem to recognize the necessity of a master for the slave, and say that "the labor and services of the plaintiff were controlled directly by the contractor," which is not alleged in the declaration, adding, "and he was compelled by force and threats, against his will, to perform the tasks assigned him," which last is alleged in the declaration, but the declaration fails to allege that he was thus compelled by the defendant.

As we have seen, it is not claimed that to cause a prisoner to work for the state is a violation of the constitutional provision forbidding slavery, but that to cause him to work upon the materials of another than the state, under a contract between such other person and the state, in the prison of the state, under the control of the state, the state receiving compensation for said work, and the convict not receiving compensation therefor, results in the transformation of the labor which is imposed upon the convict as a part of his sentence into that of a slave, and constitutes a condition of slavery. If this contention is sound, it follows that, while the state may compel the convict to work for the state upon the materials of the state in its workshop situated in the prison, the state must own the materials upon which the work is done or the

convict cannot lawfully be compelled to work. The state must therefore engage in business in which it directly employs the convict upon its own materials or it cannot lawfully compel him to work at all. Does the convict work any the less for the state when he is compelled to work upon the property and with the appliances of a contractor with the state, in the prison of the state, under the control of the state, for a wage paid to the state by the contractor under a contract made with the state, than when he so works upon materials owned by the state? It is claimed that he is compelled to work for the benefit of another, and not for the state. True, his labor is done upon materials which are not the property of the state. The contractor with the state, however, only has the labor done thereon, for which he pays the state, and which it was the right of the state to have done as a part of the sentence imposed upon the convict. We cannot think that the condition of the convict is changed by such work upon the materials of the contractor from his condition as a convict into that of a slave, either of the state or the contractor.

We see no reason to doubt that, in adopting § 4 of article 1 of the Constitution, the convention and the people had in mind slavery as it then existed in some of the states of the Union and as it had existed in this state. The word "slavery" at that time was used both in our statutes and in common parlance to mean a very definite thing, namely, the institution of slavery. We see no reason to suppose it was used in the Constitution in any other sense. The fact that prison labor existed, without question, contemporaneously with the adoption of the Constitution, is also strong evidence that the prohibition was not intended to include such labor. The long acquiescence in the legislative exercise of the power to let prison labor, beginning in January, 1847, is also a strong argument in favor of the validity of that power. We are of the opinion that the plaintiff has entirely failed to establish his contention that his status under said contract was that of a slave.

Because the statute empowers the board of control and supply to "make such contract respecting the labor of prisoners and inmates of such institutions as said board may deem proper," and provides that "all orders, agreements, and contracts made by said board with respect to said labor shall be observed and obeyed by the officers in charge of the prisoners and other inmates of such institutions," plaintiff's counsel argue that the statute "obviously authorized the board to delegate to the contractor complete control over the person and the con-

duct of the prisoner while at work (subject to the restrictions as to corporal punishment heretofore noted), as well as over his labor;" that "the power conferred on the board, and not the extent to which it is exercised, is the test of the statute's validity," and "that a court, in passing on the constitutionality of a statute, is not confined to its language, but may look to its necessary or natural effect and its natural operation." Section 21 of chapter 825, Pub. Laws 1912, reads: "Section 21. All the power and authority now vested in, and exercised by, the board of state charities and corrections over the labor of prisoners and other inmates of the institutions now under the control and management of the board of state charities and corrections are hereby transferred to and vested in the board created by this act, with power in said board to sell the products of such institutions and make such contract respecting the labor of the prisoners and inmates of such institutions as said board may deem proper, and all orders, agreements and contracts made by said board with respect to said labor shall be observed and obeyed by the officers in charge of the prisoners and other inmates of such institutions. For the purpose of the performance of their duties under this act the members of the board shall have all the powers and privileges conferred upon and enjoyed by the members of the state board of charities and corrections under the provisions of chapter 360 of the General Laws, and any acts in amendment thereof, of visiting such institutions and conferring with the prisoners and inmates therein."

The only labor for which contracts are authorized by the statute is that of prisoners and inmates of the institutions. All orders, agreements, and contracts with re-

spect to such labor are to be observed and obeyed by the officers in charge of the prisoners and other inmates of the institutions. The board is authorized to visit such institutions and confer "with the prisoners and inmates therein." It is evident that the statute contemplates only the labor of such prisoners and inmates while prisoners and inmates of the institutions. There is no indication of an intent to authorize the making of a contract whereby the state shall part with or permit any interruption of its lawful control over said prisoners and inmates. The statute authorizes the board to "makes such contract respecting the labor of prisoners and inmates of such institutions as it may deem proper." This can only mean a contract respecting such labor; and there cannot be imported into the statute the authority on the part of the board to interfere with or to modify or to terminate the lawful control of the state over said prisoners and other inmates of the institutions. The discretion given to the board in the making of such contracts is a lawful discretion as to the subject-matter of such contracts, and does not authorize the exercise of arbitrary power by the board in disposing of the control and custody of the prisoners and inmates of the state institutions. We find nothing in the statute which violates the constitutional provision forbidding slavery, or which in its necessary or natural operation tends to bring about such a result.

Our decision is that § 21 of chapter 825 of the Public Laws of Rhode Island, January, 1912, is not in violation of article 1, § 4, of the Constitution of Rhode Island. The papers in the case, with our decision indorsed thereon, will be returned to the Superior Court for the Counties of Providence and Bristol for further proceedings.

Annotation—Constitutional objections to convict labor contracts.

For the constitutionality of imprisonment for breach of contract for labor or rental, see note to *Ex parte Hollman*, 21 L.R.A.(N.S.) 242.

For the right to compel prisoners to labor, see *Topeka v. Boutwell*, 27 L.R.A. 593, and note.

For convict labor or hard labor as a cruel and unusual punishment, see note to *State ex rel. Garvey v. Whitaker*, 35 L.R.A. 566.

This note deals only with cases involving the question as to whether contracts for the leasing of convict labor are intrinsically constitutional. The question whether the state has the power to compel convicts to labor, either as punishment or as part of the prison discipline, L.R.A.1916D.

where the convicts are not leased to third parties, is not considered; nor are cases considered in which the question was as to whether, in a particular case, a sentence to hard labor was excessive or cruel and unusual punishment.

The few cases passing upon the constitutionality of contracts leasing to private persons the labor of persons serving sentence upon conviction of crime are in accord with *ANDERSON v. CRESCENT GARMENT CO.* ante, 651.

Thus, in *State v. McCauley* (1860) 15 Cal. 429, the court holds that a contract made by the state leasing the state's prison and the labor of the convicts therein for a term of years was constitutional, saying: "The objection to the constitu-

tionality of the act on the second ground, that it authorizes the transfer of the convicts to private individuals, and a lease of the labor of future convicts, is untenable. The power over the whole subject of punishment for crime is vested in the legislature. The only limitation upon its exercise is the inhibition against the infliction of cruel and unusual punishments, which are held to mean those of a barbarous character, and unknown to the common law. The first object of punishment is the protection of society; the reformation of prisoners is only subsidiary and incidental to this. Their conviction has subjected them to a constitutional, involuntary servitude; and their labor and the proceeds of it belong to the state, and may be disposed of in such way as the legislature, in its discretion, may determine. The practice of leasing out the labor of convicts prevails in several, and, as we are informed, in a majority of the states; and the power of the legislature to authorize contracts of this kind has never, we believe, been questioned. The rights of every lessee must, of course, be subordinate to the right of the governor to pardon and thereby discharge convicts from custody, and to such modifications in the extent of punishment as may be made by future legislation."

In *Georgia Penitentiary Cos. v. Nelms* (1882) 71 Ga. 301, the court holds that there is no provision of the Constitution of the state which prohibits the legislature from authorizing the governor to enter into contracts disposing of the labor of convicts of the state, provided that in making such contracts of lease the state reserves the police power over them.

In *Mason & F. Co. v. Main Jellico Mountain Coal Co.* (1888) 87 Ky. 467, 9 S. W. 391, it is held that a statute authorizing the leasing of convicts to labor for private individuals or corporations, where such convicts had been sentenced to punishment by confinement in the penitentiary at hard labor and solitary confinement, was not an *ex post facto* law in the sense that it authorized the infliction upon each convict of another and greater punishment than he was adjudged to suffer.

In *State v. Adams* (1803) 1 Brev. (S. C.) 279, it was held that a statute providing that one against whom has been found a charge of bastardy, and who will not give the security required by the act for the support of the child, shall be bound to servitude for any time not exceeding four years, was constitu-

tional, the court saying that for any particular immoral or disorderly act the legislature could deprive a person temporarily of his personal liberty, and "the mode by which this restraint shall be imposed can make no difference, unless the same should be unusually harsh or cruel. The compelling a citizen to serve as a bondsman or apprentice, for a term not exceeding four years, cannot be a more severe regulation than to compel a prisoner to labor in a penitentiary house for a given time; and is very different from a state of slavery for life."

In *McGonagill v. Evans*, (1889) 3 Tex. App. Civ. Cas. (Willson) 565, the court says it sees no reason why a convict, after serving his term of imprisonment, may not be hired out to pay off the fine and costs.

But it is only as a punishment for crime that involuntary servitude is legal.

Thus, in *Re Thompson* (1893) 117 Mo. 83, 20 L.R.A. 462, 33 Am. St. Rep. 639, 22 S. W. 863, it is held that the hiring out of a vagrant to the highest bidder for the term of six months, on a verdict of vagrancy before a justice of the peace, as authorized by statute, subjects him to involuntary servitude, and is in violation of the 13th Amendment to the Constitution of the United States and of the Constitution of Missouri, it being conceded that the person charged with vagrancy had been guilty of no crime, considering the terms of the statute under which the proceedings were had against him.

R. L. S.

NEW YORK COURT OF APPEALS.

TALMAN F. HULBERT

v.

FRED W. HULBERT et al.

and

HELEN STORY et al., Exrs., etc., of Leonard Story, Deceased, Appts.
WILLIAM F. BACON, Resp.

(216 N. Y. 430, 111 N. E. 70.)

Judgment — co-ordinate — execution — priority.

Where a judgment is a lien on the debtor's real estate from the time of docketing, no priority can be secured in case the liens of several judgments, by reason of their existence when title to real estate is acquired, simultaneously attach thereto, in favor of one of them, by issuing execution thereon

Note. — As to whether priority between judgments, the liens of which have attached simultaneously, may be obtained by priority of execution proceedings, see annotation following this case, post, 669.

and having the property advertised for sale by the sheriff.

For other cases, see Judgment, III. a, in Dig. 1-52 N. S.

(Willard Bartlett, Ch. J., and Cuddeback and Pound, JJ., dissent.)

(January 4, 1916.)

APPEAL by defendants from an order of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Special Term for Seneca County directing payment on certain judgment liens from proceeds arising from the sale of the interest of defendant Fred W. Hulbert in certain real estate, in a proceeding for the partition of the estate. Modified and affirmed.

The facts are stated in the opinion.

Mr. George E. Zartman, for appellants:

The three judgments became liens upon the real property at the same time.

Goetz v. Mott, 21 Abb. N. C. 246, 1 N. Y. Supp. 153; Re Hazard, 73 Hun, 22, 25 N. Y. Supp. 928, affirmed on opinion below in 141 N. Y. 586, 36 N. E. 739.

The judgment of the church did not obtain priority of lien by the issue of the execution and the sale thereunder.

Atlas Ref. Co. v. Smith, 52 App. Div. 109, 64 N. Y. Supp. 1044; Wood v. Colvin, 5 Hill, 228; 1 Black, Judgm. § 450; Wilkinson v. Paddock, 57 Hun, 191, 11 N. Y. Supp. 442, affirmed in 125 N. Y. 748, 27 N. E. 407; Re Hazard, 141 N. Y. 586, 36 N. E. 739.

Mr. William F. Bacon, in propria persona:

The lien of the judgment docketed by the church obtained a preference over the liens of the two Story judgments against the interest which the judgment debtor subsequently acquired in the real estate in question, since the church, by placing an execution in the hands of the sheriff and proceeding to a sale thereunder, took the requisite measures for effectuating its lien, and so, by its superior diligence, turned the scale of equal rights; and the purchaser on the execution sale should receive from the moneys now in the hands of the county treasurer the amount of his bid, with interest to the date of payment.

Re Hazard, 73 Hun, 22, 25 N. Y. Supp. 928, affirmed in 141 N. Y. 586, 36 N. E. 739; Atlas Ref. Co. v. Smith, 52 App. Div. 109, 64 N. Y. Supp. 1044; Green v. Burke, 23 Wend. 498; Wood v. Colvin, 5 Hill, 228; Waterman v. Haskin, 11 Johns. 228; 17 Am. & Eng. Enc. Law, 2d ed. 796; 1 Black, Judgm. § 450; 23 Cyc. 1380; Spring v. Sandford, 7 Paige, 550; Vaughn v. Ely, 4 Barb. 159; Smith v. Colvin, 17 Barb. L.R.A.1916D.

157; Elsworth v. Woolsey, 19 App. Div. 385, 48 N. Y. Supp. 486, affirmed in 154 N. Y. 748, 49 N. E. 1096; Treacy v. Ellis, 45 App. Div. 492, 61 N. Y. Supp. 600.

Seabury, J., delivered the opinion of the court:

This is a proceeding in an action of partition for the distribution of the proceeds of a sale of real property. On March 7, 1904, St. Paul's Church of the village of Waterloo, New York, docketed a judgment for \$906.84 against Fred Hulbert. On April 21, 1904, judgments for \$2,830.57 and \$2,351.71, respectively, were docketed against said Hulbert by the defendant Story, now deceased. All of these judgments were filed and docketed in the office of the clerk of Seneca county. At the time these judgments were docketed Hulbert was without property. In 1910, on the death of his father, Hulbert inherited an undivided one-third interest in the real estate which it was sought to partition in this action. On November 24, 1913, pursuant to leave granted by the court, the St. Paul's Church issued an execution on its judgment against the property of said Hulbert. On February 6, 1914, the sheriff of Seneca county sold Hulbert's undivided interest in said real estate to one Bacon, who is a defendant herein, for the sum of \$1,437.10, and issued to him a sheriff's certificate of sale which he now holds. The present action for partition or sale was not commenced until after the execution of the St. Paul's Church had been placed in the hands of the sheriff. The interest of the defendant Hulbert in said premises was sold in the partition action March 28, 1914, for \$1,753.36, which sum has been paid into the court subject to its further order. The proceeds of this sale are insufficient to pay all of the judgment liens in full. The appellants who are executors of the estate of Story claim that these proceeds should be applied pro rata on all of the liens. The respondent, Bacon, claims, and he has been accorded by the court below, a preference for his lien, and the payment thereof has been ordered to be made in full. It is clear that Bacon acquired no rights as against the owner of the Story judgments by virtue of the sale of the property to him and the delivery by the sheriff of a sheriff's certificate of sale, unless the fact that the execution issued by the St. Paul's Church and the act of the sheriff in advertising the property for sale served to give to the lien of the St. Paul's Church a preference over the liens of the Story judgments. It is necessary, therefore, to inquire what the status of the judgment liens was, and whether the act of the St. Paul's Church

in issuing an execution upon its lien, and the act of the sheriff in advertising the property for sale, gave to that lien a preference over the others.

Pursuant to the settled rule, which is not questioned by either party upon this appeal, the three judgments referred to became liens on the after-acquired property of the judgment debtor at the time of its acquisition by the debtor. *Re Hazard*, 73 Hun, 22, 25 N. Y. Supp. 928, affirmed on opinion below in 141 N. Y. 586, 36 N. E. 739. The liens of these three judgments, therefore, attached simultaneously to the interest of Hulbert upon his acquiring title to that interest on the death of his father. It was held below that the judgment of the St. Paul's Church acquired priority by reason of the execution issued thereon and the act of the sheriff in advertising the property for sale. The theory upon which the ruling was made was that the act of the St. Paul's Church in issuing the execution was such an exhibition of diligence as to entitle that judgment creditor to a preference over the liens owned by the other judgment creditors. The only authorities relied upon by the learned appellate division to sustain this view were the cases of *Adams v. Dyer*, 8 Johns. 347, 350, 5 Am. Dec. 344, and *Waterman v. Haskin*, 11 Johns. 228. In *Adams v. Dyer*, supra, there is a short per curiam opinion which says: "Perhaps, the mere act of delivery of the execution to the sheriff did not gain a preference as to the lands, but by the act of the sheriffs in making advertisement of the lands for sale the first execution was begun to be executed. Here was an act by which priority, in some respects, was gained. There was priority as to the time of sale, and that priority could not be defeated by the second execution."

The case of *Waterman v. Haskin*, supra, announces the same conclusion, relying solely upon the authority of *Adams v. Dyer*, supra. Although our attention has not been called to any subsequent case in this jurisdiction which has followed the decision announced in these two cases, it must be conceded that the rule announced by them has been followed in other jurisdictions. *Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754; *Lowry v. Reed*, 89 Ind. 442; *Smith v. Lind*, 29 Ill. 24; *Lippencott v. Wilson*, 40 Iowa, 425; *Burney v. Boyett*, 1 How. (Miss.) 39. Notwithstanding that the decision in *Adams v. Dyer* and *Waterman v. Haskin*, supra, has been followed in other jurisdictions, the rule announced by these decisions was early questioned in this state. In *Wood v. Colvin*, 5 Hill, 228, 230 (1843), *Bronson, J.*, speaking for the court, said: "It has on several occasions been

taken for granted that there must be a levy on real estate; but the point has never been so adjudged. The cases are collected in *Green v. Burke*, 23 Wend. 498. When the judgment is a lien upon the land, it is not necessary that the sheriff should make any formal levy or seizure before proceeding to advertise and sell. It would be an idle ceremony for him to go to the land, or make an inventory of it, or do any other act of the like nature. The judgment binds the land, which is already in the custody of the law before the execution issues. The execution comes as a power to enable the creditor to reap the fruits of the seizure already made. After lands were subjected to sale on execution, and before the judgment was made a lien (see per Chancellor *Lansing* in *Catlin v. Jackson*, 8 Johns. 546), the sale of lands and of goods on execution stood substantially upon the same footing, and a levy or seizure was necessary in the one case as well as in the other. But when the judgment was afterwards made a lien on the land, there was no longer any reason for requiring a levy before the sheriff proceeded to advertise and sell. The seizure was already made when the execution came to his hands. Lawyers and judges have still continued to speak of the supposed necessity of a levy upon land, without advertent to the fact that the reason for the rule had entirely ceased. But, as there is nothing but dicta upon the point, we feel ourselves at liberty to say that, since the judgment has been made a lien upon the land, no formal levy or seizure by virtue of the execution is necessary."

A good deal of confusion has arisen and the decisions seem not to be in harmony as to the status of the judgment lien. This condition seems to have arisen because of the statutory changes that have been made. A review of the changes which the law upon this subject has undergone will tend to a better understanding of the existing rule which we are called upon to apply to this case. At common law, when a judgment had been rendered for a debt, the sheriff was directed to cause the sum needed to be made (*fieri facias*) out of the goods and chattels of the defendant, or levied (*levari facias*) out of his goods and the fruits of his land, but the land itself was not subject to be taken in satisfaction of the debt.

"Our common law," says *Pollock & Maitland* in their *History of English Law*, "will not seize his land and sell it or deliver it to the creditor; seigniorial claims and family claims have prevented men from treating land as an available asset for the payment of debts." Vol. 2, 2d ed. p. 596.

In 1285, by virtue of the Statute of Westminster II. (13 Edw. I. chap. 18), the election was given to a creditor who sued for such debt or damages, to have a writ to the sheriff "for levying the debt of the lands and chattels, or that the sheriff deliver to him all the chattels of the debtor (except his oxen and beasts of the plow) and a moiety of his land until the debt be levied." The writ of *elegit* was founded upon this statute. It was subject to certain restrictions and operated differently even as to chattels from a *fieri facias*. 2 Tidd, Pr. 939. These restrictions need not now be commented upon, as our purpose will be served by tracing the procedure that was pursued under it in reference to the lands of the debtor. If the debtor had no land, the sheriff need not take or return an inquisition. If there were lands, it was necessary that the inquisition should be taken and returned, describing the land with convenient certainty, and after it is taken the sheriff delivers a moiety to the plaintiff by metes and bounds. 2 Tidd, Pr. 940. It was formerly usual for the sheriff to deliver actual possession of a moiety of the lands, but at the time Mr. Tidd wrote his *Practice of the King's Bench* (1807) the sheriff was only required to deliver legal possession, and in order to obtain actual possession the plaintiff must proceed by ejectment. The writ of *elegit*, however, has been said to be "almost unknown in the United States." Freeman, *Executions*, § 370. There are, however, instances of its use in Virginia, Alabama, North Carolina, and Delaware. *Ibid.* Although authorized in New York, in practice it is doubtful if it was ever adopted. In commenting upon it Chancellor Lansing said: "Whether the *elegit* was ever introduced in practice is doubtful, as the small value of the income of real estates afforded little inducement to resort to it as a means of satisfying a debt due upon a judgment." Catlin v. Jackson, *supra*, at page 547 of 8 Johns.

Prior to 1732 no judicial sale of land could be made in New York under any common-law process. Such a sale was expressly prohibited by the so-called "Charter of Liberties & Privileges," which was enacted by the colonial legislature October 30, 1683. Laws of the Colony of New York, 1664-1719, vol. 1, p. 111. By a subsequent statute passed soon afterwards by the same legislature a levy "by extent on the defendant's lands or against the debts goods and chattels & for want thereof his person" was authorized. November 2, 1683, chapter 12, Laws of the Colony of New York, 1664-1719, vol. 1, p. 134. While these colonial statutes seem to have sanctioned the *elegit*, it is probable, as already L.R.A.1916D.

remarked, that in practice that writ was not used. The act of 5 Geo. II. chap. 7, which was applicable to the "plantations and colonies in America," provided that after September 29, 1732, the lands of the debtor "shall be liable to and chargeable with all just debts, etc." This statute was intended to enable British subjects in England to sell real estates on execution in the colonies in order to satisfy the debts due to them. It received a liberal construction which extended it to all judgments. Catlin v. Jackson, 8 Johns. 520, at page 547. Under this statute the *fieri facias* was the appropriate writ under which the lands could be sold, but in several essentials the effect of the execution was necessarily different from a *fieri facias* levied upon personal property only. Catlin v. Jackson, *supra*, at page 547, of 8 Johns; Hanson v. Barnes, 3 Gill & J. 359, 367, 22 Am. Dec. 322.

By the act of 1774 (Laws of the Colony of New York, 1769-1775, vol. 5, p. 637) provision was made for docketing the judgment in the name of the person against whom the judgment was entered, and it was declared that a judgment "not docketed and entered in the books" should not affect lands as to purchasers or mortgagees, or have any preference against heirs, executors, or administrators. In 1787 (Laws of New York, 1785-1788, vol. 2, chap. 56, p. 467) and in 1801 (Laws of 1801, chap. 105) these provisions were substantially re-enacted. These statutes provided that the land of the debtor should be subject to sale in the same manner as his personal property, and made provision for the docketing of the judgment, and provided that a judgment not docketed should not affect lands as to purchasers or mortgagees. Whether the legal effect of these statutes was to make the judgment itself a lien upon the real estate of the debtor it is not necessary to determine. In *Koning v. Bayard*, 2 Paine, 251, Fed. Cas. No. 7924, decided in 1829, it was held that such was their legal effect. The first statute to specifically declare that "the said judgment shall be a lien on such lands, etc.," was the Revised Laws of 1813 (vol. 1, chap. 50, p. 500). By that statute it was enacted: "That all and singular the lands, tenements, and real estate, of every person against whom any judgment shall have been obtained in any court of record, for any debt, damages, costs or other sum of money, shall be subject to be sold upon execution to be issued upon such judgment, and the said judgment shall be a lien on such lands, tenements, and real estate: Provided," etc.

This statute also provided that a judg-

ment not docketed should not affect any lands and tenements as to purchasers and mortgagees. This statute has been several times re-enacted, amended, and amplified (2 Rev. Stat. p. 3, chap. VI. title 4, art. 2, §§ 11, 12, and Laws 1840, chap. 386), and the substance of it is expressed in the present provisions of the Code of Civil Procedure relating to this subject. See §§ 1250 and 1251 of the Code of Civil Procedure.

By virtue of the statutory changes which have been made in relation to this subject, a judgment, upon being filed and docketed, becomes a lien upon the real estate of the debtor. It is no longer necessary that an execution should be issued upon the judgment in order to cause the judgment to become a lien upon real estate. *Adams v. Dyer*, supra, decided in 1811, and *Waterman v. Haskin*, decided in 1814, had under consideration judgments that were docketed prior to the enactment of chapter 50 of the Revised Laws of 1813. At the time these two cases were decided the legal effect of the statutory change that had taken place had not been determined. *Waterman v. Haskin*, supra, was decided solely upon the supposed authority of *Adams v. Dyer*, supra, and the short opinion that was rendered in *Adams v. Dyer* ignored the question whether any statutory change had been made. Whether this was because the judgment itself was not deemed a lien prior to the statute of 1813, and the judgments under consideration in these cases were entered prior to the passage of that act, it is needless to speculate.

Of course, it is true that, if the judgment actually became a lien upon the land, it can make no difference whether it is a lien by virtue of express statutory enactment or by necessary implication from other language used in the statute. It is, however, a significant fact that at the time *Adams v. Dyer*, 8 Johns. 347, 350, 5 Am. Dec. 344, and *Waterman v. Haskin*, 11 Johns. 228, were decided it was an open and undecided question in this state whether the lien attached upon the filing of the judgment, or whether subsequent action by way of execution must be taken in order to cause the lien to attach. It was not until more than fifteen years after these cases were decided that it was first held in *Koning v. Bayard*, supra, that under earlier statutes, by implication, the judgment became a lien from the date of filing. Even after this decision, as Judge Bronson pointed out in *Wood v. Colvin*, 5 Hill, 228, 230, the effect of the statutory provision was not fully appreciated by judges and lawyers. The fact that this question was undetermined when *Adams v. Dyer* and *Waterman v. Haskin*, supra, were decided, and that it was not

determined until subsequent statutory enactments had made the original legislative purpose clear, explains why the court in these cases assumed that the rule prevailing as to the acquisition of a lien upon personal property also prevailed as to real property, and accorded a preference to the judgment creditor first taking proceedings by way of execution. The statute has now removed any doubt that may have existed on the subject, and declared that the lien attaches as to land from the filing of the judgment. Under these circumstances the ruling in *Adams v. Dyer* and *Waterman v. Haskin*, supra, should not be so applied as to make the unnecessary act of issuing an execution the ground for according, as between creditors of equal rank, to one creditor a priority over another. To so apply these decisions is to fail to give effect to the existing statutory provisions on this subject.

Whatever the legal effect of the early statutes may have been, it is perfectly clear that since 1813 the judgment itself is a lien upon the real property of the debtor. The legal effect of this statutory rule is that from the moment a judgment is duly filed and docketed legal rights in the real estate of the debtor attach. In the case now under consideration the liens of the three judgments attached simultaneously to the property of Hulbert upon his acquisition of the interest derived from his father. By virtue of the statute they were at that time equal liens entitled to share pro rata in the proceeds of the debtor's property. Such being the case, how can it be held that the issuing of the execution and the advertising by the sheriff—acts which would be an idle ceremony—should give a preference to the creditor? Once a lien is acquired it is a right which cannot be lost by the performance of an unnecessary act by another creditor. With as much reason could it be held that, as between two mortgagees holding mortgages of equal rank, the one who showed the greatest diligence in commencing an action of foreclosure should acquire a preference over the other. Under the terms of the statute the judgments of the appellants became liens on the real property of Hulbert of equal rank with the lien of the judgment of the St. Paul's Church. The liens of these judgments of the appellants, having attached, did not forfeit their position of equality and become subordinate to a lien of equal rank, merely because their owners did not do a useless thing. In *Rankin v. Scott*, 12 Wheat. 177, 179, 6 L. ed. 592, 593, Chief Justice Marshall said: "The principle is believed to be universal that a prior lien gives a prior claim, which

is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it which shall postpone him, in a court of law or equity, to a subsequent claimant. The single circumstance of not proceeding on it until a subsequent lien has been obtained and carried into execution has never been considered as such an act."

The diligence of a junior judgment creditor could not affect the lien of a senior judgment creditor, and, if it could not affect the lien of a senior judgment creditor, it cannot affect the lien of equal rank. The principle that equity favors the diligent has no application where one creditor displays his diligence in the doing of useless and unnecessary things. The liens of the three judgments attached when Hulbert acquired the property. The issuing of an execution upon one of the judgments could not affect the relative rank of the liens as between themselves. It is urged that, although this reasoning was adopted in *Rockhill v. Hanna*, 4 McLean, 554, Fed. Cas. No. 11,980, where the court refused to follow *Adams v. Dyer* and *Waterman v. Haskin*, supra, that case was not followed in the United States Supreme Court. In *Rockhill v. Hanna*, 15 How. 189, 196, 14 L. ed. 656, 659, the United States Supreme Court considered the question presented in *Rockhill v. Hanna*, 4 McLean, 554, Fed. Cas. No. 11,980, and intimated an opinion in accord with the rule declared in *Adams v. Dyer* and *Waterman v. Haskin*, supra, but the decision of the court was not placed on that ground, the court saying: "But we do not think it necessary to rest the decision of this case merely on the question of diligence, or to decide whether this doctrine has been finally established as the law of Indiana. The plaintiff's lien does not, by the statement of this case, stand on an equality as to date with that of the other judgments. By electing to take the body of his debtor in execution he has postponed his lien, because the arrest operated in law as an extinguishment of his judgment."

Under the circumstances disclosed, and in view of the fact that *Adams v. Dyer* and *Waterman v. Haskin*, supra, declare a rule contrary to our existing statute, we feel compelled to hold that these decisions are no longer controlling upon us, and that we should give effect to the rule declared in the statute.

The order appealed from should be modified by directing that the fund now deposited in court should be distributed pro rata between the three judgments, and, as L.R.A.1916D.

so modified, the order should be affirmed, without costs to either party.

Chase, Collin, and Hogan, JJ., concur.

Willard Bartlett, Ch. J., dissenting:

I dissent from the judgment about to be rendered in this case. I think it is in conflict with the established law of this state as it has existed for more than a century. It squarely overrules two decisions of our old supreme court, the doctrine of which has been adopted in other states and approved by the Supreme Court of the United States; and this without any change in conditions which in my opinion suffices to justify such action.

In the present case three judgments stood duly docketed in Seneca county against the defendant Hulbert, when, in 1910, upon the death of his father, he inherited a one-third interest in the real estate sought to be partitioned in this action. The three judgments thus simultaneously became liens upon the property so acquired by the judgment debtor. *Re Hazard*, 73 Hun, 22, 25 N. Y. Supp. 928, affirmed on opinion below in 141 N. Y. 586, 36 N. E. 739. Prior to the commencement of the partition suit, and pursuant to leave of court duly granted, an execution against the property of the defendant Hulbert had been issued to the sheriff of Seneca county on one of the three judgments, which was in favor of St. Paul's Church of Waterloo, New York; and the sheriff subsequently sold the judgment debtor's interest in the real estate inherited from his father to the respondent, William F. Bacon. The question presented by this appeal is whether St. Paul's Church acquired a preference for its lien over the liens of the other two judgments by the steps which it had taken to enforce its judgment,—to wit, the issue of an execution and causing the property to be advertised for sale thereunder. The courts below have held, without dissent, that the judgment in favor of St. Paul's Church had thus become entitled to priority. The leading cases relied upon as authority for this decision—which it is now proposed to reverse—are *Adams v. Dyer*, 8 Johns. 347, 5 Am. Dec. 344, and *Waterman v. Haskin*, 11 Johns. 228, both decided by the old supreme court, the former in 1811, when Kent was chief justice, and the latter in 1814, when Kent had become chancellor and had been succeeded as chief justice by Smith Thompson, who subsequently became an associate justice of the Supreme Court of the United States. With them on the bench were such men as Ambrose Spencer, William W. Van Ness, and Joseph C. Yates; so that the judicial ability of the

court can hardly be questioned by New York lawyers. They decided that, where judgments were equal as to the date of the lien, the issue of execution upon one of the judgments, the advertisement of the lands for sale thereunder, and the sale thereof by the sheriff, entitled the plaintiff in that judgment to have his claim first satisfied out of the property. In the second case it was held to be enough to establish the priority of such a judgment that the sheriff who received the execution thereon had begun to execute the process first; he "thereby turned the scale of equal right and gained a priority by his vigilance." *Waterman v. Haskin*, supra.

That the doctrine of these cases and cases to the same effect in other states has been regarded as establishing the law generally in accordance with the rule therein laid down appears from the statements by the leading text writers and in the *American and English Encyclopedia of Law*.

"If two or more judgments, on account of their contemporaneous rendition or docketing, or from any other cause, are equally entitled to precedence as liens on real estate of the judgment debtor, this equality may be destroyed in order to give precedence to the lien holder who first attempts to subject any specific real estate to the payment of his lien." 2 *Freeman, Judgm.* 4th ed. § 374.

In *Rorer on Judicial Sales*, § 703, the author states the rule thus: "If several judgment creditors have judgments of equal date, and their judgments are in law all liens on the real estate of the same defendant, the one that levies thereon first obtains priority."

In the *American & English Encyclopedia of Law*, 2d ed. vol. 17, p. 796, we find:

"It may be laid down as a general rule that where liens of judgment are equal, one judgment creditor may acquire a priority over another by superior vigilance in executing his judgment. Thus, in some cases it has been held that, when judgments in favor of different persons and against the same defendant are rendered or recorded on the same day, the judgment creditor first issuing execution and levying upon the debtor's property acquires a prior right to satisfaction. And the same rule has been applied to judgments rendered at the same term where by statute such judgments are made equal liens on the defendant's real estate."

I make these quotations simply to show that the doctrine of priority by execution where the judgment liens are equal is not a peculiarity of New York jurisprudence. I will cite a few cases from other jurisdictions

in which it has been adopted and applied.

The case of *Elston v. Castor*, 101 Ind. 426, 51 Am. Rep. 754, resembles the present case in the fact that the judgment debtor became the owner of the lands in controversy after the rendition of the several judgments against him. These previously existing judgments, therefore, became equal liens on the land; but it was held that the one of the holders of such liens who first caused execution to be issued and levied on such land obtained a lien which was superior to that of the other judgments. The rationale of the doctrine is thus explained in the opinion: "Judgments are liens upon the real estate of the judgment debtor because the statute makes them such. This lien is given for the purpose of collection. Mr. Freeman says: 'A judgment is not a specific lien on any particular real estate of the judgment debtor, but a general lien upon all his real estate, subject to all prior liens, either legal or equitable, irrespective of any knowledge of the judgment creditor as to the existence of such liens.' In short, a judgment creditor has no *jus in re*, but a mere power to make his general lien effectual by following up the steps of the law, and consummating his judgment by an execution and levy on the land.' Section 338. And so it was said in the case of *Gimbel v. Stolte*, 59 Ind. 446, 451, distinguishing a mortgage and judgment lien: 'There can be no doubt that a law which gives a judgment creditor a lien on the real estate of the debtor relates solely to the remedy.' When the liens are thus equal, and one of the judgment creditors first pursues the remedy and exercises the power of making his lien effectual by following up the steps of the law by an execution and levy, he thereby makes his consummated lien superior, which until then was but equal."

To the same effect is *Smith v. Lind*, 29 Ill. 24, where the court said: "While the lien was made equal, diligence was left to its reward. Under the general law, the lien of judgments is equal, but the vigilant creditor can acquire a preference in the payment of his judgment . . . by first issuing his execution. If one creditor who is precisely equal to another in point of lien shall get an advantage by the use of superior diligence in discovering property, making a levy and sale of it, where is the hardship or injustice?"

In *Bruce v. Vogel*, 38 Mo. 100, 106, the supreme court of Missouri followed the rule in *Adams v. Dyer*, supra, saying: "While the statute makes the liens equal, it does not deprive a party of any advantage he

may gain by the exercise of superior diligence. If one creditor who is exactly equal to another as regards liens, by energy, perseverance, and diligence, discovers property whereon to levy and make his money, justice demands that he shall reap the fruits of his industry. He may have gone to great labor and expense in investigating records and ferreting out and bringing to light property out of which to satisfy his execution; and to allow another person who had slept on his rights, and neither encountered labor or furnished money, to stand on an equality with him, would be inequitable. 'Vigilantibus, non dormientibus, jura subveniunt.' The laws assist those who are vigilant, not those who sleep over their rights. We are well satisfied, on principle, that where judgment liens are equal, one judgment creditor can get priority over another by his superior vigilance and watchfulness. The execution issued on the judgment rendered in favor of Brown was fairly entitled to priority, as it was first placed in the hands of the officer, and the levy and sale were made under it; and the money could not be diverted from it and applied to others subsequently issued, and under which there was neither levy nor sale."

In *Bliss v. Watkins*, 16 Ala. 229, decided in 1849, the supreme court of Alabama said: "It seems to be well settled in New York, where judgments constitute a lien upon land, that where two judgments are rendered on the same day, although neither judgment creditor has the preference as a lien, yet, if one of the creditors first take out execution, and proceed to levy and sell, his execution must be first satisfied, by reason of his superior diligence, although the other creditor put his execution in the hands of the sheriff before the sale. *Waterman v. Haskin* and *Adams v. Dyer*, supra.

Where the liens created by the judgments are equal, the money should be awarded to the creditor who first began execution of his judgment. There is nothing unreasonable in this, and it is but carrying out the spirit of our statute in respect to the subject of lien. It is giving the priority to the most vigilant, as is done by the statute in respect to personal property, which gives the preference to the party who first places his *fi. fa.* in the sheriff's hands, although it may have issued upon a junior judgment."

In Iowa it is held that, where judgments are entered on the same day, and become liens against the real estate of the judgment debtor, the judgment creditor who first issues execution and sells obtains a preference (*Lippencott v. Wilson*, 40 Iowa, 425); but the courts of that state make a L.R.A.1916D.

distinction as to after-acquired property. It is held that under such circumstances a different rule prevails, and that the issuance of execution and the sale do not give a preference. No reason for the distinction is stated, except that the two cases do not come within the same rule. *Kisterson v. Tate*, 94 Iowa, 665, 58 Am. St. Rep. 419, 63 N. W. 350. I am unable to perceive any difference in principle.

This review of the development of the rule asserted in the cases of *Adams v. Dyer* and *Waterman v. Haskin*, supra, indicates that it is rather firmly embedded in our general jurisprudence. On what ground is it proposed to overrule these time-honored authorities, the doctrine of which appears now for the first time to be questioned in this state? As I understand the prevailing opinion, it is simply because the judgments under consideration in the *Adams* and *Waterman* Cases were docketed prior to the enactment of chapter 50 of the Revised Laws of 1813, which contained the first express declaration that a judgment should be a lien on land. It is perfectly clear, however, that the judgments considered in these two cases were liens upon the lands of the judgment debtor. In the first place, in each case the court said so. I quote: "We must then consider the judgments equal as to the date of the lien," etc. *Adams v. Dyer*, supra. "By the 2d section of the 'Act Concerning Judgments and Executions,' passed the 31st of March, 1801, a judgment lien attaches upon land from the time of filing the record of judgment." *Waterman v. Haskin*, supra.

While it is quite true that under the statutes then in force judgments were not expressly declared to be liens upon real estate, those statutes necessarily implied that such was the law. The phraseology of the act of 1801 referred to in the *Waterman* Case was substantially the same as that of the act of 1787 considered by the circuit court of the United States in *Koning v. Bayard*, 2 Paine, 251, Fed. Cas. No. 7,924, decided by Mr. Justice Smith Thompson, sitting as circuit justice in 1829; and he held that the declaration in the act of 1787, that no judgment should affect land but from the time of the filing of the roll and the docketing of the judgment, necessarily implied that upon that being done the judgment should affect the land, and was equivalent to saying that it should then become a lien.

If a judgment actually is a lien upon land, I cannot see what difference it can possibly make whether it has become a lien by reason of an express statutory declaration to that effect, or by reason of necessary implication from other language used

in the statute. If, as was virtually held in the case last cited, the declaration in the Revised Laws of 1813 merely expressed what had been necessarily implied before, I cannot comprehend how the enactment of the later statute can be regarded as furnishing any basis for the distinction made in the prevailing opinion.

One of the main purposes for which this court exists is to preserve the harmony and consistency of judicial decisions, finally determining the rights of litigants; and this can only be done by maintaining a due regard for precedents. If we overrule these two precedents, it seems to me that we warn counsel and the lower courts that they

can no longer rely on authority to guide the former in giving advice or the latter in rendering decisions. If the lapse of time or later statutory enactments had brought about changed conditions which required us to take a different view from that taken by the old supreme court, I might agree with my brethren; but I can discover no change which affects the principle on which those cases were decided.

For these reasons, I dissent and vote for the affirmance of the final order appealed from without modification.

Cuddeback and Pound, JJ., concur with Willard Bartlett, Ch. J.

Annotation—May priority between judgments, the liens of which have attached simultaneously, be obtained by priority of execution proceedings.

The liens of judgments rendered against a common debtor may attach equally to the debtor's real estate by reason of the judgments having been rendered on the same day, at the same term, or by reason of becoming liens upon the after-acquired property of the judgment debtor.¹ In jurisdictions in which judgment liens thus attach equally to the judgment debtor's property, the question arises whether priority can be obtained by one of the judgment creditors who first begins execution proceedings. Until the decision in *HULBERT v.*

HULBERT, ante, 661, the courts were practically uniform in holding that priority could be obtained by one of such judgment creditors who first caused execution to issue and levy to be made upon the debtor's property.² A number of the cases supporting the majority rule relied upon *Adams v. Dyer* and *Waterman v. Haskin*, infra, note 3, cases which, since the decision in *HULBERT v. HULBERT*, are no longer authority. This rule is applied whether the judgment liens are equal because of the judgments having been rendered on the same day,³ at

¹ Judgment liens do not thus become equal liens upon the debtor's property in all jurisdictions. In the case of judgments rendered on the same day, fractions of a day are considered in some jurisdictions. In the case of judgments becoming liens on after-acquired property, the original priority is retained in some jurisdictions, and in others the lien of the judgment is held not to attach to after-acquired property in the absence of execution. On liens on after-acquired property, see note to *Moore v. Jordan*, 42 L.R.A. 209.

It was held proper to inquire into the fraction of a day for the purpose of determining the priority of judgment liens in *Smith v. Ship* (1835) 1 How. (Miss.) 234, a case in which executions on judgments taken by default on the same day were issued on the same day, and levied on the same day, on the property sold, the only difference being that one of the executions was received by the sheriff before the other, and the judgment of this creditor was first entered on the minutes. This court had previously held, however, in a case reported in the same volume, *Burney v. Boyett* (1834) 1 How. (Miss.) 39, that priority was obtained by one of several judgment creditors whose judgments were rendered on the same day, by the issuance of execution L.R.A.1916D.

and sale of the property. In the *Burney Case* nothing is said as to the fraction of a day being considered in determining priority.

² See cases cited in notes 3, 4, and 5.

One of two judgment creditors whose judgments became liens on the same day on the property of a bondsman in replevin for the judgment debtor, who first issues execution and has it levied on the land of the replevin bondsman, obtains a priority over the other judgment creditor. *Lowry v. Reed* (1882) 89 Ind. 442.

That a priority is obtained by proceeding to execution seems to have been the theory of the imperfectly reported case of *Waymire v. Staley* (1828) 3 Ohio, 366, where, in the case of several judgment creditors, the liens of whose judgments had become equal because of a failure to levy execution upon the property of the debtor within twelve months from the rendering of their judgments, one such creditor, who had first put his execution into the sheriff's hand, was held to have thereby obtained a preference to the fund.

³ *Bliss v. Watkins* (1849) 16 Ala. 229 (fi. fas. issued on both judgments on the same day. One was handed to the sheriff and levied upon the debtor's property and sale had thereunder. On the day of sale

the same term,⁴ or by reason of their attaching at the same time upon after-acquired property.⁵

The rule applies also to equitable interests where judgments are liens upon such interests. The party who first

the *fi. fa.* of the other creditor was handed to the sheriff. This delay in handing the *fi. fa.* to the sheriff was a fact considered in holding that the first creditor had obtained a preference).

Hollcraft v. Douglass (1888) 115 Ind. 139, 17 N. E. 275 (no other execution issued); *Wilson v. Baker* (1879) 52 Iowa, 428, 2 N. W. 481 (execution issued and property sold before other judgment creditor proceeded); *Bruce v. Vogel* (1866) 38 Mo. 100 (executions were issued on other judgments before sale, but not till after execution and levy).

In *Burney v. Boyett* (1834) 1 How. (Miss.) 39, three judgments were rendered on the same day against the same defendant. An execution was issued to the sheriff, and by him levied upon a negro girl, on one of the judgments; three days thereafter an execution was issued and levied upon the same girl upon a second judgment; thereafter an execution was issued on the third judgment and levied upon other property of the judgment debtor; the slave was sold under the first two executions levied, and the last of the judgment creditors to levy an execution claimed the proceeds; this was denied him, the court stating that his execution was not instrumental in producing the money by the sale of the slave, and he could not claim to have it appropriated to the payment of his demand.

An opinion in accord with this rule is expressed in *Rockhill v. Hanna* (1853) 15 How. (U. S.) 189, 14 L. ed. 656, where judgment creditors who had issued executions which had been levied on the debtor's land were held to have obtained a priority over other judgment creditors whose judgments were rendered on the same day. But, as stated in *HULBERT v. HULBERT*, ante, 661, the decision was not rested on this point alone, but on the additional fact that the complaining creditor had elected another remedy which operated as an extinguishment of his judgment, so that it was not on an equality with that of the other judgment.

Adams v. Dyer (1811) 8 Johns. (N. Y.) 347, 5 Am. Dec. 344, and *Waterman v. Haskin* (1814) 11 Johns. (N. Y.) 228, holding in accord with these cases, can no longer be considered the law in New York, since the decision in *HULBERT v. HULBERT*. These cases are sufficiently discussed in the opinion in *HULBERT v. HULBERT*.

In holding that judgments entered on the same day obtained no priority because of the actual hour of the day on which they were entered, but that all must be considered equal, it is stated, in *Metzler v. Kilgore* (1831) 3 Penn. & W. (Pa.) 249, 23 Am. Dec. 76, that "it has never been thought material in Pennsylvania to inquire how or on whose judgment the money has been made," and the decision in *Adams v. Dyer* L.R.A.1916D.

is disapproved. It is not clear that the property was sold under an execution issued on one of the judgments, so that it does not appear that the question under annotation was directly raised. See a discussion of the general doctrine prevailing in Pennsylvania as to liens on after-acquired lands, in the note to *Moore v. Jordan*, 42 L.R.A. 212.

So, in the case of judgment liens created at the same time and by the same decree, the creditor who enforces his lien by the issuance and levy of an execution obtains a preference. *Shirley v. Brown* (1883) 80 Mo. 244. In this case the execution had been issued and levied, and sale had taken place, before any steps were taken by the other judgment creditor to enforce his lien.

⁴*Smith v. Lind* (1862) 29 Ill. 24. The judgment of the creditor who obtained a preference was rendered and docketed first in point of time; an execution was issued and immediately placed in the hands of the sheriff; on the subsequent day the judgment of the creditor who was contending for a pro rata distribution was rendered and execution issued and put in the hands of the sheriff. It seems no property was levied upon at the time, but subsequently the first judgment creditor discovered real estate of the judgment debtor and directed a levy to be made upon it; this was done and the property afterwards sold to the judgment creditor. The statute in this case made a judgment a lien from the time it was entered on the judgment docket of the court, but contained a proviso that, as between judgment creditors and other parties claiming under the lien of judgments rendered at the same term of the court, or on the same day in vacation, there should be no preference or priority of the lien of one judgment over that of another.

Bradley v. Heffernan (1900) 156 Mo. 653, 57 S. W. 763. The execution was issued, levy made, and also the property sold before the other judgment creditor began proceedings to enforce his judgment.

In *Gay v. Rainey* (1878) 89 Ill. 221, 31 Am. Rep. 76, this point does not seem to have received special consideration. It is stated in that case that creditors whose judgments were rendered at the same term of court were entitled under the statute to share pro rata in the proceeds arising from the sale by the sheriff, no matter on which judgment and execution the sale was actually made, all the executions being at the time in the sheriff's hands. It appears that, on the first execution having been returned no property found, one of the creditors was diligent in ordering an alias *fi. fa.* to issue, while the other judgment holders delayed some time. Beyond the above statement there is nothing contained in the opinion on this point.

⁵*Michaels v. Boyd* (1848) 1 Ind. 259 (creditor whose judgment was obtained last

causes an execution to issue and levy to be made obtains priority, as in case of a bond for title⁶ held by the judgment debtor, or an equity of redemption.⁷ Equitable interests are more frequently reached by creditors in equitable actions, a subject not considered in this note, which is confined to priority as between creditors who reach the debtor's property by execution and levy.

The supreme court of Iowa makes a distinction between judgment liens which are equal because of having been rendered on the same day, and those which are equal because attaching to after-acquired property, holding in the former case that priority may be obtained by the issuance of execution and levy upon the property of the debtor,⁸ but in the latter case that no priority can be obtained.⁹

The reason most commonly advanced

in point of time first issued execution; after a levy on this, execution was issued on the other judgment and levy made. By statute a judgment was made a lien from the time of its rendition; *Elston v. Castor* (1884) 101 Ind. 426, 51 Am. Rep. 754, holding that the issuance and levy of the lien upon one of the judgments and a sale thereunder destroy the equality of the lien, so that the remaining judgment creditors occupy the position of junior lien holders. The execution under which the property was sold was the only one issued and levied.

One of two judgment creditors obtained a priority which was sustained in *Chapron v. Cassady* (1842) 3 Humph. (Tenn.) 661, by taking an assignment from the judgment debtor of his equitable interest in after-acquired land, against another judgment creditor who had failed to comply with the statutory requirements as to perfecting his judgments.

⁶ *Lippencott v. Wilson* (1875) 40 Iowa, 425. Before the premises were sold the other judgment creditors had begun an equitable action to subject the real estate which was held by the judgment debtor under a bond for title, the legal title being in his vendor, to the payment of the judgments; the creditors who thus began the equitable action claimed to be entitled to the preference because of the superior diligence in commencing an action in equity. It was held, however, that the equitable interest of the debtor was subject to execution and levy, and the other creditors, who had taken this action previously to the commencement of the equitable action, were entitled to priority.

⁷ This rule was applied in *Cook v. Dillon* (1859) 9 Iowa, 407, 74 Am. Dec. 354, where the judgment debtor, previously to the judgments, however, had conveyed his land in trust to secure a debt, and the liens of the judgments were held to attach L.R.A.1916D.

in support of the majority rule is diligence on the part of the creditor in pursuing his remedies.¹⁰

It is the theory of some cases that the judgment creditor has merely a general lien with power to make it effectual by execution and levy upon specific property; that the judgment creditor who first pursues the remedy and exercises the power of making his lien effectual by execution and levy thereby makes his consummated lien superior, which until then was but equal.¹¹

In some cases a search has been required to discover the debtor's property. In such a case the rule finds additional support. The creditor who has expended time and money in searching out property is entitled to profit by his effort.¹²

Thus, giving priority to the creditor who proceeds with execution does not conflict with the rulings that a judgment

to the proceeds of the land in the hands of the trustee after a sale in accordance with the trust deed. The court held that it devolved upon the judgment creditors to take some step to have the fund appropriated to the payment of their judgments; that the trustee was under no duty to make search and inquiry whether there were any liens upon the money in his hands; that it devolved upon the parties claiming to hold such liens to give notice of them and to enforce them at the earliest practicable moment, and that, accordingly, a judgment creditor who had issued execution and had it levied upon the land held by the trustee, and another who had issued execution and, on the day of the sale of the land by the trustee, had attached the trustee as garnishee, were entitled to a preference over another creditor who became a purchaser of the land, but failed to take any action on his judgment. It seems that the priority was made to depend upon the attachment, and not on the execution and levy upon the land. At any rate, no point is made of the fact that one of the executions was not levied upon the land.

See *Chapron v. Cassady*, *supra*, note 5.

⁸ See Iowa cases cited in note 3, *supra*.

⁹ *Kisterson v. Tate* (1895) 94 Iowa, 665, 58 Am. St. Rep. 419, 63 N. W. 350. The opinion in this case is very brief, and an earlier Iowa case having to do with another matter is relied upon as authority.

¹⁰ *Cook v. Dillon* (Iowa) *supra*. It is stated that the law favors the diligent creditor, and will suffer no interference by one who has slept on his rights for the purpose of taking from him the fruits of his superior diligence. See the facts in this case, *supra*, note 7.

¹¹ *Elston v. Castor* (1884) 101 Ind. 426, 51 Am. Rep. 754.

¹² *Bruce v. Vogel* (1866) 38 Mo. 100.

Smith v. Lind (1862) 29 Ill. 24. The court concludes by stating that "on prin-

lien which is superior by seniority cannot be overthrown by a junior judgment lien. There the preference is completed by seniority. In case of equal liens there is no seniority, and the preference is brought about by the superior diligence

in following up the steps of the law, and, in a sense, appropriating the property by the levy of an execution.¹³

The reasoning in support of not giving priority to the creditor is set forth in *HULBERT v. HULBERT*, ante, 661.

ciple and authority we are satisfied where liens of judgments are equal, one judgment creditor can get a priority over another by superior vigilance in executing his judg-

ment, and that vigilance was fully shown by the plaintiff in this case."

¹³ *Elston v. Castor* (Ind.) supra.

W. A. E.

OKLAHOMA SUPREME COURT.

MARK READER, Plff. in Err.,
v.

FRANK FARRISS.

(— Okla. —, 153 Pac. 678.)

Quo warranto — claimant out of possession.

1. Quo warranto, or a proceeding in the nature thereof, lies only against one who is in the possession and user of the office, and not against one who merely lays claim to the office, or who has never been admitted thereto.

For other cases, see Quo Warranto, II. c, in Dig. 1-52 N. S.

Pleading — supplemental petition — subsequently occurring facts.

2. If, on the facts stated in the petition, no cause of action exists against the defendant, and no relief can be granted against him on those facts, subsequently occurring facts cannot be made a part of the plaintiff's case, and he will not be permitted to file a supplemental petition alleging such additional facts to enable him to maintain the action which he has instituted, as the office of a supplemental complaint is not to supply facts which, being necessary to the maintenance of the action, have been omitted from the original complaint, but is to bring into the record new facts which will enlarge or change the kind of relief to which the plaintiff is entitled, and enable the court to render a final judgment upon the facts existing at the time of its rendition.

For other cases, see Pleading, I. o, in Dig. 1-52 N. S.

Same — curing defective action.

3. If the cause of action which it was sought to enforce by the original petition did not exist at the time when that pleading was filed, it cannot be created, cured, or aided by matters subsequently occurring and set up in a supplemental petition.

For other cases, see Pleading, I. o, in Dig. 1-52 N. S.

(Sharp, J., dissents.)

(December 7, 1915.)

Headnotes by KANE, Ch. J.
L.R.A.1916D

ERROR to the District Court of McClain County to review a judgment in plaintiff's favor in a proceeding to try title to the office of county sheriff. Reversed.

The facts are stated in the opinion.

Messrs. Nagle & Reynolds, J. M. Bishop, and C. G. Moore, for plaintiff in error:

An action in the nature of quo warranto cannot be brought except against a person in actual possession of the office or franchise.

Rex v. Whitwell, 5 T. R. 85; 19 Am. & Eng. Enc. Law, 672; 17 Enc. Pl. & Pr., p. 407.

It was error to refuse defendant's written demand for a jury trial.

Bradford v. Territory, 1 Okla. 366, 34 Pac. 66; *State ex rel. West v. Cobb*, 24 Okla. 662, 24 L.R.A.(N.S.) 639, 104 Pac. 361.

Messrs. Dorset Carter and Franklin & Mauldin for defendant in error.

Kane, Ch. J., delivered the opinion of the court:

This was an action in the nature of quo warranto, commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, for the purpose of trying the title to the office of sheriff of McClain county. The parties hereafter will be designated "plaintiff" and "defendant," respectively, as they appeared below.

It seems that the parties were rival candidates for the office of sheriff at the election held in November, 1914, and that the certificate of election was issued to the defendant, who was the Socialist candidate: whereupon this quo warranto proceeding was instituted by the plaintiff, who was the Democratic candidate, prior to the time either of the candidates was entitled to or had taken possession of the office. After a motion to strike the petition on the ground that it was prematurely filed was overruled, the defendant continued to save the question raised by his motion to strike, but

Note. — As to whether original petition or complaint which states no cause of action may be aided by supplemental pleading, see annotation following this case, post, 676.

finally issues, both of law and fact, were joined, and the cause was duly set for trial at a date subsequent to that on which the defendant had taken the oath of office and entered upon the duties of his office as sheriff. Upon the cause being called for trial, the defendant again objected to any further action therein, upon the ground that it was prematurely commenced, whereupon the court, without requiring any previous notice to the defendant or making any terms as to costs, granted leave to file instant a supplemental petition alleging, in effect, that, subsequent to filing his original petition, the defendant entered into actual possession of the office, and is now performing the duties thereof. The trial court also entered an order requiring the defendant to file his answer to the supplemental petition within twenty-four hours. At the expiration of the twenty-four-hour period the court overruled a motion for a continuance filed by the defendant, and, upon his refusal to answer the supplemental petition, ordered that his answer to the supplemental petition, to all of which the defendant objected and excepted. Upon the trial to the court which immediately followed there was judgment to the effect that neither party was entitled to the office of sheriff, and the same was declared vacant, whereupon both parties instituted separate proceedings in error for the purpose of reviewing the action of the trial court.

In view of the conclusion reached by the court, the foregoing statement is sufficient to present all questions necessary for a review. The plaintiff in error contends: (1) That the petition was prematurely filed; (2) that, inasmuch as no cause of action existed in favor of the plaintiff, and no relief could be granted on the facts stated in the original petition, the subsequently occurring facts could not have been material to the plaintiff's case, and therefore it was error to permit him to file a supplemental petition setting up such additional facts to enable him to maintain his action. We are of the opinion that both these contentions are well founded. In a very early case *Rex v. Whitwell*, 5 T. R. 85, Mr. Justice Buller said: "No instance has been produced in which the court have granted an information in nature of quo warranto, where the party against whom it was applied for has not been in the actual possession of the office."

The same may be said to-day. From that time to this an unbroken line of authorities, both in England and this country, are to the same effect.

The prevailing modern rule is stated in *L.R.A.*1916D.

17 Enc. Pl. & Pr. 407, where the authorities are collected, as follows: "Quo warranto, or a proceeding in the nature thereof, lies only against one who is in the possession and user of the office, and not against one who merely lays claim to the office, or who has never been admitted thereto."

This proposition, however, is not seriously disputed by counsel for the plaintiff, but they take their stand more firmly upon the second, and insist that, if the original petition was immaterially filed, then that matter was cured by the filing of the plaintiff's supplemental petition, which, they say, was pursuant to § 4795, Rev. Laws 1910, which provides: "Either party may be allowed, on notice, and on such terms, as to costs, as the court may prescribe, to file a supplemental petition, answer or reply, alleging facts material to the case, occurring after the former petition, answer or reply."

In support of this position they cite several Kansas and one Iowa case, which states, it seems, have similar statutes. *Williams v. Moorehead*, 33 Kan. 609, 7 Pac. 226; *Simpson v. Vose*, 31 Kan. 227, 1 Pac. 601; *Flint v. Dulany*, 37 Kan. 332, 15 Pac. 208; *Gribben v. Clement*, 141 Iowa, 144, 133 Am. St. Rep. 157, 119 N. W. 596. We have examined these cases, and are of the opinion that in the Kansas cases cited the statute is properly construed and applied, but we do not believe the cases are in point. There seems to be some confusion in the Iowa cases touching the question. If the case from that state, cited by counsel for the defendant, can be said to be an authority supporting his contention, it is difficult to reconcile it with *Dennison v. Soper*, 33 Iowa, 183, and *Zalesky v. Home Ins. Co.* 102 Iowa, 613, 71 N. W. 566, which seem to support a contrary view.

Undoubtedly, the general rule governing the right to file supplemental pleadings is as follows: "If, on the facts stated in the complaint, no cause of action exists against the defendant, and no relief can be granted against him on those facts, subsequently occurring facts cannot be made a part of the plaintiff's case, and he will not be permitted to file a supplemental complaint alleging such additional facts to enable him to maintain the action which he has instituted, as the office of a supplemental complaint is not to supply facts which, being necessary to the maintenance of the action, have been omitted from the original complaint, but is to bring into the record new facts which will enlarge or change the kind of relief to which the plaintiff is entitled, and enable the court to render a final

judgment upon the facts existing at the time of its rendition."

This text, which is taken from 21 Enc. Pl. & Pr. 18, is supported by a great array of authorities, among which we find the case of *Rogers v. Hodgson*, 46 Kan. 276, 26 Pac. 732. This was an action to recover upon a promissory note which was given to secure the same. By a supplemental petition the plaintiff undertook to allege such defaults as would entitle him to recover 12 per cent interest from the date of the mortgage, instead of the 7 per cent rate stipulated therein, which the trial court refused to permit him to file. This ruling was not disturbed on appeal; the supreme court holding that the record did not disclose any abuse of discretion on the part of the trial court. Mr. Justice Johnston, who delivered the opinion for the court, stated, however, that the trial court would have been warranted in allowing the supplemental petition to be filed, alleging additional defaults which would have entitled the plaintiff to recover a greater amount, but he also further says that "if there had been no default before the commencement of the action, the plaintiff would hardly be entitled to enlarge his action by a supplemental petition setting forth subsequent defaults or grounds of forfeiture which did not exist at the commencement of the suit."

The quoted portion of the opinion supports the text. This was the prevailing rule in Kansas for a long time prior to the time we adopted our statute governing supplemental pleadings from that state. In another somewhat analogous Kansas case, *Brown v. Galena Min. & Smelting Co.* 32 Kan. 528, 4 Pac. 1013, it was held: "The pleadings all relate to the time of the commencement of the suit, the same as if filed at that time, and the rights of the parties are to be determined as they existed when suit was commenced. An amended petition in a suit stands in the place of and as a substitute for the original petition, which is superseded by it, and must be based on the facts and causes of action as they existed at the time the original petition was filed; and, if a right of action did not exist when the original petition was filed, one cannot be created by filing an amended petition."

It seems perfectly reasonable and logical to us that, if the cause of action which it was sought to enforce by the original petition did not exist at the time when that pleading was filed, it cannot be created, cured, or aided by matters subsequently occurring and set up in a supplemental petition. By the terms of the statute the facts alleged must be "material to the case," L.R.A.1916D.

clearly indicating that they must relate to a cause of action which had previously accrued, and be pertinent to the rights or liabilities of the parties connected with that cause of action. A few cases in addition to those hereinbefore cited, holding to this effect, are: *Continental Constr. & Improv. Co. v. Vinal*, 48 Hun, 620, 1 N. Y. Supp. 200 (Sup. Ct. Gen. T.); *Bostwick v. Menck*, 4 Daly, 68; *Farmers' Loan & T. Co. v. United Lines Teleg. Co.* 47 Hun, 315; *Mitchell v. Taylor*, 27 Or. 377, 41 Pac. 119; *Meyer v. Berlandi*, 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513; *Smith v. McGaughey*, 13 Tex. 464; *Orton v. Noonan*, 29 Wis. 541; *Hill v. Den*, 121 Cal. 42, 53 Pac. 642; *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4.

Probably, if the trial court had required the plaintiff to give the notice and make reasonable terms, as required by statute, as to costs, and allowed the defendant such a reasonable time to answer the supplemental petition and get ready for trial as to make it appear that his action did not result in a miscarriage of justice, or deprive the defendant of any substantial constitutional or statutory right, the court would be justified in applying the harmless error statute (Rev. Laws 1910, § 6005). But such is not the case, and no useful purpose would be subserved by further speculating on what might have been.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded, with directions to take such further proceedings therein, not inconsistent with this opinion, as it may deem proper.

All the Justice concur, except Sharp, J., who delivers an opinion expressing his views.

Sharp, J., dissenting:

With the rule that quo warranto, or a proceeding in the nature thereof, lies only against one who is in the possession and user of the office, and not against one who merely lays claim to the office, or who has never been admitted thereto, I have no disposition to take issue. By § 4919, Rev. Laws 1910, the writ of quo warranto and proceedings by information in the nature of quo warranto are abolished; but it is there provided that the remedies theretofore obtainable in those forms may be had by a civil action, and, as held in *Newhouse v. Alexander*, 27 Okla. 46, 30 L.R.A.(N.S.) 602, 110 Pac. 1121, Ann. Cas. 1912B, 674, permits a private person to contest with another private person the right or title to a public office. The remedy afforded being that of a civil action, under the statute the pleadings in such an action are gov-

earned in general by the rules applicable to pleadings in ordinary civil actions. 32 Cyc. 1447. Statutes relating to amendments in civil suits are generally held applicable to quo warranto, or to a proceeding in the nature thereof. *Com. v. Commercial Bank*, 28 Pa. 386; *State ex rel. Ballard v. Greene*, 87 Vt. 94, 88 Atl. 515; *State ex rel. Atty. Gen. v. Gleason*, 12 Fla. 190; *West End v. State*, 138 Ala. 295, 36 So. 423; *Hinze v. People*, 92 Ill. 406; *Kelly v. State*, 79 Miss. 168, 30 So. 49; *Gunton v. Ingle*, 4 Cranch, C. C. 438, Fed. Cas. No. 5,870; *High Extr. Legal Rem. § 737*; *Spelling, Inj. & Extr. Rem.*, § 1856.

The right of the plaintiff to file an amended petition in a proceeding in the nature of quo warranto, for the same reason, in proper cases, would afford the right to file supplemental pleadings, as authorized by § 4795, Rev. Laws 1910. The only material change found in the supplemental petition from that contained in the original petition is the allegation that on the 4th day of January, 1915, the defendant qualified and took possession of the office of sheriff, and was continuing to exercise the authority of that office conferred upon him by law. Defendant's entrance into office was pursuant to the certificate of election issued to him by the county election board of McClain county November 6, 1914. The statute, as we construe it, makes the filing of supplemental pleadings a matter of discretion with the trial court. This discretion was exercised in favor of the plaintiff, by permitting him to file the supplemental petition. In *Smith v. Smith*, 22 Kan. 699, in an opinion by Judge Brewer, the application for leave to file a supplemental petition was denied, and the question presented was whether reversible error had been committed. It is said in the opinion: "We do not understand that a party may commence suit before a cause of action accrues, and then, after it accrues, as a matter of right, file a supplemental petition alleging the facts showing this. A party may not sue on a note two months before it matures, and then upon maturity demand, as a right, the filing of a supplemental petition showing the maturity. We do not mean that a court may not allow this, or that it may never be done; but it is not a matter of right."

In *State ex rel. Dawson v. Chicago, B. & Q. R. Co.* 85 Kan. 649, 118 Pac. 872, it was urged that the action had been prematurely brought, for the reason that the defendants had eighty-seven days remaining in which to comply with the order in question, and that hence it was impossible for them to have already failed to obey. It was held that the allegations of the peti-

tion fairly showed a present determination not to perform, and that the defendants expressed no willingness to obey the order when sued, but contested its validity, and, under the circumstances, the action was not premature. It was said that the ninety days allowed by the statute for compliance with the order of the board of railroad commissioners "has now long since passed, and the defendants still refuse performance, and undertake to justify their course by the contention that the order is invalid."

And, further, that "a peremptory writ commanding such compliance at this time ought not to be withheld on the ground that, when the matter was first brought to the attention of the court, it was still possible for the defendants to obey the order within the statutory period. Even an ordinary civil action brought before the plaintiff's right has fully matured may be proceeded with, in the discretion of the court, upon the filing of a supplemental pleading (*Smith v. Smith*, 22 Kan. 699, 703; *King v. Hyatt*, 51 Kan. 504, 37 Am. St. Rep. 304, 32 Pac. 1105). And an action for damages for breach of contract may be maintained before the arrival of the time for its performance, where its obligation is denied (*Caley v. Mills*, 79 Kan. 418, 100 Pac. 69)."

In *Brown v. Stuart*, 90 Kan. 302, 133 Pac. 725, it was held to be wholly within the sound discretion of the court to permit the filing of a supplemental petition; while in *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579, citing *Howard v. Johnston*, 82 N. Y. 271, it was said that the provision of the Code allowing supplemental pleadings authorizes the court to permit a defendant to set up a set-off or counterclaim based upon facts arising since the filing of the original petition. After citing the statute of that state permitting the filing of supplemental pleadings, the court, in *Half-moon Bridge Co. v. Canal Board*, 213 N. Y. 160, 107 N. E. 344, held that the trial court had a discretion to permit or refuse a supplemental pleading, but that such discretion must be exercised reasonably, and not capriciously or wilfully. In *Jensen v. Dorr*, 159 Cal. 742, 116 Pac. 553, it was held to be an abuse of discretion to refuse leave to defendant to set up by supplemental answer the bankruptcy discharge obtained subsequent to the commencement of the action as a bar to any personal judgment, where proper application was made therefor within a reasonable time. Other cases bearing upon the question at issue are: *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 179 Ind. 429, 45 L.R.A.(N.S.) 796, 101 N. E. 473; *Milliken v. McGarragh*, 164 App. Div. 110, 149 N. Y. Supp. 484; *Henry*

v. Montezuma Water & Land Co. 55 Colo. 182, 133 Pac. 747; Gribben v. Clement, 141 Iowa, 144, 133 Am. St. Rep. 157, 119 N. W. 596.

The statute authorizing the filing of supplemental petitions has been construed and given effect by this court in *Wade v. Gould*, 8 Okla. 690, 59 Pac. 11; *Reynolds v. Hill*, 28 Okla. 533, 114 Pac. 1108; *Prince v. Gosnell*, — Okla. —, 149 Pac. 1162. Our statute permitting amendments is very broad, and that permitting the filing of supplemental pleadings, it seems, vests in the trial court a full discretion in the matter of filing a supplemental petition, and leaves to the court the authority to permit the same to be done, upon such terms as to costs as the court may prescribe. In the case at bar the supplemental petition brought into the case no fact not known to the defendant. Indeed, at every stage of the proceedings, he had urged the precise objection that was met by the supplemental pleading. The trial was begun on March 25th, or almost three months after defendant had qualified and assumed the duties of the office. The court had already acquired jurisdiction of the action, though the original petition was defective. There was no change of parties, the subject-matter remained the same, and the object of the proceedings was the same. *State ex rel. Wood v. Baker*, 38 Wis. 71; *State ex rel. Rose v. Job*, 205 Mo. 1, 103 S. W. 493; *Hunnicut v. State*, 75 Tex. 233, 12 S. W. 106.

I believe the majority opinion of this court is in conflict with both the spirit and letter of § 6005, Rev. Laws 1910; for it certainly cannot be said that, by reason of the action of the trial court in permitting the supplemental petition to be filed, a miscarriage of justice resulted, or that in doing so the trial court violated a constitutional or statutory right of the defendant. This statute, and § 4791, providing that errors or defects in the pleadings or proceedings, not affecting the substantial rights of the adverse party, should

furnish no grounds for reversal on account of such error, were intended to prevent the reversal of judgments upon mere technicalities, and to give regard to the merits of a controversy. The purpose of the former provision of the statute is recognized by the majority opinion, but it is said, in effect, that because the court refused to allow the defendant a reasonable time to answer the supplemental petition, and to prepare for trial, the court would not be justified in applying the statute. That the court may or may not have committed an error in ruling the defendant to answer on the following day presents another and different assignment of error from that under consideration. The point I urge is that, upon the record, no error or abuse of discretion was committed by the trial court in permitting the filing of the supplemental petition.

The opinion takes no account of the former decision of the court in *Lewis v. Bandy*, — Okla. —, 144 Pac. 624, where it is said in the syllabus: "Where the original petition alleges an intent upon the part of defendant to usurp the duties and functions of a particular office, it is not error for the court to permit an amendment to allege that such usurpation had, in fact, occurred."

The statement of the case is somewhat involved, though it appears that the action was begun November 20, 1912, and we may fairly assume from the statement in the syllabus and from the law fixing the time that the term of office of county commissioners shall begin that the "amendment" was filed after the defendant had entered upon the discharge of the duties of his office. In such circumstances a supplemental, and not an amended, petition, would have been the proper pleading, though the point does not appear to have been made.

I am, for the reasons stated, unable to concur in the opinion of the court.

Annotation—May original petition or complaint which states no cause of action be aided by supplemental pleading.

For effect upon right of foreign corporation to maintain suit, of compliance with local law after suit is instituted, see the notes to *National Fertilizer Co. v. Fall River Five Cents Sav. Bank*, 14 L.R.A.(N.S.) 561, and *Amalgamated Zinc & Lead Co. v. Bay State Zinc Min. Co.* 23 L.R.A.(N.S.) 492; and also the case of *Shipman, D. R. & Co. v. Portland Constr. Co.* (1913) 64 Or. 1, 128 Pac. 989.
L.R.A.1916D.

The rule.

It is a general principle that an original petition or complaint which states no cause of action cannot be aided by supplemental pleading.

Eng.—*Godfrey v. Tucker* (1863) 33 Beav. 280, 33 L. J. Ch. N. S. 559, 9 Jur. N. S. 1188, 9 L. T. N. S. 359, 12 Week. Rep. 33; *Atty. Gen. v. Avon* (1863) 11 Week. Rep. 1050, 2 New Reports, 564, 9 Jur. N. S. 1117; *Tonkin v. Lethbridge* (1811) G. Cooper, 43.

Fed.—Emerson v. Hubbard (1888) 34 Fed. 327; Putney v. Whitmire (1895) 66 Fed. 385.

Ala.—Hill v. Hill (1846) 10 Ala. 527; Land v. Cowan (1851) 19 Ala. 297 (as stating the rule); Vaughan v. Vaughan (1857) 30 Ala. 329; Planters' & M. Mut. Ins. Co. v. Selma Sav. Bank (1879) 63 Ala. 585; Scheerer v. Agee (1896) 113 Ala. 383, 21 So. 81 (in effect).

Cal.—Wittenbrock v. Bellmer (1880) 57 Cal. 12; Hill v. Den (1898) 121 Cal. 42, 53 Pac. 642; Morse v. Steele (1901) 132 Cal. 456, 64 Pac. 690.

Conn.—Dickerman v. New York, N. H. & H. R. Co. (1899) 72 Conn. 271, 44 Atl. 228.

D. C.—Morrison v. Shuster (1881) 1 Mackey, 190.

Fla.—Neubert v. Massman Bros. (1896) 37 Fla. 91, 19 So. 625.

Ill.—Brownback v. Keister (1906) 220 Ill. 544, 77 N. E. 75.

Ind.—Patten v. Stewart (1865) 24 Ind. 332; Simmons v. Lindley (1886) 108 Ind. 297, 9 N. E. 360; Chapman v. Jones (1897) 149 Ind. 434, 47 N. E. 1065, 49 N. E. 347; Barker v. Prizer (1897) 150 Ind. 4, 48 N. E. 4 (stating the rule).

Kan.—Brown v. Galena Min. & Smelting Co. (1884) 32 Kan. 528, 4 Pac. 1013.

Me.—Birmingham v. Lisan (1885) 77 Me. 494, 1 Atl. 151.

Md.—Bannon v. Comegys (1888) 69 Md. 411, 16 Atl. 129.

Mass.—Nichols v. Rogers (1885) 139 Mass. 146, 29 N. E. 377; Bernard v. Toplitz (1893) 160 Mass. 162, 39 Am. St. Rep. 465, 35 N. E. 673.

Minn.—Meyer v. Berlandi (1888) 39 Minn. 438, 1 L.R.A. 777, 12 Am. St. Rep. 663, 40 N. W. 513.

Miss.—Brown v. Bank of Mississippi (1856) 31 Miss. 454.

N. J.—Edgar v. Clevenger (1835) 3 N. J. Eq. 258.

N. Y.—Haddow v. Lundy (1874) 59 N. Y. 320 (stating the rule); McMahon v. Allen (1855) 12 How. Pr. 39, affirmed in (1856) 3 Abb. Pr. 89; Wattson v. Thibou (1863) 17 Abb. Pr. 184; McCullough v. Colby (1859) 4 Bosw. 603; Muller v. Earle (1874) 5 Jones & S. 388 (as stating the rule); Morange v. Morange (1880) 2 Month. L. Bull. (N. Y.) 30; Halsted v. Halsted (1894) 7 Misc. 23, 27 N. Y. Supp. 408; Berford v. New York Iron Mine (1890) 25 Jones & S. 404, 8 N. Y. Supp. 193; Staunton v. Swann (1886) 10 N. Y. Civ. Proc. Rep. 12; Lafayette Trust Co. v. Peck (1909) 133 App. Div. 370, 117 N. Y. Supp. 336; Continental Constr. & Improv. Co. v. Vinal (1888) 14 N. Y. Civ. Proc. Rep. L.R.A. 1916D.

293, 1 N. Y. Supp. 200; Banigan v. Nyack (1898) 25 App. Div. 150, 49 N. Y. Supp. 199; South Shore Traction Co. v. Brookhaven (1907) 53 Misc. 392, 102 N. Y. Supp. 1074; Tiffany v. Bowerman (1874) 2 Hun, 643; Farmers' Loan & T. Co. v. United Lines Teleg. Co. (1888) 47 Hun, 315.

Okla.—READER v. FARRISS, ante, 672.

Tex.—Bradford v. Hamilton (1851) 7 Tex. 55.

Wash.—Lawrence v. Pederson (1904) 34 Wash. 1, 74 Pac. 1011; Gunby v. Ingram (1910) 57 Wash. 97, 36 L.R.A. (N.S.) 232, 106 Pac. 495; Keeler v. Parks (1913) 72 Wash. 255, 130 Pac. 111.

W. Va.—Straughan v. Hallwood (1887) 30 W. Va. 274, 8 Am. St. Rep. 29, 4 S. E. 394.

Thus, an action prematurely brought cannot be aided by a supplemental complaint. Morse v. Steele (1901) 132 Cal. 456, 64 Pac. 690.

Where it appeared that the plaintiff sued as the assignee of a mortgage from a corporation, the assignment being executed by its president, who had no such authority, it was held that the plaintiff could not succeed on showing a ratification since the commencement of the action, nor file a supplemental complaint for that purpose. Wittenbrock v. Bellmer (1880) 57 Cal. 12.

An action for services as worth so much, where the plaintiff had been placed by the defendant in possession of land which, under the contract for services, he was to receive, cannot be aided by showing that since the commencement of the suit the plaintiff had quit and surrendered the land, as he had no cause of action for the relief demanded when he brought his suit. Hill v. Den (1898) 121 Cal. 42, 53 Pac. 642.

The subsequent dismissal of the injunction suit cannot be set up by a supplemental pleading by plaintiff in an action for damages for wrongful injunction commenced after the injunction had been dissolved, but while the cause was still pending, as he had no right of action till the original cause was disposed of. Brown v. Galena Min. & Smelting Co. (1884) 32 Kan. 528, 4 Pac. 1013, quoted from in READER v. FARRISS.

One having no title at all to the cause of action may not set up by supplemental complaint his acquirement of a title pendente lite. Emerson v. Hubbard (1888) 34 Fed. 327; Bannon v. Comegys (1888) 69 Md. 411, 16 Atl. 129; Staunton v. Swann (1886) 10 N. Y. Civ. Proc. Rep. 12; Bradford v. Hamilton (1851) 7 Tex. 55; Atty.-Gen. v. Avon (1863) 11 Week.

Rep. (Eng.) 1050, 2 New Reports, 564, 9 Jur. N. S. 1117.

In *Atty.-Gen. v. Avon* (1863) 11 Week. Rep. (Eng.) 1050, the court, in holding that the plaintiff, having no title to sue when the bill was filed, could not avail himself of a title afterwards created, said: "The power of adding new matter by amendment was given by Stat. 15 & 16 Vict. chap. 86, only in those cases where a supplemental bill could have been filed under the old practice; but a supplemental bill was the continuation, not the commencement, of a suit, and it was contrary to the practice of the court to allow a plaintiff to seek, either by amendment or supplemental bill, relief to which he was not entitled at the time of the filing of the original bill."

One claiming to redeem a mortgage without title may not show by supplemental bill that he has bought in the title since filing the original bill. *Tonkin v. Lethbridge* (1811) G. Cooper (Eng.) 43 (this case is reported with great obscurity; but Story on Equity Pleading, § 339, and other authorities, adopt this construction of it).

In *Evans v. Bagshaw* (1869) L. R. 8 Eq. (Eng.) 469, it was held that a reversioner not in possession cannot bring partition, nor aid his bill by alleging other title acquired pendente lite.

In *Pilkington v. Wignall* (1817) 2 Madd. Ch. (Eng.) 240, it was held that the plaintiff, who filed a bill to redeem from a mortgage, having no title to do it, could not show by amended bill that he had acquired title since the filing of the original bill (but it is not stated what the result would have been on a supplemental bill).

The plaintiff suing for infringement of patents will not be permitted by supplemental bill to set up an assignment of claims for infringement which he did not own at the time of bringing the action. *Emerson v. Hubbard* (1888) 34 Fed. 327.

But a partial title may be strengthened pendente lite and set up by supplemental bill. See in illustration, *Reeve v. North Carolina Land & Timber Co.* (1905) 72 C. C. A. 287, 141 Fed. 821, certiorari denied in (1906) 203 U. S. 588, 51 L. ed. 329, 27 Sup. Ct. Rep. 776; *Jaques v. Hall* (1855) 3 Gray (Mass.) 194; *Lowry v. Harris* (1867) 12 Minn. 255, Gil. 166; *Mutter v. Chauvel* (1828) 5 Russ. Ch. (Eng.) 42.

Where complainant had an imperfect but inchoate title, and, after bringing the suit, simply perfected it by obtaining a valid sheriff's deed in place of an invalid one "which attempted to convey L.R.A.1916D.

the same title," it was proper to bring this in by supplemental bill. *Reeve v. North Carolina Land & Timber Co.* (1905) 72 C. C. A. 287, 141 Fed. 821, certiorari denied in (1906) 203 U. S. 588, 51 L. ed. 329, 27 Sup. Ct. Rep. 776.

In *Jaques v. Hall* (1855) 3 Gray (Mass.) 194, the court said, in sustaining a supplemental bill where some title was shown in the original bill: "The rule sought to be applied to this case, and one well sustained by authority, is that a bad title, set up in the original bill, cannot be aided by a supplemental bill, setting up a new and distinct title.

. . . It is where the right to maintain the original bill wholly fails that no supplemental bill as to new matter can be filed. But it is not so where the plaintiff has subsequently strengthened an inchoate title, as in *Mutter v. Chauvel* (1828) 5 Russ. Ch. (Eng.) 42."

Jaques v. Hall (Mass.) supra, was followed in *Lowry v. Harris* (1867) 12 Minn. 255, Gil. 166, where, however, the court held that any objection was waived.

In *Mutter v. Chauvel* (Eng.) supra, one claiming under his father's will was permitted by supplemental bill to show a release from his sisters.

It was held in *Humphreys v. Humphreys* (1734) 3 P. W. Wms. (Eng.) 349, that the next of kin suing for the intestate's assets may show by amended bill that she had taken out administration since filing the original bill, where Lord Chancellor Talbot, in overruling the objection that there was an amended, and not a supplemental, bill, said that it was sufficient that the next of kin "had now taken out letters of administration, which, when granted, related to the time of the death of the intestate, like the case where an executor, before his proving the will, brings a bill, yet his subsequent proving the will makes such bill a good one, though the probate be after the filing thereof."

In *Swatzel v. Arnold* (1869) Woolw. 383, Fed. Cas. No. 13,682, it was held that an administrator in another jurisdiction, who had brought an action to foreclose a mortgage, might ask leave to amend, and, after this had been granted, might procure letters of administration in the jurisdiction, as the defect was not radical, he had an interest in the matter, the payment to him would have been a good payment, but the better practice would have been for him to have applied by supplemental bill.

Chancellor Walworth expressed the view that a foreign executor ought to be allowed to show that, since filing a bill,

he had taken out local letters, in *Buck v. Buck* (1844) 11 Paige (N. Y.) 170, where he said, in dismissing a bill on another ground: "The taking out letters testamentary here, if the bill was properly filed by the personal representatives of the decedent, was a matter of form merely, and the liberty to make such amendment, and to retain the ne exeat, would be a proper exercise of judicial discretion. Such an amendment is an exception to the general rule that matters arising after the filing of the bill are not the proper subjects of amendment."

But in *Mason v. Hartford, P. & F. R. Co.* (1882) 10 Fed. 334, where administrators brought a bill of revivor and it appeared they had not been appointed administrators in the jurisdiction, they were not allowed to set up that they had taken out local letters since the suit was brought.

In *Austin v. Jones* (1892) 47 Kan. 565, 28 Pac. 621, it seems to have been held that some title in ejectment may be aided by showing, by supplemental petition, perfecting deeds and facts since the commencement of the action.

In *Williams v. Moorehead* (1885) 33 Kan. 609, 7 Pac. 226, the plaintiff, being in possession, but having, it seems, no other valid title, brought an action to quiet title, and was allowed to allege by supplemental petition a title acquired since suit brought.

Where time is not material, the plaintiff in specific performance, not having a title in fee, may show a title gained since the bill was filed; i. e., by act of Parliament passed since. *Wynn v. Morgan* (1802) 7 Ves. Jr. (Eng.) 202.

An action for specific performance may be aided by deed in confirmation of the plaintiff's title, made since the action was brought, where it is proper, in view of all the equities. *National Webster Bank v. Eldridge* (1874) 115 Mass. 424.

In *Reformed Protestant Dutch Church v. Mott* (1838) 7 Paige (N. Y.) 77, 32 Am. Dec. 613, it was held that "it is not a matter of course, however, to dismiss a bill for specific performance merely because the title was not perfect at the commencement of the suit, although that may be a sufficient reason for giving costs to the defendant, if he has not made any unreasonable objection to the title. A specific performance may be decreed if it appears by the report of a master that a perfect title can be made to the purchaser at the time of making such report, unless the purchaser has been materially injured by the delay." L.R.A.1916D.

Contra.

The only cases against the general rule seem to be (1) a few cases considering that it is not controlling in equity (see next subdivision), (2) certain Iowa cases (see "Iowa cases") a case in the Ohio circuit court (see *infra*, "creditors' bills"), and one or two Kansas cases.

The Kansas cases seem in the main to follow the rule, but in *Shaffer v. School Dist.* (1899) 8 Kan. App. 751, 61 Pac. 759, it was held that a petition to recover on school district warrants may be aided by showing by supplemental petition an act of the legislature, passed after action brought, validating the issue of the warrants, which had no prior validity. The court observed that there was an equitable obligation on the school district for the warrants.

And in *King v. Hyatt* (1893) 51 Kan. 504, 37 Am. St. Rep. 304, 32 Pac. 1105, cited in the dissenting opinion in *READER v. FARRIS*, the plaintiff, suing to recover land, was allowed by supplemental petition to set up an after-acquired title, but it does not appear whether or not he had any title at all before acquiring such title.

Equity cases follow the rule.

The general rule applies not only in law, but also in equity. *Godfrey v. Tucker* (1863) 33 Beav. (Eng.) 280, 33 L. J. Ch. N. S. 559, 9 Jur. N. S. 1188, 9 L. T. N. S. 359, 12 Week. Rep. 33; *Atty-Gen. v. Avon* (1863) 11 Week. Rep. (Eng.) 1050, 2 New Reports, 564, 9 Jur. N. S. 1117; *Tonkin v. Lethbridge* (1811) G. Cooper (Eng.) 43; *Emerson v. Hubbard* (1888) 34 Fed. 327; *Putney v. Whitmore* (1895) 66 Fed. 385; *Reeve v. North Carolina Land & Timber Co.* (1905) 72 C. C. A. 287, 141 Fed. 821; *Hill v. Hill* (1846) 10 Ala. 527; *Vaughan v. Vaughan* (1857) 30 Ala. 329; *Planters' & M. Mut. Ins. Co. v. Selma Sav. Bank* (1879) 63 Ala. 585; *Scheerer v. Agee* (1896) 113 Ala. 383, 21 So. 81; *Morrison v. Shuster* (1881) 1 Mackey (D. C.) 190; *Neubert v. Massman Bros.* (1896) 37 Fla. 91, 19 So. 625; *Brownback v. Keister* (1906) 220 Ill. 544, 77 N. E. 75; *Patten v. Stewart* (1865) 24 Ind. 332; *Birmingham v. Lesan* (1885) 77 Me. 494, 1 Atl. 151; *Bernard v. Toplitz* (1893) 160 Mass. 162, 39 Am. St. Rep. 465, 35 N. E. 673; *Nichols v. Rogers* (1885) 139 Mass. 146, 29 N. E. 377; *Brown v. Bank of Mississippi* (1856) 31 Miss. 454; *Edgar v. Clevenger* (1835) 3 N. J. Eq. 258; *Haddow v. Lundy* (1874) 59 N. Y. 320 (as stating the rule); *Banigan v. Nyack* (1898) 25 App. Div. 150, 49 N. Y. Supp. 199; *South Shore Trac-*

tion Co. v. Brookhaven (1907) 53 Misc. 392, 102 N. Y. Supp. 1074; Morange v. Morange (1880) 2 Month. L. Bull. (N. Y.) 30; Halsted v. Halsted (1894) 7 Misc. 23, 27 N. Y. Supp. 408; Gunby v. Ingram (1910) 57 Wash. 97, 36 L.R.A. (N.S.) 232, 106 Pac. 495; Keeler v. Parks (1913) 72 Wash. 255, 130 Pac. 111; Straughan v. Hallwood (1887) 30 W. Va. 274, 8 Am. St. Rep. 29, 4 S. E. 394. See also Ferrier v. Ferrier (1843) 4 Edw. Ch. (N. Y.) 296.

"If the original bill is wholly defective, so that no valid decree could be made thereon, the party cannot, by filing a supplemental bill, founded upon matters which have subsequently taken place, sustain the proceedings originally commenced." Walworth, Chancellor, in Candler v. Pettit (1828) 1 Paige (N. Y.) 168, 19 Am. Dec. 399, where, however, a supplemental bill was held proper.

"We have found no authority that goes so far as to authorize a party who has no cause of action at the time of filing his original bill, to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill." Pinch v. Anthony (1865) 10 Allen (Mass.) 470, 2 Mor. Min. Rep. 593, where the court allowed a supplemental bill.

"If an orator has no case in equity when he brings his original bill, he cannot make one by a supplemental bill setting up a new cause of action." International Paper Co. v. Bellows Falls Canal Co. (1914) — Vt. —, 90 Atl. 943.

In Mellor v. Smither (1902) 52 C. C. A. 64, 114 Fed. 116, the court, in holding a supplemental bill proper, said: "The correct decision of this case turns on the question whether or not the plaintiff, at the time he filed his bill, had a cause of action. If he had no cause of action, then he cannot, by amendment or supplemental bill, introduce a cause of action that accrued thereafter, even though it arose out of the same transaction that was the subject of the original bill."

In New York Secur. & T. Co. v. Lincoln Street R. Co. (1896) 74 Fed. 67, the court, in holding a supplemental bill proper, said: "The question is whether the original bill set forth a substantial cause of action; for it is admitted by counsel for complainant that if the original bill fails to set up a state of facts justifying the relief sought, or, in other words, fails to set up a cause of action then existing, a supplemental bill, based L.R.A.1916D.

upon facts occurring after the filing of the original bill, cannot be sustained.

See also the quotation from Atty-Gen. v. Avon (1863) 11 Week. Rep. (Eng.) 1050, 2 New Reports, 564, 9 Jur. N. S. 1117 (supra, under "The rule").

In Putney v. Whitmire (1895) 66 Fed. 385, where several parties filed a bill in equity in the United States circuit court, each party's claim being less than \$2,000, and later filed a supplemental bill alleging that, since filing the original bill, some of the complainants had assigned to others, thus increasing the claim of the latter to a sum above the jurisdictional amount, the court, in holding that the jurisdictional defect had not been cured by the supplemental bill, said: "The rule is that if an original bill is defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill founded upon matters which have subsequently taken place."

A premature action is not aided by a supplemental complaint setting up facts occurring since the suit was brought. Gunby v. Ingram (1910) 57 Wash. 97, 36 L.R.A. (N.S.) 232, 106 Pac. 495 (foreclosure); Bernard v. Topplitz (1893) 160 Mass. 162, 39 Am. St. Rep. 465, 35 N. E. 673 (bill to redeem from a mortgage); Keeler v. Parks (1913) 72 Wash. 255, 130 Pac. 111.

On a bill in equity for the construction of a will by heirs against the mortgagees of a legatee, where it was held that the legatee took under a condition subsequent, which he had failed to perform, the plaintiffs could not succeed without entry, and could not show entry since filing the original bill. Birmingham v. Lesan (1885) 77 Me. 494, 1 Atl. 151.

Where a will gave the widow the right to pick out fifteen slaves, she could not maintain an action against the heirs and administrators for the fifteen slaves where she did not pick them out until after the bringing of the action, and endeavored to set up the matter by supplemental bill, as the cause of action did not accrue until after the suit was brought. Vaughan v. Vaughan (1857) 30 Ala. 329.

—divorces.

A divorce a vinculo cannot be had on acts of adultery committed since the suit was brought. Ferrier v. Ferrier (1843) 4 Edw. Ch. (N. Y.) 296, where nothing is said of any supplemental pleading.

On the authority of this case the court denied a motion to file a supplemental bill in the like case of Morange v. Mo-

range (1880) 2 Month. L. Bull. (N. Y.) 30.

In *Halsted v. Halsted* (1894) 7 Misc. 23, 27 N. Y. Supp. 408, it was held that "in an action for divorce a vinculo matrimonii the plaintiff cannot recover upon proof merely that the defendant has committed an act of adultery since the action was commenced (*Ferrier v. Ferrier* (N. Y.) supra), for the obvious reason that the adultery proved is not the adultery alleged and complained of. Thus, the cause of action assigned is unproved. The subsequent adultery is ground for a new and independent action, and leave, therefore, to set it up by supplemental complaint, should not be granted. *Milner v. Milner*, 2 Edw. Ch. (N. Y.) 114; *Morange v. Morange* (N. Y.) supra."

In *Hill v. Hill* (1846) 10 Ala. 527, where a man brought an action against his wife for divorce from bed and board on the ground of cruelty, and stated that she had left his house and gone to the state of Mississippi, he would not afterwards be allowed to bring in a supplemental bill asking for a divorce a vinculo, charging a voluntary abandonment by the wife for the space of three years, it appearing by the court's opinion that this cause of action did not exist at the time of the filing of the original bill.

—creditors' bills.

A creditor's bill is not supported by judgment obtained as a creditor after the filing of the bill, he not being a judgment creditor at that time. *Morrison v. Shuster* (1881) 1 Mackey (D. C.) 190; *Brown v. Bank of Mississippi* (1856) 31 Miss. 454; *Edgar v. Clevenger* (1835) 3 N. J. Eq. 258.

The same is true where no execution had been issued and returned before the suit was brought. *Neubert v. Massman Bros.* (1896) 37 Fla. 91, 19 So. 625.

A creditors' bill which was not good, as it was brought within six months from the judgment, and no elegit had been issued, could not be supported by amendment showing a mortgage acquired pending the suit. *Godfrey v. Tucker* (1863) 33 Beav. (Eng.) 280, 33 L. J. Ch. N. S. 559, 9 Jur. N. S. 1188, 9 L. T. N. S. 359, 12 Week. Rep. 33.

In *Banigan v. Nyack* (1898) 25 App. Div. 150, 49 N. Y. Supp. 199, it was held that a receiver in supplemental proceedings, suing before execution, could not set up later executions on judgments in favor of third parties on which he was also appointed receiver.

But there may be equity in the original bill although there had not been L.R.A.1916D.

judgment and execution at law. Thus, complainant, pending a suit at law against the defendant, brought a bill against him, praying an injunction and ne exeat, and he was allowed to show a later judgment and execution at law, as the original bill was sustainable on the ground that the bail had become insolvent, and this was sufficient for the ne exeat. *Candler v. Pettit* (1828) 1 Paige (N. Y.) 168, 19 Am. Dec. 399.

It has been held in two cases in Ohio and one in New York, that the reversal of the judgment in the case at law on which a creditors' bill rests, and a subsequent new judgment for the plaintiff at law, may be set up by supplemental bill. *Stoddard v. Myers* (1837) 8 Ohio, 203; *Gibbon v. Dougherty* (1859) 10 Ohio St. 365; *Merrihew v. Kingsbury* (1912) 150 App. Div. 40, 134 N. Y. Supp. 452. The Ohio cases do not seem to consider this as any infringement of the general rule, while the New York case puts its decision on the ground that the rule is not controlling in equity. (For a fuller statement of the New York case, see infra, under "—view that rule is not controlling in equity.")

In *Stoddard v. Myers* (Ohio) supra, the court said: "It is assumed that when the right to recover, in the bill in equity, was taken away by the reversal of the judgment, the suit ceased to be pending, so far as to bind the property. We are not satisfied that this position is a sound one. No such distinction is to be found in the books. But the doctrine seems plain that by the institution of a suit, the subject of litigation is placed beyond the power of the parties to it; that whilst the suit continues in court, it holds the property to respond to the final judgment or decree. This suit, instituted in 1831, was regularly continued until the final decree in 1835. The supplemental bill was engrafted into the original bill, and became identified with it. The whole was a *lis pendens*, effectually preventing an intermediate alienation."

In *Gibbon v. Dougherty* (Ohio) supra, the court said: "The subject-matter of the suit and the parties in the action, as well as the object of the suit, all continued to be before the court. The substantial object was the payment of the debt of the judgment debtor; and the reversal of that judgment for an irregularity was in no sense an intimation of its payment, or a relinquishment of the claim of the plaintiff to enforce its payment in the manner and by means expressed in the petition. The law, which never requires a vain thing, would not,

therefore, require a plaintiff, after having the irregularity in the judgment cured by a new judgment expressing the same debt, [to] incur the delay and expense of dismissing the suit and commencing de novo, when the entire proceeding could be perfected by a supplemental petition."

Contrary to the general rule it was held in *Scofield v. Excelsior Oil Co.* (1905) 27 Ohio C. C. 347, that a petition by a creditor of a corporation alleged to be insolvent, which is bad as not stating a judgment and execution against the company, may be aided by a supplemental petition showing such a judgment and execution since the suit was brought. The court does not refer to the rule nor to any distinction between law and equity in the matter.

—view that rule is not controlling in equity.

There are a few cases which take the view that in equity the rule is not controlling. *Woodbridge v. Pratt & W. Co.* (1897) 69 Conn. 304, 37 Atl. 688; *Butler v. Butler* (1823) 4 Litt. (Ky.) 202; *Merrihew v. Kingsbury* (1912) 150 App. Div. 40, 134 N. Y. Supp. 452.

In *Woodbridge v. Pratt & W. Co.* (Conn.) supra, the court, in holding that the plaintiff could recover in an equity action for an accounting prematurely brought, said: "An action at law can only be supported on the facts existing when it was first brought. It rests on the charge of a breach of duty, for which, at common law, the defendant was liable to immediate arrest and imprisonment. In such a proceeding, if it appears that the plaintiff had suffered no wrong which would support his suit, when the process was served, there can be no recovery. Equitable proceedings rest upon different foundations, and in them the parties can always rely on new matter, if properly pleaded. The plaintiff asked for both legal and equitable relief, but the latter only was awarded him by the judgment. Had he put the allegations of the fourth or fifth count in the shape of a supplemental complaint, the accounting ordered would have been entirely proper. His failure to present his cause of action in that form cannot invalidate the judgment unless the defendant was injuriously affected by it. Gen. Stat. § 1135. Nothing appears upon the record to indicate that such can have been the result. It had full opportunity, under the pleadings as they stood, to offer all testimony and present all claims of which it could have availed itself upon a trial under a sup-

plemental complaint." The court does not cite any authority for the view that the rule is not controlling in equity.

In *Butler v. Butler* (1823) 4 Litt. (Ky.) 202, an action for alimony on the ground of abandonment when, at the time of suit brought, the necessary year of abandonment had not expired, but it did expire before the decree, the court, in intimating that this fact might have been set up by new pleading, said, though it was not necessary to the result: "It will be admitted that the trial of an issue, in a court of common law, determines upon the controversy as it stood at the commencement of the action, except such issues as are formed on the plea of *puis darreign* continuance; and that if there was, at the commencement of suit, no cause of action, it is fatal, however strong it may have become afterwards. But the rule in a court of equity is somewhat different. The chancellor is not tied down to such strictness as to refuse relief in all cases where the bill was filed prematurely. Redress may sometimes be given in such case, and the costs of the suit may be imposed upon the complainant, which accrued before the cause of complaint had arrived at maturity, as a penalty upon his haste." The court does not support its view with any authority.

In *Merrihew v. Kingsbury* (1912) 150 App. Div. 40, 134 N. Y. Supp. 452, referred to supra under "—creditors' bills," the court allowed a supplemental complaint where, as it states the case, "the plaintiff obtained a judgment against defendant Parrott, and issued execution, which was returned unsatisfied, whereupon the present action was brought in the nature of a creditors' bill, to set aside a conveyance of land made by her to appellant Kingsbury, and by him transferred to the other defendants, in alleged fraud of the plaintiff's rights. Thereafter the judgment obtained against Parrott was set aside and the cause retried, resulting in another judgment for a similar amount except for increased interest. The plaintiff issued an execution upon this latter judgment, which was returned unsatisfied, and then moved to be allowed to file a supplemental complaint, alleging the recovery of the second judgment and the issuance and return of execution unsatisfied thereon." The court said: "If the action were one at law it would have been improper to allow a supplemental pleading setting forth acts subsequent to the commencement of the action for which an independent action might have been brought. *John D. Park & Sons Co.*

v. Hubbard (1910) 198 N. Y. 136, 91 N. E. 261. The action, however, is in equity, where full relief may be given up to the time of trial. . . . Nor will such applications be denied on the theory that a cause of action is not stated in the original pleading, not only because the amendment may cure that defect, but because the pleading should not be tested on such a motion. *Brewster v. F. G. Brewster Co.* 138 App. Div. 139, 122 N. Y. Supp. 1019." *Brewster v. F. G. Brewster Co.* is not an authority for the proposition that the supplement may cure a pleading which does not state a cause of action. It was there said: "Unless the insufficiency of the original pleading has been authoritatively adjudicated, the motion for leave to serve the supplemental pleading will neither be denied on the theory that a cause of action is not stated in the original pleading, nor on the theory that it will be of no avail, for those questions should be left to be decided on demurrer, or on motion for judgment on the pleadings, or on the trial, whereby the party desiring to interpose the pleading will be afforded a clear legal right to review any adverse decision or ruling."

Iowa.

In Iowa, with one or two exceptions, the rule is not regarded.

Upon an action to reform a marine insurance policy and for a loss incurred, it was held that the petition gave the court jurisdiction, and therefore, although the action was brought within sixty days from the time of loss, whereas, by the policy, the company was not held to pay a loss until after sixty days, the plaintiff might, by supplemental bill, show that the sixty days had expired. *Franklin Ins. Co. v. McCrea* (1854) 4 G. Greene (Iowa) 229.

Where the defendant set up that notes sued on were not to become due and payable until he was released as indorser on certain notes given by the plaintiff, it was held that the plaintiff might show by supplemental complaint that, since the commencement of the suit, the plaintiff had paid off the notes on which the defendant was indorser, as the original cause of action was not on the release, but on the notes. *Davenport v. Mitchell* (1863) 15 Iowa, 194.

In *Dennison v. Soper* (1871) 33 Iowa, 183, while there is no mention of a supplemental pleading, the court held that a surety on a note, who, before its maturity, brought an action alleging that the other makers had disposed in part of their property, and were attempting to

dispose of the balance, with intent to defraud their creditors, could not show that, since the bringing of the action, he had paid the note.

In *Bloom v. State Ins. Co.* (1895) 94 Iowa, 359, 62 N. W. 810, the plaintiff sued on a policy of fire insurance, the premium note not having been paid at the time of the fire, but having been collected by the company thereafter and after the suit was brought. The court apparently considered that the company had waived the objection as to time of payment, and said: "A point is made that the payment of the note was made after the action was commenced, and that if no right of action existed when the suit was commenced the plaintiff should fail. It appears from the abstract that the plaintiff filed a substituted petition on the 15th day of February, 1893, and that the defendant filed its answer on the 18th day of April, 1893. Both of these pleadings were filed some time after the premium note was fully paid. So far as the petition was based upon the complete payment of the premium, it was in the nature of a supplemental pleading."

In *Zalesky v. Home Ins. Co.* (1897) 102 Iowa, 613, 71 N. W. 566, where, under the fire insurance policy sued on, an appraisal was a condition precedent to the bringing of a suit on the policy, it was held that a demand for, or acquiescence in an appraisal after suit was brought should not be set up by supplemental bill.

In *Little v. Pottawattamie County* (1904) 127 Iowa, 376, 101 N. W. 752, where the statute provided that "no action shall be brought against any county on an unliquidated demand until the same shall be presented to such board [of supervisors] and payment demanded and refused or neglected," it was held that the plaintiff might by supplemental petition set up a demand and refusal subsequent to suit brought. The court said, *inter alia*: "Action having been prematurely brought, the plaintiff should be allowed, after presenting his claim, and being met with a refusal to pay, to file an amendment or supplement to his petition, reciting the facts, and, after paying or offering to pay the costs down to the time the payment was refused, be permitted to proceed with the case."

. . . The only discordant note, if there be any, is *Zalesky v. Home Ins. Co.* (Iowa) *supra*. But in that case the plaintiff had no cause of action for more than nominal damages until ascertained by an appraisal, and it was held that as he had, by reason of a contract be-

tween the parties, stipulated that no suit should be brought until an appraisal was made, and then only for the amount of the appraisal, he could not, by supplemental petition, show that after the bringing of the original action he had made a demand for an appraisal. The case was decided wholly on the contract limitations made by the parties, and the statutes relied upon by plaintiff herein, as well as by plaintiff in that case, with reference to the filing of amended or supplemental petitions, were held not applicable. Moreover, the plaintiff in that case did not file a supplemental petition, as we understand it. He asked for a continuance of the case, that he might make demand for an appraisal; and the trial court—erroneously, as we held—granted his request. This for the plain reason that a plaintiff cannot ask a delay of his suit that he may either perfect or create a substantial cause of action. What was said in the case must be construed with reference to the facts involved. True, after the continuance was granted in that case, a supplemental petition was filed; but it was the order granting the continuance in the case for the purpose of maturing or creating the cause of action which was the controlling feature."

In *Gribben v. Clement* (1909) 141 Iowa, 144, 133 Am. St. Rep. 157, 119 N. W. 596, the plaintiff brought an action on a note and mortgage, given to secure him as surety for the defendant, before he had paid the principal's debt, and later paid it and set this up in a supplemental pleading and succeeded. The court, in affirming the judgment, pointed out that while, at the time of suit brought, the debt had not been paid, the plaintiff had authorized the bank which held it and where he had an account to pay it and charge it to his account, but further stated: "The old rule which required an action to be abated, merely because prematurely brought, has been borne down by the trend of modern decisions. Under the later decisions, if the plaintiff's cause of action is complete and mature before it comes to a hearing, he will ordinarily be permitted to try it out on its merits. If the action was prematurely brought, the court has full power to impose proper terms upon the plaintiff for the full protection of the defendant. The usual terms imposed are that plaintiff be required to pay all costs incurred prior to the maturity of his cause of action. If other terms ought in justice to be imposed, the court has plenary power in L.R.A.1916D.

the matter. The rule is to permit a supplemental petition to be filed and to allow the case to proceed. See *Little v. Pottawattamie County* (1904) 127 Iowa, 381, 101 N. W. 752; *Bloom v. State Ins. Co.* (1895) 94 Iowa, 359, 62 N. W. 810." The court distinguished the cases of *Dennison v. Soper* (1871) 33 Iowa, 183, and *Zalesky v. Home Ins. Co.* (1897) 102 Iowa, 621, 71 N. W. 566, but did not seem to approve the *Dennison Case*.

Miscellaneous.

Where the defendant, in an action for contribution on a joint account of the parties with a broker, claimed that there was a balance still due on the joint account, and that the action would not lie until this was paid or the plaintiff deducted it, the court said: "Assuming that to have been the situation when the bill was filed in July, 1894, it would seem that the statute of limitations has long since run against the brokers, and on the report the brokers must be taken to have acquiesced in that as the practical ending of all claims or their part, and the action can now be maintained. That an action may be maintained if outstanding debts due the partnership are barred, see *Williams v. Henshaw* (1832) 12 Pick. (Mass.) 380, 23 Am. Dec. 614. A fact occurring after the filing of the bill which makes good the plaintiff's cause of action may be set up by amendment. Chancery Rule 25." *Hill v. Fuller* (1905) 188 Mass. 195, 74 N. E. 361.

In *Rogers v. Davenport* (1880) 11 Reporter, 167, mem. also reported in 23 Hun (N. Y.) 353, where, in an action on a judgment of another state, the answer alleged that the appearance of the attorney in the other state was unauthorized, it was held that the plaintiff was properly allowed to serve a supplemental complaint upon the promissory note on which the judgment was obtained, but that the defendant should have been allowed the taxable costs of his defense if he wished to allow judgment to be entered on the note.

In an action against officers for seizure of merchandize, the defense was that the property was taken by attachment as the property of a third person, to which the plaintiff replied by general denial, and later the attachment was discharged on the ground that the alleged causes were untrue, and it was held proper for the plaintiff, by amended reply, to set up the discharge. *Simpson v. Voss* (1884) 31 Kan. 227, 1 Pac. 601, where the court said: "The discharge of

the attachment related back to the issuance of the order of attachment, and swept away the defense that, by virtue of the attachment proceedings, the defendants below officially took possession of the property claimed. After the attachment was dissolved, they could not justify thereunder."

In *Fahs v. Roberts* (1870) 54 Ill. 192, an action was brought to enjoin the sheriff from selling certain property under execution as not the subject of levy, and it was held that it might not be shown by supplemental bill that the judgment on which the execution rested had been reversed since bringing the injunction suit. The ground of the decision probably is that the reversal of the judgment was not germane to the injunction suit. The court, however, apparently states that there was no ground for the injunction originally, although it also shows that of the three kinds of property levied on, two kinds were exempt from levy.

Where the plaintiff, after bringing an action of infringement of a patent, was enjoined from proceeding against the

customers of a certain person, of whom the defendant was one, it was proper by supplemental bill to set up the eventual success of the plaintiff in said injunction suit. *Kryptok Co. v. Haussmann & Co.* (1914) 216 Fed. 267.

State ex rel. Dawson v. Chicago, B. & Q. R. Co. (1911) 85 Kan. 649, 118 Pac. 872, is sufficiently referred to in the dissenting opinion in *READER v. FARRISS*, ante, 672. It will be noticed that the action was held not premature.

Smith v. Smith (1879) 22 Kan. 699, also is sufficiently referred to in such dissenting opinion.

The holding ascribed in the dissenting opinion to *Brown v. Stuart* (1913) 90 Kan. 302, 133 Pac. 725, was in a case where it was held that the court had jurisdiction before the after-occurring facts.

Orton v. Noonan (1872) 29 Wis. 541, cited in the opinion in *READER v. FARRISS* ante, 672, related to a supplemental answer, as did *Halfmoon Bridge Co. v. Canal Board* (1914) 213 N. Y. 160, 107 N. E. 344, cited in the dissenting opinion. B. B. B.

UNITED STATES SUPREME COURT.

TENNESSEE COAL, IRON, & RAILROAD
COMPANY, Plff. in Err.,
v.
WILEY GEORGE.

(233 U. S. 354, 58 L. ed. 997, 34 Sup. Ct. Rep. 587.)

Statutes — full faith and credit — venue of transitory action.

The enforcement by the Georgia courts of the cause of action given by Ala. Code, § 3910, to a servant against the master, for injuries occasioned by defective machinery, does not deny full faith and credit to the provision of § 6115 of that Code, that "all actions under § 3910 must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere."

For other cases, see *Conflict of Laws*, II. in Dig. 1-52 N. S.

(Mr. Justice Holmes dissents.)

(April 13, 1914.)

Note. — As to extraterritorial effect of statute limiting jurisdiction in which action may be brought, see annotation following this case, post, 688.

For validity of provision in contract as to place where action must be brought, see annotation following *Nashua River Paper Co. v. Hammermill Paper Co.* post, 696. L.R.A.1916D.

ERROR to the Court of Appeals of the State of Georgia to review a judgment which affirmed a judgment of the City Court of Atlanta in favor of plaintiff in an action founded on a provision of the Alabama Code giving a right of action to a servant against the master for injuries occasioned by defective machinery. Affirmed.

The facts are stated in the opinion. Mr. Alexander W. Smith, for plaintiff in error:

The condition or limitation put upon a right of action created by statute, and not existing at common law, inheres in the right itself, and follows it into other jurisdictions.

Galveston, H. & S. A. R. Co. v. Wallace, 223 U. S. 481, 490, 56 L. ed. 516, 522, 32 Sup. Ct. Rep. 205; *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; *Davis v. Mills*, 194 U. S. 451, 454, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692; *Munos v. Southern P. Co.* 2 G. C. A. 163, 2 U. S. App. 222, 51 Fed. 188; *Stern v. La Compagnie General Transatlantique*, 110 Fed. 996; *The Edna*, 185 Fed. 206; *United States use of Gibson Lumber Co. v. Boomer*, 106 C. C. A. 164, 183 Fed. 726; *Coyne v. Southern P. R. Co.* 155 Fed. 683.

As a condition or limitation need not be contained in the same statute. It operates the same way if it be specially attached to such a statutory right of action subsequently and in a different statute.

Davis v. Mills, 194 U. S. 451, 454, 48 L. ed. 1067, 1070, 24 Sup. Ct. Rep. 692.

The courts of the United States take judicial notice of the public laws of each state of the Union.

Mills v. Green, 159 U. S. 651, 657, 40 L. ed. 293, 295, 16 Sup. Ct. Rep. 132.

Where a limitation to local courts was affixed to a cause of action existing at the common law, and independently of the statute affixing it, the limitation was disregarded in *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397. A well-defined distinction exists between cases based on common-law liability and those depending on statutory rules of liability.

Charleston & W. C. R. Co. v. Miller, 113 Ga. 15, 38 S. E. 338; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 382, 28 L. ed. 787, 789, 5 Sup. Ct. Rep. 184; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 378, 379, 37 L. ed. 772, 777, 778, 13 Sup. Ct. Rep. 914; *Missouri P. R. Co. v. Castle*, 224 U. S. 541, 56 L. ed. 875, 32 Sup. Ct. Rep. 606; *Employer's Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 537, 52 L. ed. 297, 326, 28 Sup. Ct. Rep. 141; *Second Employers' Liability Cases* (*Mon-
dou v. New York, N. H. & H. R. Co.*) 223 U. S. 1, 49, 56 L. ed. 327, 345, 38 L.R.A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; *Mobile & B. R. Co. v. Holborn*, 84 Ala. 133, 4 So. 146, 13 Am. Neg. Cas. 125.

"Interstate venue," or venue as between different countries, is jurisdictional. "Municipal venue," or venue as between different places in the same jurisdiction, as a rule has to do with procedure merely.

Ellenwood v. Marietta Chair Co. 158 U. S. 105, 108, 39 L. ed. 913, 914, 15 Sup. Ct. Rep. 771; *Companhia de Mocambique v. British South Africa Co.* [1892] 2 Q. B. 358, 61 L. J. Q. B. N. S. 663, 66 L. T. N. S. 773, 40 Week. Rep. 650.

There is a profound distinction between the existence of jurisdiction in a given court and its proper exercise in a given case therein.

Smith v. McKay, 161 U. S. 355, 358, 40 L. ed. 731, 732, 16 Sup. Ct. Rep. 490; *Louisville Trust Co. v. Knott*, 191 U. S. 225, 233, 48 L. ed. 159, 162, 24 Sup. Ct. Rep. 119; *United States v. Larkin*, 208 U. S. 333, 338, 52 L. ed. 517, 519, 28 Sup. Ct. Rep. 417; *Fore River Shipbuilding Co. v. Hagg*, 219 U. S. 175, 55 L. ed. 168, 21 Sup. Ct. Rep. 185; *Van Fleet, Collateral Attack*, chap. 4.

Whenever a right of action has become fixed and a legal liability incurred, that

right of action may be pursued and that liability enforced in any court of competent jurisdiction.

Dennick v. Central R. Co. 103 U. S. 11, 18, 26 L. ed. 439, 441; *Texas & P. R. Co. v. Cox*, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Whitman v. National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

The principle involved is closely analogous to that found in the decisions relative to the enforcement of "death statutes" enacted in one state and invoked in another. All restrictions and limitations therein found are enforced everywhere.

Slater v. Mexico Nat. R. Co. 194 U. S. 120, 126, 48 L. ed. 900, 902, 24 Sup. Ct. Rep. 581; *Chambers v. Baltimore & O. R. Co.* 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34.

So, also, it is analogous to the application of statutes of limitations of the locus in the forum.

Davis v. Mills, 194 U. S. 451, 457, 48 L. ed. 1067, 1071, 24 Sup. Ct. Rep. 692; *Selma, R. & D. R. Co. v. Lacey*, 49 Ga. 106.

So, also, it is analogous to the question of statutory venue of suits under the act of Congress authorizing actions on contractor's bonds in government work.

Davidson Bros. Marble Co. v. United States, 213 U. S. 10, 16, 53 L. ed. 675, 677, 29 Sup. Ct. Rep. 324; *United States use of Gibson Lumber Co. v. Boomer*, 106 C. C. A. 164, 183 Fed. 726; *United States v. Congress Constr. Co.* 222 U. S. 199, 56 L. ed. 163, 32 Sup. Ct. Rep. 44.

Mr. Reuben R. Arnold, for defendant in error:

The decision of the United States Supreme Court in the case of *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397, which was a decision upon a similar statute of New Mexico, is controlling.

There are many cases where the forum, in enforcing the law of another state, has enforced the substantive rights created by such state through statute, and has ignored attempted conditions imposed by the *lex loci* which deal only with the remedy.

Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270, 20 L. ed. 571; *Husted v. Missouri P. R. Co.* 143 Mo. App. 623, 128 S. W. 282; *Philes v. Missouri P. R. Co.* 141 Mo. App. 561, 125 S. W. 555.

In the following cases the right of action was sustained in transitory actions in one state under the laws of another state, and various provisions of the *lex loci regulat-*

ing the remedy, which were claimed to be a part of the right itself, were disregarded.

Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Hollenbach v. Elmore & H. Contracting Co.* 174 Fed. 845; *Southern R. Co. v. Decker*, 5 Ga. App. 21, 62 S. E. 678; *Southern R. Co. v. Robertson*, 7 Ga. App. 154, 66 S. E. 535; *Holmes v. Barclay*, 4 La. Ann. 63.

The *lex loci* relating to remedy, even though those laws may have been parcel of the same general enactment in which the rights were created, does not apply to the forum, and it is clear that the Federal Constitution and act of Congress upon the full faith and credit proposition are not in conflict with the general current of authority.

Minor, Conf. L. § 192, p. 476; *Storey*, Conf. L. §§ 539, 540, 556, 558; *Stevens v. Brown*, 20 W. Va. 450; *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 196, note; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 772, 16 N. W. 413.

It would be impossible to transplant all the remedies provided by the *lex loci* to the *lex fori* and make them parts and conditions of the rights granted. The jurisdiction and powers of the courts of the several states vary, and each state must apply its own machinery to rights granted in another state, as the machinery cannot be transferred. This applies to the forms of action, the process, the sufficiency of the pleadings, etc.

22 Am. & Eng. Enc. Law, 1383, 1384; 4 Sutherland, Damages, § 4280.

Mr. Justice Lamar delivered the opinion of the court:

Wiley George, the defendant in error, was an engineer employed by the Tennessee Coal, Iron, & Railroad Company at its steel plant in Jefferson county, Alabama. While he was under a locomotive repairing the brakes, a defective throttle allowed steam to leak into the cylinder, causing the engine to move forward automatically, in consequence of which he was seriously injured. He brought suit by attachment, in the city court of Atlanta, Georgia, founding his action on § 3910 of the Alabama Code, which makes the master liable to the employee when the injury is "caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer."

The defendant filed a plea in abatement in which it was set out that § 6115 of that Code also provided that "all actions under § 3910 must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere." The defendant thereupon prayed that the action be abated

because "to continue said case of said statutory cause of action given by the statutes of Alabama, and restricted by said statutes to the courts of Alabama, would be a denial so far as the rights of this defendant are concerned of full faith and credit to said public acts of the state of Alabama in the state of Georgia, contrary to the provisions of art. 4, § 1 of the Constitution of the United States." A demurrer to the plea in abatement was sustained and the judgment for the plaintiff thereafter entered was affirmed by the court of appeals. The case was then brought to this court.

The record raises the single question as to whether the full faith and credit clause of the Constitution prohibited the courts of Georgia and enforcing a cause of action given by the Alabama Code, to the servant against the master, for injuries occasioned by defective machinery, when another section of the same Code provided that suits to enforce such liability "must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere."

There are many cases where right and remedy are so united that the right cannot be enforced except in the manner and before the tribunal designated by the act. For the rule is well settled that "where the provision for the liability is coupled with a provision for the special remedy, that remedy, that alone, must be employed." *Pollard v. Bailey*, 20 Wall. 527, 22 L. ed. 378; *Galveston, H. & S. A. R. Co. v. Wallace*, 223 U. S. 400, 56 L. ed. 522, 32 Sup. Ct. Rep. 205; *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; *Fourth Nat. Bank v. Franklyn*, 120 U. S. 753, 30 L. ed. 828, 7 Sup. Ct. Rep. 757.

But that rule has no application to a case arising under the Alabama Code relating to suits for injuries caused by defective machinery. For, whether the statute be treated as prohibiting certain defenses, as removing common-law restrictions, or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action,—the right and the remedy are not so inseparably united as to make the right dependent upon its being enforced in a particular tribunal. The cause of action is transitory, and like any other transitory action can be enforced "in any court of competent jurisdiction within the state of Alabama. . . ." But the owner of the defective machinery causing the injury may have removed from the state, and it would be a deprivation of a fixed right if the plaintiff could not sue the defendant in Alabama because he had left the state, nor sue him where the defendant or his property could be found because the

statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama, and for that, or other, reason may have found it to his interest to bring suit by attachment or in personam in a state other than where the injury was inflicted.

The courts of the sister state, trying the case, would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action, or which named conditions on which the right to sue depend. But venue is no part of the right; and a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action.

The case here is controlled by the decision of this court in *Atchison, T. & S. F. R. Co. v. Sowers*, 218 U. S. 55, 70, 53 L. ed. 695, 702, 29 Sup. Ct. Rep. 397, where the New Mexico statute, giving a right of action for personal injuries, and providing that suits should be brought after certain form of notice in a particular district, was preceded by the recital that "it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery thereof in other states and territories, to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory and the derogation of the dignity of the courts thereof." Despite this statement of the public policy of the territory, the judgment obtained by the plaintiff in Texas was affirmed by this court in an opinion wherein it was said that where an action is brought

in "another jurisdiction, based upon common-law principles, although having certain statutory restrictions, such as are found in this [territorial] act, as to the making of an affidavit, and limiting the time of prosecuting the suit, full faith and credit is given to the law when the recovery is permitted, subject to the restrictions upon the right of action imposed in the territory enacting the statute. . . . When it is shown that the court in the other jurisdiction observed such conditions, and that a recovery was permitted after such conditions had been complied with, the jurisdiction thus invoked is not defeated because of the provision of the statute" requiring the suit to be brought in the district where the plaintiff resides or where the defendant, if a corporation, has its principal place of business.

It is claimed, however, that the decision in the *Sowers* Case is not in point because the plaintiff was there seeking to enforce a common-law liability, while here he is asserting a new and statutory cause of action. But that distinction marks no difference between the two cases because in New Mexico common-law liability is statutory liability,—the adopting statute (Comp. Laws, § 1823) providing that "the common law, as recognized in the United States of America, shall be the rule of practice and decision."

The decision in the *Sowers* Case, however, was not put upon the fact that the suit was based on a common-law liability. The court there announced the general rule that a transitory cause of action can be maintained in another state even though the statute creating the cause of action provides that the action must be brought in local domestic courts.

In the present case the Georgia Court gave full faith and credit to the Alabama act and its judgment is affirmed.

Mr. Justice Holmes dissents.

Annotation—Extraterritorial effect of statute limiting jurisdiction in which action may be brought.

This note deals merely with the question whether the courts of one state, territory, or country will, under the full faith and credit provision of the Federal Constitution, or upon principles of comity, respect a provision of a statute of another, purporting to confine the jurisdiction of certain actions to the courts of the latter, and is not concerned with the power of a state or territory to impair or affect the jurisdiction of the Federal courts, except so far as the statute in question attempts to preclude the jurisdiction of a Federal court sitting in another state or territory, treating such court the same as the courts of the other states. The scope of the note, therefore, excludes the cases dealing with the power of a state to require a foreign corporation, as a condition of doing business within the state, to stipulate against the removal of suits to the Federal courts. A particular phase of that subject is discussed in the note to *Harrison v. St. Louis & S. F. R. Co.* L.R.A.1915F, 1187.

For validity of provision in contract as to place where action must be brought,

see annotation to *Nashua River Paper Co. v. Hammermill Water Co.* post, 691.

The following quotation from *Home Ins. Co. v. Morse* (1874) 20 Wall. (U. S.) 445, 22 L. ed. 365, one of the leading cases on the subject just referred to, and therefore on its facts not within the scope of this note, is given here as pertinent to the question under consideration: "Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. A man may not barter away his life or his freedom, or his substantial rights. . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."

The question as to whether a court of one state will entertain an action upon a cause of action arising in another has generally been discussed from the point of view of comity, and the effect of the full faith and credit provision on this question has received but little attention, except in the comparatively rare instances where the statute of the state or territory in which the cause of action arose has attempted to limit the jurisdiction to the courts of that state or territory, and preclude the maintenance of the action in any other. The question as to the jurisdiction of a court of one state or country over an action for personal injuries or for death, arising in another, has been treated, so far as principles of comity are concerned, in the note to *Boston & M. R. Co. v. Hurd*, 56 L.R.A. 193. And specific aspects of the question in relation to actions for death are discussed in other notes that may be found by consulting the Index to L.R.A. Notes under the title, "Conflict of laws," subtitle, "Personal injuries; death."

The decisions of the United States Supreme Court in *Atchison, T. & S. F. R. Co. v. Sowers* (1909) 213 U. S. 55, 70, 53 L. ed. 695, 702, 29 Sup. Ct. Rep. 397, and *TENNESSEE COAL, IRON & R. Co. v. GEORGE*, ante, 685, seem to have definitely settled that a court of one state is not bound, under the "full faith and credit" provision of the Federal Constitution, to

refuse jurisdiction of a cause of action arising in another state or territory because of a provision of the statute of the latter purporting to restrict the jurisdiction to its own courts. And this seems to be true so far as the "full faith and credit" provision is concerned, whether the action be regarded as based on a common-law or a statutory cause of action.

There is some conflict among the cases as to whether such a provision should be respected upon principles of comity.

In the *Sowers Case*, a citizen of Arizona brought an action in Texas to recover for personal injuries sustained in New Mexico while in the employment of the defendant railroad company as a brakeman. The statute of New Mexico (after reciting that it had become customary for persons claiming damages for personal injuries received in the territory to institute and maintain suits therefor in other states and territories, to the increased cost and annoyance, and manifest injury and oppression, of the business interests in the territory, and the derogation of the dignity of the courts thereof,) provided in § 1 that there should be no civil liability under either the common law or any statute of the territory for personal injuries inflicted or death caused in the territory, unless the person claiming damages should make an affidavit as to the matters therein provided, and should commence an action within one year after such injuries occurred "in the district court of this territory in and for the county of this territory where the claimant or person against whom such claim is asserted resides, or, in event such claim is asserted against a corporation, in the county in this territory where such corporation has its principal place of business," it being further "expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries;" and the statute further provided, in § 3, that "it shall be unlawful for any person to institute, carry on, or maintain any suit for the recovery of any such damages in any other state or territory." The Texas court of civil appeals (*Atchison, T. & S. F. R. Co. v. Sowers* (1906) — Tex. Civ. App. —, 99 S. W. 190) affirmed a judgment for the plaintiff, and held that such provision did not defeat the jurisdiction of the courts of Texas; and as already shown its judgment was sustained by the United States Supreme

Court. The latter court, however, treated the question simply from the point of view of the "full faith and credit" provision, and not from the point of view of comity. The Supreme Court took the view that the full faith and credit demanded by the Federal Constitution was accorded to the New Mexico statute when the Texas court respected the requirements of the statute as to the making of an affidavit in respect of the claim, and the bringing of suit within the specified time. Mr. Justice Holmes dissented upon the ground that the territory could have abolished the right of action altogether if it had seen fit; that it said by its statutes that it would not do that, but would adopt the common-law liability on certain conditions precedent, making them, however, absolute conditions to the right to recover at all; that one of those conditions was that the party should sue in the territory,—a condition that goes to the right and conditions it everywhere. He added: "I am willing to assume that the statute could not prohibit a suit in another state, and, indeed, it recognized that in that particular it might be disobeyed with effect. § 3. But I do not see why the condition in § 1 was not valid and important. If it had been complied with, there might have been a different result."

The doctrine of the Sowers Case was applied in *Atchison, T. & S. F. R. Co. v. Mills* (1909) 53 Tex. Civ. App. 359, 116 S. W. 852, holding that the provisions of the New Mexico statute above referred to did not prevent a court of Texas from entertaining an action for personal injuries sustained in New Mexico by a resident of California. The argument of the court in this case suggests that perhaps, as a matter of comity at least, the provisions of the New Mexico statute as to jurisdiction might be respected where the cause of action is the statutory one for death. The United States Supreme Court in *TENNESSEE COAL, IRON & R. Co. v. GEORGE*, ante, 685, however, apparently repudiates any distinction between a common-law liability and a statutory liability so far as the "full faith and credit" provision of the Federal Constitution is concerned, and declares that the decision in the Sowers Case was not put upon the fact that the suit was based on the common-law liability, but that the court there announced the general rule that a transitory cause of action can be maintained in another state even though the statute creating the cause of action

provides that the action must be brought in a local domestic court.

In *Southern P. Co. v. Dusablon* (1908) 48 Tex. Civ. App. 203, 106 S. W. 766, however, the court gave effect to the provisions of the New Mexico statute by holding that an action would not lie in Texas by a resident citizen of New Mexico, for a personal injury received in New Mexico the defendant being a corporation of Kentucky operating a railroad in New Mexico. The Sowers Case was distinguished on the ground that the plaintiff there was not a citizen of New Mexico. The court observed that it had been decided so far as it could be by courts of Texas, that the action for personal injuries under the New Mexico statute is not a statutory one, in the sense that it can be prosecuted and maintained only in the state where the injury was inflicted, and, as indicated, the decision refusing to entertain the action was put upon the ground that the plaintiff was, at the time his cause of action accrued and when the suit was brought, a resident citizen of New Mexico.

In *Swisher v. Atchison, T. & S. F. R. Co.* (1907) 76 Kan. 97, 90 Pac. 812, it was held that the notice required by the New Mexico statute as a condition of an action for death was an essential part of the cause of action, and that an action could not be maintained in Kansas for a death in New Mexico unless that notice had been given. The court emphasized the point that there was no right of action for death at common law, and none existed in New Mexico except as created by statute, and declared generally that when a cause of action which did not exist at common law is created by the statute of another state or territory, such cause of action, when presented to the courts of Kansas for enforcement, will be held to consist, not merely of right given, but of the conditions and limitations of the statute of the place where it was created. The report in this case sets out the provisions of the New Mexico statute with reference to jurisdiction, but the opinion makes no specific allusion to them. They would perhaps have been sufficient to bring the case within the principle above stated, even though there had been no other conditions of the action prescribed by the statute.

In *Lessendon v. Missouri P. R. Co.* (1911) 238 Mo. 247, 142 S. W. 332, the Missouri supreme court said that it saw no reason why a state which creates a right of action may not impose the condition that it shall be enforced only in the courts of the state; and further, that

if the state court to which the cause of action is carried should decline to take jurisdiction of it, on the ground that the statute of the state which created it forbade its removal, it would only be giving full faith and credit to the law of the sister state. The court attempted to distinguish *Atchison, T. & S. F. R. Co. v. Sowers* (1908) 213 U. S. 55, 53 L. ed. 695, 29 Sup. Ct. Rep. 397, upon the ground that that was a case of a common-law right of action for personal injuries, whereas the action in the case at bar was based upon a statutory cause of action (the Kansas statute making railroads liable for injuries inflicted upon employees through the negligence of fellow servants). What was said on this point, however, was obiter, as the Kansas statute was construed not to create a condition that the action be brought in that state. Although the distinction by which the court sought to sustain its obiter statement on this point is apparently repudiated by the United States Supreme Court in *TENNESSEE COAL, IRON & R. Co. v. GEORGE*, supra, so far as the "full faith and credit" provision is concerned, the validity of the distinction so far as the principles of comity are concerned, is not necessarily affected. A writ of error in the *Lessenden Case* was dismissed by the United States Supreme Court for want of jurisdiction (225 U. S. 696, 56 L. ed. 1262, 32 Sup. Ct. Rep. 838).

A clause of a Nevada statute, following a provision declaratory of the common law as to the liability of one who inflicts an injury on another, to the effect that such liability "shall exist only in so far as the same shall be ascertained and adjudged by a state or Federal court of competent jurisdiction in this state," was upheld and given effect in *Coyne v. Southern P. Co.* (1907) 155 Fed. 683, holding that a Federal court sitting in Utah would not take jurisdiction of an action for personal injuries arising in Nevada. The court said that the plaintiff's right was no less an exclusively statutory right because the same facts would have created a right under prior common-law principles; and that, viewed as a statutory right, it must be admitted that the state creating the right can attach to it any valid condition, so that when the right is sought to be vindicated in another state or in a foreign country, the condition must be applied. There was no reference in this case to the "full faith and credit" provisions.

In *Shields v. Union Cent. L. Ins. Co.* (1896) 119 N. C. 380, 25 S. E. 951, it was held, in effect, that the trial court erred

in rendering a judgment for the defendant in an action against an Ohio insurance company upon a demurrer ore tenus to the jurisdiction, on the ground that under the provisions of its charter an action could be brought against the defendant company only in the state of Ohio. The court observed that permission to a foreign corporation to do business outside the state where it is created is always with the proviso that it is subject to the laws of the forum, and has no greater privileges than domestic corporations under its statutes. The report of the case does not disclose the terms of the provision of the charter. It appeared that the corporation had a branch office in North Carolina.

In *Huthison v. Ward* (1908) 192 N. Y. 375, 127 Am. St. Rep. 909, 85 N. E. 390, holding that an action would lie in New York to recover the amount remaining due upon a bond secured by a mortgage upon real property in New Jersey, after applying the proceeds derived from a sale under a decree of the court of chancery of the latter state, the contract being a New Jersey contract and governed by the law of that state, the court alluded to the fact that there was nothing in the New Jersey statute which confined the action on the bond to the courts of that state; and the opinion, perhaps, carries some implication that if there had been such a provision, it would have been respected.

A provision of a Louisiana statute chartering a railroad company, that the company should be sued only at its domicile, was construed in *Houston & T. C. R. Co. v. Fife* (1912) — *Tex. Civ. App.* —, 147 S. W. 1181, to relate only to the venue of an action brought in Louisiana, and not to apply to an action brought in another state, and therefore the entertaining of an action in another state did not deny full faith and credit to the Louisiana statute. G. H. P.

MASSACHUSETTS SUPREME JUDICIAL COURT.

NASHUA RIVER PAPER COMPANY
v.
HAMMERMILL PAPER COMPANY.

(223 Mass. 8, 111 N. E. 678.)

Contract — stipulation as to court — validity.

A provision in a commercial contract between citizens of different states, that no

action upon it shall be instituted in other than a specified court of one of the states, is invalid as against public policy.

For other cases, see Contracts, III. c. 1, in Dig. 1-52 N. S.

(February 12, 1916.)

REPORT by the Superior Court for Suffolk County for the determination by the Supreme Judicial Court of questions arising in an action brought to recover a balance due plaintiff for goods sold and delivered and money paid to the defendant. Judgment for plaintiff.

The facts are stated in the opinion.

Mr. Harold S. Davis, for plaintiff:

The agreement to bring suit only in Pennsylvania is collateral, and is not available to defeat the present action, even if valid.

Bauer v. International Waste Co. 201 Mass. 197, 87 N. E. 637; *Dawson v. Fitzgerald*, L. R. 1 Exch. Div. 257, 45 L. J. Exch. N. S. 893, 35 L. T. N. S. 220, 24 Week. Rep. 773; *Perkins v. United States Electric Light Co.* 16 Fed. 513; *Boston & L. R. Corp. v. Nashua & L. R. Corp.* 139 Mass. 463, 31 N. E. 751; *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174; *Hall v. People's Mut. F. Ins. Co.* 6 Gray, 185.

A private agreement cannot deprive the court of its jurisdiction over the parties and the subject-matter.

Electric Welding Co. v. Prince, 200 Mass. 386, 128 Am. St. Rep. 434, 86 N. E. 947; *Hall v. People's Mut. F. Ins. Co.* 6 Gray, 185; *Meacham v. Jamestown, F. & C. R. Co.* 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851; *Savage v. People's Bldg. Loan & Sav. Asso.* 45 W. Va. 275, 31 S. E. 991; *Benson v. Eastern Bldg. & L. Asso.* 174 N. Y. 83, 66 N. E. 627; *Matt v. Iowa Mut. Aid Asso.* 81 Iowa, 135, 25 Am. St. Rep. 483, 46 N. W. 857; *Slocum v. Western Assur. Co.* 42 Fed. 235; *The Etona*, 64 Fed. 880; *Gough v. Hamburg Amerikanische Packetfahrt Aktiengesellschaft*, 158 Fed. 174; *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512; *Sanford v. Commercial Travelers' Mut. Acci. Asso.* 147 N. Y. 326, 41 N. E. 694; *Buel v. Baltimore & O. S. W. R. Co.* 24 Misc. 660, 53 N. Y. Supp. 749; *Bartlett v. Union Mut. F. Ins. Co.* 46 Me. 500; *Roberts v. Knights*, 7 Allen, 449; *Tennessee Coal, Iron & R. Co.*

Note. — For validity of provision in contract as to place where action must be brought, see annotation following this case, post, 696.

As to extraterritorial effect of statute limiting jurisdiction in which action may be brought, see annotation following *Tennessee Coal, Iron & R. Co. v. George*, ante, 685.

L.R.A.1916D.

v. George, 233 U. S. 354, 58 L. ed. 997, ante, 685, 34 Sup. Ct. Rep. 587; *Bellows Falls Power Co. v. Com.* 222 Mass. 51, 109 N. E. 891.

The agreement in question is contrary to public policy.

Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. ed. 365; *Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills*, 27 C. C. A. 212, 54 U. S. App. 290, 82 Fed. 508; *Rea's Appeal*, 13 W. N. C. 546; *Benson v. Eastern Bldg. & L. Asso.* 174 N. Y. 83, 66 N. E. 627; *Savage v. People's Bldg. Loan & Sav. Asso.* 45 W. Va. 275, 31 S. E. 991; *Healy v. Eastern Bldg. & L. Asso.* 17 Pa. Super. Ct. 385; *Darling v. Protective Assur. Soc.* 71 Misc. 113, 127 N. Y. Supp. 486; *Prince Steam Shipping Co. v. Lehman*, 5 L.R.A. 464, 39 Fed. 704; *Blair v. National Shirt & Overalls Co.* 137 Ill. App. 413; *McLean v. Tobin*, 58 Misc. 528, 109 N. Y. Supp. 926; *Reichard v. Manhattan L. Ins. Co.* 31 Mo. 518.

Messrs. Brandeis, Dunbar, & Nutter and J. Butler Studley, for defendant:

The construction and legal effect of the contract are governed by the law of Massachusetts.

Mittenthal v. Mascagni, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; *Atwood v. Walker*, 179 Mass. 514, 61 N. E. 58; *Brockway v. American Exp. Co.* 168 Mass. 257, 47 N. E. 87, 2 Am. Neg. Rep. 561; *Baxter Nat. Bank v. Talbot*, 164 Mass. 213, 13 L.R.A. 52, 28 N. E. 163; *Morgan v. New Orleans, M. & T. R. Co.* 2 Woods, 244, Fed. Cas. No. 9,804; *Hamlyn v. Talisker Distillery* [1894] A. C. 202, 6 Reports, 188, 71 L. T. N. S. 1, 58 J. P. 540.

By ¶ 11 of the contract dated December 1, 1910, action in this jurisdiction against this defendant is prohibited.

Daley v. People's Bldg. Loan & Sav. Asso. 178 Mass. 13, 59 N. E. 452.

The provision is valid.

Mittenthal v. Mascagni, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425; *Daley v. People's Bldg. Loan & Sav. Asso.* supra.

If the assignor could not have brought this action in Massachusetts, it is obvious that the present plaintiff cannot maintain it.

Earnshaw v. Whittemore, 194 Mass. 187, 80 N. E. 520.

Mr. Robert Weston also for defendant.

Rugg, Ch. J., delivered the opinion of the court:

The question is whether, in a contract between a manufacturer and its sales agent, a provision is valid to the effect that "no action at law, equity, or chancery shall be instituted or maintained by

the corporation in any court of any state of the United States or in any circuit or district court of the courts of the United States, against the company, other than in the courts of the common pleas of the state of Pennsylvania."

This stipulation occurs in an ordinary commercial contract between a corporation incorporated and domiciled in this commonwealth and another corporation incorporated under the laws of Pennsylvania.

It becomes necessary to review some of the cases. *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174, was an action upon a policy of insurance, one stipulation of which, incorporated in the contract by reference to the by-laws of the company, was in substance that any "action shall be brought at a proper court in the county of Essex." It was held that this stipulation was not binding, and that an action could be brought in any county where the venue properly might be laid. The general principle on which this decision was made to rest was that it was not within the province of parties to enter into an agreement concerning the remedy for a breach of a contract, which is created and regulated by law. Considerations of public policy were adverted to as supporting the conclusion, but not giving decisive weight. Chief Justice Shaw, in concluding the discussion, said: "The greatest inconvenience would be in requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulations of parties in framing and diversifying their contracts in regard to remedies."

In *Hall v. People's Mut. F. Ins. Co.* 6 Gray, 185, the provision of the contract of insurance was explicit to the effect that no action should be brought upon the policy except in the county of Worcester. Chief Justice Shaw, in giving the opinion of the court, after adverting to *Nute v. Hamilton Mut. Ins. Co.* as substantially deciding the question, said: "The court were of opinion that a stipulation in an original contract, that in case of breach the suit shall be brought in a particular county, or, in other words, that a suit shall not be brought in a county in which it is directed by law to be brought, is not a proper matter of contract. After a contract has been made and broken, the remedy is regulated by law, and of course must be governed by the law of the forum where the remedy is sought. . . . It is a well-settled maxim that parties cannot, by their consent, give jurisdiction to courts where the law has not given it; and it seems to follow, from L.R.A.1916D.

the same course of reasoning, that parties cannot take away jurisdiction where the law has given it."

The same point was decided in *Amesbury v. Bowditch Mut. F. Ins. Co.* 6 Gray, 596, 603. In *Roberts v. Knights*, 7 Allen, 449, it was held that a British subject who had shipped in England as seaman for an entire voyage, under a statutory law which provided that under such contract no seaman should sue for wages in any court abroad except in case of discharge or danger to life, nevertheless might bring an action against the master of the vessel although both parties were residents of Great Britain. It commonly has been thought that "such law enters into the terms of the contract and becomes a part of its obligation." *Hanscom v. Malden & M. Gaslight Co.* 220 Mass. 1, 7, 107 N. E. 426. Therefore the refusal of the court to give any heed to the British statute is significant, although there was no discussion of the point here raised. These cases generally have been understood as supporting the proposition that parties could not contract that their disputes arising under the contract should be litigated in a single court or in the courts of a particular jurisdiction.

It was held in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365, that a statute making it a condition precedent to the granting of the privilege to a foreign corporation to do business within a state, that it would not remove suits from state to Federal courts, was unconstitutional, and a contract to that effect was invalid. It there was said, at page 451 of 20 Wall: "A man may not barter away his life or his freedom, or his substantial rights. . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. So he may omit to exercise his right to remove his suit to a Federal tribunal, as often as he thinks fit, in each recurring case. In these aspects any citizen may no doubt waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."

This point was reaffirmed expressly in *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148. This principle has been followed in numerous decisions of circuit and district Federal courts. *Prince Steam Shipping Co. v. Lehman* (D. C.) 5 L.R.A. 464, 39 Fed. 704; *Slocum v. Western Assur. Co.* (D. C.) 42 Fed. 235; *The Etona* (D. C.) 64 Fed. 880; *Gough v. Hamburg Amerikan-*

ische Packetfahrt Aktiengesellschaft (D. C.) 158 Fed. 174; *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.* (D. C.) 222 Fed. 1006.

It was held in *Benson v. Eastern Bldg. & L. Asso.* 174 N. Y. 83, 86, 66 N. E. 627, in substance that parties cannot in the ordinary case by contract deprive courts of competent jurisdiction of their power to adjudicate causes, on the ground that that jurisdiction is prescribed by law and it cannot be increased or diminished by agreement of parties. In *Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills*, 27 C. C. A. 212, at 214, 54 U. S. App. 290, 82 Fed. 508, at page 510, it was said by Lurton, J.: "The policy [of insurance] . . . contained a stipulation that no suit in law or equity should be brought upon it except in the circuit court of the United States. This provision, intended to oust the jurisdiction of all state courts, is clearly invalid. Any stipulation between contracting parties distinguishing between the different courts of the country is contrary to public policy and should not be enforced."

To the same effect, see *Savage v. People's Bldg. L. & Sav. Asso.* 45 W. Va. 275, 282, 31 S. E. 991; *Bartlett v. Union Mut. F. Ins. Co.* 46 Me. 500; *Reichard v. Manhattan L. Ins. Co.* 31 Mo. 518; *Indiana Mut. F. Ins. Co. v. Routledge*, 7 Ind. 25; *Baltimore & O. R. Co. v. Stankard*, 56 Ohio St. 224, 49 L.R.A. 381, 60 Am. St. Rep. 745, 46 N. E. 577; *Owsley v. Yerkes*, 109 C. C. A. 250, 187 Fed. 560; *First Nat. Bank v. White*, 220 Mo. 717, 737, 132 Am. St. Rep. 612, 120 S. W. 36, 16 Ann. Cas. 889; *Healy v. Eastern Bldg. & L. Asso.* 17 Pa. Super. Ct. 385, 392, 393; *Matt v. Iowa Mut. Aid Asso.* 81 Iowa, 135, 25 Am. St. Rep. 483, 46 N. W. 857; *Shuttleworth v. Marx*, 159 Ala. 418, 428, 49 So. 83. In many of these cases the opinion of this court by Chief Justice Shaw in *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174, has been cited and relied on as an authority. Attempts to place limitations by contract of the parties upon the powers of courts as to actions growing out of the particular contract, or to oust appropriate courts of their jurisdiction, have been regarded with disfavor and commonly have been held invalid. *Guaranty Trust & S. D. Co. v. Green Cove Springs & M. R. Co.* 139 U. S. 137, 140, 35 L. ed. 116, 11 Sup. Ct. Rep. 512; *Meacham v. Jamestown, F. & C. R. Co.* 211 N. Y. 346, 352, 353, 105 N. E. 653, Ann. Cas. 1915C, 851. It might be argued with force that the law as to the enforcement of rights arising out of personal injuries was imported into the terms of a contract for hire. Yet it has been decided that statutory limitations to L.R.A.1916D.

the effect that a right of action for personal injuries shall be confined to the state where it occurred are invalid. *Atchison, T. & S. F. R. Co. v. Sowers*, 213 U. S. 55, 70, 53 L. ed. 695, 702, 29 Sup. Ct. Rep. 397; *Tennessee Coal Iron & R. Co. v. George*, 233 U. S. 354, 58 L. ed. 997, ante, 685, 34 Sup. Ct. Rep. 587.

So far as we are aware, the current of authority (with the exceptions presently to be noted) is unbroken in support of the principle laid down in *Nute v. Hamilton Mut. Ins. Co.* 6 Gray, 174, although that principle is followed by compulsion of authority and under protest by Judge Hough in *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.* (D. C.) 222 Fed. 1006. There are two of our own cases where the principle was not applied and which appear to be exceptions to it. In *Daley v. People's Bldg. Loan & Sav. Asso.* 178 Mass. 13, 59 N. E. 452, an action was brought by a citizen of this commonwealth which involved the construction of a condition contained in his certificate of membership in the defendant corporation, to the effect that "any action brought against this association by any shareholder shall be brought . . . in the county of Ontario, state of New York."

It was held that this condition of the contract should be enforced. After stating that it was not meant to overrule *Nute v. Hamilton Mut. Ins. Co.* supra, the court said: "Here we are dealing with a New York corporation, most of whose members would live in New York, and the greater part of whose dealings and contracts naturally would take place also in New York. There, we take it from *Greve v. Aetna Live Stock Ins. Co.* 81 Hun, 28, 30 N. Y. Supp. 668, which was put in evidence, the condition would be an answer to an attempt to sue in another county. The condition, at least so far as we have occasion to consider it, refers to suits by members of the corporation as such. It is perfectly reasonable, and as applied to a New York corporation in view of the New York law cannot be held contrary to the policy of Massachusetts with regard to such contracts as happen . . . to be concluded on this side of the boundary line. . . . It will be understood that we are speaking of parties standing in an equal position, where neither has any oppressive advantage or power, and that our decision as to the validity of the condition as a defense does not go beyond the particular circumstances of this case."

It is obvious that the assumption based upon *Greve v. Aetna Live Stock Ins. Co.* supra, that such a contract would be valid under the laws of New York, was an im-

portant factor in the reasoning of the court. The Daley Case was decided in February, 1901. It was held, however, in *Benson v. Eastern Bldg. & L. Asso.* supra, decided in March, 1903, that *Greve v. Aetna Live Stock Ins. Co.* did not state correctly the law of New York, and precisely the same condition that was before this court in *Daley v. People's Bldg. Loan & Sav. Asso.* was there adjudged to be invalid and unenforceable. If the *Benson* Case had been decided earlier than the *Daley* Case, and the law of New York had been proved in the *Daley* Case, as declared finally and conclusively in the *Benson* Case, instead of the erroneous view put forward in the decision of the *Greve* Case by an inferior court, an important link in the chain of reasoning by which the conclusion in the *Daley* Case was reached would have been wanting. The binding force of such a decision is open to question. *Kapiolani v. Atcherley*, 238 U. S. 119, 59 L. ed. 1229, 35 Sup. Ct. Rep. 832. The reasoning and ground of the decision well might have been different, although possibly the result might have been the same upon the ground that certificates of membership in the New York corporation were accepted with the inherent limitation and restriction explained at length in *Longyear v. Hardman*, 219 Mass. 405, 106 N. E. 1012. As the decision in the *Daley* Case was expressly confined to its own peculiar circumstances, it can hardly be considered as substantially narrowing the authority of *Nute v. Hamilton Mut. Ins. Co.* supra. In *Mittenthal v. Mascagni*, 183 Mass. 19, 60 L.R.A. 812, 97 Am. St. Rep. 404, 66 N. E. 425, the parties were both nonresidents. The action was on a contract made in Florence, Italy, where the defendant, a subject of the King of Italy, had his home, and where the plaintiffs, citizens of New York, elected a domicile by a provision of the contract. It related to a concert tour through the various states of this country, and was partly to be performed in Florence, and contained the provision that the courts of Florence, Italy, should have exclusive jurisdiction of any difference between the parties, except that the defendant reserved a right of action in New York for a payment of his recompense due under the contract. It was held that under the circumstances of hurried travel through many different jurisdictions, it was reasonable that the parties should fix upon the jurisdiction of the domicile of the defendant as the one where disputes should be adjusted. As both the parties were nonresidents, they had no standing in the courts of this state as matter of strict right, but only as matter of

comity. *National Teleph. Mfg. Co. v. Du Bois*, 165 Mass. 117, 30 L.R.A. 628, 52 Am. St. Rep. 503, 42 N. E. 510. It therefore was regarded as appropriate to yield to the terms of a contract between the parties having such obvious foundation in convenience and reason, although the court well might have declined to exercise any jurisdiction of the case on the ground that the parties were aliens. *Nute v. Hamilton Mut. Ins. Co.* supra, was referred to in the opinion, and not treated as overruled. In this connection *Palmer v. Lavers*, 218 Mass. 286, 291, 105 N. E. 1000, 1002, may be adverted to, where it was said that "where one of two parties to a possible litigation, in order to obtain a release from what is equivalent to an attachment, agrees that the judgment of the court of first instance shall be final, that agreement does not come within that principle [that is, the principle of *Nute v. Hamilton Mut. Ins. Co.* supra,], and that it is an agreement which is binding and will be enforced."

That decision has no relevancy to the question now presented. Nor is the question here raised, whether the parties may by contract provide that their respective rights growing out of the agreement shall be determined according to the law of a particular jurisdiction. See *Brandeis v. Atkins*, 204 Mass. 471, 476, 26 L.R.A. (N.S.) 230, 90 N. E. 861; *Pritchard v. Norton*, 106 U. S. 124, 136, 27 L. ed. 104, 108, 1 Sup. Ct. Rep. 102; *Greer v. Poole*, L. R. 5 Q. B. Div. 272, 274, 49 L. J. Q. B. N. S. 463, 42 L. T. N. S. 687, 28 Week. Rep. 582, 4 Asp. Mar. L. Cas. 300.

The *Daley* and *Mittenthal* Cases, as to the points adjudicated, while not extending the doctrine of the *Nute* Case, do not overrule it, and are not inconsistent with it. All three of these cases may be treated as stating the law applicable to the several states of facts presented to the court. The *Nute* Case lays down the general principle. The other two cases stand as sound upon their several states of facts. To extend them to the present case involves overruling the *Nute* Case. That case, as has been pointed out, states a general principle which has been adopted and prevails in all Federal courts by reason of the binding decisions of the United States Supreme Court in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L. ed. 365, and *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148. The same rule prevails generally in all states where the question has arisen. It relates to a matter as to which uniformity of decision and harmony of law among the several jurisdictions of this country are desirable. It would be unfortunate if contracts touching a subject of general com-

mercial interest, and which may be broadly operative as to jurisdiction, should be held valid in one state and invalid in all others. All these circumstances bring us to the conclusion that the clause in the contract here in question is unenforceable, and that therefore the action can be maintained in the courts of this commonwealth.

The plaintiff's demurrers to the defendant's answer in abatement and to the part of the answer in bar setting up the same matter must be sustained. The case is to stand for disposition upon the issues raised by the answer to the merits.

So ordered.

Annotation—Validity of provision in contract as to place where action may be brought.

As indicated by the title, the present annotation is confined to contractual provisions to the exclusion of statutory provisions. As to extraterritorial effect of statute limiting jurisdiction in which action may be brought, see annotation to *Tennessee Coal, Iron & R. Co. v. George*, ante, 685.

Cases like *Palmer v. Lavers* (1914) 218 Mass. 286, 105 N. E. 1000, upholding a contract waiving a right to appeal, and *Terre Haute Brewing Co. v. Ward* (1913) — Ind. App. —, 102 N. E. 395, upholding a contract waiving a right to change of venue, as applied to an existing right or claim of right, are not within the scope of this annotation.

The ultimate question as to whether a stipulation purporting to limit the courts in which an action on the contract may be brought shall be respected doubtless pertains to the remedy, and so is governed by the law of the forum; hence, the validity of a stipulation according to the law of the place where the contract is made does not necessarily render it effective in another jurisdiction in which an action, contrary to its terms, is brought. It is so held in *Meacham v. Jamestown, F. & C. R. Co.* (1914) 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851, with reference to stipulations, for arbitration. (Such stipulations, however, are not within the scope of the note.)

It may be observed, however, that upon the assumption that it is not contrary to the public policy of the forum to respect and enforce a stipulation confining actions on the contracts to the courts of another state, it may become necessary to test the validity of the stipulation by the law of another state or country which governs as to the substantive rights of the parties, since the stipulation may be invoked on the theory that it does not affect the remedy merely, but attaches as a condition of the contract and of the substantive rights of the parties, and that theory would depend upon the validity of the stipulation. *L.R.A.1916D.*

tion tested by the property law of the contract (see on this point *Daley v. People's Bldg. Loan & Sav. Asso.* (1901) 178 Mass. 13, 59 N. E. 452, *infra*).

The courts in general refuse to respect or enforce contractual provisions to the effect that any action based upon the contract shall be brought in a certain court or in the courts of a certain state or district, whether such provision is invoked to defeat the jurisdiction of a court of another state or of another district of the same state as that of the court or district specified. This is upon the general ground that it is not competent for the parties by their contract, in advance, to oust the jurisdiction of the courts, and is sometimes assimilated to the principle which invalidates stipulations for arbitration of all questions that may arise under a contract.

Thus, a provision in a by-law of a mutual insurance company to which the policies are expressed to be subject, that any action on the policy shall be brought in a certain county, where the company is established, or a negative provision that the action shall not be brought in another county, is not binding on the assured so as to prevent the bringing of an action in another county. *Nute v. Hamilton Mut. Ins. Co.* (1856) 6 Gray (Mass.) 174; *Hall v. People's Mut. F. Ins. Co.* (1856) 6 Gray (Mass.) 185; *Amesbury v. Bowditch Mut. F. Ins. Co.* (1856) 6 Gray (Mass.) 596. In the *Nute* Case, which is a leading case on the subject, Chief Justice Shaw distinguished such a provision from limiting the time within which an action shall be commenced, declaring in effect that the latter is a condition annexed to the acquisition and continuance of a legal right, and depends on contract and the acts of the parties; while the other is a stipulation concerning the remedy, which is created and regulated by law.

A provision in a *Lloyd's* policy against bringing suit in any court other than the court of highest jurisdiction was held in *Blair v. National Shirt & Overalls Co.*

(1907) 137 Ill. App. 413, to be void as against public policy, and hence not to interfere with the right to bring the action before a justice of the peace.

A stipulation in a policy of insurance that no action shall be maintained except in the county where the principal office of the insurer is situated is invalid. *Matt v. Iowa Mut. Aid Asso.* (1890) 81 Iowa, 135, 25 Am. St. Rep. 483, 46 N. W. 857. The court cited *May on Insurance*, § 490, to the effect that "a condition in the contract limiting the venue or place where the action shall be brought is invalid." The action was brought in another county of the same state in which the county specified was situated.

A clause in a policy of insurance that any action to enforce the same must be brought in the supreme court, county of New York, state of New York, is invalid. The constitution and statutes determine the jurisdiction which shall be exercised by the courts of the state, and, their jurisdiction having been lawfully conferred, they cannot be prevented from exercising it when it is properly invoked, by private contract of individuals. *McLean v. Tobin* (1908) 58 Misc. 528, 109 N. Y. Supp. 926. In this case apparently the provision was set up as a defense to an action on the policy, and not as a ground for a change of venue.

A stipulation in an insurance contract restricting the jurisdiction to a certain court was held in *Darling v. Protective Assur. Soc.* 71 Misc. 113, 127 N. Y. Supp. 486, to be invalid, as it attempted to deprive a party of rights given to him by the Constitution and statutes of the state.

Prior to the act of 6 Edw. VII. chap. 19, § 22 (0), declaring that an agreement which provides for the place of trial of an action shall be of no force or effect, but declares that the provisions of the section shall not apply or be available until the defendant shall make a motion to change the venue or place of trial, the courts had respected and given effect to stipulations in contracts for the sale of machinery to the effect that the trial of any action arising out of the contract should take place in the county where the head office of the company (the seller) was located, by granting the defendant's (seller's) motion for a change of venue to that county (see *Wright v. Ross* (1906) 11 Ont. L. Rep. 113), or denying a motion for a change of venue from that county (see *Goodison Thresher Co. v. Wood* (1905) 6 Ont. Week. Rep. 19). The statute in question, however, was held in *Bell v. Goodison Thresher* L.R.A.1816D.

Co. (1906) 12 Ont. L. Rep. 611, to apply to a contract made before its enactment.

Upon the authority of the *Nute Case* and other cases in Massachusetts, it was held in *NASHUA RIVER PAPER Co. v. HAMMERMILL PAPER Co.* ante, 691, that a stipulation in a contract between a manufacturer and its sales agent, one party being a corporation of Massachusetts and the other of Pennsylvania, that no action at law, equity, or chancery should be instituted in any court of any state or in any Federal court of the United States, other than the court of common pleas of the state of Pennsylvania, was held unenforceable, and did not preclude an action in a court of Massachusetts.

So, a stipulation in a policy of marine insurance issued at Toronto, Canada, by a corporation organized and doing fire and marine insurance business there, and having a branch office in New York for fire insurance only, to the effect that any action on the policy should be brought in a court in the city of Toronto and not elsewhere, is not a valid stipulation; nor will a Federal court sitting in New York decline jurisdiction of the suit, the libellants all being citizens of the United States and two of them being residents of New York. *Slocum v. Western Assur. Co.* (1890) 42 Fed. 235.

A stipulation in a policy of insurance that no suit in law or equity shall be brought upon it except in the circuit courts of the United States is intended to oust the jurisdiction of the state courts. Any stipulation between contracting parties distinguishing between the different courts of the country is contrary to public policy, and should not be enforced. *Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills* (1897) 27 C. C. A. 212, 54 U. S. App. 290, 82 Fed. 508.

A stipulation in a contract of mutual fire insurance that if the assured should not acquiesce in the determination of the directors on his claim, he may bring an action against the company for the loss, which action shall be brought at a proper court in the county in New Hampshire where the company was organized, was held in *Bartlett v. Union Mut. F. Ins. Co.* (1859) 46 Me. 500, not to be binding upon the insured, especially where the directors neglected to ascertain and determine the amount of the loss. The decision, however, was not put solely upon the narrower ground, but was referred to the general principle that after a contract has been broken, the remedy is regulated by law, and must be governed by that of the forum

where redress is sought, citing the Nute Case.

A stipulation in a contract of insurance waiving all right to bring any action for any claim under the policy, except in the courts of the state in which the company was organized, was held void in *Reichard v. Manhattan L. Ins. Co.* (1862) 31 Mo. 518, as contrary not only to public policy, but, also to the provision of the Missouri statute in relation to foreign insurance companies. It does not appear in this case where the policy was issued or the insured was domiciled, but presumably in Missouri.

A stipulation in a charter party that all disputes should be settled at the point of discharge only is against public policy and void, and a motion based on such stipulation, and addressed to the discretion of the court to decline jurisdiction of a suit to recover freight money, cannot prevail. *Prince Steam Shipping Co. v. Lehman* (1889) 5 L.R.A. 464, 39 Fed. 704. The court said that, the provision being void, it made no difference which party sought to take advantage of it.

In *Benson v. Eastern Bldg. & L. Asso.* (1903) 174 N. Y. 83, 66 N. E. 627, reversing (1901) 67 App. Div. 319, 74 N. Y. Supp. 506, involving a provision in a contract of a building and loan association that "any action brought against this association (defendant) shall be commenced within six months after filing proofs in the county of Onondaga and state of New York," the court said that such condition, if valid (and it may be so in this case, since, the principal office of the defendant being in the county of Onondaga, that was the county where the Code authorized the action to be brought), "affected only the venue of the action. If, in violation of the stipulation, the plaintiff brought his action in another county, the defendant's remedy was to move to have the place of trial changed to that in which the plaintiff had agreed it should be brought. The Code provides in what counties the venue of an action may be laid, but if, in contravention of those provisions, the venue is laid in another county than that prescribed, the remedy given is a motion to change the place of trial. The erroneous practice neither affects the jurisdiction of the court nor defeats the cause of action. The same principle controls the case before us."

Similar provisions in the contracts of New York building and loan associations were held contrary to public policy and unenforceable in the courts of another

state, upon the ground that the jurisdiction of the courts cannot be ousted in that way, in *Healey v. Eastern Bldg. & L. Asso.* (1901) 17 Pa. Super. Ct. 385; *Savage v. People's Bldg. Loan & Sav. Asso.* (1898) 45 W. Va. 275, 31 S. E. 991.

The decision in *Greve v. Aetna Live Stock Ins. Co.* (1894) 81 Hun, 28, 30 N. Y. Supp. 668, that a stipulation in a policy of insurance that any action or suit to enforce a claim arising thereunder shall be brought in a certain county of the state, is valid and may be set up as an answer to an action brought in another state, is apparently overruled by *Benson v. Eastern Bldg. & L. Asso.* (1903) 174 N. Y. 83, 66 N. E. 627.

In the Nute Case, the court placed no great reliance upon considerations of public policy, though it said that, so far as they went, they were opposed to the admission of a defense based on such a stipulation; but that the "greatest inconvenience would be in requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the remedy, according to the stipulations of parties in framing and diversifying their contracts in regard to remedies."

In *Meacham v. Jamestown, F. & C. R. Co.* (1914) 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851, Cardozo, J., remarked that if an agreement that a foreign court shall have exclusive jurisdiction is to be condemned, it is not saved by a declaration that resort to the foreign court shall be deemed a condition precedent to the accrual of the cause of action.

In *Buel v. Baltimore & O. S. W. R. Co.* (1898) 24 Misc. 646, 53 N. Y. Supp. 749, the court was apparently of the opinion that, if the provision in a trust deed securing railroad bonds, that in certain contingencies the trustee might file a bill in equity against the company in a court of equity in the state of Ohio, were to be construed to deny the right of a bondholder to maintain such a suit in another state, it would be contrary to public policy and void.

In *Rea's Appeal* (1883) 13 W. N. C. (Pa.) 546, the court, while unwilling to say that a clause in a trust agreement restricting the jurisdiction to the court of a certain county was entirely without effect, and that jurisdiction may not thereby be conferred upon the court of the county named, was clearly of the opinion that the general jurisdiction of other courts throughout the commonwealth is not thereby ousted.

In *Carveth v. Railway Asbestos Packing Co.* (1913) — *Ont.* —, 9 D. L. R. 631, that court said that the election by the parties to the contract of a domicile at a place in Quebec where the contract was made fell far short of an agreement not to sue in a court of any other province; but added that probably any agreement not to resort to the courts of Ontario, even when the contract is made abroad, would be regarded as against public policy and void.

There is an intimation in the *Nute Case* that perhaps such a stipulation might not be void in its creation, and that possibly it might be regarded as an executory contract upon which an action would lie, and upon which damages, if any were sustained, might be recovered. And in the *Hall Case* (1856) 6 Gray (*Mass.*) 185, the chief justice remarked that even if such a stipulation is of any legal force, it is an executory contract only, and cannot be specifically carried into effect and enforced by the court having jurisdiction of the cause and the parties.

No case, however, has been discovered involving the validity and effect of such a stipulation as the basis of a claim for damages. In all the cases cited in the note the stipulation was invoked for the purpose preventing the maintenance of the action in a court other than that designated.

The above cases are not, of course, opposed by cases like *Indiana Mut. F. Ins. Co. v. Routledge* (1855) 7 *Ind.* 25; *Howard v. Kentucky & L. Mut. Ins. Co.* (1852) 13 *B. Mon. (Ky.)* 282; *Sanders v. Hillsborough Ins. Co.* (1862) 44 *N. H.* 238; *Portage County Mut. Ins. Co. v. Stukey* (1849) 18 *Ohio*, 455; and *Arnet v. Milwaukee Mechanics' Mut. Ins. Co.* (1867) 22 *Wis.* 516, and possibly other cases, which hold, or assume, that a provision in the charter or a private law governing an insurance company, to the effect that any action against the company must be brought in a certain court or district, will be respected and enforced, if unrepealed and applicable to the facts of the case, since the provisions are statutory, and not contractual merely. The effect of such statutory provisions is not within the scope of this note. As to their effect in other states, see annotation following *Tennessee Coal, Iron & R. Co. v. George*, ante, 685.

Exceptions.

Occasionally, such contractual stipulations have been respected when the circumstances seem to make them reasonable and their enforcement proper. *L.R.A.* 1916D.

Thus, in *Mittenthal v. Mascagni* (1903) 183 *Mass.* 19, 60 *L.R.A.* 812, 97 *Am. St. Rep.* 404, 66 *N. E.* 425, it was held not contrary to the public policy of Massachusetts to give effect to a stipulation in a contract made in Italy between the defendant, a domiciled citizen of that country, and the plaintiff, a citizen of New York, who had by the contract elected a domicile in Italy, by which exclusive jurisdiction was given to the Italian courts of all differences or questions between the parties, saving only jurisdiction of suits by the defendant to recover his compensation, which was given to the courts of New York; and it was accordingly held that a court of Massachusetts would not take jurisdiction of an action to recover damages for an alleged breach of the contract. The contract in this case contemplated a concert tour through Canada and the United States; and the decision as a precedent is cut down by the opinion in *NASHUA RIVER PAPER CO. v. HAMMERMILL PAPER CO.* ante, 691, to the particular facts and circumstances of the case which made the stipulation not an unreasonable one, especially the circumstance of hurried travel through many jurisdictions in the performance of the contract, and the inconvenience of having actions brought in any state in which the parties might be temporarily present. The opinion in the *Mittenthal Case* suggests a somewhat broader ground of decision than that subsequently ascribed to it by *NASHUA RIVER PAPER CO. v. HAMMERMILL PAPER CO.*

In *Daley v. People's Bldg. Loan & Sav. Assn.* (1901) 178 *Mass.* 13, 59 *N. E.* 452 (opinion by Chief Justice Holmes, now of the United States Supreme Court), it was held that a provision of a certificate of membership in a New York building and loan association, that any action against the association by a shareholder should be brought in a certain county of the state of New York, was valid and should be enforced. The opinion referring to the *Nute Case*, observed that that was a somewhat hesitating decision and ought not to be pressed so far as to dispose of the case at bar. Continuing, the court said: "We are dealing with a New York corporation, most of whose members would live in New York, and the greater part of whose dealings and contracts naturally would take place also in New York. There, we take it from *Greve v. Ætna Live Stock Ins. Co.* (1894) 81 *Hun.* 28, 30 *N. Y. Supp.* 668, which was put in evidence, the condition would be an answer to an

attempt to sue in another county. The condition, at least so far as we have occasion to consider it, refers to suits by members of the corporation as such. It is perfectly reasonable, and as applied to a New York corporation in view of the New York law cannot be held contrary to the policy of Massachusetts with regard to such contracts as happen, by the accidents of postoffice communication, to be concluded on this side of the boundary line. The language is different from that used in *Nute v. Hamilton Mut. Ins. Co.*, and stronger. It plainly purports to attach a condition to the contract, and we are of opinion that it does so effectually. It is not intimated in *Nute v. Hamilton Mut. Ins. Co.* that when such a condition is attached to a contract and is valid, there is any technical difficulty in enforcing it as an answer to an action in another place. It is true that in this case the question is not between counties, but between states, and that our decision requires a resident of Massachusetts to go elsewhere for a remedy upon a contract made here. *Reichard v. Manhattan L. Ins. Co.* (1862) 31 Mo. 521. But objections of this sort may be made to appear more serious than they are. Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own."

The fact pointed out by *NASHUA RIVER PAPER CO. v. HAMMERMILL PAPER Co.* ante, 691, and confirmed by *Benson v. Eastern Bldg. & L. Asso.* (1903) 174 N. Y. 83, 66 N. E. 627, that the Daley Case was decided under a misapprehension induced by *Greve v. Aetna Live Stock Ins. Co.* (N. Y.) supra as to the validity and effect of the stipulation tested by the law of New York, does not seem to destroy altogether the force of the Daley Case as an authority for the general proposition that such a stipulation should be respected. The misapprehension as to the law of New York seems merely to affect the minor premise of the argument, viz., that the stipulation in the particular case was a condition attached to the contract; it is not apparent that it affects the major premise, viz., that such a condition if attached to the contract, ought to be respected. In other words, the misapprehension does not impair the intrinsic force of the chief justice's argument as applied to a stipulation valid by the proper law of the contract. The decision itself in the *NASHUA RIVER PAPER CO. CASE*, however, undoubtedly detracts L.R.A.1916D.

from the Daley Case as an authority on the question.

The criticism of the Daley Case by the court of appeals in *Benson v. Eastern Bldg. & L. Asso.* (N. Y.) supra, seems to be directed against the major premise of the argument, and not merely against the minor premise. The court of appeals said: "In the opinion there delivered [the Daley Case] the case of *Nute v. Hamilton Mut. Ins. Co.* is not overruled, but distinguished in the fact that in the earlier case the stipulation prescribed in what county the action should be brought, while in the later case it required the action to be brought in another state, New York. We do not see that the difference in circumstance justified any distinction in principle. In the latter case [the Daley Case] the learned court said, referring to such a condition in the agreement: 'It plainly purports to attach a condition to the contract, and we are of opinion that it does so effectually.' We assume that this is to say that the parties have agreed that the shareholder should have no cause of action against the defendant unless his action was brought in the specified county in the state of New York, and that therefore, when he brings a suit elsewhere, his cause of action is not established. We think this argument proves too much. It is difficult to see why it would not uphold an agreement that all claims against the parties should be determined by arbitrators, and not by the courts. It might be said with as much force in such a case as in the one now before us that the cause of action could, under the agreement, accrue only on the decision of the arbitrators. Yet nothing is better settled than that agreements of the character mentioned are void. . . . We think the doctrine of the *Nute Case* is the true one, that the stipulation affects the remedy, not the cause of action."

An agreement upon a valuable consideration, not to bring any action in the state of New York upon or in respect of a judgment, but to bring such action, if at all, in Russia, is not void, as contrary to public policy, under the rule that forbids an agreement to withdraw from ordinary jurisdiction of the courts future and unknown controversies. *Gitler v. Russian Co.* (1908) 124 App. Div. 273, 108 N. Y. Supp. 793, reversing (1907) 55 Misc. 553, 106 N. Y. Supp. 886.

In *Meacham v. Jamestown, F. & C. R. Co.* (1914) 211 N. Y. 346, 105 N. E. 653, Ann. Cas. 1915C, 851, holding an arbitration stipulation invalid, Cardozo, J., ob-

served that whether a contract which purports to preclude any action except in a foreign court is always invalid need not be determined, but added that there may be exceptional circumstances where resort to the courts of another state is so obviously convenient and reasonable as to justify the court in yielding to the agreement of the parties and declining jurisdiction, and referred to *Mittenthal v. Mascagni* (1903) 183 *Mass.* 19, 60 *L.R.A.* 812, 97 *Am. St. Rep.* 404, 66 *N. E.* 425. He added that if any exceptions to the general rule are to be admitted, they ought not to extend to a contract where exclusive jurisdiction has been bestowed, not on the regular courts of another sovereignty, but on private arbitrators.

In *Giener v. Meyer* (1796) 2 *H. Bl. (Eng.)* 603, it was held that a Dutch seaman having entered into articles at a Dutch port with the master of a Dutch ship, in which he agreed not to institute any suit against the master in foreign countries or cite him before any judge or magistrate, but to abide by the adjudication of their own courts, an English court would not take jurisdiction of an action against the master for wages, although the ship and cargo were confiscated in an English port, and the voyage thereby ended. The lord chief justice said: "Although no persons in this country can by an agreement between themselves exclude themselves from the jurisdiction of the King's courts, and though it must be admitted that contracts are transitory, and that a personal action follows the person, and that the contract in question is of such a nature as to be agreeable to our laws, yet when the parties, who are foreigners, bind themselves in their own country not to sue in any other, and when by suing here they put the defendant under an intolerable hardship, I think we ought to look into the contract in order to see what effect it would have, and how it could be enforced in the country where it was made, that we may not do any thing here unjust or contrary to the laws of that country. Now it appears to me to be good according to my apprehension of those laws, or at least, as there is no evidence to show that it is not good, we must presume it to be so. Then the first thing that stares us in the face is an agreement that they will not resort to our laws. There is nothing unreasonable in this; the parties are domiciled in Holland, the contract is to perform the whole voyage ending in Holland, and to seek their remedy in their own courts of *L.R.A.* 1916D.

justice. . . . Now, it is obvious that the master would be placed in a very cruel situation, if, after the ship and cargo were confiscated, he was to be sued in a foreign country for wages for a voyage, the proceeds of which might be either remitted or on board the ship so confiscated; the effect of it might be to cause him to lie in a foreign jail, perhaps for life. It seems therefore to me more reasonable to send the parties to their own country, there to pursue their remedy."

Lord Ellenborough, speaking of a similar stipulation, in *Johnson v. Machielsne* (1811) 3 *Campb. (Eng.)* 44, 13 *Revised Rep.* 745, said that if it were merely the regulation of a foreign government, he should leave that government to enforce it by punishing the infraction of it, or by any other means that might be more effectual, but it being a personal contract between individuals expressly stipulating that the mariners shall not sue the captain for wages in foreign parts, it was impossible to say that it was void.

In *Kirchner v. Gruban* [1909] 1 *Ch. (Eng.)* 413, 78 *L. J. Ch. N. S.* 117, 99 *L. T. N. S.* 932, 53 *Sol. Jo.* 151, involving an agreement between a German firm and a German subject who represented the firm in the United Kingdom, by which they submitted themselves in all cases of dispute to the exclusive jurisdiction of the Leipzig courts, the court said that *prima facie* such an agreement is one by which the parties are bound, and upon which the court must act, unless for some cause there is reason to think that the matter ought to be determined otherwise than by the tribunal to which the parties have deliberately agreed to submit their differences. In this case, the firm sued out a writ for an injunction to restrain the defendant from engaging in any other business than that of the plaintiffs until after the date prior to which he had agreed by the contract not to give notice of discontinuance; and for an injunction to restrain him from divulging matters relating to the plaintiff's business. The defendant entered a conditional appearance to the writ, and asked that the writ of summons and service thereof be set aside, or in the alternative that all proceedings in the action be stayed, on the ground of the agreement to submit to the exclusive jurisdiction of the Leipzig courts. The court was of the opinion that the plaintiffs were not entitled to the first injunction asked, because it would in effect compel specific perform-

ance of a contract of service; and that their right to the second injunction asked depended upon the existence of an implied contract on the part of an employee, involving the construction of the written contract, which the English court was precluded from construing by

the express agreement of the parties. The court accordingly concluded that no cause had been shown why the parties should not be held to their agreement to refer all disputes to the Leipsic courts.
G. H. P.

WASHINGTON SUPREME COURT.
(Department No. 1.)

DAISY D. IMLER et al., Appts.,
v.

NORTHERN PACIFIC RAILWAY COMPANY et al., Respts.

(— Wash. —, 154 Pac. 1086.)

Railroad — licensee on tracks — reliance on customary movement of train.

1. A licensee walking along a double track railroad cannot rely on a custom to move trains on the respective tracks only in one direction, so as to permit recovery in case, to avoid a train approaching him on one track, he steps on to the parallel track and is hit by a train on it coming from the same direction as the other, for which he did not look.

For other cases, see Railroads, II. c, 1, in Dig. 1-52 N. S.

Same — absence of headlight — proximate cause.

2. Absence of headlight on an engine which runs down a licensee on the track does not render the railroad company liable for the injury, if such absence was not the proximate cause of the injury.

For other cases, see Railroads, II. d, 2, in Dig. 1-52 N. S.

Same — duty due licensee.

3. One walking along a fenced and guarded railroad track in the country is not, although a licensee, entitled to the protection which the railroad company is required to afford to persons crossing its tracks at regularly established crossing places.

For other cases, see Railroads, II. d, 2, in Dig. 1-52 N. S.

Same — view of track — liability for injury.

4. The mere fact that the engineer had an unobstructed view of the track for more than a mile does not render the company liable for injury to one hit by the train

Note.—As to right of one on railroad track to rely on custom to move trains on certain track only in one direction, see annotation following this case, post, 706.

As to duty of railroad company to keep lookout for trespassers on track, see notes to *Smith v. Norfolk & S. R. Co.* 25 L.R.A. 287; *Frye v. St. Louis, I. M. & S. R. Co.* 8 L.R.A.(N.S.) 1069; and *Martin v. Hughes Creek Coal Co.* 41 L.R.A.(N.S.) 264. L.R.A.1916D.

while walking along the track, if there is nothing to show that the injured person was in fact on the track while the train was approaching him for that distance.
For other cases, see Railroads, II. d, 2, in Dig. 1-52 N. S.

(February 7, 1916.)

APPEAL by plaintiffs from a judgment of the Superior Court for Thurston County in defendant's favor in an action brought to recover damages for the alleged wrongful death of plaintiffs' decedent. Affirmed.

The facts are stated in the opinion.

Messrs. Hugo Metzler, Ben S. Sawyer, and Gordon & Easterday, for appellants: Plaintiffs' decedent was a licensee, and not a trespasser.

Roth v. Union Depot Co. 13 Wash. 540, 31 L.R.A. 855, 43 Pac. 641, 44 Pac. 253; *Great Northern R. Co. v. Thompson*, 47 L.R.A.(N.S.) 506, 118 C. C. A. 79, 199 Fed. 395; *Dotta v. Northern P. R. Co.* 36 Wash. 506, 79 Pac. 32; *Hamlin v. Columbia & P. S. R. Co.* 37 Wash. 450, 79 Pac. 991.

Defendants are liable for gross, wilful, and wanton neglect, even though deceased was a trespasser.

East St. Louis Connecting R. Co. v. O'Hara, 150 Ill. 580, 37 N. E. 918, 11 Am. Neg. Cas. 416; *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250, 14 N. E. 70; 1 *Thomp. Neg.* 2d ed. § 22; *Shumacher v. St. Louis & S. F. R. Co.* 39 Fed. 174; *Overton v. Indiana, B. & W. R. Co.* 1 Ind. App. 436, 27 N. E. 651; *Rhymes v. Jackson Electric R. Light & P. Co.* 85 Miss. 140, 37 So. 708; *Roth v. Union Depot Co.* supra; *Ft. Worth & D. C. R. Co. v. Longino*, 54 Tex. Civ. App. 87, 118 S. W. 198; *Young v. Clark*, 16 Utah, 42, 50 Pac. 832, 3 Am. Neg. Rep. 315; *Brown v. Boston & M. R. Co.* 73 N. H. 568, 64 Atl. 196; *Conley v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 402, 12 S. W. 764.

Deceased being a licensee, the railroad company owed additional care toward him to use ordinary precaution in both discovering and avoiding the injury.

McConkey v. Oregon R. & Nav. Co. 35 Wash. 58, 76 Pac. 526, 16 Am. Neg. Rep. 258.

The question of contributory negligence was for the jury, and not for the court.

Gregg v. Northern P. R. Co. 49 Wash. 189, 94 Pac. 911; *Thompson v. Northern P. R. Co.* 35 C. C. A. 357, 93 Fed. 384; *Northern P. R. Co. v. Baxter*, 109 C. C. A. 635, 187 Fed. 787.

Messrs. *George T. Reid, J. W. Quick, and L. B. da Ponte*, for respondents:

Deceased was a trespasser.

McConkey v. Oregon R. & Nav. Co. 35 Wash. 55, 76 Pac. 526, 16 Am. Neg. Rep. 258; *Dotta v. Northern P. R. Co.* 36 Wash. 506, 79 Pac. 32; *Hamlin v. Columbia & P. S. R. Co.* 37 Wash. 448, 79 Pac. 991; *Schug v. Chicago, M. & St. P. R. Co.* 102 Wis. 515, 78 N. W. 1090, 6 Am. Neg. Rep. 239; *Illinois C. R. Co. v. Eichler*, 202 Ill. 556, 67 N. E. 376; *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 514, 11 L.R.A. 385, 12 S. E. 553; *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Ward v. Southern P. Co.* 25 Or. 433, 23 L.R.A. 715, 36 Pac. 166.

If it should be held that the deceased was a licensee at the time he received the injuries resulting in his death, still plaintiffs cannot recover.

Williamson v. Southern R. Co. 104 Va. 146, 70 L.R.A. 1007, 113 Am. St. Rep. 1032, 51 S. E. 195; *Illinois C. R. Co. v. Eichler*, 202 Ill. 556, 67 N. E. 376; *Northern P. R. Co. v. Jones*, 75 C. C. A. 205, 144 Fed. 47.

Statutes requiring electric headlights are in the same class as those requiring the sounding of whistles at public crossings, or the ringing of bells at public places. They are for the protection of those who are where they have a legal right to be.

Williamson v. Southern R. Co. supra; *Ellis v. Southern R. Co.* 90 C. C. A. 270, 163 Fed. 686; *Lynch v. Great Northern R. Co.* 38 Mont. 511, 100 Pac. 616; *Baltimore & O. S. W. R. Co. v. Bradford*, 20 Ind. App. 348, 67 Am. St. Rep. 252, 49 N. E. 388; *Toomey v. Southern P. R. Co.* 86 Cal. 374, 10 L.R.A. 139, 24 Pac. 1074.

The railroad company was not negligent in running the north-bound train on the south-bound track.

Boulden v. Louisville & N. R. Co. — Ky. —, 112 S. W. 936; *Morgan v. Northern P. R. Co.* 116 C. C. A. 223, 196 Fed. 449.

Chadwick, J., delivered the opinion of the court:

Joseph Imler, while walking along the track of the defendant railway company on the evening of the 4th of November, 1912, was struck and killed by one of defendant's work trains. The place of the accident was between the stations of Centralia and Bucoda, where the company maintains a double-track railway which is fenced and L.R.A.1916D.

guarded at all proper places with cattle guards. Imler had been at work during the day at a farm about a mile and a half south of Bucoda, where he lived. He left the place of his employment about dusk, and followed a road or footpath to the right of way of respondent company. He entered on the right of way either through, or by climbing over, a gate which had been left for the convenience of the owner of the land; the place having been formerly maintained as a private crossing. The crossing had been abandoned about three years before when the company double-tracked its road. The gates had not been removed. Imler had apparently gone but a short distance in the direction of Bucoda when he was struck and killed.

The testimony shows, notwithstanding the fact that respondent maintained a double-track railroad, a part of its transcontinental system, over which some forty trains passed each way every day, and with the track properly guarded, that the people in the neighborhood had for a long time been accustomed to use the right of way and the tracks as a footpath in going to and from their homes situated near the tracks. At times some had ridden bicycles along and between the tracks. One witness testifies that he had ridden a motorcycle, and another that he had seen a man riding along the tracks on horseback.

It is contended by the appellants that the use of the tracks and the right of way by the public in the manner indicated had continued for so long a time that a license to use the tracks as a footpath is implied, and respondent did not use that degree of care which it owed to deceased as a licensee, and is liable to answer in damages. Negligence is charged in that respondent's train was running against traffic, that is, running north on the south-bound tracks; that the headlight was not burning or was so defective as to give no warning; that the train was running at an excessive rate of speed (the testimony does not sustain a finding that it was running more than 35 miles an hour); that at the time of the happening of the accident a north-bound passenger train equipped with a powerful electric headlight, and with cars and coaches brilliantly lighted, was going north on the north-bound track; that the lights from the passenger train sufficiently lighted the track and that portion of the right of way upon which the deceased was walking to enable the engineer and fireman to see and observe him in time to give him warning of his peril; and further that the noise and light caused by the passing of the passenger train held the attention of the deceased, and he relied upon the fact that

the west track was habitually used by south-bound trains, and was induced to believe that the south-bound track was, and would be, free and clear of obstructions from behind, and the light and noise and confusion of the passenger train made it impossible for him to hear and discover the approach of the work train.

It is shown that deceased was about forty-five years of age, in the possession of all of his faculties, and had, at one time, been a section hand working along the track where he was killed, and hence had knowledge of the frequent use of the tracks.

As material to the history of the case, although not a fact essential to our holding, there was a public highway leading into Bucoda at about the same distance from the place where the deceased was working as was the railroad track. At the close of plaintiff's testimony, the trial judge took the case from the jury and entered a judgment of nonsuit.

Much of the briefs are taken up with the discussion of the inquiry as to whether deceased was a trespasser or licensee. We shall not inquire whether deceased was a trespasser. We shall assume that he was a licensee, although it may well be doubted whether any person can claim a license to use a railway track, more especially the double track of a transcontinental system over which trains run with great frequency, as a footpath, where, as in this case, the track is laid in the open and between stations and is fenced and guarded. Under such circumstances, it has been held that a use, however long continued, will not imply a license. *Burg v. Chicago, R. I. & P. R. Co.* 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Ward v. Southern P. Co.* 25 Or. 433, 23 L.R.A. 715, 36 Pac. 166. And such would seem to be the logical result of the opinion of this court in the case of *Hamlin v. Columbia & P. S. R. Co.* 37 Wash. 448, 79 Pac. 991, and *Dotta v. Northern P. R. Co.* 36 Wash. 506, 79 Pac. 32. The duty of a railroad company to a licensee is defined in the case of *McConkey v. Oregon R. & Nav. Co.* 35 Wash. 55, 76 Pac. 526, 16 Am. Neg. Rep. 258, as follows: "In the case of the licensee, the company, when moving trains, is charged with the additional duty of being in a state of expectancy as to the probable presence of persons upon the track at places where travel thereon is known to be customary and frequent. The care required in the case of the licensee, therefore, calls for both reasonable lookout in advance, and a reasonable effort to avoid injury after presence is discovered."

The determinative question is, therefore, whether the engineer and fireman, or L.R.A.1916D.

either of them, discovered the presence of the deceased and his peril in time to avoid the accident.

There is no testimony that would warrant us in holding that respondent's agents were remiss in the performance of their duty to the deceased; that is, to keep a lookout and avoid any wanton or wilful injury. The engineer testifies that he was keeping a lookout, and that he did not see the deceased until just the moment he was struck. This is not disputed by the testimony of anyone, nor do we find the physical or admitted facts to be contrary to his declaration.

In *Spicer v. Chesapeake & O. R. Co.* 34 W. Va. 516, 11 L.R.A. 385, 12 S. E. 553, a recovery was denied under the following state of facts: "He is not at a street crossing, but purely for his own convenience is walking on the track from Sixteenth to Twentieth street; and seeing a train moving towards him on the track on which he is walking, he steps upon the next track; and being blinded by the headlight of the engine approaching, and his hearing dulled by it, or more likely because he did not look for a train on the track to which he stepped, he is scarcely on that track before he is struck by a train which is being backed from the depot to the shops, receiving injury from which he dies in about an hour. No one questions that the company was simply exercising, on ground belonging to it, its lawful business, and that the deceased was not in the public highway, but using the track for his own convenience, when he could have used a walk or path but a few yards distant, outside the tracks, or an alley but a short distance further away. What duty did the company owe him, under these circumstances, except that it should not wilfully or wantonly hurt him? Where could the deceased have found a more deadly, dangerous walk? And he was fully aware of this, for he was an employee of the company, was well acquainted with the yard and works of the company there, but not in service in the yard nor on duty then or there. Indeed, his daily contact and familiarity with the railroad operations lulled him into a feeling of security and negligence which cost him his life when but twenty-one or twenty-two years of age. He was in possession of all the natural senses and faculties which tell of danger and aid us in self-preservation amid perils surrounding us."

Although there is no testimony to sustain it, we think the assumption of appellants, as set forth in that part of their complaint describing the presence of the passenger train, is a fair theory of the immediate circumstances and conditions. The

deceased was evidently on the west side of the west track when struck, for the bruises on his body indicate that he was struck just above the hip by the pilot beam. At the time the two trains were running nearly parallel, and the deceased must have assumed that the passenger train was the only train approaching, and, there being an utter absence of testimony that he had been walking for any distance on either track, he must have stepped upon the ties immediately in front of the work train without looking, resting upon the assumption that a train on the west track, if any, would come from the north, and not from the south. It follows that the only contention that can be advanced with any show of reason is that respondent was bound to operate its trains "with traffic" in all instances, and that licensees may rest secure in the belief, and act upon it without looking, that all trains will move in the customary manner. Whatever the rights of a licensee may be, railroad tracks are laid for the convenience of those who operate them, and the public which employs them, and those who ride upon their cars. A licensee cannot, from the nature of things, having in mind the public duty of the carrier, assume that a railroad company will not, or may not, use its property as will best serve, or as may be necessary at times to serve, its primary purposes. It cannot be held guilty of negligence if, in the performance of its functions as a public carrier, it suspends its own rules for the time being for the movement of its trains, and sends a train forward against traffic. We might as well hold that a train running ahead of time or behind time would have to flag its way to protect those who were accustomed to use its track as a footpath in country districts; for, if appellants' theory be good, a licensee might as well rest under the assumption that if a train did not pass the point of his use at a given time, or upon schedule time, it would have no rights which he was bound to respect or to take notice of.

In all cases then, we come to the one question whether the company kept a lookout, and whether the presence of the licensee was discovered in time to prevent the accident. As we have said, the testimony in this case not only does not sustain such a finding, but is contrary to it.

The fact is apparent and conclusive that the deceased acted upon the assumption that but one train was approaching from the south, and that the west track was clear. Such assumptions find no favor in the law. A similar contention was made in *Boulden v. Louisville & N. R. Co.* — Ky., 112 S. W. 936. The court there held L.R.A.1916D.

that the company had a right to run its trains on either of the two tracks. "The court properly instructed the jury that the defendant had the right to use either track, as otherwise they might have thought it negligent for the defendant to run the train in question on the east track. Persons who walk along a railroad track are under obligations to keep out of the way of trains, and they cannot complain that the train is run on one track and not on another. There was nothing in the plaintiff's conduct to apprise the operatives of the train that he was ignorant of its approach, or to impose upon them the duty of taking extra precautions for his safety, until he, without looking back to see if the train was coming, suddenly placed himself in peril when the train was right upon him."

See also *Morgan v. Northern P. R. Co.* 116 C. C. A. 223, 196 Fed. 449.

In *Northern P. R. Co. v. Jones*, 75 C. C. A. 205, 144 Fed. 47, instead of running against traffic, a train was running off its schedule. The court, in holding that the company was not negligent in so operating its trains, said: "In *Louisville & N. R. Co. v. McClish*, 53 C. C. A. 60, 115 Fed. 268, it was said: 'Even in the case of a licensee, there is, under such circumstances, the highest duty to exercise the utmost degree of vigilance in looking out for approaching engines or cars. . . . The track is the property of the railroad company, which it has the legal right to use at any and all times.' The rule is well established that it is the duty of a traveler to stop and look and listen before crossing or walking along a railroad track. He has no right to assume at any time of the day or night that trains will not be run over the track. *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697, 24 L. ed. 542, 7 Am. Neg. Cas. 345; *Schofield v. Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; *Northern P. R. Co. v. Freeman*, 174 U. S. 379, 43 L. ed. 1014, 19 Sup. Ct. Rep. 763. Said the court in *Elliott v. Chicago, M. & St. P. R. Co.* 150 U. S. 248, 37 L. ed. 1071, 14 Sup. Ct. Rep. 86: 'The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom.' The defendant in error was a miner of the age of thirty-four years, and was in the full possession of his senses. According to his own testimony, he walked upon the railroad track a distance of more than half a mile without once looking back or stopping to listen for an approaching train. In so doing, it must be held that he was guilty

of gross negligence, which, irrespective of negligence in the failure of the engineer to discover him on the track, is sufficient to bar his right of recovery. It was no excuse for his failure to take such precautions that the wind was blowing in his face, or that the noise of a waterfall may have deadened the sound of an approaching train. Those circumstances only rendered the use of his senses the more imperative. It was his duty continually to exercise vigilance."

We attach no importance to the contention that the headlight on the train was not burning, or was so dim as to afford no protection to the deceased. There is no testimony even tending to show that the lack of a headlight, or its defective character, was the proximate cause of the injury. Appellants' testimony shows that the electric headlight of the passenger train illuminated the track and the right of way. Another headlight would have added no security to the deceased.

Appellants rely principally on the cases of *Roth v. Union Depot Co.* 13 Wash. 525, 31 L.R.A. 855, 43 Pac. 641, 44 Pac. 253; *Northern P. R. Co. v. Baxter*, 109 C. C. A. 635, 187 Fed. 789; and *Great Northern R. Co. v. Thompson*, 47 L.R.A. (N.S.) 506, 118 C. C. A. 79, 199 Fed. 395. These cases, like many that might be cited, are either crossing cases, or cases from cities and towns where population is congested and the public have been accustomed to cross the tracks or to use them as a thoroughfare. Recoveries are allowed in such cases because a higher duty rests upon a railroad company under such circumstances. In moving trains over and across the streets of cities, or through depot grounds, or in switch yards, the railroad company, from the nature of things, must have its trains under control and be constantly alert to the possibility of injuring persons or property. This is a condition which is generally compelled or regulated by statute or ordinance. But we do not find it to be so held in any of the cases where, as in this case, a fenced and guarded track was used, not as a crossing, but as a footpath in the country and between stations.

The crossing cases may be further distinguished. They rest in implied license

upon legal grounds, as differentiated from the acts or conduct of the parties as they may arise in a particular case. In consequence, a duty is put upon the court in all such cases to measure the relative rights, as well as the relative obligations, of the parties to the action. The company is held to a rule of strict accountability, because it is necessary for men and traffic to cross railway tracks in the pursuit of their legitimate undertakings and conveniences. The law charges a company with a knowledge that they will do so. Whereas one who walks along a railroad track using it as a footpath, especially where the track is in the country and fenced, cannot claim the protection given to those who do things of necessity, for, from the very nature of things, he is using the track for his personal comfort and convenience. Men must, and therefore may, move from one side of a track to another at places established by the company, or so long used by the public as to imply a license, resting under the assumption of legal right. But the one who does not cross, but loiters, or crosses the barriers that have been erected to warn him and save him from the consequences of his folly, can claim no more than that he shall not be wantonly or wilfully injured if his peril is discovered in time to prevent his injury. The cases all rest in the same sound principle which controls every exploration into the law of negligence; that is, that the degree of care in every case shall be measured, not by any abstract rule, but by reference to the facts and circumstances attending the particular case.

There is no merit in the contention that the respondent's engineer had an unobstructed view of the track for more than a mile, and should have discovered the peril of the deceased. There is no evidence that deceased was on the track, and we cannot hold, as a matter of law, that the engineer was bound to anticipate that a man walking along the right of way would step in front of a railway train without exercising any care for his own safety.

Affirmed.

Morris, Ch. J., and Fullerton, Mount, and Ellis, JJ., concur.

Annotation—Right of one on railroad track to rely on custom to move trains on certain track only in one direction.

IMLER v. NORTHERN P. R. Co. ante, 702, in holding that a licensee on the railroad tracks has no right to rely on the custom of the company to operate its trains in one direction only on certain tracks, is in L.R.A.1916D.

accord with the authorities that have considered the question under annotation.

Thus, which of its tracks would or should be used by a railroad company for its various trains is a matter for the ex-

clusive determination of the railroad company. *Morgan v. Northern P. R. Co.* (1912) 116 C. C. A. 223, 196 Fed. 449.

So, persons walking along a railroad track have no right to rely upon the fact that trains are ordinarily run only in one direction on a particular track. (Fed.) *Ibid.*

In *Lake Shore & M. S. R. Co. v. Hart* (1877) 87 Ill. 529, one who, while using the railroad track as a pathway, was struck by a switching engine proceeding south on a north-bound track, urged, as excuse for not looking toward the north, the practice of the railroad company in running only north-bound trains on this track, but the court stated that he was not justified in relying upon any such practice, as the company had the right to change it at any time and to run their trains at all times in either direction, and any dependence upon such former practice was at his risk; that this practice before did not excuse the exercise of caution and vigilance in looking for approaching trains in both directions. The court added, however that the proof showed satisfactorily that this practice did not prevail as to switching engines and trains being switched in the yards at this point.

Also in *Boulden v. Louisville & N. R. Co.* (1908) — Ky. —, 112 S. W. 936, cited in *IMLER v. NORTHERN P. R. Co.* ante, 702, an action for injuries by one who, while walking along a railroad track, in order to avoid a puddle, stepped on the east track, which was customarily used by trains going north, and was struck by a train going south, it was held that negligence could not be predicated on the fact that, contrary to its custom, the railroad company for some reason or other operated this train south on the east track. The court stated that persons who walk along a railroad track are under obligations to keep out of the way of trains, and cannot complain if the trains run on one track and not on another.

So, in *Stearman v. Baltimore & O. R. Co.* (1895) 6 App. D. C. 46, an action for the death of one while walking along railroad tracks, alleged to have been due to negligence of the railroad company in running its trains, in holding that a verdict was properly directed for the defendant, the court said: "The fact that trains had not usually been run upon the eastern track into the city, in which direction she was walking, or had not been seen by the witness to run in that direction, makes but little, if any, difference. It does not appear that there

was any law or regulation governing the running of trains upon that track, and the fact that the train which did the injury was running into the city thereon would tend to show at least that there was no rule or invariable custom controlling its use."

And in *Holmes v. South Pacific Coast R. Co.* (1893) 97 Cal. 161, 31 Pac. 834, one, while waiting for a train at the station, walked up and down the tracks and was struck by a train coming up from behind, and it was held that the liability of the railroad company could not be made to depend upon the question whether or not the deceased did or did not know that the railroad company ran its trains on the left-hand track, and so evidence was held to be irrelevant that, with the exception of that particular road, it was the universal custom in the operation of double-track railroads to run trains upon the right-hand track.

But in *Sullivan v. New York, N. H. & H. R. Co.* (1900) 73 Conn. 203, 47 Atl. 131, where one lawfully on the railroad tracks was struck by an engine backing west on an east-bound track, it was held that there was no contributory negligence as a matter of law, considering that a passenger train was coming in the same direction at the same time upon the other track, so that it was easy to see how deceased, having looked and listened, may have seen and heard only the approaching passenger train, and may have reasonably supposed that while he was passing over the east-bound track he was in no danger from a train going west upon that track. It was also held that under the facts disclosed by the evidence it could not be said that the railroad company was not guilty of negligence in unnecessarily and improperly running its engine west on the east-bound track.

And contributory negligence of a traveler about to cross railroad tracks was held in *Greenawaldt v. Lake Shore & M. S. R. Co.* (1905) 165 Ind. 219, 74 N. E. 1081, to be a question for the jury, where, with knowledge that the railroad company had established the custom of running its train east on the north track and west on the south track, in reliance on such custom, and in view of the fact that a long freight train headed west was standing on the south track so as to obscure her vision to the west, she directed all her attention to ascertaining whether a train was approaching from the west and, hearing none, proceeded to cross and was struck by a train on the north track which approached from the east without warning signal.

Railroad employees.

That in consequence of a wreck on its line it became necessary for the railroad to operate east-bound trains on the west-bound track was held, in *Graham v. Grand Trunk R. Co.* (1912) 25 Ont. L. Rep. 429, 19 Can. Ry. Cas. 232, 1 D. L. R. 554, Ann. Cas. 1912D, 1053, not to be of itself such negligence as to warrant recovery for injuries sustained by track repairers who were working on such west-bound tracks in reliance upon the custom to operate only west-bound trains over such track, and in ignorance of anything making it necessary to change such customary mode of operating trains.

So, also, in *Belt R. Co. v. Skaszypeczak* (1907) 225 Ill. 242, 80 N. E. 113, it was held that an experienced track repairer who was working on tracks had no right to assume that a track would be used only for trains running in a certain direction, because customarily used only for such trains, where he had seen an engine leave a train and go down the track to a watering tank, and he must have known that the engine would probably return from that direction for the remainder of the train. At least, the circumstances, the court said, were such as to put him upon his guard to watch for the return of that engine over the track upon which he was working.

In *Stewart v. Washington & G. F. Electric R. Co.* (1903) 22 App. D. C. 496, an action for injuries to an employee of an electric railroad company whose barns were located outside the city limits, while walking along the right of way, the only means of reaching the barn, caused by being struck by a car coming up from his rear on the left-hand track, it was conceded that the company had full control and right to run their cars over their railroad at such time and over such of their tracks as they might deem it necessary for the execution of their work; and that it was no violation of duty to anyone to run their cars upon one track rather than another, when the exigency or convenience of the service undertaken by them rendered it proper in their judgment so to do; but it was contended that if there be a change made in the operation of the railroad, either as to the time of running or as to the direction of trains on several tracks, there should be notice given of such a change to employees and others concerned, so that they might pursue their course accordingly. The court, in denying this contention, said: "This would certainly be an unusual requirement and one that might be very embarrassing in the operation of a railroad on L.R.A.1916D.

important occasions. All parties coming in contact with the operation of a railroad must be presumed to know that the owner has entire control and direction of the course and manner of operation, and so long as there be no contractual obligation or public duties violated, the owner must be allowed to exercise his own judgment and discretion in the use of his property." The court added that when the accident occurred the car was not at any stopping place nor at any crossing of either a public or private way, where signals were required, but it was passing where it was entitled to an unobstructed right of way.

And *Kinnare v. Chicago, R. I. & P. R. Co.* (1895) 57 Ill. App. 153, a car washer stepped from a car and, without looking toward the south, walked north along the south-bound track, and was struck from the rear by cars being backed into the station for the purpose of making up a south-bound train. It was contended that he had a right to rely upon the fact that the track upon which he stepped was what was known as the outgoing or south-bound track, and that he was therefore excused from looking in any direction except that from which outgoing trains would approach him, or that, if he was at all negligent in not looking in the other direction, his negligence was slight, and that the negligence of the company was gross in comparison. The court stated, however, that the doctrine of comparative negligence was no longer the law of the state, and so, as a condition to recovery, a person injured must be found to be in the exercise of ordinary care for his own safety, and the injury must result from the negligence of the defendant. In holding that the contributory negligence of the party injured was such as barred recovery, the court said: "We fail to find in the evidence any near approach to the exercise of ordinary care by the deceased for his safety. He stepped from a train in a yard where the switching of cars was continually going on, and, without looking in but a single direction, walked a distance of several feet with apparently no heed of his surroundings, and placed himself directly in front of a moving car when no more than 3 feet from it. The slightest attention on his part would have shown him the danger he was incurring, and if he chose to avoid the exercise of any diligence, others should not be held responsible. He should have looked in both directions The deceased was accustomed to the system of switching

which prevailed in the yard, and must have known that the track upon which outgoing trains passed must necessarily be used, as it always had been, to back cars into the station upon, in order that they might make up the trains that should pass out."

But in *Louisville & N. R. Co. v. Trisler* (1910) 140 Ky. 447, 131 S. W. 198, a railroad employee who was walking to-

ward the depot on the railroad track and was struck by an inbound train was held not guilty of contributory negligence in relying on the custom of the railroad company to run inbound trains in on another track, especially in view of the fact that when he passed the switch he saw that it was set to run that train in on such other track. J. H. B.

MISSISSIPPI SUPREME COURT.
(In Banc.)

GUARANTY TRUST COMPANY OF NEW YORK, Appt.,
v.
MOBILE & OHIO RAILROAD COMPANY.
(— Miss. —, 70 So. 585.)

Carrier — forged bill of lading — ordering valid one — liability.

1. A railroad company which receives goods for shipment, issues bills of lading therefor, and telegraphs the broker of the consignor of their receipt, is not liable to one who purchases, on the faith of the tele-

Note.—While an extensive search has disclosed no other case passing upon the liability of a carrier which confirms the receipt for shipment, of goods corresponding to the description in a forged bill of lading, the decision upon this point in *GUARANTY TRUST Co. v. MOBILE & O. R. Co.* seems clearly to be correct. It has been stated that a common carrier is not estopped, even by a non-negotiable bill of lading signed by its agent, from denying that the goods were actually received as therein stated, especially where the action is between itself and the alleged shipper. "And even as against a bona fide consignee or indorsee, the great weight of authority seems to be in favor of the doctrine that the carrier is not estopped by the bill of lading, fraudulently or mistakenly issued by its agent, from showing that no goods were shipped as therein stated." 10 R. C. L. 773. And if a carrier is not estopped from showing that no goods were shipped, by a bill of lading issued by its agent, either fraudulently or mistakenly, it seems clear that it should not be estopped from so showing, by the mere confirmation of the receipt for shipment, of goods corresponding to those described in a forged bill of lading, especially where it had no knowledge of the forgery, and either negligently or mistakenly confirmed the receipt of the goods, or, as in *GUARANTY TRUST Co. v. MOBILE & O. R. Co.*, had actually received such goods and issued a valid bill of lading therefor. In the latter case, the nonliability of the carrier under the forged bill of lading, on the ground of estoppel or otherwise, seems especially clear, as it was not guilty of any fraud or even negligence, but merely con-

firm, a draft with a forged bill of lading for similar property attached, because it honors the order of a purchaser of the true bill to stop shipment without giving the broker an opportunity to protect interests which may be acquired on the faith of the telegram.

For other cases, see Bills of Lading, in Dig. 1-52 N. S.

Same — confirmation of forged bill of lading — liability.

2. A railroad company is not liable, on the ground of estoppel, to a purchaser of a draft with forged bill of lading attached, because, without knowledge of the forgery, it confirms by telegram to the broker, upon which the purchaser relies, the receipt of

firmed, in good faith, the receipt of goods which it had in fact received for shipment, and which, without its knowledge, corresponded to the description in a previously forged bill of lading.

As to the liability of a carrier to a bona fide holder upon a bill of lading issued by the negligence or mistake of its agent without the delivery of any goods to the carrier, see notes to *Roy & Roy v. Northern P. R. Co.* 6 L.R.A.(N.S.) 302; *Franklin Trust Co. v. Philadelphia, B. & W. R. Co.* 22 L.R.A.(N.S.) 828; and *Sealy v. Missouri, K. & T. R. Co.* 41 L.R.A.(N.S.) 500.

As to the constitutionality of a statute making a bill of lading conclusive proof of the receipt of property, see note to *Yazoo & M. Valley R. Co. v. Bent*, 22 L.R.A.(N.S.) 821.

Upon the conclusiveness of a bill of lading as to the character and amount of goods, as between the carrier and a bona fide transferee, see note to *Thomas v. Atlantic Coast Line R. Co.* 34 L.R.A.(N.S.) 1177.

For the rights and liabilities of the assignee of a bill of lading with draft attached, as against the consignee, who does not get the goods or who finds them defective, see notes to *Finch v. Gregg*, 49 L.R.A. 679; *Haas v. Citizens' Bank*, 1 L.R.A.(N.S.) 242; *Mason v. Nelson*, 18 L.R.A.(N.S.) 1221; *Cosmos Cotton Co. v. First Nat. Bank*, 32 L.R.A.(N.S.) 1173; and *Springs v. Hanover Nat. Bank*, 52 L.R.A.(N.S.) 241.

Upon the right of the discounteer of a draft as to property covered by a bill of lading attached to the draft, see note to *American Thresherman v. De Tamble Motors Co.* 49 L.R.A.(N.S.) 644.

A. C. W.

goods corresponding to those described in the forged bill, when such goods are actually received and a valid bill of lading issued for them.

For other cases, see Estoppel, III. c, in Dig. 1-52 N. S.

(February 7, 1916.)

APPEAL by plaintiff from a judgment of the Circuit Court for Lowndes County in defendant's favor in an action brought to recover money advanced by plaintiff on forged bills of lading, for which loss defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Mr. W. J. Lamb, for appellant:

The sending of the telegram by the agent of the defendant was a complete ratification of the two bills of lading, and the direct cause of the trouble and loss to plaintiff.

23 Am. & Eng. Enc. Law, 189, 889; Norton v. Shelby County, 118 U. S. 451, 30 L. ed. 189, 6 Sup. Ct. Rep. 1121; Scott v. Buchanan, 11 Humph. 470; Hatton v. Stewart, 2 Lea, 234; Ansonia v. Cooper, 64 Conn. 544, 30 Atl. 760; Curnane v. Scheidel, 70 Conn. 13, 38 Atl. 878; 23 Cyc. 1528; Carter v. Pomeroy, 30 Ind. 438; Hartman v. Hornsby, 142 Mo. 368, 44 S. W. 242; First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646; Goodwin v. East Hartford, 70 Conn. 18, 38 Atl. 876.

When the defendant sent the telegram in question, it was as fully bound to all intents and purposes as if it had given Steel, Miller, & Company direct authority to sign the bills of lading.

First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 652; Gunther v. Ullrich, 82 Wis. 222, 33 Am. St. Rep. 32, 52 N. W. 88; Uniontown Grocery Co. v. Dawson, 68 W. Va. 332, 69 S. E. 845, Ann. Cas. 1912B, 148.

Because of being asked to send this unusual telegram, that fact alone was sufficient to put the defendant on inquiry, and it owed a public duty to make the inquiry, and give the proper information regarding this shipment of cotton.

29 Cyc. 1114; Parker v. Foy, 43 Miss. 266, 5 Am. Rep. 484; Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 25 L. ed. 892; Searles Bros. v. Smith Grain Co. 80 Miss. 688, 32 So. 287; Jasper Trust Co. v. Kansas City M. & B. R. Co. 99 Ala. 416, 42 Am. St. Rep. 79, 14 So. 546; The Protection, 42 C. C. A. 489, 102 Fed. 516.

Defendant having elected to deliver the cotton to the banking company at Columbus, it did so at its own risk, and is liable to the plaintiff for its value.
L.R.A.1916D.

6 Cyc. 425; Garden Grove Bank v. Humeston & S. R. Co. 67 Iowa, 526, 25 N. W. 761; Hieskeil v. Farmers' & M. Nat. Bank, 89 Pa. 155, 33 Am. Rep. 745; The Protection, 42 C. C. A. 489, 102 Fed. 516; Walters v. Western & A. R. Co. 56 Fed. 369.

Defendant is estopped from denying its liability to the plaintiff for the loss it has sustained.

Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; Bank of United States v. Bank of Georgia, 10 Wheat. 340, 23 L. ed. 337; Daniels v. Tearney, 102 U. S. 415, 26 L. ed. 187; Staton v. Bryant, 55 Miss. 272; 11 Am. & Eng. Enc. Law, p. 431; Davis v. Bowmar, 55 Miss. 671; Clark v. Parsons, 69 N. H. 147, 76 Am. St. Rep. 158, 39 Atl. 898; Mask v. Allen, — Miss. —, 17 So. 82; Money v. Ricketts, 62 Miss. 209; Armour v. Michigan C. R. Co. 65 N. Y. 111, 22 Am. Rep. 610; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; Midland Nat. Bank v. Missouri P. R. Co. 132 Mo. 492, 53 Am. St. Rep. 514, 33 S. W. 521.

Mr. William Baldwin also, for appellant:

The cotton, as soon as it was delivered to the defendant railroad company by Steel, Miller, & Company, became at once the property of the plaintiff and was his cotton, so far as Steel, Miller, & Company was concerned.

Lovell v. Newman, 113 C. C. A. 39, 192 Fed. 753, 227 U. S. 412, 57 L. ed. 577, 33 Sup. Ct. Rep. 375; The Idaho, 93 U. S. 576, 23 L. ed. 978; Hentz v. Lovell, 113 C. C. A. 48, 192 Fed. 762; Pyle v. Texas Transport & Terminal Co. 121 C. C. A. 664, 203 Fed. 1023, 192 Fed. 725.

Messrs. S. R. Prince and J. M. Boone, for appellee:

It was the legal duty of defendant to recognize and honor its bills of lading. Steel, Miller, & Company were named as consignees in the bills of lading, making them, therefore, both consignor and consignee, and under the law they were presumed to be the owners, and must be treated by the carrier as the absolute owners, of the property, until notified to the contrary, and in the absence of such notice, delivery to the consignee will discharge the carrier.

Hutchison, Carr. 2d ed. § 130; Elliott, Railroads, 2d ed. § 1426; Butler v. Smith, 35 Miss. 465; Alabama G. S. R. Co. v. Organ Power Co. 92 Miss. 781, 46 So. 254.

The only reasonable and natural thing which the agent could imagine would be a negotiation in connection with the valid lading.

Stanford v. Lyon, 37 N. J. Eq. 94; 11 Am. & Eng. Enc. Law, 427; Houston v.

Witherspoon, 68 Miss. 190, 8 So. 515; 11 Am. & Eng. Enc. Law, 2d ed. pp. 426, 427.

An estoppel does not apply except as to past and present facts. This being true, the effort to create an estoppel against defendant as to maintenance of a status, which would necessarily be a covenant as to the future, must fail.

11 Am. & Eng. Enc. Law, 2d ed. 425, 426; Union Mut. L. Ins. Co. v. Mowry, 96 U. S. 544, 24 L. ed. 674.

Fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim.

Friedlander v. Texas & P. R. Co. 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570.

Stevens, J., delivered the opinion of the court:

On, and for a long time prior to, April 20, 1910, the firm of Steel, Miller, & Company was engaged in the cotton business, with their principal office at Corinth, Mississippi. It appears that one A. L. Jones was their agent at Columbus, Mississippi, and in the course of their business they would buy and ship cotton to the compress at Columbus, and that the Columbus Insurance & Banking Company would furnish the money to pay for the cotton and take over as its security the compress receipts and bills of lading. The firm had a broker in the city of New York, one F. Van Gerpen, to whom they would send bills of lading covering export shipments, insurance certificates, and foreign exchange. This broker would sell sixty-day drafts upon foreign purchasers of cotton, to banking establishments in New York city, assigning to the bank bills of lading, invoices, insurance, etc. The record of this case discloses that Steel, Miller, & Company, on or about April 20, 1910, forwarded to its broker in New York foreign exchange, insurance certificate, and two documents purporting to be bills of lading covering, respectively, 100 bales marked RGCY, and 100 bales marked RAEN, consigned to Steel, Miller, & Company, Bremen, Germany, via New Orleans, Louisiana. These ladings purported to have been issued by the Mobile & Ohio Railroad Company at Columbus, Mississippi, but in truth and in fact they were false and forged. Van Gerpen offered to the Guaranty Trust Company, appellant herein, these forged bills of lading and foreign exchange attached. It so happened at the time that the firm of Knight, Yancey, & Company, a cotton firm of Decatur, Alabama, had failed some days prior, and on account of this big failure the exchange purchaser of appellant would not buy the paper offered by Van

Gerpen until appellant should receive evidence satisfactory to it that the cotton had in fact been delivered to the railroad company for shipment. When appellant declined to buy the exchange Van Gerpen thereupon telegraphed Steel, Miller, & Company to have the railroad wire him they had received the cotton for shipment. On April 22, 1910, Mr. Jones, the agent at Columbus, acting under instructions from Steel, Miller, & Company, secured compress clearances for 200 bales of cotton for shipment, and in accordance with the usual custom himself prepared bills of lading in his office and carried them to the railroad office for issuance and execution. Mr. Jones accordingly arranged with the railroad agent for the shipment of 100 bales of cotton marked RGCY, and 100 bales marked RAEN, consigned, routed, and marked exactly like the cotton appeared to have been shipped and marked by the forged ladings then in New York city. At the same time Mr. Jones had the agent of the railroad company at Columbus to sign a telegram to Van Gerpen, reading as follows:

Columbus, Miss., April 22, 1910.

F. Van Gerpen, 15 Williams St., New York.

We have received for shipment to Bremen from Steel, Miller, & Company one hundred marked RGCY, and one hundred RAEN, routed via New Orleans.

[Signed] W. E. Kennedy, Agent, M. & O. R. R. Co.

This telegram was written out by Mr. Jones, and was delivered to the telegraph company and the fee for its transmission paid by Jones. At this time neither the agent of the railroad company nor Mr. Jones, as agent of Steel, Miller, & Company, knew anything of any forged ladings having been sent by Steel, Miller, & Company to Van Gerpen, or of any forged ladings being in New York, and no one connected with the railroad company at Columbus had any intimation whatever that forged ladings were out, or that anyone connected with Steel, Miller, & Company intended to use the telegram in negotiating any false bills of lading. The true bills of lading made out by Mr. Jones in his cotton office at Columbus were dated April 19th, but were not expected by the railroad until April 22d, three days later, and complaint is made by appellant of the action of the railroad company in antedating the true ladings. When Van Gerpen received the telegram above set out, he attached it to the same papers he had before that time offered to the purchasing agent of appellant, and on the representation of facts stated in the telegram, succeeded in selling to appellant

the foreign exchange, and received from appellant \$15,240.18. After Mr. Jones received the true ladings he turned them over to the Columbus Insurance & Banking Company, which, as a holder of the true ladings, stopped the shipment of the 200 bales of cotton covered by the true ladings and sold the cotton on the market to a third party. The cotton had not been fully loaded on the cars when the shipment was ordered stopped, and of course the cotton never left the station in Columbus before it was disposed of by the Columbus Insurance & Banking Company. According to the testimony of Van Gerpen, the foreign exchange and forged bills of lading were sold to appellant on the 25th; and according to the testimony of Kennedy, the agent of the railroad company, instructions to hold the shipment were not given him until about 3:30 o'clock P. M. of the 25th, and then Mr. Kennedy was advised that it would be the following day before these instructions could be made definite. The record further shows that on the 26th Mr. Kennedy wired Van Gerpen that the shipment had been stopped and the true ladings recalled or surrendered. This brought to light the fact that forged ladings had been transferred, but the loss had then already occurred. The foreign exchange draft which Van Gerpen sold to appellant was never honored, and consequently appellant received nothing of value, but, on the contrary, lost the money advanced on the forged ladings. It thereupon filed its declaration in the circuit court of Lowndes county, claiming from the appellee herein the money lost by it as aforesaid. The declaration is in two counts, the first of which complains of the nondelivery of the cotton covered by the apparently valid bills of lading purchased and held by appellant, while the second count seeks to recover the \$15,000 out of which appellant was defrauded, basing the right of recovery on the allegation that appellant was misled by the telegram sent by the agent of appellee to Van Gerpen. Proper issue was joined on both counts, evidence was heard by the court, the facts as above stated were developed, and a peremptory instruction was given in favor of appellee as defendant in the court below.

It is the contention of appellant that the railroad company caused the loss complained of; that the railroad company knew, or ought to have known, that the telegram was sent for the purpose of negotiating invoices and bills of lading for cotton, and that it was wrong for the railroad company to send this telegram. It is the further contention of appellant that after having sent the telegram it was the duty of the railroad company to hold the cotton for shipment until L.R.A.1916D.

Van Gerpen, the party to whom the telegram was addressed, could take legal steps to protect his interests or the interests of anyone relying upon the information contained in the telegram. It is the further contention of appellant that the telegram gave validity to and ratified the forged ladings then in New York.

The main point stressed in the oral argument of counsel for appellant is the contention that appellee, on the facts of this case, misled appellant and caused the loss. No action was taken by appellant against the Columbus Insurance & Banking Company or its assignee. On the contrary, it is claimed that appellant has no recourse against anyone except appellee, Steel, Miller, & Company being insolvent and its estate having been administered in bankruptcy. What is it, therefore, that appellee has wrongfully done or failed to do? The request for the telegram came from the agent of Steel, Miller, & Company, and not from appellant. The telegram was addressed to the broker of the shipper, and not to appellant. This telegram, furthermore, stated the truth. There is no misrepresentation in it of an existing fact. The business of appellee is, of course, to receive and transmit shipments of freight. Its duty in that regard was not violated. It, as common carrier, evidenced its contract with the shipper by and with the true bills of lading. The shipment of the 200 bales of cotton in question was, and must necessarily be, controlled by the true ladings, and the rights of the true holder of these ladings must be recognized and respected. The railroad company was obliged to deliver the cotton to the holder in good faith of the true ladings. There could not therefore be in this case any ratification of forged ladings. If the railroad company was justified in stopping the shipment on the order of the true holder of the good ladings, how have the rights of appellant been by appellee invaded?

The question then presents itself whether appellee is in fault in sending the telegram. It must be conceded that there was nothing unlawful in the bare fact of sending this message. It was sent at the request of the shipper and for his accommodation. It stated the absolute truth. This is not a case, therefore, where the party representing a fact is afterwards estopped from denying the fact to the hurt or injury of another. But it is contended that the agent of appellee was familiar with the way foreign shipments of cotton were handled, and that he ought to have known this telegram was intended for the use of appellant in selling its paper or in disposing of its ladings. The law would accord the right, however, even to a railroad company,

to indulge the presumption of good faith on the part of its customers, and not require it to presume a felony had been, or would be, committed. The agent of appellee might well have thought the telegram would be of some service to Steel, Miller, & Company or to its broker in handling or disposing of the shipment of cotton actually receipted for. But just why the agent should have presumed false and forged ladings would be offered to the banking establishments of New York city it is difficult to conceive. The agent might well presume that the true ladings would be sold, and the telegram in question neither added to nor took away anything from the true ladings or the exact contract evidenced thereby. There is not the slightest proof of bad faith on the part of any of the agents or employees of appellee. Mr. Jones himself was ignorant of the false ladings. There is therefore no element of estoppel in this case.

It will be noted that this is not a contest

between Steel, Miller, & Company, or its trustee in bankruptcy, and the holder of the forged ladings. The rights of third parties have intervened, and their superior rights are conceded by appellant.

As a matter of fact, the loss in this case was occasioned by the false and forged ladings. With the purchase by appellant of these forged documents appellee had nothing to do. While the case of *Friedlander v. Texas & P. R. Co.* 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570, may not be directly in point, the court in that case uses language applicable to the case at bar: "The law can punish roguery, but cannot always protect a purchaser from loss, and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim."

The peremptory charge given appellee in the court below was proper, and the case is accordingly affirmed.

MISSOURI SUPREME COURT.
(Division No. 2.)

CITY OF ST. LOUIS, Appt.,

v.

ST. LOUIS, IRON MOUNTAIN, & SOUTHERN RAILWAY COMPANY et al.

REGAL BUGGY COMPANY, Respt.

(— Mo. —, 182 S. W. 750.)

Damages — eminent domain — leasehold — removal from property.

1. The allowance of damages for the condemnation of a leasehold under the right of eminent domain does not include compensation for the cost of removal of the stock from the property to a new location, or its depreciation because of such removal, nor for the injury to the business because of interruptions during removal.

For other cases, see Damages, III. 1, 3, in Dig. 1-52 N. S.

Same — value of fixtures.

2. The value of fixtures is to be included in the award for the condemnation of property under the right of eminent domain, lessened, in case the condemner permits them to be retained by the owner, by their market value as affixed to the property condemned, in estimating which the cost of tearing them out and installing them elsewhere is to be considered.

For other cases, see Damages, III. 1, 2, a, in Dig. 1-52 N. S.

(January 6, 1916.)

Note. — For injury to, or expense of removing, personality, as an element of damage for taking real estate, see annotation following this case, post 719.
L.R.A.1916D.

APPEAL by plaintiff from a judgment of the Circuit Court for the city of St. Louis awarding compensation to the respondent buggy company in a proceeding to condemn certain land for a bridge approach. Reversed.

Statement by Faris, P. J.:

The city of St. Louis brought this action to condemn a strip of land for the western approach to its municipal bridge. Damages were assessed in favor of the several defendants by a commission of three freeholders, to whose report the city filed exceptions. The case came on for hearing in the circuit court of the city of St. Louis, wherein the exceptions of appellant city were overruled, and it appealed.

The Regal Buggy Company, respondent herein, was the lessee for years of one parcel of the real estate which was condemned in this action. The lease of respondent, at the date of the making of the commissioners' report, had a little over three years to run. Specifically touching the land occupied by respondent, the commission assessed the value of said land taken, plus the damages to the remainder of the parcel, at the sum of \$41,310. They then apportioned this sum by allowing to the owner thereof \$38,610, and to this respondent as lessee the sum of \$2,700, being the appraised value of its lease over and above the monthly rent reserved. After making allowances of damages aforesaid, the commission allowed the respondent the further sum of \$8,450 on account of injury to its business, and for its damages and expenses arising from the removal of the fixtures and personal prop-

erty of respondent from the premises condemned to a new location, and for installing said property therein. The commissioners' report, which was approved by the circuit court upon exceptions taken thereto, states the specific elements of damages going to make up the last-mentioned sum thus: "(1) For the cost of removal of their several stocks of goods and fixtures from their present place of business to new locations, and installing said goods and fitting said fixtures therein; (2) for depreciation in the value of such goods and fixtures caused by the removal and reinstallation of the same; (3) for injury to their said businesses caused by the interruption of the same during the period of removal of their said stocks of goods and fixtures."

The allowance of damages for the three items above enumerated is the sole matter of contention here. It is conceded even that if these three items were proper subjects of damages, then the amount allowed respondent therefor is fair and reasonable; but appellant contends that under the laws of eminent domain of this state, no such damages may be paid by the condemner to him whose land is taken for public uses.

These three propositions and the contentions of appellant and respondent pro and con, respectively, form the points up for decision.

Messrs. Charles H. Daues and Truman P. Young, for appellant:

In cases where land to be condemned is under lease, the measure of damages in favor of the lessee is the market value of his lease over and above the rent reserved.

2 Lewis, Em. Dom. § 719; Hughes v. Hood, 50 Mo. 350; Baltimore v. Rice, 73 Md. 307, 21 Atl. 181.

Where land is condemned for public use, there can be no allowance of damages for the cost of removing personal property, or for injury to such property during the process of removal, or for interruption of business, whether the land is occupied by the owner or by a lessee.

St. Louis, K. & N. W. R. Co. v. Knapp-Stout & Co. 160 Mo. 396, 61 S. W. 300; Springfield Southwestern R. Co. v. Schweitzer, 173 Mo. App. 650, 158 S. W. 1058; Missouri P. R. Co. v. Porter, 112 Mo. 361, 20 S. W. 588; Cobb v. Boston, 109 Mass. 444; 2 Lewis, Em. Dom. § 727; Re New York & B. Bridge, 4 N. Y. Supp. 222; New York C. & H. R. R. Co. v. Pierce, 35 Hun, 306; Edmonds v. Boston, 108 Mass. 535; Williams v. Com. 168 Mass. 364, 47 N. E. 115; Re New York, W. S. & B. R. Co. 35 Hun, 633; Becker v. Philadelphia & R. Terminal R. Co. 177 Pa. 253, 35 L.R.A. L.R.A.1916D.

583, 35 Atl. 617; Ranlet v. Concord R. Corp. 62 N. H. 561.

In cases where an allowance has been made for the cost of moving personal property or for interruption to business, the decision has been based upon peculiar provisions of the statutes or Constitution, and such decisions recognized that the general rule, in the absence of such provisions, does not allow the recovery of such damages.

Blincoe v. Choctaw, O. & W. R. Co. 4 L.R.A. (N.S.) 890, and note, 16 Okla. 286, 83 Pac. 903, 8 Ann. Cas. 689.

The Missouri cases which have allowed damages for the removal of property have done so only in those cases where the condemner would have had to pay the entire value of the property removed, if it were allowed to stay upon the land. In order to reduce the amount of damages, buildings and appurtenances found upon the land condemned may be removed and the cost of removal charged as a proper element of damages.

Hannibal Bridge Co v. Schaubacher, 57 Mo. 582; Chicago, S. F. & C. R. Co. v. McGrew, 104 Mo. 282, 15 S. W. 931; St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; Kansas City v. Morse, 105 Mo. 511, 16 S. W. 893; St. Louis, K. & N. W. R. Co. v. Clark, 121 Mo. 169, 26 L.R.A. 751, 25 S. W. 192, 906.

These cases do not sustain the proposition that a lessee or owner may recover the cost of the removal of personal property or damages for injury to business.

Springfield Southwestern R. Co. v. Schweitzer, 173 Mo. App. 650, 158 S. W. 1058.

Messrs. Rasselour, Kammerer, & Rasselour, for respondent:

Section 21 of the Bill of Rights protects private property in personalty as fully as it does in real estate.

Chicago, S. F. & C. R. Co. v. McGrew, 104 Mo. 282, 15 S. W. 931; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; St. Louis v. Abeln, 170 Mo. 318, 70 S. W. 708; Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

Under the state Constitution and the provisions of the city charter authorizing condemnation proceedings, the commissioners properly assessed as damages the cost of removing respondent's stock of goods and fixtures, the depreciation in value of its goods and fixtures caused by removal and reinstallation, and the injury to its business caused by the interruption of same during the period of removal.

St. Louis v. Abeln, 170 Mo. 318, 70 S. W. 708; Chicago, S. F. & C. R. Co. v. McGrew, 104 Mo. 282, 15 S. W. 931; Hannibal

Bridge Co. v. Schaubacher, 57 Mo. 582; St. Louis v. Brown, 155 Mo. 545, 56 S. W. 298; Blincoe v. Choctaw, O. & W. R. Co. 16 Okla. 286, 4 L.R.A.(N.S.) 890, 83 Pac. 903, 8 Ann. Cas. 689; Metropolitan West Side Elev. R. Co. v. Siegel, 161 Ill. 638, 44 N. E. 276; Grand Rapids & I. R. Co. v. Heisel, 47 Mich. 393, 11 N. W. 212; Grand Rapids & I. R. Co. v. Weiden, 70 Mich. 390, 38 N. W. 294; Philadelphia & R. R. Co. v. Getz, 113 Pa. 214, 6 Atl. 356; James McMillin Printing Co. v. Pittsburg, C. & W. R. Co. 216 Pa. 504, 65 Atl. 1091.

Faris, P. J., delivered the opinion of the court:

As forecast, there is no contention made by appellant that respondent as the owner of a lease for a term of years was not entitled to compensation therefor; nor that the amount of damages awarded as the market value of respondent's lease, to wit, \$2,700, is unfair or unreasonable. It is only the damages awarded for the three items set out in our statement herein that are in controversy.

I. For convenience of discussion we will consider all items or elements of damages together, except that having to do with the fixtures, which we leave for subsequent separate discussion, since, under the law as we view it, this may be conveniently done. In brief, these elements have to do with the allowance of damages (a) for the removal of the stock of goods of respondent from the right of way taken to a new location and placing them therein; (b) for depreciation in the value of said goods, caused by such removal and reinstallation; and (c) for injury to the business of respondent on account of the interruption or cessation thereof during the period of removal of said stock of goods and fixtures.

When this case was argued, the writer was of the opinion that it ought to be affirmed upon principle, if not upon authority; but, upon coming to examine the authorities, I have been forced to a different view. Coming to the question of authority first, we have had our attention directed to but one case squarely on all fours in favor of the allowance of damages for the expense of removal of personal property from the right of way condemned. That is the case of Blincoe v. Choctaw, O. & W. R. Co. 16 Okla. 286, 4 L.R.A.(N.S.) 890, 83 Pac. 903, 8 Ann. Cas. 689. In the latter case the question of the allowance of such expenses was squarely before the court, and he whose lease was taken was adjudged entitled to expenses of removing certain personal property, to wit, lumber, from the lands taken. In that case, however, the learned court admitted that the rule in other jurisdictions

was contrary to the conclusion reached; but it held that the law in Oklahoma warranted a different holding because of the language of the statute of that state, which in substance required the commission to consider the injury which the owner of the land might sustain, and assess the damages caused him by reason of the appropriation of his lands.

The case of Philadelphia & R. R. Co. v. Getz, 113 Pa. 214, 6 Atl. 356, is urged upon us as announcing a rule in favor of the contention that damages of the sort here under discussion may be allowed; but that case did not deal with ordinary personal chattels, but apparently with machinery and fixtures. Besides, the Pennsylvania court, in the later case of Becker v. Philadelphia & R. Terminal R. Co. 177 Pa. 252, 35 L.R.A. 583, 35 Atl. 617, held to the contrary, in that they held that it was proper to refuse to allow proof as to the expense of the removal from such land of the personal property of him whose land was being taken, and said that the expense of such removal could not be considered as an element of damages for the condemnation of real estate for public uses.

The case of Atchison, T. & S. F. R. Co. v. Schneider, 127 Ill. 144, 2 L.R.A. 422, 20 N. E. 41, is urged as an authority for the awarding of damages of the sort here under discussion. But we need not consider whether that case is an authority or not, for the reason that it was distinguished and practically overruled by the later case of Braun v. Metropolitan West Side Elev. R. Co. 166 Ill. 434, 46 N. E. 974. So, we cannot see that respondent's contentions are at all aided by either of the above cases.

The case of Covington Short-Route Transfer R. Co. v. Piel, 87 Ky. 267, 8 S. W. 449, is cited by respondent as an authority for a modicum of the position taken by it. This case seems to an extent to bear out respondent's contention touching the phase of its right to damages for and during the interruption of its business caused by the taking of its property. We need not consider whether this is so or not, nor need we microscopically analyze the latter case, but pass it by, saying merely that it is opposed in its doctrine by the great weight of authority everywhere and in this state as well, and that in reaching the conclusion stated the learned court wholly overlooked and failed to consider the necessarily hypothetical and speculative character of such damages. United States v. Wiener, 127 C. C. A. loc. cit. 385, 210 Fed. 832.

The rule announced by Mr. Lewis, in his excellent work on Eminent Domain, is as follows: "While it is proper to show how the property is used, it is incompetent to

go into the profits of the business carried on upon the property. No damages can be allowed for injury to business. The reason is that the Constitution and the statutes, as ordinarily worded, require only that just compensation shall be made for the property taken. Just compensation, as we have already seen, where an entire property is taken, is the market value of the property, and, where a part is taken, it is the value of the part taken and damages to the remainder by the taking and use of the part for the purpose proposed. The business conducted upon the property is not taken, and the owner can remove it to a new location or continue it upon the part of the property which remains. Any incidental loss or inconvenience in business which may result from a removal or change consequent upon the taking must be borne by the owner for the sake of the general good in which he participates. In a few instances, the statute has expressly provided that compensation should be made for injury to business." 2 Lewis, Em. Dom. § 727; *Central P. R. Co. v. Pearson*, 35 Cal. 247; *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489; *Jacksonville & S. E. R. Co. v. Walsh*, 106 Ill. 253; *Chicago & E. R. Co. v. Dresel*, 110 Ill. 89; *De Buol v. Freeport & M. River R. Co.* 111 Ill. 499; *Braun v. Metropolitan West Side Elev. R. Co.* 166 Ill. 434, 46 N. E. 974; *Cook & R. Co. v. Sanitary Dist.* 177 Ill. 599, 52 N. E. 870; *Marshall v. Chicago*, 77 Ill. App. 351; *Sanitary Dist. v. McQuirl*, 86 Ill. App. 392; *Whitman v. Boston & M. R. Co.* 3 Allen, 133; *Cobb v. Boston*, 109 Mass. 438; *Pegler v. Hyde Park*, 176 Mass. 101, 57 N. E. 327; *Sawyer v. Metropolitan Water Board*, 178 Mass. 267, 59 N. E. 658; *Bailey v. Boston & P. R. Corp.* 182 Mass. 537, 66 N. E. 203; *Boston Belting Co. v. Boston*, 183 Mass. 254, 67 N. E. 428; *Nashua River Paper Co. v. Com.* 184 Mass. 279, 68 N. E. 209; *St. Louis, K. & N. W. R. Co. v. Knapp-Stout & Co.* 160 Mo. 396, 61 S. W. 300; *St. Louis, M. & S. E. R. Co. v. Continental Brick Co.* 198 Mo. 698, 96 S. W. 1011; *Mt. Washington Road Co.'s Petition*, 35 N. H. 134; *Ranlet v. Concord R. Corp.* 62 N. H. 561; *Re Public Parks*, 53 Hun, 280, 6 N. Y. Supp. 750; *Van Buren v. Fishkill & M. Waterworks Co.* 50 Hun, 448, 3 N. Y. Supp. 336; *Re Grade Crossing*, 17 App. Div. 54, 44 N. Y. Supp. 844; *Re Gilroy*, 26 App. Div. 314, 49 N. Y. Supp. 798; *Cincinnati Iron Store Co. v. Cincinnati Southern R. Co.* 9 Ohio C. C. N. S. 103, 29 Ohio C. C. 719; *Schuylkill Nav. Co. v. Farr*, 4 Watts & S. 362; *Schuylkill Nav. Co. v. Thoburn*, 7 Serg. & R. 411; *Pittsburgh & W. R. Co. v. Patterson*, 107 Pa. 461; *Hamilton v. Pittsburgh, B. & L. L.R.A.* 1916D.

E. R. Co. 190 Pa. 51, 51 L.R.A. 319, 42 Atl. 389; *Schonhardt v. Pennsylvania R. Co.* 216 Pa. 224, 65 Atl. 543; *Porter v. Scranton City*, 38 Pa. Super. Ct. 218; *Fuller v. Edings*, 11 Rich. L. 239; *Eddings v. Seabrook*, 12 Rich. L. 504; *Richmond, P. & C. R. Co. v. Chamblin*, 100 Va. 401, 41 S. E. 750; *Hunter v. Chesapeake & O. R. Co.* (Fitzhugh v. Chesapeake & O. R. Co.) 107 Va. 158, 17 L.R.A. (N.S.) 124, 59 S. E. 415; *Stadler v. Milwaukee*, 34 Wis. 98; *Esch v. Chicago, M. & St. P. R. Co.* 72 Wis. 229, 39 N. W. 129; *Union S. B. Co. v. Chicago (C. C.)* 39 Fed. 723; *Bigg v. London, L. R.* 15 Eq. 376, 28 L. T. N. S. 336; *Reg. v. Vaughan*, L. R. 4 Q. B. 190, 38 L. J. Mag. Cas. N. S. 49, 17 Week. Rep. 115.

In the case of *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489, the Georgia supreme court said: "The measure of her damages is the injury to her property which is injuriously affected by the public improvement. In arriving at that damage, neither the profits in the business conducted on the premises, nor the cost to the tenant of fixtures and improvements placed therein, nor the articles purchased for the purpose of enabling the lessee to conduct the business, nor diminution in the value of fixtures, improvements, or articles such as are removed by the lessee, can be recovered as damages; but the increased value of the premises for rent in consequence of the putting in of such fixtures and improvements may properly be considered in computing the damages to the leasehold estate."

The general rule as regards including, as elements of damages, expenses of removal of personal property, as well as that regarding the status of fixtures, below discussed, is thus stated by Mr. Lewis: "Fixtures upon the property taken must be valued and paid for as part of the real estate, and any depreciation in the value of fixtures upon the part not taken is to be taken into consideration, the same as damage to the soil itself. Where a railroad was laid through premises which had been fitted up for a water cure, so as to render it unsuitable for that purpose, it was held that the owner was entitled to the difference between what the fixtures and appurtenances were worth in connection with the property as a water cure (not exceeding their reasonable cost), and what they were worth to be removed from the premises and applied to other purposes. In a case in Pennsylvania it was held proper to show the expense of removal of machinery and fixtures as bearing upon the value of the property as it stood. But the damages to personal property, or the expense of removing it from the premises, cannot be con-

sidered in estimating the compensation to be paid. But when both parties proceed upon the theory that the owner is entitled to the cost of removing machinery, the condemning party cannot complain. Where the statute provided that the commissioners should 'inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land,' it was held that the words in italics required that compensation should be made for the removal of personal property." 2 Lewis, Em. Dom. § 728, citing *Blincoe v. Choctaw, O. & W. R. Co.* 16 Okla. 286, 4 L.R.A.(N.S.) 890, 83 Pac. 903, 8 Ann. Cas. 809, supra.

But this matter has also been before our Missouri courts, and, if we are now to hold that respondent is entitled to damages for the three elements under discussion, we must of necessity overrule two Missouri cases wherein the point involved was squarely lodged, and wherein it was held that no such compensation is allowable under our laws. *St. Louis, K. & N. W. R. Co. v. Knapp-Stout & Co.* 160 Mo. 396, 61 S. W. 300; *Springfield Southwestern R. Co. v. Schweitzer*, 173 Mo. App. 650, 158 S. W. 1058. In the *Knapp-Stout Case*, supra, at page 412 of 160 Mo., Judge Gantt, writing the opinion of the court, in defining the measure of damages, and touching the identical question of the allowance of damages of the sort here under discussion, said: "It is the settled law of this court that the measure of compensation and damages in cases in which only a part of a tract is condemned, as in the case at bar, is the market value of the land taken for the right of way, and the damages to the remainder by reason of the railroad running through it, less any benefits that are peculiar to the tract of land arising from the running of the road through it. *Mississippi River Bridge Co. v. Ring*, 58 Mo. 491; *Wyandotte K. C. & N. W. R. Co. v. Waldo*, 70 Mo. 629; *Kansas City, C. & S. R. Co. v. Story*, 96 Mo. 611, 10 S. W. 203; *Chicago, M. & St. P. R. Co. v. Baker*, 102 Mo. 553, 15 S. W. 64. Injury to business, loss of profits, inconvenience to the owner, damage to personal property, or the expense of removing it, are not to be estimated as distinct elements of damages."

In the very late case ruled by the Springfield court of appeals, practically all of the Missouri cases were examined and discussed, and such of them as seem upon casual glance to oppose the conclusion reached were successfully distinguished. Many of these cases are urged upon us as announcing a different rule, but we do not think they so

far announce a different rule when carefully considered, and when the precise point upon which judgment is regarded, as to warrant us in overruling those on all fours; a fortiori, when they but follow the overwhelming weight of the authorities upon these questions everywhere. Since all of these cases have been so lately fully and ably discussed in *Springfield Southwestern R. Co. v. Schweitzer*, supra, we need not take up space to consider them again.

In the *Knapp-Stout Case*, supra, precisely the same question was before this court that was before the Oklahoma court in the *Blincoe Case*, viz., the question of whether he whose land was taken for public uses could recover the expenses necessarily incurred in the removal of personal property from the land, to wit, lumber, lying thereon. In both cases parts of lumber yards were taken, yet we ruled that such expenses were not proper elements of damages.

At first glance, it is to be conceded that there exists a difficulty in finding a reason for not compensating the owner of personal chattels who is compelled to remove them, for his expense in so removing them to a point at least beyond the edge of the right of way. It is equally clear, on the other hand, that no logical reason can be found for compensating him for the expense of removal beyond such point. This is so, for the reason that A might desire to move his chattels only into the next adjoining house, while B might desire to have his taken several blocks or even several miles, and C, on the other hand, his business being broken up, might desire to remove his goods to some other place or city. No reason in logic therefore can be found for the condemner's paying more than is sufficient to move the personal property off the right of way. A rule which would require the condemner to do more would be variant and indefinite, and therefore speculative.

It is obvious that a lessee stands in no better condition touching his right to be compensated for expenses of this sort than does the owner of the fee. In fact, the reasons are more cogent for permitting the owner of the fee to recover as damages expenses of this sort than they are in favor of the lessee, for the lessee may be compelled to move at the end of his term; and, since his occupancy of the premises is founded on contract, it may even be said that the presumption is that he will move. Or if there be no such presumption, or no presumption either way, the lessee is not aided by a discussion of this moving matter, for arguments in his favor in this behalf are founded upon the presumption that he will

renew his lease and remain at the end of his term. But as regards the owner whose lands are taken, no requirement exists for his removal at any time, unless he sells the premises,—a contingency too remote for consideration in this connection.

We apprehend that back of the rule against allowing damages of this nature also lie the considerations that loss of profits during removal is necessarily so speculative as to afford as a measure of computation no rule except a mere guess; that likewise, beyond the mere moving of goods to a point just outside the bounds of the right of way condemned, the expenses of removal being variant, damages would be arbitrary and highly speculative, and removal but to a point only just beyond the edge of the right of way would fall into the category *de minimis*; and that, moreover, the inclusion of expenses of removal of personal property and compensation for loss of profits during removal is merged and included in the price paid for the easement to the owner, or to the lessee, as the case may be. Viewed as a forced purchase by the public for the public good, as a condemnation action is in the last analysis, the latter consideration seems of great weight; for, if he whose land is condemned had voluntarily sold his land to a private purchaser, ordinarily no thought would occur to either one, absent agreement to that end, that the seller should be compensated by the buyer for the removal from the sold premises of mere personal goods and chattels. That one is a voluntary sale, and the other an involuntary sale, does not peculiarly detract from the force of the argument.

But be all these things as may be, the overwhelming weight of authority, both in this state and in all other jurisdictions, is as we hold, and having had other views in the beginning, by reason of the apparent, rather than real, crying inequities in the case, we have yet been compelled to follow the law as it is written both here and elsewhere. To rule otherwise would necessitate the overruling of at least two Missouri cases squarely in point, and of most carefully distinguishing three or four other cases. *Chicago, S. F. & C. R. Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931; *Hannibal Bridge Co. v. Schaubacher*, 57 Mo. 582; *Missouri P. R. Co. v. Porter*, 112 Mo. 361, 20 S. W. 568.

We therefore hold, in consonance with the great weight of authority everywhere, that respondent was not entitled to recover for loss of profits in its business during the removal of its stock of goods; nor for the expense of the removal of its stock of goods and personal property, as contradistinguished from fixtures, from its old loca-

tion, which was condemned, to a new location; nor for the depreciation in value of such personal property and stock of goods, caused by such removal and reinstallation.

II. What we have said above disposes of a part of the contentions involved in contention 1 *supra*; that is, to that part of this contention having to do with the cost of the removing of mere personal property and chattels. The other phase of the case mooted in both contentions 1 and 2, viz., that touching the cost of removal of trade fixtures, which we left over for subsequent separate discussion, presents a somewhat different question. We assume, of course, nothing further appearing, that the word "fixtures" is used in its legal and technical sense, and not as a mere mercantile designation applied to chairs, tables, iron safe, et *id omne genus*.

A fixture appertains to the real estate itself, which real estate to the extent, at least, of an easement therein, is being taken by condemner. We need not enter into any intricate discussion of fixtures (since such a discussion does not belong here) for the reason above given, which is well settled, to wit, that a trade fixture such as is herein involved, and such as was to an extent involved in the case of *Hannibal Bridge Co. v. Schaubacher*, *supra*, is a part of the realty; and since it passes ordinarily, as between vendor and vendee, upon a voluntary sale, we see no reason why it should not pass to the condemner upon an involuntary transfer, such as this is. We find nothing in the Missouri cases, nor in the cases from other jurisdictions, which seriously militates against this view. Those mentioned below sustain it. It seems to be right on principle; to do full justice and afford full compensation.

In passing we may say, *arguendo*, that the view that the owner should be compensated for the expense of tearing out, moving, and reinstalling fixtures in another location, has much of logical cogency. But it seems out of consonance with our own rulings, and subject to the objection that the expense of carriage from the old to the new location would be speculative, and so, having reached a view which affords full compensation for the injury done, we hesitate to overrule our former holdings. Many of the cases from other jurisdictions which have been urged upon us as sustaining all of respondent's contentions are cases which allowed compensation for removing and reinstalling fixtures, and ruling that such compensation was permissible. This for the reason that if the owner of the land or lease condemned take such fixtures off the hands of the condemner, who ordinarily does not want them, thus minimizing the damages

accruing, both the owner and the condemner ought to be held to the rule that their reciprocal duty toward each other is to so act as not unduly to augment the damages arising from the appropriation of the land.

In a very late case, decided in the United States circuit court of appeals for the second district, it was held that an award in a condemnation proceeding for the value of certain trade fixtures, to wit, machinery of an engraving plant, was proper; the court holding that, in condemnation proceedings where the land is taken in invitum, the rule which obtains as to such fixtures is analogous to that between vendor and vendee, and not that between landlord and tenant. *United States v. Wiener*, 127 C. C. A. 382, 210 Fed. 832. In the latter case the court quoted with approval what was said in *Re Avenue A*, 66 Misc. 488, 122 N. Y. Supp. 321, wherein it was ruled: "The city took the entire buildings as they stood, including the trade fixtures therein, and for the purposes of this proceeding they must all be regarded as real property; that is, as between the tenant and the city, the trade fixtures were real property and must be paid for by the city the same as a building, and the tenant was under no more obligation to remove them than he would be to remove a building if he were the owner. As between the tenant and the owner, however, the trade fixtures were personalty, and could be removed, and therefore any award made for them would go to the tenant."

In the above case of *United States v. Wiener*, the court, upon the other phases of this case discussed supra, says: "There seems to be no authority for an allowance for the removal of the business as distinguished from the plant and machinery. The district court allowed \$2,500 as damages which may result from the change of location. This was based upon hypothesis and speculation, and we are unable to find any controlling authority to support the award."

Since houses, which are but fixtures to

real estate, pass to condemner (*Kansas City v. Morse*, 105 Mo. loc. cit. 519, 16 S. W. 893), and since trade fixtures, under the vendor and vendee rule, would pass to the buyer, they pass here to the condemner, and it must pay for them. Respondent, absent an election on its part and consent of the city to that end, could not take fixtures which the city had condemned, nor obtain as damages pay for moving property which by condemnation became that of the city. *Ibid.* *Springfield Southwestern R. Co. v. Schweitzer*, 173 Mo. App. 650, 158 S. W. 1058.

It follows from all this that respondent was entitled to be paid the reasonable market value of its fixtures (contradistinguished from mere goods and chattels) which were contained in, and affixed to, the leased premises condemned. But the apparent present status of the instant case causes us to further rule that, if appellant does not want these fixtures, and respondent elects, or has elected, to take them (or, as seems probable, has already taken them), then damages which appellant will be held to pay as such value of them should be recouped to the extent of their reasonable market value, as they stood in their old location, when confronted, however, as diminishing such value, by the necessity of immediately tearing them out and reinstalling them elsewhere.

Upon the other phases of the case, and to the extent last discussed upon the latter one, we are of the opinion that the court erred, and that for such error this case must be reversed and remanded, to be retried in such wise as is not inconsistent with the views herein expressed. Let this be done.

All concur.

Petitions for rehearing and to transfer to the court in banc denied February 14, 1916.

Annotation—Injury to, or expense of removing, personalty, as an element of damage for taking real estate.

This annotation is supplementary to the note to *Blincee v. Choctaw, O. & W. R. Co.* 4 L.R.A.(N.S.) 890.

As to the right to compensation for fixtures in a building taken, see note to *Jackson v. State*, L.R.A.1915D, 492.

For loss of profits from suspension of business while moving, as an element of damage in eminent domain, see note to *Fitzhugh v. Chesapeake & O. R. Co.* 17 L.R.A.(N.S.) 124. L.R.A.1916D.

Among the later decisions, it has been held, in accord with the general rule as stated in the earlier note, that depreciation in the value of personal property located on real estate taken for a public purpose, due to the taking, or the cost of removing it therefrom, cannot be considered in estimating the compensation to be paid. *Kansas City Southern R. Co. v. Anderson* (1908) 88 Ark. 129, 113 S. W. 1030, 16 Ann. Cas. 784; and see *St.*

LOUIS v. ST. LOUIS, I. M. & S. R. Co. ante, 713.

At least, the cost of removing personal property from premises condemned for a public use is not a distinct element of the compensation payable. *St. Louis, K. & N. W. R. Co. v. Knapp-Stout & Co. Co.* (1900) 160 Mo. 396, 61 S. W. 300; *Central P. R. Co. v. Pearson* (1868) 35 Cal. 247; *Re New York, W. S. & B. R. Co.* (1885) 35 Hun (N. Y.) 633.

And, as stated in *St. Louis, K. & N. W. R. Co. v. Knapp-Stout & Co. Co.* (Mo.) supra, "damage to personal property or the expense of removing it are not to be estimated as distinct elements of damages," upon the condemnation of land for a railroad right of way.

So, a tenant of property taken under condemnation proceedings, with a lease three years yet to run, cannot recover compensation for the cost of removing his personal property from the condemned premises to a new location. "The reasons for not allowing this damage are (1) that the tenant would have to move anyhow, and this is one of the encumbrances attaching to the act of placing personal property on leased premises; (2) it is not within the language of the Constitution,—that the expense of moving it is neither a taking nor a damaging of the property; and (3) that a verdict would necessarily be based upon conjecture, as one tenant might locate his personal property within a few feet or a few yards or a few blocks of the place from which it is removed; another might move it a mile distant (as in this case), and another might go still farther. The cost of removal would apparently differ greatly. As our supreme court has ruled in no uncertain terms that the expense of removing personal property from condemned premises cannot be recovered by the owner of such personal property, it is our plain duty to follow that ruling." *Springfield Southwestern R. Co. v. Schweitzer* (1913) 173 Mo. App. 650, 158 S. W. 1058.

And a tenant of real estate taken under the right of eminent domain, whose lease expired shortly after the time when he was compelled to leave the premises by reason of the taking thereof, is not entitled to recover, as an element of damages caused by the taking, the expenses of removing his property to a new place of business, as he "would have had to leave the premises [upon the expiration of the lease] and could have recovered nothing for being forced to do so." L.R.A.1916D.

Emery v. Boston Terminal Co. (1901) 178 Mass. 172, 86 Am. St. Rep. 473, 59 N. E. 763.

But in *Springfield Southwestern R. Co. v. Schweitzer* (Mo.) supra, it was held that a tenant of condemned real estate is entitled to recover for the damages sustained by his personal property in moving, from breakage and deterioration. The court said: "It became necessary for the tenant to remove the machinery and property, and if it could not be moved without being damaged the tenant should be paid for such damage as ensued, because it is expressly provided by our Constitution that property shall not be taken or damaged without just compensation."

In *James McMillin Printing Co. v. Pittsburg, C. & W. R. Co.* (1907) 216 Pa. 504, 65 Atl. 1091, which was an action against a railroad company by a subtenant of property taken by it in the construction of its road, to recover the loss sustained by the taking, which action had been tried by both sides on the theory that there could be a recovery of the reasonable cost of removing the plaintiff's personal property from the premises taken, in addition to the value of the lease,—the defendant itself having requested an instruction that, there being no evidence of the value of the unexpired term of the lease, the measure of damages was the actual amount shown to have been expended in the removal of the property, and that the verdict should be limited to that amount,—the court, holding that, under these circumstances, the defendant could not, on appeal, complain of the fact that the cost of removing the personalty was submitted as a distinct item for which there could be a recovery, and not merely as evidence of the value of the right of which the plaintiff was deprived, said: "Market value is an unsatisfactory test of the value to a tenant of a leasehold interest. It is really no test at all, because a lease rarely has any market value. Generally it is not assignable at the will of the tenant, and he pays in rent all that the right of occupation is worth. The right of which he is deprived, and for which he is entitled to full compensation, is the right to remain in undisturbed possession to the end of the term. The loss resulting from the deprivation of this right is what he is entitled to recover. The value of the right he is forced to sell cannot ordinarily be measured by its market price, for there is no market for it; nor can it always be measured by the difference between the rent reserved and

the rental value if the lease should be a favorable one. If, as was the case here, a tenant engaged in a business requiring the use of heavy machinery and appliances should secure a new place equally well adapted to his business and at the same rent, he would still be at the expense of removal and at a loss because of the stoppage of his business. These are matters to be considered in connection with others, not as substantive elements of damage, but as tending to prove the value of the leasehold interest."

And in *North Coast R. Co. v. Kraft Co.* (1911) 63 Wash. 250, 115 Pac. 97, which was an action by a public service corporation against the lessee of a building which it had purchased for railroad purposes, to condemn the leasehold interest, it was held that evidence showing the expense of moving the lessee's personal property to a new place of business, and the damages to the same resulting from the removal, "was admissible, not as a basis for a specific claim, but as showing the value of the unexpired term;" the court further saying: "Damages, in law, means an adequate compensation for the loss suffered or the injury sustained. The rule itself is well settled and simple of statement, but its application is often attended with difficulty on account of the great diversity of circumstances surrounding different cases where the principle is sought to be applied. As was said in *Seattle & M. R. Co. v. Scheike* (1892) 3 Wash. 625, 29 Pac. 217, 30 Pac. 503: 'It is difficult, if not impossible, to lay down a rule of universal application as to what may be considered as elements of damage, as the equities of the parties must more or less depend upon the particular facts and circumstances of each case.' This is particularly true as applied to a leasehold which may have no market value in excess of the rent reserved. The appellant is entitled to be paid the value of the unexpired term. The items under consideration are but constituent elements of that value. In principle, and according to what we consider the better authority, they are not recoverable as something apart from the leasehold interest. They form an essential part of its value."

Under a constitutional provision forbidding the legislature to enact any law "whereby property shall be taken or damaged for public uses without just compensation," and a statutory provision in accordance therewith, that in condemnation proceedings commissioners must

be appointed "to ascertain what will be a just compensation for the land or other property, or for the interest or estate therein, proposed to be condemned for its uses, and to award the damages, if any, resulting to the adjacent or other property of the owner, or to the property of any other person," etc.,—it has been held that the expense to the tenant of land used for the storage of lumber, of which land a strip had been taken for widening a street, of removing the lumber piled upon the strip taken, and of removing and replacing his fences, should be allowed as an element of his just compensation. *Richmond v. Williams* (1913) 114 Va. 698, 77 S. E. 492.

Similarly, in *St. Louis, V. & T. H. R. Co. v. Capps* (1872) 67 Ill. 607, which was an action on the case for damages for the construction of a railroad in a public street in front of the plaintiff's place of business, under a city ordinance requiring the railroad company to pay for "all damages that may accrue to the property owners on said Main street by reason of the construction of said railroad," the court said: "Appellee is entitled to damages for interruption to his business during such time as would have been necessarily employed in accommodating himself to another place of business equally eligible, and his removal thereto. . . . The necessary reasonable expenses attending the removal will be an element of damage. It cannot be permitted appellee to remain in that locality transacting business at a loss, in order to make appellants chargeable therefor in the shape of damages."

And in *Chicago, M. & St. P. R. Co. v. Hock* (1886) 118 Ill. 587, 9 N. E. 205, which was a condemnation proceeding, the court said: "The inconvenience and cost of removal of the business from the premises condemned are mentioned as elements of damages proper for consideration. This, however, is in harmony with the ruling in *St. Louis, V. & T. H. R. Co. v. Capps* (Ill.) supra."

In *Re Briggs Ave.* (1909) 196 N. Y. 255, 36 L.R.A.(N.S.) 273, 89 N. E. 814, 17 Ann. Cas. 1032, which was an appeal in a proceeding for the opening and widening of a street, in which the appellant sought to recover the value of a building which the city had previously taken and paid for in another street opening proceeding, and which he had purchased at auction and moved, in bad faith, onto the land sought to be acquired by the city in this proceeding,—the appellant having been awarded, for the building, only the amount which it would cost

him to move it off the strip of land taken in this proceeding, together with all other expenses incidental to the moving,—the court, holding that the appellant could not recover the value of the building, because, under the circumstances, it retained its character as personal property, said: "The municipality in this case does not seek to condemn the building except as it is a part of the real property necessary to be taken by it. As personal property the owner can remove it from the premises. Just compensation to the owner of the lands taken does not require that such building so moved upon such lands shall be used to enhance the damages to be

paid to him. Such a building so planted should be treated as personal property and the damages awarded accordingly. The appellant should not complain of the award made to him by the commissioners."

It will be noted, however, that the award in this case was not based upon a right to recover the expense of removal, but was merely the just compensation required by statute for the property taken, which compensation, under the circumstances of this case, was fixed at the cost of removing the building, that cost being less than the market value of the building as real estate. A. C. W.

OKLAHOMA SUPREME COURT.

B. F. DAVIS, Plff. in Err.,

v.

P. A. JANEWAY, Admr., etc., of W. H. Jacobs, Deceased, et al.

(— Okla. —, 155 Pac. 241.)

Contract—to move postoffice—validity.

Plaintiff's grantor and defendant's assignor entered into a written contract. The object sought was to move the postoffice from one location to another (lot 11, block 11), and to maintain or cause it to be maintained at the latter place for five years, and to accomplish the object defendant D.'s assignor, M., was to use his influence, and such influence as he could bring to bear upon the Department, to procure the removal, and in payment therefor the plaintiff J.'s grantor, R., was to pay \$5 per month for five years. A lien was given by R. on lot 14, block 11, to secure the payment. Held: (a) That plaintiff's petition to cancel the lien contract, showing the above state of facts, did not state a cause of action, and the court erred in overruling the demurrer thereto. (b) That the contract was void as against public policy and good morals. (c) That the plaintiff took the land encumbered with the apparent lien with full knowledge of all that has transpired, and, having declared on the contract, was in pari delicto with the defendant, and it was the duty of the court to have sustained the demurrer and dismissed the petition without further relief to either party. For other cases, see *Contracts*, III. c. 4; III. g, 2, in *Dig. 1-52 N. S.*

(January 1, 1916.)

Headnote by WATTS, C.

Note.—For contract as to location of public buildings, see annotation following this case, post, 727. L.R.A.1916D.

ERROR to the District Court for Washita County to review a judgment overruling a demurrer to a petition filed for the cancelation of a lien contract and for the quieting of plaintiff's title to certain real estate as against any claims of defendants. Reversed.

The facts are stated in the Commissioner's opinion.

Mr. A. E. Pearson, for plaintiff in error:

The presumption is always in favor of assuming that people enter into contracts for legitimate purposes, and legitimate purposes only. And to assume the contract which is sued on in this case was entered into for unlawful purposes, for the purpose of accomplishing an end that was against public policy, is entirely out of harmony with the law.

Kling v. Fries, 33 Mich. 275; Curtis v. Gokey, 68 N. Y. 300; Lorillard v. Clyde, 86 N. Y. 384; 2 Elliott, Contr. § 650; Fearnley v. De Mainville, 5 Colo. App. 441, 39 Pac. 73; Bryan v. Dyer, 28 Ill. 188.

If said contract is contrary to public policy, plaintiff is not entitled to the relief asked for in his petition.

9 Cyc. 546; Holman v. Johnson, Cowp. pt. 1, p. 341; Edwards v. Randle, 63 Ark. 318, 36 L.R.A. 174, 58 Am. St. Rep. 109, 38 S. W. 343; Cohn v. Heimbauch, 86 Wis. 176, 56 N. W. 638; St. Louis, J. & C. R. Co. v. Mathers, 71 Ill. 592, 22 Am. Rep. 122.

Messrs. Massingale & Duff, for defendants in error:

The contract, a copy of which is identified as exhibit "A" to the plaintiff's petition in the trial court, is void as against public policy.

Hare v. Phaup, 23 Okla. 575, 138 Am. St. Rep. 852, 101 Pac. 1050; Woodman v. Innes, 47 Kan. 26, 27 Am. St. Rep. 274, 27

Pac. 125; *Molacek v. White*, 31 Okla. 693, 122 Pac. 523; *Enid Right of Way & Townsite Co. v. Lile*, 15 Okla. 317, 92 Pac. 810; *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746; *Filson v. Himes*, 5 Pa. 452, 47 Am. Dec. 422; *Meguire v. Corwine*, 101 U. S. 108, 25 L. ed. 899; *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868.

Plaintiff is absolutely innocent of any wrongdoing, and his administrator is in a position to assail the invalidity of this contract.

6 R. C. L., p. 215.

Watts, C., filed the following opinion:

W. H. Jacobs, defendant in error, plaintiff below, sued B. F. Davis and W. A. McAtee in district court, Washita county. Jacobs died pending litigation, and the case has been revived in the name of P. A. Janeway, administrator, and W. A. McAtee. Defendant Davis filed a general demurrer to the petition, which was overruled. He declined to plead further, gave notice, and appeals. The petition charges:

"Comes W. H. Jacobs, the plaintiff herein, and for cause of action against said defendants states:

"That he is the owner and is in possession of lot 14 in block 11 in the town of Sentinel, in Washita county, Oklahoma; that said defendants claim some interest in said property adverse to this plaintiff; that as near as plaintiff is able to state, the nature of their claim is as follows: That on the 19th day of August, 1910, one C. T. Reese, who was on said day the owner of said lot, and who has since conveyed the same to this plaintiff by warranty deed, entered into a contract with defendant W. A. McAtee, said contract purporting to grant a lien upon said lot for the sum of \$300, payable at the rate of \$5 per month; that said instrument was acknowledged and filed for record, and was recorded in the office of the register of deeds of Washita county, Oklahoma, on the 10th day of September, 1910, at page 632 of Book 5 of Miscellaneous Records of said office. A copy of said instrument, with the indorsements thereon, is hereto attached, marked for identification Exhibit A, and made a part of this petition.

"That the sole and only consideration for said contract was the undertaking on the part of the said McAtee to procure the removal of the United States postoffice in Sentinel, Oklahoma, from the location where it then existed to lot 11 in block 11 in Sentinel, Oklahoma, and the further agreement that said McAtee would maintain or cause said postoffice to be maintained on the said lot 11 in block 11 in said L.R.A.1916D.

town for said period of five years described in said contract. Said McAtee was to and did use his influence, and such influence as he could bring to bear upon the Department of the Interior of the United States, to procure the removal of said postoffice to said location, all of which was against public policy and illegal, and said contract based upon said consideration is also void and against public policy, and is illegal and unenforceable. Defendant B. F. Davis claims to have some interest in said contract or to be the owner by assignment, and this plaintiff makes him a party to this suit in order that he may set forth such interest as he may claim, and in order that the court may adjudicate and determine the validity of said contract.

"That said contract constitutes a cloud upon the title to this plaintiff's property, and should be canceled and held for naught, and plaintiff's title quieted as against the same for the reason that said contract is wholly void; that plaintiff has no adequate remedy at law,"—praying cancellation of the contract, that his title be quieted, and for costs.

Exhibit A is the written contract between McAtee and C. T. Reese, and is as follows:

Sentinel, Oklahoma, August 1, 1910.

Made this 1st day of August, 1910, between C. T. Reese, of the first part, and W. A. McAtee or order, party of the second part, witnesseth: That the said party of the first part agrees to pay to the said second party or order the sum of five dollars (\$5) per month for value received beginning August 1, 1910, and continuing for five years from the date of beginning. It is further agreed and fully understood that this agreement and contract shall be a lien on the following realty in Sentinel, Washita county, Oklahoma: All of lot fourteen (14) in block eleven (11) in Sentinel, Washita county, Oklahoma. It is further agreed and fully understood that in the event the government removes the Sentinel postoffice from lot eleven in block eleven, Sentinel, Oklahoma, that this contract shall be null and void. It is mutually agreed and understood that the covenants and agreements herein contained shall be obligatory upon our heirs, executors, administrators, and assigns of the said first party and the said second party.

In witness whereof the first parties of the contract have hereunto set their respective hands this 19th day of August, A. D., 1910.

C. T. Reese.

Counsel for defendants in his brief says. lot 11, block 11, at the time mentioned in

the petition and contract, belonged to Reese, and subsequently was conveyed to defendant Davis.

The question for decision is: Does the petition state a cause of action? This proposition depends on whether: First, the contract viewed in the light of the petition is void; second, if void between the makers, are the assignee of the postoffice contract and grantee of lot 14, block 11, in *pari delicto*?

Snyder's Comp. Laws 1909 provide:

"Section 1077. . . . The consideration of a contract must be lawful within the meaning of § 1123."

"Section 1123. What is Unlawful.—That is not lawful which is: 1. Contrary to an express provision of law. 2. Contrary to the policy of express law, though not expressly prohibited; or, 3. Otherwise contrary to good morals."

In Pom. Eq. Jur., vol. 2 (3d ed.), we find:

"Section 935. Contracts affecting public relations.—Contracts made for the purpose of unduly controlling or affecting official conduct, or the exercise of legislative, administrative, and judicial functions, are plainly opposed to public policy. They strike at the very foundations of government, and tend to destroy that confidence in the integrity and discretion of public official action which is essential to the preservation of civilized society. The principle is universal, and is applied without any reference to the mere outward form and alleged purpose of the transaction. If a contract does unduly interfere with governmental functions, or with the relations of the citizen towards his own government in any of its departments, whether the interference be direct or indirect, such agreement is illegal, whatever form it may have assumed. . . .

"Contracts interfering with executive proceedings:—These are subject to the same general rules which apply to similar agreements concerning legislation. All agreements, whether made with officials or with third persons, which directly or indirectly control or interfere with the due exercise of executive and administrative functions as prescribed or regulated by law, are clearly illegal."

In *Houlton v. Nichol*, 93 Wis. 393, 33 L.R.A. 166, 57 Am. St. Rep. 928, 67 N. W. 715, it is said: "All agreements which tend to introduce personal influence and solicitation as elements in procuring and influencing legislative action or action by any department of the government are contrary to sound morals, lead to inefficiency in the public service, and come under the condemnation of the rule here under consideration."

L.R.A.1916D.

In 6 R. C. L. § 152, p. 747, it is said: "Moreover, it has been said that any contract made for the purpose of securing the location of a public office, such as a post-office, in any certain part of a city or elsewhere, or which prevents, or tends to prevent, the change or removal of such office, when the necessities of business or the interest of the public demands such change or removal, is opposed to public policy, and void, as tending to the injury of the public service, and as subordinating the public welfare to individual convenience or gain. It is true that there is some authority for the view that where it does not appear that improper means were adopted or personal influence used, a contract relating to the location of a public building may be upheld notwithstanding the fact that it is susceptible of the interpretation that personal influence was to be used. But in reaching this conclusion there has evidently been a failure to take into consideration the rule approved by the weight of judicial opinion that contracts of this character are not void because of the conclusion that corruption and wrongdoing and undue influence would be the certain result thereof, but on account of the recognition of the corrupting tendencies of such contracts."

In *Elkhart County Lodge v. Crary*, 98 Ind. 238, 49 Am. Rep. 746, we find a case in principle very much like the one at bar. The syllabus is as follows: "Contracts—public policy—constructive fraud.—An owner of adjacent property entered into a combination with others and agreed with the owners of a building in a city, if they would offer their building to the government for a nominal rent, to be used as a postoffice for ten years, and use their personal influence and 'proper persuasion' to secure its acceptance, the former would, in case of success, pay the latter a certain sum annually for ten years. The location was chosen and leased accordingly, one of the owners of the building, who was a personal friend of the Postmaster General, having truthfully represented to him that the location was suitable; and their notes were given for the annual instalments. Held, that the consideration of the notes was illegal; the agreement being against public policy, and therefore void."

In commenting upon the moral tendency of such a contract, the court said:

"The material deduction of fact from these subsidiary facts is that the parties formed a combination for the purpose of securing the location of a public office, and as part of the plan the appellants undertook that certain individuals of their number should use their influence with the government officers to effect the purpose of the

combination, and that the agreement to pay for such services was contingent upon the success of the scheme. It has long been established that a contract against public policy will not be enforced. This principle is firmly fixed and has often been applied to contracts. There can therefore be no doubt as to the existence of the rule. The only question is as to its applicability to the facts of this case. Where the general public has an interest in the location of an office, a railroad station, or the like, a contract to secure its location at a particular place is held to be against public policy, and not enforceable. . . .

"There are many phases of injury to the public service, and we do not deem it necessary to examine the cases upon the subject, for we think it quite clear that a contract which is made for the purpose of securing the location of an important office connected with the public service, for individual benefit, rather than for the public good, tends to the injury of the public service. The case made by the evidence falls fully within the principle that contracts which tend to improperly influence those engaged in the public service, or which tend to subordinate the public welfare to individual gain, are not enforceable in any court of justice. *Pollock, Contr. 279; Anson, Contr. 175; 1 Whart. Contr. §§ 402-414, inclusive.* A wholesome rule of law is that parties should not be permitted to make contracts which are likely to set private interests in opposition to public duty or to the public welfare. . . .

"It is not necessary that actual fraud should be shown; for a contract which tends to the injury of the public service is void, although the parties entered into it honestly and proceeded under it in good faith. The courts do not inquire into the motives of the parties in the particular case to ascertain whether they were corrupt or not, but stop when it is ascertained that the contract is one which is opposed to public policy. Nor is it necessary to show that any evil was, in fact, done by or through the contract. The purpose of the rule is to prevent persons from assuming a position where selfish motives may impel them to sacrifice the public good to private benefit. An English author says: 'But an agreement which has an apparent tendency that way, though an intention to use unlawful means be not admitted, or even be nominally disclaimed, will equally be held void.' *Pollock, Contr. 286.* In the case of *Providence Tool Co. v. Norris*, 2 Wall. 45, 17 L. ed. 868, the court said: 'All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of

justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.' . . .

"The contract before us has two infirmities,—one of an agreement for the use of personal influence, and another of an agreement for compensation dependent upon the contingency of success. That we are correct in saying that the agreement is dependent upon a contingency is shown by the fact that the consideration became payable only in the event that the postoffice was located and maintained in appellant's building."

We have quoted extensively from the above case, because, in our mind, the contract as reflected by the allegations in the petition brings it clearly within the rule therein announced, and it answers most all of the contentions made by counsel.

In the case at bar the object sought was to move the postoffice from one location to another (lot 11, block 11), and to maintain or cause it to be maintained at the latter place for five years, and to accomplish the object defendant Davis's assignor, McAtee, was to use his influence, and such influence as he could bring to bear upon the Department, to procure the removal, and in payment therefor Jacob's grantor, Reese, was to pay \$5 per month for five years, with a provision that, if the government removed the postoffice from the place last mentioned, then the contract to become null and void.

We think the cases very analogous. In the former, one was to tender his building for a nominal rent for ten years and use "personal influence" and "proper persuasion" to secure an acceptance, and in case of success the other was to pay \$5 per month for the term of years. In the latter, one was to procure the removal of and maintain in his own building a postoffice, and use "his own" and such "influence" as he could bring to bear upon the Department to procure the removal, and in the event of success the other was to pay \$5 per month for five years. It seems to us for all practical intention and purpose the contracts are substantially the same. This class of contracts we think void as against public policy and good morals. The original parties may not have intended to do any wrong, and the removal of the postoffice, no doubt, was financially a benefit to them, but a great injustice may have been perpetrated on the public and the administrative department of the government; but in

such cases one has no right to exchange his "personal influence," etc., for a consideration, and agree to do or have done a thing in which the administrative welfare of the public is concerned, and, when the quid pro quo is thus, a court of equity will not pause to inquire. *Spence v. Harvey*, 22 Cal. 337, 83 Am. Dec. 69. The law frowns on such dealings, because public interest is not a subject of barter and sale, and, as the law views it, it is better not only to shun evil, but the very appearance of evil. We do not mean, however, to hold that in no instance can a valid contract be made compensating one by contribution or other valid consideration for the use of his property when let to the postoffice department for a minimum rent, but where, like the case at bar, the trick is by "influence," etc., the court will supply that which is left for inference and hold the contract invalid.

In *Hare v. Phaup*, 23 Okla. 575, 138 Am. St. Rep. 852, 101 Pac. 1050, Dunn, J., distinguished the cases cited therein as well as herein, *Fearnley v. De Mainville*, 5 Colo. App. 441, 39 Pac. 73, and *Bryan v. Dyer*, 28 Ill. 188, and discussed and refused to follow *Beal v. Polhemus*, 67 Mich. 130, 34 N. W. 532.

In *Edwards v. Goldsboro*, 141 N. C. 60, 53 S. E. 652, 4 L.R.A.(N.S.) 589, note, 8 Ann. Cas. 479, most of the cases cited herein and many others are coalited and classified and for sake of brevity reference is made thereto.

2. Having held that the contract was void between the makers, it follows that such invalidity continues in the hands of the assignee. But counsel for defendant says: Are the assignee of the postoffice contract and grantee of lot 14 in block 11 in *pari delicto*? In this case, yes. Plaintiff took the land encumbered with the apparent lien, and in accordance with the allegations of his petition with full knowledge of all that had transpired, and it is therefore a privy in this sense. Besides, he declared in his petition on the contract. If a court of equity in such instances could relieve plaintiff, it could as easily relieve his vendor. Unless the impurity of the contract contaminates all who declare and take under it, the purpose of the law fails, and in such instances one in *pari delicto* could one minute transgress the law with impunity, and in the next convey his property and be forgiven, a complete ruse whereby a court of equity would punish one and help the other. Under the state of pleadings and facts we think the sins of Reese were visited on Jacobs. Neither party was entitled to relief.

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In 9 Cyc. 546, it is said: "No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxims, 'Ex dolo malo non oritur actio,' and 'In *pari delicto potior est conditio defendentis*.' The law, in short, will not aid either party to an illegal agreement; it leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back."

See also *Edwards v. Boyle*, 37 Okla. 639, 133 Pac. 233.

In *Garrison v. Burns*, 98 Ga. 762, 26 S. E. 471: "It has been held that it makes no difference whether the illegality of the transaction is made to appear by the plaintiff or by the defendant. See *Howell v. Fountain*, 3 Ga. 182, 46 Am. Dec. 415, where the following language of Lord Mansfield, in *Holman v. Johnson*, Cowp. Pt. 1, p. 343, is approved as a correct expression of the law on this subject: 'If from the plaintiff's own statement, or otherwise, the cause of action appears to arise ex turpi causa, or from the transgression of a positive law of this country, then the court says he has no right to be assisted.' In this connection consult also *Bugg v. Towner*, 41 Ga. 318; *Heineman v. Newman*, 55 Ga. 262, 21 Am. Rep. 279; *Tompkins v. Compton*, 93 Ga. 525, 21 S. E. 79. It would seem that the general rule deducible from all the authorities is as stated in *Clark, Contr.* 491, viz.: 'That the court will not lend its aid to a party who, as the ground of his claim, must disclose an illegal transaction.' We understand this to mean that, whenever either party has to rely upon a contract which is, in fact, illegal, the other party may, in avoidance of it, show its illegality. The plaintiff in the present case does not, it is true, rely on the contract. On the contrary, he seeks to rescind it. But he had to bring it to light, and in making out his case disclose its real nature; and, as it was an executed contract, this gave the defendant the right to invoke the rule that the court should leave them where it found them."

We are of the opinion that the trial court erred in overruling defendant's demurrer, and should have sustained same,

dismissed the petition, and denied further relief to either party. We therefore recommend that the judgment of the trial court be reversed, and that it be directed to sustain the demurrer and dismiss the petition.

Per Curiam:
Adopted in whole.

Petition for rehearing denied February 29, 1916.

Annotation—Contract as to location of public buildings.

The earlier cases on this question are considered in a note to *Edwards v. Goldsboro* (1906) 4 L.R.A.(N.S.) 589, of which the present annotation is supplementary.

Generally, as to validity of contract to procure legislative action, see notes to *Houlton v. Dunn*, 30 L.R.A. 737, and *Stroemer v. Van Orsdel*, 4 L.R.A.(N.S.) 212.

As to validity of an agreement by which compensation is dependent upon success in procuring a contract with public officer or board, see notes to *Kansas City Paper House v. Foley R. Printing Co.* 39 L.R.A.(N.S.) 747, and *Hyland v. Oregon Hassam Paving Co.* L.R.A.1915C, 823.

A contract by a postmaster, for a consideration, to locate the postoffice in a certain building, is void as contrary to public policy. *Benson v. Bawden* (1907) 149 Mich. 584, 13 L.R.A.(N.S.) 721, 113 N. W. 20.

The assignee of the equipment of a postoffice, which the owner had previously assigned to the postmaster in consideration of his locating the office in a certain building, cannot maintain trover for its value, against the postmaster, since the prior contract of assignment is void and the parties are in pari delicto. (Mich.) Ibid.

In an action to recover back post-office equipment which the owner had assigned to the postmaster in consideration of the location of the office in a certain building, it is not error to admit in evidence the contract showing the assignment and the consideration. (Mich.) Ibid.

A contract to pay for services and expenses incurred in procuring the establishment of a postoffice in a particular location in a city, the payments to continue so long as the postoffice is maintained there, not to exceed ten years, is contrary to public policy and void. *Hare v. Phaup* (1909) 23 Okla. 575, 138 Am. St. Rep. 852, 101 Pac. 1050.

And a contract contemplating the establishment and maintenance of a postoffice at a certain place for the private advantage of the signers thereof, as contradistinguished from the interest of

the general public, and providing that certain payments should be made contingent upon the accomplishment of such purpose, is contrary to the public policy of this state and void. *Whitaker v. First Nat. Bank* (1916) — Okla. —, 155 Pac. 1175.

But it has been held that a contract to influence government officials to purchase certain property as a postoffice site is not necessarily void. *Bush v. Russell* (1913) 180 Ala. 590, 61 So. 373. The court said: "To 'lobby' with department officials for a contract, as alleged in those pleas, does not necessarily imply corruption, but it carries nevertheless a certain commonly understood suggestion of sinister purposes. It does imply a form of personal solicitation which tends to corruption, and is for that reason forbidden. But 'influence' is a much broader term. Standing alone, its moral and ethical implications are indifferent. They may be good or bad. The methods of influence may be legitimate or illegitimate. To say, then, that plaintiff promised 'to influence' the officers of the government, without more, meant nothing. An intention to violate law or morals is not to be presumed."

And such a contract is not to be condemned because of a stipulation for compensation contingent upon the success of the undertaking. *Bush v. Russell* (Ala.) Ibid.

The rule is well settled that, if a public institution must be located or structure built, private contributions on condition that a particular location is selected are not against public policy. *Currier v. United States* (1910) 106 C. C. A. 654, 184 Fed. 700.

So, it was no ground for objection to the selection of a site for a postoffice building that the Secretary of the Treasury was induced to choose it by an agreement of the neighboring property owners to pay the cost thereof in excess of the sum appropriated by Congress, there being no claim that the Secretary was not wholly free from any influence, save his judgment of the suitability of the location and the donations towards its cost. (Fed.) Ibid. W. W. A.

UTAH SUPREME COURT.

WILLIAM B. HUGHES PRODUCE COMPANY, Resp't.,
v.

GEORGE H. PULLEY, Appt.

(— Utah, —, 155 Pac. 337.)

Sale — potatoes — furnishing of sacks — condition precedent.

1. The furnishing of the sacking is a condition precedent to performance of a contract to deliver a certain quantity of potatoes f. o. b. at a certain place, sacks to be furnished by buyer.

For other cases, see Contracts, IV. d, in Dig. 1-52 N. S.

Same — delay in demanding performance — effect.

2. A purchaser of potatoes to be delivered in sacks to be furnished by him, f. o. b. at a certain place within thirty days of the execution of the contract, cannot hold the seller for breach of the contract, where performance is refused upon his demand therefor sixty-eight days after such execution. *For other cases, see Sale II. a, in Dig. 1-52 N. S.*

(February 8, 1916.)

APPEAL by defendant from a judgment of the District Court for Utah County in plaintiff's favor in an action brought to recover damages for breach of a contract for the sale of potatoes. Reversed.

The facts are stated in the opinion.

Mr. J. W. N. Whitecotton, for appellant:

Where acts to be performed by the parties to a contract are mutual and dependent, or where the existence of a right in one claiming it depends upon the performance of duties on his part, as by the payment of money or delivery of goods, tender of performance by him is necessary to enable him to enforce the right.

38 Cyc. 132; 3 Elliott, Contr. p. 2098; 1 Beach, Contr. § 298.

Defendant was under no obligation to deliver the potatoes until he had received the sacks, which the plaintiff admits he never delivered nor offered to deliver, either within the life of the contract, nor afterwards, nor at any time at all.

Louisville, N. A. & C. R. Co. v. Diamond State Iron Co. 126 Ill. 294, 18 N. E. 735; Read v. Delaware & H. Canal Co. 49 N. Y. 652; Hughes v. Knott, 138 N. C. 105, 50 S. E. 586, 3 Ann. Cas. 903; Bembridge v. Stoddard, 4 Ind. 587; Blossom v. Shotter,

Note. — As to effect of provision of contract of sale that buyer shall furnish receptacles, see annotation following this case post, 730.

L.R.A.1916D.

59 Hun, 481, 13 N. Y. Supp. 523; Lozes v. Segura Sugar Co. 52 La. Ann. 1844, 28 So. 249; National Coal Tar Co. v. Malden & M. Gaslight Co. 189 Mass. 234, 75 N. E. 625.

When the time limited in the contract had expired, the buyer had no right to make further demands on the seller.

Cazier v. Stack, 45 Utah, 124, 143 Pac. 133.

Messrs. Edward McGurrian and William E. Rydalcch, for respondent:

It was the duty of defendant to have the potatoes on board the cars at American Fork within thirty days from February 4th, 1911.

Benjamin, Sales, 7th ed. § 682, p. 701.

It was the duty of the seller to give notice to the buyer at what time and place the potatoes would be on board in American Fork within the thirty days specified.

Cullum v. Wagstaff, 48 Pa. 300, 2 Mor. Min. Rep. 573; Rogers v. Van Hoesen, 12 Johns. 221; McNairy v. Bishop, 8 Dana, 150; Parker v. Selden, 69 Conn. 544, 38 Atl. 212; Stanford v. McGill, 6 N. D. 536, 38 L.R.A. 760, 72 N. W. 938; Dwight v. Eckert, 117 Pa. 480, 12 Atl. 32; Weiseger v. Wheeler, 14 Wis. 109; 5 Elliott, Contr. § 5043; 35 Cyc. 168; 2 Mechem, Sales, §§ 1126, 1127, 1130; 24 Am. & Eng. Enc. Law, 2d ed. pp. 1073, 1074; Henkle v. Smith, 21 Ill. 238; McKee v. Retter, 10 Ill. 315; Low v. Forbes, 14 Ill. 423.

Frick, J., delivered the opinion of the court:

This is an action for breach of contract. The action is based upon a certain contract, which was introduced in evidence by the plaintiff as his exhibits A and B. Exhibit A reads:

February 4, 1911.

Received from Wm. B. Hughes Produce Company of Salt Lake City, Utah, ten and no 100 dollars in part payment of six hundred bushels or more of first-class potatoes at \$1.25 per hundred sacked, to be delivered f. o. b. cars at American Fork within 30 days from date. Balance of payment to be made on the delivery of said potatoes.

Geo. H. Pulley.

Exhibit B is as follows:

For R. N. Z. potatoes. Price \$1.25 per cwt., sacked f. o. b. American Fork. Advances \$10.00. Sacks to be furnished by William B. Hughes.

The undisputed evidence is to the effect that plaintiff was doing business in Salt Lake City under the name of William B. Hughes Produce Company, and that he, under that name, entered into the foregoing agreement with the defendant, who was a farmer at American Fork, Utah county, Utah; that the plaintiff at no time furnished any sacks, nor offered to do so, in which to sack the potatoes; that on the 26th day of March, 1911, the defendant, not having heard anything from the plaintiff regarding said potatoes, sold the same for 5 cents less per bushel than the contract price, the price he sold them for being the market price for potatoes at American Fork at that time; that the defendant did not notify the plaintiff of his intention to sell the potatoes; that the plaintiff demanded the potatoes on April 14, 1911, at which time he was informed by the defendant that he had disposed of the potatoes. The plaintiff also testified that the market value of the potatoes "to me" at American Fork in February and March was \$1.45 per hundredweight. Upon substantially the foregoing evidence the court found that the defendant had breached the contract, and that the plaintiff, in consequence thereof, was damaged in the sum of \$54. Judgment was accordingly entered in favor of the plaintiff, and the defendant appeals.

The defendant insists that the findings are not supported by the evidence, and that the conclusions of law and judgment are contrary to law. It seems to us that the whole question hinges upon what meaning shall be given to the contract in question. Considering exhibits A and B together for the purpose of ascertaining the intention of the parties, as we must do, what are the terms and conditions of the agreement?

In our opinion they are just these: The defendant sold to the plaintiff at least 600 bushels of first-class potatoes at \$1.25 per hundred-weight, to be delivered in sacks f. o. b. cars at American Fork within thirty days from February 4, 1911; that the plaintiff paid the defendant \$10 as part payment of the purchase price, the remainder to be paid upon delivery of the potatoes, and the plaintiff further agreed that he would furnish the sacks in which to sack the potatoes. Now, it seems to us that while the defendant had obligated himself to deliver the potatoes as stipulated in the agreement, the plaintiff had bound himself to furnish the necessary sacks in which the potatoes were to be sacked before delivery. If it be held that plaintiff was not required to furnish the sacks, then something he agreed to do must be eliminated from the agreement. How can it reasonably be contended that the plaintiff has complied with the stipula-

tions of the contract, unless it be shown that he had tendered the sacks to the defendant in which the potatoes were to be placed before delivery and shipment? Plaintiff's counsel, however, vigorously insist that the furnishing of the sacks by the plaintiff was not a condition precedent to his right to have the potatoes delivered, because his agreement to furnish sacks was not an essential or material part of the contract. That seems to have been the view taken by the trial court. Indeed, unless that view is taken, the court's conclusions cannot be sustained.

In support of their contention counsel cite and rely on a case from the supreme court of Illinois, namely, *McKee v. Retter*, 10 Ill. 315, decided in 1848, in which a contract for the sale of wheat, very similar in terms to the one in question here, was passed on, and where it was held that the furnishing of the sacks by the plaintiff was not a condition precedent, and that the defendants were not excused for a failure to deliver the wheat because the plaintiff had not furnished the sacks in which it was to be sacked before delivery. It was held that the failure to furnish the sacks by the plaintiff was too "insignificant" to justify the defendants in refusing to deliver the wheat at the time and place agreed upon. Upon the other hand, counsel for the defendant cites and relies upon a case from the supreme court of Indiana (*Russell v. Witt*, 38 Ind. 9), where the defendants in error agreed to furnish the sacks in which a certain quantity of clover seed was to be sacked by the plaintiff in error, which the defendants in error had purchased from Russell, and where the defendants in error had failed to furnish the sacks, and Russell then had disposed of the clover seed elsewhere, and was sued for breach of contract. The supreme court of Indiana held that the furnishing of the sacks by defendants in error was a condition precedent to their right to have the clover seed delivered, and reversed the judgment of the court below, which was in their favor. We can see no escape from either the logic or justice of that decision. Nor can we understand how the supreme court of Illinois could logically have arrived at the conclusion that the furnishing of the sacks was a matter too "insignificant" to justify the defendant's failure to deliver the wheat at the time specified in the contract. In arriving at such a conclusion the court in effect held that, although one party to a contract is bound by its stipulations, yet the other is not. It might be that a certain stipulation in a contract is so foreign to the real purpose and intention of the parties in entering into it that a court might well say that

the mere failure to comply with such a stipulation by the party agreeing to perform it offers no excuse for the other party to refuse to comply with all of the terms of his agreement. Courts should, however, be very careful not to excuse parties from their obligations by substituting their own judgment for that of the parties with respect to what constitutes a material stipulation in a contract. When courts once enter into that realm, they will find it somewhat difficult to say just where to pause. This court is firmly committed to the doctrine that courts may "enforce, but not create, liabilities." *Smith v. Bowman*, 32 Utah, 43, 9 L.R.A.(N.S.) 889, 88 Pac. 687; *Blyth-Fargo Co. v. Free*, — Utah, —, 148 Pac. 430. While in those cases surety contracts were involved, yet the principle that courts are created to enforce, and not to excuse or create, liability, is just as much involved here as it was in those cases. What right have we to excuse the plaintiff from furnishing the sacks while we enforce the obligation of the defendant to deliver the potatoes, although no sacks were furnished nor tendered him at any time, not even on the 14th day of April, when the delivery of the potatoes was finally demanded by the plaintiff?

Then the further question arises of whether the plaintiff could postpone the demand for the potatoes indefinitely. That is, whether he was, under the terms of the contract, entitled to demand them at any time. The potatoes were to be sacked and delivered within thirty days from February 4, 1911. No sacks were furnished, and no demand was made for the potatoes until April 14th following; that is, not until sixty-eight days had elapsed. If the plaintiff could wait for sixty-eight days, why could he not wait six months before making a demand? True it is that, had the plaintiff not agreed to furnish sacks in which the potatoes were to be placed and delivered, he would have been required to do nothing. Under the terms of the contract the defend-

ant was, however, required to sack the potatoes and to deliver them sacked within thirty days from the making of the contract. He, we think, was not required to comply with those conditions unless he was furnished the sacks in which to place the potatoes. According to the opinion of the supreme court of Illinois in the case referred to, the plaintiff's failure to furnish the sacks did not excuse the defendant from delivering the potatoes, for the reason that if sacks were necessary, he should have provided them. Now, how many sacks, what kind and quality, and what would be the cost thereof to sack 600 bushels of potatoes, we are not advised. It may be that it would have required 600 sacks. It may well be that it would have been difficult for the defendant to obtain that number of sacks at a reasonable price. If he did so, however, he would perhaps have to invest money in an article he did not need, or would perhaps have had to sue the plaintiff to recover back the money he invested in the sacks. In either event he was placed in a dilemma. What right has this, or any, court to place that burden upon him? The language of the contract is plain and unambiguous that the plaintiff was to furnish the sacks. Had the plaintiff complied with the terms of his agreement in that regard, no dilemma nor controversy would perhaps have arisen. The plaintiff, and not the defendant, therefore, is responsible for defendant's failure to deliver the potatoes at the time and place specified in the agreement. That being so, we cannot see how the plaintiff can prevail in an action for a breach of a contract, for which breach he alone is responsible.

The judgment is reversed, and the cause is remanded to the District Court of Utah County, with directions to grant a new trial. Costs to appellant.

Straup, Ch. J., and McCarty, J., concur.

Annotation—Sale—Effect of provision of contract that buyer shall furnish receptacles.

This note does not include agreements by the buyer to furnish the means of transportation. As to which party must furnish cars under a contract to ship goods f. o. b., see notes to *Samuel M. Lawder & Sons Co. v. Albert Mackie Grocery Co.* 62 L.R.A. 795, and *Hurst v. Altamont Mfg. Co.* 6 L.R.A.(N.S.) 928. And later case, *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 28 L.R.A.(N.S.) 1007. L.R.A.1916D.

The cases upon the question under annotation are quite evenly divided.

Thus, in *Russell v. Witt* (1871) 38 Ind. 9, which is approved in *WILLIAM B. HUGHES PRODUCE CO. v. PULLEY*, ante, 728, an action by a purchaser of clover seed against the seller, which was defended on the ground that the purchaser did not furnish bags for the transportation of the seed, according to the contract of sale, it was held that the fur-

nishing of the bags was a condition precedent to the obligation of the seller to deliver the seed, and, although it was to be inferred from some of the evidence that the buyer acted on the theory that it was the duty of the seller to notify him when he was ready for the bags, and that it was not his duty under the contract to furnish the bags until he had such notice, the court said that this was a mistaken theory of the law applicable to the case, inasmuch as the contract did not provide for any such notice, nor was there anything in the nature of the transaction that made such notice necessary.

So, in *Kellogg v. Nelson* (1856) 5 Wis. 125, an action by a buyer of wheat under a contract whereby the seller was to deliver the wheat at the buyer's warehouse, the buyer to furnish bags for hauling it, it was held that the agreement by the buyer to furnish the bags was a part of the consideration for the promise of the seller to sell and deliver the wheat, and, it being a part of the consideration, the buyer should have been prepared to show that that part of the agreement had been performed on his part; saying: "It can make no difference that the thing to be done was trivial, or that it made no material difference to the defendants whether the bags were furnished or not, because, when the liability of the defendant is contingent upon the performance of certain acts by the plaintiff, the latter must show a complete performance or he cannot recover."

And in *Austin & McCargar v. Langlois* (1908) 81 Vt. 223, 69 Atl. 739, where there was some dispute as to whether the terms of a contract for the sale of hay required the buyer or the seller to bale the hay, one contention being that the buyer was to bale the hay so that it could be delivered on board boat before the close of navigation, the court said that if this claim was established, the baling of the hay was a condition precedent to the buyer's right of action, and his failure to perform that condition discharged the contract.

But in *McKee v. Retter* (1848) 10 Ill. 315, which is disapproved in *WILLIAM B. HUGHES PRODUCE CO. v. PULLEY*, an L.R.A.1916D.

action of assumpsit upon a contract for the sale of wheat which defendant agreed to deliver to plaintiff put up in sacks in good shipping order, the sacks to be furnished by the buyer as soon as they could be obtained, it was held that the furnishing of the sacks was a condition precedent to the sacking of the wheat only, and not to its delivery, the failure to furnish the sacks being insignificant as compared with the principal objects of the contract, and their nondelivery being a detriment to the buyer rather than to the seller, who was thereby relieved from the duty of sacking the wheat.

The above case was followed in *Low v. Forbes* (1853) 14 Ill. 423, in which a contract for the sale of corn provided that the buyer should furnish the sacks in which the seller was to put the corn, but failed to do so, the court saying that it was for the benefit of the buyer that the corn was to be sacked, and if he neglected to furnish the sacks it was no reason why he might not have the corn in bulk.

But in a subsequent suit between the same parties upon a different contract, where a valid subsequent parol agreement between the parties was established, whereby it was stipulated that the buyer should furnish the seller with sacks in which he should sack the corn, and that the seller should not deliver the corn until the sacks were furnished, it was held that this agreement made the delivery of the sacks a condition precedent to the delivery of the corn. (1857) 18 Ill. 568.

In *McNairy v. Gathings* (1876) 52 Miss. 592, a contract reciting the receipt of \$3,000 in full payment for 5,000 pounds of lint cotton, with a further recital that the buyer was to furnish the bagging and rope, and the seller was to gin and bale the cotton, was held to be an absolute and unconditional contract of sale of the cotton, and the failure of the buyer to furnish the bagging and rope was held to deprive him of the right to claim that the seller should bale the cotton, but did not affect his claim upon the seller to deliver the lint cotton.

R. L. S.

WASHINGTON SUPREME COURT.
(In Banc.)

WILLIAM R. CRAWFORD

v.

SEATTLE, RENTON, & SOUTHERN RAILWAY COMPANY et al.

AUGUSTUS S. PEABODY, Trustee, etc., et al., Respts.,
v.

SCOTT CALHOUN et al., Receivers of Seattle, Renton, & Southern Railway Company, et al., Appts.

PEABODY, HOUGHTELING, & COMPANY, Appts.,
v.

SAME, Respts.

(86 Wash. 628, 150 Pac. 1155.)

Conflict of laws — usury — what law governs.

The intention of the parties to a loan to have the contract governed by the law of the borrower's residence with respect to interest, by which the amount reserved is valid, rather than by that of the lender's residence, where it would be void, may be found from the facts that the borrower is a corporation located and doing business in one state, the name of which the bonds securing the loan bear and in which they were actually signed, although they were delivered in the state where the lender resides and are payable there, while the deed of trust securing the bonds permitted advertisement in the state of the borrower's residence in case the bonds were to be paid before maturity, and the appointment by its courts of a new trustee in case the office became vacant; and the same is true with respect to interest on notes executed under similar circumstances, and secured by a pledge of the stock of the corporation. *For other cases, see Conflict of Laws, I. b, 2, in Dig. 1-52 N. S.*

(August 11, 1915.)

APPEAL by the receivers from an order of the Superior Court for King County allowing the claims of the trustee in full in a receivership proceeding to wind up the affairs of the insolvent railroad company. Affirmed.

APPEAL by claimant Peabody, Houghteling, & Company from an order of the Superior Court for King County disallowing a part of its claim in a receivership proceeding to wind up the affairs of the insolvent railroad company. Reversed.

The facts are stated in the opinion.

Note. — For conflict of laws as to usury, see annotation following Midland Sav. & L. Co. v. Henderson, post, 750. L.R.A.1916D.

Messrs. Harold Preston, O. B. Thorgrimson, and Scott Calhoun, for the receivers, appellants:

The contracts are governed by the law of Illinois.

Inland Trading Co. v. Edgcombe, 57 Wash. 257, 106 Pac. 768; Libert v. Unfried, 47 Wash. 186, 91 Pac. 776; Thomas v. Price, 33 Wash. 459, 99 Am. St. Rep. 961, 74 Pac. 563; Knight v. American Invest. & Improv. Co. 73 Wash. 380, 132 Pac. 219; Lee v. Hillman, 74 Wash. 408, L.R.A.—, —, 133 Pac. 583, Ann. Cas. 1915A, 759; Re Pittock, 2 Sawy. 416, Fed. Cas. No. 11,189; Arnett v. Pinson, 33 Ky L. Rep. 36, 108 S. W. 852; Lockwood v. Mitchell, 7 Ohio St. 388, 70 Am. Dec. 78; Dugan v. Lewis, 79 Tex. 246, 12 L.R.A. 93, 23 Am. St. Rep. 332, 14 S. W. 1024; Johnson v. Bank of United States, 2 B. Mon. 310; Shaw v. Cleveland, C. C. & St. L. R. Co. 97 C. C. A. 520, 173 Fed. 752; 2 Whart. Confl. L. 3d ed. p. 1218; Walker v. Lovitt, 250 Ill. 543, 95 N. E. 631; Mills v. Wilson, 88 Pa. 118; Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 6 U. S. App. 566, 55 Fed. 223; Gay v. Rainey, 89 Ill. 221, 31 Am. Rep. 76; Smith v. Myers, 207 Ill. 126, 69 N. E. 838; Baum v. Birchall, 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620; Hooley v. Talcott, 129 App. Div. 233, 113 N. Y. Supp. 820; Bascom v. Zediker, 48 Neb. 380, 67 N. W. 148; Kline Bros. & Co. v. North Coast F. Ins. Co. 80 Wash. 609, 142 Pac. 7; McElroy v. Metropolitan L. Ins. Co. 84 Neb. 866, 23 L.R.A. (N.S.) 968, 122 N. W. 27; Northampton Mut. Live Stock Ins. Co. v. Tuttle, 40 N. J. L. 476; Emerson Co. v. Proctor, 97 Me. 360, 54 Atl. 849; Mutual L. Ins. Co. v. Cohen, 179 U. S. 262, 45 L. ed. 181, 21 Sup. Ct. Rep. 106; Hieronymus v. New York Nat. Bldg. & L. Assn. 101 Fed. 12; Illinois C. R. Co. v. Beebe, 174 Ill. 13, 43 L.R.A. 210, 66 Am. St. Rep. 253, 50 N. E. 1019; Coats v. Chicago, R. I. & P. R. Co. 239 Ill. 154, 87 N. E. 929; Hutchinson, Carr. § 212; Atchison, T. & S. F. R. Co. v. Smith, 38 Okla. 157, 132 Pac. 494, Ann. Cas. 1915C, 620; Fish v. Delaware, L. & W. R. Co. 211 N. Y. 374, 105 N. E. 661; Washington F. Ins. Co. v. Maple Valley Lumber Co. 77 Wash. 686, 138 Pac. 553; Hagan v. Barnes, 92 Minn. 128, 99 N. W. 415; Hunter v. Weriathee Land Co. 36 Wash. 541, 79 Pac. 40; McGarry v. Nicklin, 110 Ala. 559, 55 Am. St. Rep. 40, 17 So. 726; McAllister v. Smith, 17 Ill. 328, 65 Am. Dec. 651; Akers v. Demond, 103 Mass. 318; Barnes v. Whitaker, 22 Ill. 608; Maynard v. Hall, 92 Wis. 565, 66 N. W. 715; Woodruff v. Hill, 116 Mass. 310; Stix v. Mathews, 63 Mo. 371; Baum v. Birchall, 150 Pa. 164, 30 Am. St. Rep. 797, 24 Atl. 620; State Bank v. King, 244 Pa. 29, 90 Atl. 453;

Long v. Symonds, 216 Mass. 595, 104 N. E. 476; Baxter v. Beckwith, 25 Colo. App. 322, 137 Pac. 901; True v. Northern P. R. Co. 126 Minn. 72, 147 N. W. 948; Davis v. McColl, 179 Mo. App. 198, 166 S. W. 1113; Colonial Nat. Bank v. Duerr, 108 App. Div. 215, 95 N. Y. Supp. 810; Merchants' Bank v. Brown, 86 App. Div. 599, 83 N. Y. Supp. 1037; Cherry v. Sprague, 187 Mass. 113, 67 L.R.A. 33, 105 Am. St. Rep. 381, 72 N. E. 456; Wylle v. Cotter, 170 Mass. 356, 64 Am. St. Rep. 305, 49 N. E. 746; Exchange Bank v. Appalachian Land & Lumber Co. 128 N. C. 193, 38 S. E. 813; Daniel v. Boston & M. R. Co. 184 Mass. 337, 68 N. E. 337; E. L. Welch Co. v. Gillett, 146 Wis. 61, 130 N. W. 879; John A. Tolman Co. v. Reed, 115 Mich. 71, 72 N. W. 1104; Hallam v. Telleren, 55 Neb. 255, 75 N. W. 560; Carey v. Schmeltz, 221 Mo. 132, 119 S. W. 946.

Messrs. Peters & Powell, Higgins & Hughes, and Hyman Zettler, for respondents Peabody et al., and Peabody Company, appellants:

Both the bond and note transactions are governed by the laws of Washington, and are therefore not usurious.

Robinson v. Bland, 2 Burr. 1077; 9 Cyc. 665, 666; 5 R. C. L. p. 938; Mayer v. Roche, 77 N. J. L. 681, 26 L.R.A.(N.S.) 763, 75 Atl. 235; Griesemer v. Mutual L. Ins. Co. 10 Wash. 202, 38 Pac. 1031, 1034; Jacobs v. Credit Lyonnais, L. R. 12 Q. B. Div. 589, 53 L. J. Q. B. N. S. 156, 50 L. T. N. S. 194, 32 Week. Rep. 761, 1 Eng. Rul. Cas. 338; Whart. Conf. L. 3d ed. § 510g, pp. 1195, 1204; Hall v. Cordell, 142 U. S. 116, 117, 35 L. ed. 956, 958, 12 Sup. Ct. Rep. 154; Mott v. Rowland, 85 Mich. 561, 48 N. W. 638; Dugan v. Lewis, 79 Tex. 246, 12 L.R.A. 93, 23 Am. St. Rep. 332, 14 S. W. 1024; Chapman v. Robertson, 6 Paige, 627, 31 Am. Dec. 264; Scott v. Perlee, 39 Ohio St. 63, 48 Am. Rep. 421; Arnold v. Potter, 22 Iowa, 194; Vliet v. Camp, 13 Wis. 198; Richards v. Globe Bank, 12 Wis. 692; Kellogg v. Miller, 2 McCrary; 395, 13 Fed. 198; Jackson v. American Mortg. Co. 88 Ga. 756, 15 S. E. 812; United States Sav. & L. Co. v. Beckley, 62 L.R.A. 35, note; Pennsylvania Mortg. Invest. Co. v. Simms, 16 Wash. 247, 47 Pac. 441; Pritchard v. Norton, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; Re Missouri S. S. Co. L. R. 42 Ch. Div. 341, 58 L. J. Ch. N. S. 721, 61 L. T. N. S. 316, 37 Week. Rep. 696; Hamlyn v. Taliaker Distillery [1894] A. C. 202, 6 Reports, 188, 71 L. T. N. S. 1, 58 J. P. 540; Spurrier v. La Cloche [1902] A. C. 446, 71 L. J. P. C. N. S. 101, 51 Week. Rep. 1, 86 L. T. N. S. 631, 18 Times L. R. 606; Green v. Northwestern L.R.A.1916D.

Trust Co. 128 Minn. 30, post, 739, 150 N. W. 229; 39 Cyc. 899.

Even if the bond and note transactions were governed by the laws of Illinois, they would not be usurious because of the Illinois statute prohibiting to corporations the defense of usury.

Curtis v. Leavitt, 15 N. Y. 152; Southern Life Ins. & T. Co. v. Packer, 17 N. Y. 51; Butterworth v. O'Brien, 23 N. Y. 275; Stewart v. Bramhall, 74 N. Y. 85; Cook, Corp. 6th ed. p. 2641; Whart. Conf. L. 3d ed. § 510r; 3 Thomp. Corp. 2d ed. § 2252; 29 Am. & Eng. Enc. Law, 2d ed. 538; Belmont State Bank v. Hoge, 35 N. Y. 65; Ballston Spa Bank v. Marine Bank, 16 Wis. 120; Lyon v. Ewings, 17 Wis. 61; Lane v. Watson, 51 N. J. L. 186, 17 Atl. 117, affirmed in 52 N. J. L. 550, 10 L.R.A. 784, 20 Atl. 894; Binghampton Trust Co. v. Auten, 68 Ark. 299, 82 Am. St. Rep. 295, 57 S. W. 1105; Junction R. Co. v. Bank of Ashland, 12 Wall. 226, 20 L. ed. 385; American C. R. Co. v. Miles, 52 Ill. 174; Hartford F. Ins. Co. v. Hadden, 28 Ill. 260; Hurd v. Marple, 2 Ill. App. 403. Mr. Will H. Thompson, amicus curiæ.

Parker, J., delivered the opinion of the court:

There are here involved two separate claims of creditors filed in the superior court for King county in the receivership proceedings of the Seattle, Renton, & Southern Railway Company, an insolvent corporation, the affairs of which are being wound up in these proceedings.

The claim of Augustus S. Peabody, as trustee for the holders of the bonds of the railway company, is sought to be made a preferred claim against all of the property of the railway company by virtue of a trust deed given to secure the payment of the bonds. While this claim is sought to be enforced in the receivership proceedings, the trustee seeks, in effect, the foreclosure of the trust deed as a mortgage, a sale of the property in the hands of the receivers, and the payment of his claim from the proceeds thereof in preference to all other creditors of the railway company.

The claim of Peabody, Houghteling, & Company is that of a general creditor, and rests upon notes evidencing a loan made by them to the railway company, which loan was secured by the pledging of all of the shares of the capital stock of the railway company by the owners thereof, William R. Crawford and John B. Berryman, as evidenced by collateral agreements executed by the railway company, Crawford, Berryman, Peabody, Houghteling, & Company, and Augustus S. Peabody, as trustee.

These claims were separately heard and

determined in the superior court. The claim of Augustus S. Peabody, as trustee, under the bonds and trust deed securing them, was allowed by the superior court in full, including interest at the rate specified therein, as a preferred lien upon the property in the hands of the receivers. From the order entered so allowing this claim the receivers have appealed. The superior court allowed upon the claim of Peabody, Houghteling, & Company only the amount of money they actually parted with in making the loan to the railway company upon its notes, and disallowed all claim for interest as provided for in the notes. From the order so entered upon this claim Peabody, Houghteling, & Company have appealed.

The principal defense made in the superior court by counsel for the receivers against the allowance of these claims, as it is also made here, is that the contracts upon which the claims are rested are usurious under the laws of Illinois, and that such contracts are referable to and governed by the laws of Illinois. The superior court rendered its decision as to each claim upon the theory that the contracts were referable to and governed by the laws of Illinois; that the interest provided for in the bonds, together with the bonus or discount reserved, was not in amount sufficient to make that transaction usurious under the laws of Illinois; but that the interest provided for in the notes, together with the bonus or discount reserved, was sufficient to make that transaction usurious under the laws of Illinois. The highest rate of interest permitted to be contracted for under the laws of Illinois is 7 per cent, and when any higher rate of interest is contracted for with reference to the laws of that state, the whole of such interest so contracted for is forfeited, and the lender is entitled to recover only the principal sum so loaned. The learned trial judge concluded that the interest contracted for in the bond transaction, including the bonus or discount reserved, did not exceed 7 per cent, but that the interest so contracted for in the note transaction did exceed 7 per cent. We may concede for present purposes that the interest contracted for in the note transaction, together with the bonus or discount reserved, amounted to approximately 8 per cent. The interest contracted for in the bond transaction did not in any event exceed 7½ per cent. The highest rate of interest permitted to be contracted for under the laws of Washington is 12 per cent. Rem. & Bal. Code, § 6251 (P. C. 263, § 3). The main question here for determination is: Were these contracts made with reference to the laws of Illinois or the laws of Washington? If the former should be L.R.A.1916D.

found controlling, it would then be necessary for us to deal with some additional questions. If the latter be found controlling, such fact will dispose of both claims in favor of Augustus S. Peabody, as trustee, and Peabody, Houghteling, & Company.

The two appeals are presented here together in the same briefs and by the same counsel. The controlling facts relative to both claims touching the question of whether the laws of Illinois or the laws of Washington are decisive of the question of usury are not materially different as we view them. Indeed, counsel do not seem to seriously contend that there is any substantial difference so far as this question is concerned. We shall notice the facts which are substantially the same as to each claim, and which we regard as decisive of each. The Seattle, Renton, & Southern Railway Company is a Washington corporation having its principal place of business during its entire existence in the city of Seattle. Until the appointment of receivers for it upon its becoming insolvent, it owned and operated a street and interurban electric railway wholly within King county, in this state. It never maintained any agency or place of business outside of this state. Peabody, Houghteling, & Company are now, and were at all times here involved, a partnership, with their place of business at Chicago. They are purchasers of and dealers in bonds and other securities. Augustus S. Peabody, one of the trustees named in the deed of trust here involved, is a member of the firm of Peabody, Houghteling, & Company. In January, 1908, William R. Crawford, the president of the railway company, went to Chicago for the purpose of negotiating a loan for the railway company in order to make necessary improvements and betterments of its property and refund its outstanding indebtedness. In February, 1908, he entered into a tentative agreement at Chicago in behalf of the railway company with Peabody, Houghteling, & Company, for a loan of \$1,000,000 for the railway company, to be evidenced by bonds of the railway company, and to be secured by a trust deed upon all the property of the railway company. We need not here notice in detail the terms of this tentative agreement, since they became merged in the final contract evidenced by the provisions of the trust deed and the bonds issued thereunder. The trust deed and bonds were accordingly prepared by Peabody, Houghteling, & Company at Chicago, and dated as of May 1, 1908. The trust deed was signed and acknowledged at Chicago by the trustees First Trust & Savings Bank of Chicago and Augustus S. Peabody on June 4, 1908. It was then forwarded by Peabody, Hough-

teling, & Company, together with \$600,000 of the bonds, to the railway company, at Seattle, Washington, where the trust deed was duly signed and acknowledged by the railway company on June 15, 1908, the railway company at the same time signing the bonds so forwarded to it, all in pursuance of resolution of the board of trustees of the railway company made in that behalf. The signed bonds and the trust deed were then forwarded to the trustees at Chicago, where the bonds were delivered by the trustees to Peabody, Houghteling, & Company after they were identified by indorsement thereon by the trustees as being bonds secured by the trust deed, such indorsement being made as provided by the terms of the trust deed. Peabody, Houghteling, & Company then paid the railway company for the bonds by sending direct to the railway company at Seattle, New York exchange amounting to \$125,804.68, by paying and satisfying outstanding bonded indebtedness of the railway company which had been incurred by it in the course of its business, which indebtedness was evidenced by bonds then at Chicago, and by paying expenses incident to the examination of the railway company's property and the title thereto at Seattle, which became security for the loan under the provisions of the trust deed and the bonds. The remainder of the bonds here involved secured by the trust deed were thereafter signed, delivered, and paid for in a similar manner.

We now notice the provisions of the trust deed and the bonds constituting the contract here involved, which we regard as shedding light upon the question of the intention of the parties as to whether they made this contract with reference to the laws of the state of Illinois or with reference to the laws of the state of Washington. The general purpose of the loan is recited in the trust deed as follows: "Whereas, said company desires to borrow money for the transaction of its business and the exercise of its corporate rights and privileges, the refunding of its funded debt, and the funding of its unsecured indebtedness, the construction of tracks and the equipment thereof, the extension and improvement of its lines, and for other lawful purposes of its incorporation, and is about to make and issue its first mortgage bonds, of the form, tenor, and effect hereinafter set forth, to the aggregate amount of \$1,000,000."

The trust deed specifies the form in which the bonds shall issue; such form being embodied therein in full. By this provision L.R.A.1916D.

and as issued, the bonds have a heading in large capital type as follows:

UNITED STATES OF AMERICA,
STATE OF WASHINGTON.
SEATTLE, RENTON, & SOUTHERN
RAILWAY COMPANY.
FIVE PER CENT FIRST MORTGAGE
GOLD BONDS.

The printed filing form upon the back of the bonds is headed the same. The bonds are by their terms payable at Chicago. The bonds refer to the trust deed as security, and the provisions thereof as affecting the rights of the bondholders as follows: ". . . To which trust deed or mortgage reference is hereby expressly made for a particular description of the terms and conditions thereof on which the said bonds are issued and secured, for a description of the nature and extent of the security therefor, and the rights of the bondholders with regard to such security."

The trust deed requires the railway company to furnish to Peabody, Houghteling, & Company monthly sworn statements in detail showing the condition of the company's business and its property. The trust deed provides that the railway company may elect to pay the bonds before maturity, and thereby acquires the right so to do. As a prerequisite to the exercise of this right the railway company "shall publish a notice of its such election and of the date of proposed prepayment in a newspaper of general circulation published in the city of Chicago, state of Illinois, and in a similar newspaper published in the city of Seattle, state of Washington. . . ." It is provided in the trust deed that in the event of the resignation of the trustees, or the rendering of that office vacant for any cause, so that there shall no longer be any person to act in that capacity under the trust deed, "a new trustee may be appointed upon the application of the holder or holders of one eighth ($\frac{1}{8}$) in amount of said bonds then outstanding and unpaid, and upon notice to said company, by the superior court of King county, Washington." For our present purpose we may regard Augustus S. Peabody as the sole acting trustee under the trust deed here involved.

It is well settled by the authorities that the parties to a contract may make the same with reference to the laws of any state or country, and have their contractual rights governed thereby, provided only that such laws have a real, and not a mere fictitious, connection with the subject-matter of the transaction. It is enough to support this power to contract with reference to the laws of some particular state or country

that some of the substantial elements of the contract have their situs in the state or country the laws of which the parties intend to control their rights under the contract. The intention of the parties in this respect may be evidenced by express words in the contract, or may be presumed from the facts and circumstances attending the making of the contract. 9 Cyc. 665, 666; 2 Whart. Conf. 3d ed. §§ 510b, 510c.

Of course, where the residence of all parties, as well as every fact and circumstance attending the making of the contract, is in one state, the contract is conclusively presumed to have been made with reference to the laws of that state, and the rights of the parties are governed accordingly. In such cases, and in cases of express provision in the contract evidencing the intention of the parties, there is no room for controversy as to their intention. It is where the contract is silent on that subject so far as express words are concerned, and its elements in some substantial measure have their situs in different states, that the question of what law was intended by the parties to govern their rights thereunder often becomes a difficult one. There is seemingly great conflict in the decisions dealing with this question. Such conflict, however, is probably more apparent than real, and arises from the great number of varying circumstances attending the contracts involved in different cases. Indeed, so marked is this variation of circumstances with which the courts have been called upon to deal that it seems quite impossible to formulate rules applicable alike to all cases. In 2 Wharton, Conf. L. 3d ed. § 510c, the learned author observes: "When the intention of the parties with respect to the governing law is not shown by the express language of their contract, it is necessary to infer or presume it from the terms of the contract in connection with the circumstances surrounding the transaction. These terms and circumstances are of such great variety, and susceptible of so many different combinations, that it is impossible to formulate any rule or set of rules for ascertaining the unexpressed intention of the parties that will cover every case. Each case must therefore depend, to a considerable extent, upon its own circumstances. Certain combinations of terms and circumstances, however, are of such frequent occurrence that they have become the basis of formulated principles or rules for ascertaining the bona fide intention of the parties. Each of these rules rests upon an inference or presumption as to the intention of the parties, drawn from one or more of the terms of the contract, or circumstances of the transaction. It is obvious, therefore, that it is not a hard and fast rule (like the

rule, for instance, that the *lex situs* determines the requisites of an acknowledgment of a deed of real property), but yields to additional circumstances indicating an intention contrary to the inferred or presumed intention on which it rests. It follows, therefore, that these rules are merely *prima facie*, and that one may give way to another as additional circumstances appear, or that all may yield to circumstances which have never become the basis of a formulated rule, but which nevertheless rebut the presumptions upon which the formulated rules rest."

The problem here involved, as we view it, is to a considerable extent freed from its seeming involved nature when we are reminded that it is a question of fact, rather than one of law, and that all of the rules applicable thereto have to do with presumptions of fact, and not with presumptions of law, since we are not dealing with a case where it can be said, as a matter of law, that the parties intended the laws of any particular state to govern their contractual rights, as when all the elements of the contract have their situs in one state. It would seem unnecessary to review the authorities here to show that they regard the intent of the parties as paramount in controlling the question of what law governs in cases of this nature. The following among numerous authorities are worthy of notice as evidencing this main thought in that great number of cases having to do with the intention of the parties, other than expressed intention and that intention which follows as a matter of law when all the elements of the contract have their situs in one state. In 5 R. C. L. 938, the learned editors state the general rule, with numerous authorities cited in support thereof, as follows: "Fortunately the conflict between the various rules and theories that have been stated is more apparent than real. The majority of them can be reconciled by the application of another rule, namely, that the true test for the determination of the proper law of a contract is the intent of the parties, and this intent, whether express or implied, will always be given effect." See also *Mayer v. Roche*, 77 N. J. L. 681, 26 L.R.A. (N.S.) 763, 75 Atl. 235; *Richards v. Globe Bank*, 12 Wis. 692; *Wilson v. Lewiston Mill Co.* 150 N. Y. 314, 55 Am. St. Rep. 680, 44 N. E. 959; *Jackson v. American Mortg. Co.* 88 Ga. 756, 15 S. E. 812, 39 Cyc. 897.

See note in 62 L.R.A. 33.

If we are correct in assuming that this contract has the situs of substantial portions of its elements both in Illinois and in Washington, so as to enable the parties thereto to make the same with reference to

the laws of either state, then there comes to our aid in our search for the intention of the parties the presumption of lawful intent on their part in the making of the contract, and also the rule that the contract will, if possible, be given that construction which will render it valid. In 2 *Parmelee's Wharton*, Conflict of Laws, 3d ed. § 507, after noting circumstances attending the making of contracts which point to the intent of the parties touching the governing law thereof, such as their residence, the place of making and performance of the contract, etc., where the question of usury is involved, the author says: "More reasonable is the view maintained by Savigny, and substantially adopted by Mr. Parsons, that when there are two conflicting laws bearing on this point, that law will be adopted by which the validity of the obligation is best sustained. The applicability of a local law, it is argued, is based on the presumed consent of the parties; but parties cannot be presumed to consent to a local law by which their engagements would be made null."

In *Mott v. Rowland*, 85 Mich. 561, 566, 48 N. W. 638, 639, dealing with the question of usury where the written obligation might have been made with reference to the laws of either of two different states, the court said: "It cannot be presumed that the parties intended to enter into an illegal contract. The presumption is rather in favor of its validity. The law will presume an honest intention, unless there is something in the nature of the transaction or in the proofs to establish the contrary. Transactions of this kind were and are now common between citizens of the western and those of the eastern states. The parties had an undoubted right to adopt the law of either state, provided they did so in good faith."

In *Green v. Northwestern Trust Co.* 128 Minn. 30, 36, post, 739, 150 N. W. 229, 231, dealing with the question of interest contracted for, which would be usurious under the laws of one state, and not under another, and the contract evidencing the obligations might have been made with reference to the laws of either state, the court observed: "When the circumstances determinative of the governing law are equivocal, and the determination of what the governing law is must be made by resorting to the presumed intent of the parties as to what law shall govern,—that of one state, which leaves the transaction valid, or that of the other, which makes it usurious and illegal,—a strong presumption is indulged that the intent was to contract with reference to the law of the state where the transaction

is valid; and the presumption in a particular case may be conclusive."

In *Commercial Bank v. Auze*, 74 Miss. 609, 623, 21 So. 754, 755, dealing with a similar question, the court said: "A presumption will never be indulged that a contract is in violation of law when it is capable of any other reasonable construction."

In the text of 39 Cyc. 899, on the subject of usury, the rule is stated with numerous cited authorities in support thereof, as follows: "Every presumption is against an intention to violate the law. Therefore, where the several elements of a contract have their situs in different states, if by the laws of one of the states the contract would be legal, but illegal by the laws of the others, then the parties will be presumed to have contracted with reference to the law of the place wherein the transaction would be valid, rather than in view of the law by which the transaction is illegal, always providing there is no evidence of bad faith, or of any intention to evade the usury laws of the latter state."

In *Pritchard v. Norton*, 106 U. S. 124, 137, 27 L. ed. 104, 108, 1 Sup. Ct. Rep. 102, 112, Justice Matthews, speaking for the United States Supreme Court touching the intention of the parties to a contract not involving the question of usury, however, observed: "Phillimore says: 'It is always to be remembered that in obligations it is the will of the contracting parties, and not the law, which fixes the place of fulfillment—whether that place be fixed by express words or by tacit implication—as the place to the jurisdiction of which the contracting parties elected to submit themselves.' 4 Int. Law, 469. The same author concludes his discussion of the particular topic as follows: 'As all the foregoing rules rest upon the presumption that the obligor has voluntarily submitted himself to a particular local law, that presumption may be rebutted either by an express declaration to the contrary or by the fact that the obligation is illegal by that particular law, though legal by another. The parties cannot be presumed to have contemplated a law which would defeat their engagements. 4 Int. Law, § 654, pp. 470, 471. This rule, if universally applicable, which perhaps it is not, though founded on the maxim, 'Ut res magis valeat, quam pereat,' would be decisive of the present controversy, as conclusive of the question of the application of the law of Louisiana, by which alone the undertaking of the obligor can be upheld. At all events, it is a circumstance, highly persuasive in its character, of the presumed intention of the parties, and entitled to prevail, unless controlled by more express and positive proofs of a contrary intent."

It would seem, then, that where a contract might have been made by the parties thereto with reference to the laws of either one of two or more states, which contract is silent upon the subject of which laws shall govern the rights of the parties thereunder, so far as express language is concerned, and there is fair room for argument that it might have been made with reference to the laws of either state, the presumption of lawful intention on the part of the makers of the contract should be controlling, and result in giving the contract that construction which will make it lawful, rather than that which will make it unlawful. This court, in *Pennsylvania Mortg. Invest. Co. v. Simms*, 16 Wash. 243, 247, 47 Pac. 441, 443, in harmony with this view, said: "Elementary rules require that such a construction should be given to the contract as will give it force, rather than one which will make it of no effect,"—though that case did not involve a question of conflict of laws.

Counsel for the receivers contend that this is wholly an Illinois contract, because, as they insist, it was made there and performable there. Application of technical rules of law might lead to these conclusions, though there is, in the light of all the facts, fair argument to be made in support of the view that the contract was partly made in Washington, and at least some of its requirements were to be performed there, when we consider the provisions of the trust deed as well as the provisions of the bond. However, we do not think the technical making and required performance of the contract in Illinois is controlling of the intent of the parties, nor as to their right to make the contract with reference to the laws of Washington, in view of the elements of the contract having their situs in this state. We think this contract must be considered as evidenced not only by the bonds, but by the trust deed in connection therewith. The bonds make such reference to the provisions of the trust deed as to make this evident. We then have the following facts pointing to an intention of the parties in the making of the contract to have their rights thereunder governed by the laws of the state of Washington. The railway company, the maker of the trust deed and bonds, is a Washington corporation with its only place of business within this state. It never maintained any place of business outside the state. It signed and acknowledged, and in that sense executed, the trust deed in the state of Washington. It signed, and in that sense executed, the bonds in the state of Washington. As recited in the trust deed, the purpose of the loan was to promote the business of the railway company manifestly L.R.A.1916D.

largely, if not wholly, in the state of Washington. The heading of the bonds, as well as the filing form indorsed thereon, recited, among other things, "State of Washington," thus apparently identifying them as Washington securities. The railway company by the terms of the trust deed was to furnish data to Peabody, Houghteling, & Company monthly touching the condition of its business here, evidently to the end that they might at all times be informed of the condition thereof. The contract, in giving the railway company the right to pay the bonds before maturity at its election, provided that the election of such right should be exercised by publication in a newspaper in the state of Washington, as well as in one in the state of Illinois. The trust deed also provided that in the event of vacancy in the office of trustee, with no one to perform the duties thereof, a trustee might be appointed by the superior court for King county, in this state. We are not prepared to say to just what extent any one of these facts standing alone would influence our decision touching the intent of the parties here in question. But, taking them all together, it seems quite clear to us that the contract is one that might have been made by the parties referable to the laws of the state of Washington, and, applying the presumption of lawful intention on the part of the makers of the contract, we are of the opinion that the scale is turned in favor of the view that the contract was, in fact, made with reference to the laws of this state. This view renders the contract valid and we are quite clear is preferable to one which would render the contract void, as it would be if held to be referable to the laws of Illinois.

We have noticed the authorities with a view of ascertaining general principles applicable, rather than with a view of finding cases dealing with the same state of facts as we have here, since as has been suggested, and as has been rendered evident by our search of the cases, each case must be determined largely upon its own facts. Expressions are found in the decisions, especially in the earlier ones, to the effect that a contract is enforceable by the laws of the state of its execution or by the law of the state of its performance, but such expressions are not without qualification. The decision of this court rendered in *Bank v. Doherty*, 42 Wash. 317, 4 L.R.A.(N.S.) 1191, 114 Am. St. Rep. 123, 84 Pac. 872, is of some interest in this connection. In that case the mortgage and note involved were both executed in the state of Montana between residents of that state, the debt being payable there. While the contract was usurious under the laws of the state of

Washington, where the mortgaged land was situated, it was not usurious under the laws of the state of Montana. The presumption that the contracting parties were intending to act lawfully was manifestly of some weight, inducing the court to reach its conclusion that the contract was made with reference to the laws of the state of Montana, though that was probably not the controlling consideration. Our conclusion here reached is not out of harmony with the conclusion there reached.

We have stated with reference to the bond transaction only those facts which are, in substance, the same as the facts with reference to the later note transaction. The only substantial difference, so far as we have stated the facts, is that the later note transaction, instead of resting upon a trust deed, rests upon contracts entered into between the railway company, Peabody, Houghteling, & Company, Augustus S. Peabody, a member of that firm, as trustee, William R. Crawford and J. B. Berryman, owners of all the stock of the railway company, in pursuance of which contracts the notes were issued to and paid for by Peabody, Houghteling, & Company, in substantially the same manner as the bonds were issued and paid for. Under those contracts all of the stock of the railway company, the same being owned by Crawford and Berryman, was pledged by them as security for the payment of the note indebtedness, the same being deposited with Augustus S. Peabody, as trustee, the contracts giving the trustee a voice in the affairs of the railway company in behalf of Peabody, Houghteling, & Company to a certain extent as if they were stockholders therein. The duties and the obligations of the railway company under those contracts were substantially of the same nature as under the trust deed and bond contract. The notes were signed by the railway company in the state of Wash-

ington, the company had the privilege of paying the notes before maturity, and in the exercise of that privilege were required to publish a notice of their election in a newspaper in the state of Washington, as well as in the state of Illinois, as in the bond contract. The office of trustee, should it become vacant, and there be no one to perform the duties thereof, by the terms of that contract, could be filled by appointment by the superior court of King county, in this state. We think these contracts and the notes issued in pursuance thereof contain as convincing evidence of the intent of the makers thereof to have made the same with reference to the laws of the state of Washington as do the trust deed and bond contract. What has already been said in reference to the law of that contract is applicable to these contracts, and we are of the opinion that they were made by the parties thereto with reference to the laws of the state of Washington, where they are valid.

We conclude, therefore, that the order of the Superior Court, allowing the claim of Augustus S. Peabody, trustee, upon the bonds in full, with interest as therein specified, should be affirmed, and that the order of the Superior Court allowing the claim of Peabody, Houghteling, & Company upon the notes should be set aside, with direction to enter an order allowing that claim in full, with interest as specified in the notes. It is so ordered, and that case is remanded to the Superior Court for further proceedings in accordance with our views herein expressed.

This disposition of the two causes renders it unnecessary for us to notice other questions raised in the briefs.

Morris, Ch. J., and Mount, Main, Holcomb, Ellis, Fullerton, and Crow, JJ., concur.

MINNESOTA SUPREME COURT.

J. S. GREEN, Appt.,
v.

NORTHWESTERN TRUST COMPANY et
al., Respts.

(128 Minn. 30, 150 N. W. 229.)

Appeal — rejection of evidence — materiality.

1. Though the trial court in an equity

Headnotes by DIBELL, C.

Note. — For conflict of laws as to usury, see annotation following *Midland Sav. & L. Co. v. Beats*, post, 750.
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case erroneously excludes testimony bearing upon material facts in issue, and rejects offers to prove them, the case will not be reversed for such errors if, with the facts taken as the party offering the proof claims them to be, there could be no result in the case other than that reached by the trial court.

For other cases see *Appeal and Error*, VII. m, 3, a, (5) in *Dig. 1-52 N. S.*

Conflict of laws — secured notes — usury.

2. Where notes are claimed to be usurious, and there is no expressed or actual intent as to whether the governing law of the transaction is the law of one state or another, to either of which it may with propriety be

referred in part, and there is no attempt to evade the usury law, the court will indulge the presumption that the law of the state which upholds the transaction is the law intended by the parties; and applying this rule it is held that the law of Montana, under which the transaction involved was valid, was the proper law of the contract where purchase money notes were made to a corporation of that state, secured on lands located there, sold to a South Dakota corporation, having an office in Minnesota, under the laws of which the transaction was invalid, though the negotiations were had in Minnesota, and the notes executed and payable there, and the trust deed securing them executed there to a Minnesota trust company as trustee.

For other cases, see Conflict of Laws I. b, 2, in Dig. 1-52 N. S.

(December 18, 1914.)

APPEAL by plaintiff from an order of the District Court for Ramsey County denying new trial of an action brought to enjoin the defendant land company from paying, and the defendant trust company from receiving, interest on certain notes made by the former to an improvement company, secured by a purchase money mortgage in the form of a trust deed by the land company to the trust company as trustee and to enjoin the latter from proceeding to enforce the mortgage. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Harris Richardson and Walter Richardson, for appellant:

The notes and mortgage involved are usurious.

Chase v. Whitten, 51 Minn. 485, 53 N. W. 767; *Aldrich v. Chase*, 70 Minn. 243, 73 N. W. 161.

Although the notes were secured by a mortgage on land in Montana, the Minnesota statute applies.

Thomson v. Kyle, 39 Fla. 582, 63 Am. St. Rep. 193, 23 So. 12; *Klinck v. Price*, 4 W. Va. 4, 6 Am. Rep. 268; *Tenny v. Porter*, 61 Ark. 329, 33 S. W. 211; *Sawyer v. Dickson*, 66 Ark. 77, 48 S. W. 903; *Freie v. No. 4 Fidelity Bldg. & Sav. Union*, 166 Ill. 128, 57 Am. St. Rep. 123, 46 N. E. 784; *Guignon v. Union Trust Co.* 156 Ill. 135, 47 Am. St. Rep. 186, 40 N. E. 556; *Commercial Bank v. Auze*, 74 Miss. 609, 21 So. 754; *Armistead v. Blythe*, — Miss. —, 20 So. 298; *American Freehold Land & Mortg. Co. v. Jefferson*, 69 Miss. 770, 30 Am. St. Rep. 587, 12 So. 464; *Long v. Long*, 141 Mo. 352, 44 S. W. 341; *South Missouri Land Co. v. Rhodes*, 54 Mo. App. 129; *Central Nat. Bank v. Cooper*, 85 Mo. App. 383; *Sands v. Smith*, 1 Neb. 108, 93 Am. Dec. 331; *Dolman v. Cook*, 14 N. J. Eq. 56; *Andrews* L.R.A.1916D

v. Torrey, 1 N. J. Eq. 355; *Cope v. Alden*, 53 Barb. 350; *Arrington v. Gee*, 27 N. C. (5 Ired. L.) 594; *Lockwood v. Mitchell*, 7 Ohio St. 387, 70 Am. Dec. 78; *Shipman v. Bailey*, 20 W. Va. 144; *Central Trust Co. v. Burton*, 74 Wis. 329, 43 N. W. 141; *Phelps v. American Sav. & L. Asso.* 121 Mich. 343, 80 N. W. 120; *Russell v. Pierce*, 121 Mich. 208, 80 N. W. 118; *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L.R.A. 595, 55 Am. St. Rep. 723, 35 Atl. 684; *People's Bldg. L. & Sav. Asso. v. Berlin*, 201 Pa. 1, 88 Am. St. Rep. 764, 50 Atl. 308; *Equitable Bldg. & L. Asso. v. Vance*, 49 S. C. 402, 27 S. E. 274, 388, 29 S. E. 204; *Tobin v. McNab*, 53 S. C. 73, 30 S. E. 827; *Hubble v. Morristown Land & Improv. Co.* 95 Tenn. 585, 32 S. W. 965; *Ware v. Bankers' Loan & Invest. Co.* 95 Va. 680, 29 S. E. 744; *Pioneer Sav. & L. Co. v. Cannon*, 96 Tenn. 599, 33 L.R.A. 112, 54 Am. St. Rep. 858, 36 S. W. 386; *Conrad v. Lepper*, 13 Wyo. 473, 81 Pac. 307, 82 Pac. 2; *United States Sav. & L. Co. v. Harris*, 113 Fed. 27; *Goddin v. Shipley*, 7 B. Mon. 575; *Wm. Glenny Glass Co. v. Taylor*, 99 Ky. 24, 34 S. W. 711; *Brown v. Todd*, 16 Ky. L. Rep. 697, 29 S. W. 621; *Eastern Bldg. & L. Asso. v. Bedford*, 88 Fed. 7, affirmed in 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 697; *Vermont Loan & T. Co. v. Dygert*, 89 Fed. 123, 37 C. C. A. 389, 94 Fed. 913; *Guarantee Sav. Loan & Invest. Co. v. Alexander*, 96 Fed. 870; *Hamilton v. Fowler*, 40 C. C. A. 47, 99 Fed. 18; *Finnes v. Selover*, 102 Minn. 334, 113 N. W. 883; *Walsh v. Selover*, 109 Minn. 136, 123 N. W. 291.

The notes are to be governed by the law of the place provided for payment, i. e., the place of performance.

Ames v. Benjamin, 74 Minn. 335, 77 N. W. 230; *Schultz v. Howard*, 63 Minn. 196, 56 Am. St. Rep. 470, 65 N. W. 363; *Stahl v. Mitchell*, 41 Minn. 325, 43 N. W. 385; *Thomson-Houston Electric Co. v. Palmer*, 52 Minn. 174, 38 Am. St. Rep. 536, 53 N. W. 1137; *Smith v. Parsons*, 55 Minn. 520, 57 N. W. 311.

Messrs. Butler & Mitchell, for respondents:

It was the intention of the parties that the transaction should be treated as a Montana contract, and was entered into with a view to the laws of Montana.

Smith v. Parsons, 55 Minn. 520, 57 N. W. 311; *Martin v. Johnson*, 84 Ga. 481, 8 L.R.A. 170, 10 S. E. 1092; *Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638; *Kellogg v. Miller*, 2 McCrary, 395, 13 Fed. 198; *Newman v. Kershaw*, 10 Wis. 333; *Vliet v. Camp*, 13 Wis. 198; *Swedish-American Nat. Bank v. First Nat. Bank*, 89 Minn. 98, 99 Am. St. Rep. 549, 94 N. W. 218; *New Eng-*

land Mortg. Secur. Co. v. Vader, 28 Fed. 265.

The validity of a mortgage contract is to be decided by the laws of the state where the land lies.

Post v. First Nat. Bank, 138 Ill. 559, 28 N. E. 978; Bramblet v. Commonwealth Land & Lumber Co. 26 Ky. L. Rep. 1176, 83 S. W. 599; Swank v. Hufnagle, 111 Ind. 453, 12 N. E. 303; Dow v. Memphis & L. R. R. Co. 20 Fed. 260; National Mut. Bldg. & L. Asso. v. Burch, 124 Mich. 57, 83 Am. St. Rep. 311, 82 N. W. 837; Swedish-American Nat. Bank v. First Nat. Bank, 89 Minn. 98, 99 Am. St. Rep. 549, 94 N. W. 218; People's Bldg. Loan & Sav. Asso. v. Kidder, 9 Kan. App. 385, 58 Pac. 798.

The place of payment is not a controlling factor nor an absolute criterion, and the general rule that the place of payment determines the law governing the contract was itself based on an effort to get at the presumed intention of the parties, and if there be other facts and circumstances from which a contrary intention could be presumed, the place of payment is ignored.

Brown v. American Finance Co. 31 Fed. 516; Wayne County Sav. Bank v. Low, 81 N. Y. 567, 37 Am. Rep. 533; Western Transp. & Coal Co. v. Kilderhouse, 87 N. Y. 430; Hosford v. Nichols, 1 Paige, 220; Van Vleet v. Sledge, 45 Fed. 743; Dugan v. Lewis, 79 Tex. 246, 12 L.R.A. 93, 23 Am. St. Rep. 332, 14 S. W. 1024; Bullard v. Thompson, 35 Tex. 319; Sherman v. Gassett, 9 Ill. 521; Roberts v. McNeely, 52 N. C. (7 Jones, L.) 506, 78 Am. Dec. 261; Jackson v. American Mortg. Co. 88 Ga. 756, 15 S. E. 812; Fisher v. Otis, 3 Chand. (Wis.) 83; McIlwaine v. Ellington, 55 L.R.A. 933, 49 C. C. A. 446, 111 Fed. 578; Hieronymus v. New York Nat. Bldg. & L. Asso. 101 Fed. 12; United States Sav. & L. Co. v. Shain, 8 N. D. 136, 77 N. W. 1006; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. (The Montana) 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Finnes v. Selover, 102 Minn. 334, 113 N. W. 883; Walsh v. Selover, 109 Minn. 136, 123 N. W. 291; Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 38 Am. St. Rep. 536, 53 N. W. 1137.

Plaintiff has not alleged nor proved facts which are a condition precedent to the right of a stockholder to bring a suit to enforce a right belonging to his corporation.

4 Thomp. Corp. 2d ed. §§ 4553-4556; Mount v. Radford Trust Co. 93 Va. 427, 25 S. E. 244.

Dibell, C., filed the following opinion:

This action was brought by the plaintiff, a stockholder in the Cartersville Irrigated Land Company, against that company and

the Northwestern Trust Company to enjoin the Cartersville company from paying, and the trust company from receiving, interest upon certain notes made by the Cartersville company to the Rosebud Land & Improvement Company, secured by a purchase money mortgage in the form of a trust deed made by the Cartersville company to the trust company as trustee, and to enjoin the trust company from proceeding to enforce the mortgage. There were findings for the defendants, and the plaintiff appeals from an order denying his motion for a new trial.

1. On November 23, 1911, the Rosebud company and the plaintiff, Green, entered into a contract for the sale of certain Montana lands, the contract setting forth the agreement in detail. This contract Green assigned to the Cartersville company on December 6, 1911. On December 20, 1911, the Rosebud company conveyed the lands to the Cartersville company.

During the summer of 1911 negotiations were had in Montana between the Rosebud company and Green relative to the disposition of these lands. The Rosebud company claimed that these negotiations had reference to a sale to Green and that they resulted in the conveyance to the Cartersville company. Green claimed that he was acting as agent for the Rosebud company; that if he made a sale he was to have a commission; that the contract of November 23, 1911, which was acknowledged by the company on November 18th, was executed for the purpose of enabling him to dispose of the lands to certain Minneapolis people; that these people did not complete the proposed purchase; that he then associated himself with other parties, with whom he was to have a joint interest, and that the contract was delivered to him by the Rosebud company as a matter of convenience in completing this transaction; and that the negotiations with reference to this transaction, which was completed when the conveyance to the Cartersville company was made, were had in Minnesota.

The real question in the case being whether the transaction was governed by the Minnesota law or by the Montana law, as is explained hereafter, the inquiry as to the nature and place of these negotiations was important. The court found that Green was not the agent of the Rosebud company. There was evidence that he was and that he was not. The court sustained objections to pertinent questions put by plaintiff's counsel upon the issue, and sustained objections to plaintiff's offers to prove the facts as he claimed them to be, both as to Green's agency and as to the negotiations culminating in the deed to the

Cartersville company. In this the court erred. Ordinarily such an error, infecting, as it did, material facts in issue, results in a new trial. If, however, from the facts properly found, and the other facts found as the plaintiff claims them to be, including the facts in proof of which evidence was rejected, there could be but one result, and that the one reached by the trial court, a new trial should not be had; that is, if from the facts properly found, and the other facts taken to be as the plaintiff claims them, the law declares the transaction a valid one, a new trial is unnecessary. This is such a case. Therefore, in reciting the facts, additional to those properly found, they are assumed to be as the plaintiff by his rejected proofs offered to show them.

2. The ultimate question upon which the rights of the parties depend is whether the Montana law or the Minnesota law is the governing law of the transaction brought in question.

The facts, as we have them for the purposes of this appeal, are not in controversy, and are not complicated.

The Rosebud company is a Montana corporation. It has no office elsewhere. Its officers and stockholders reside in Montana. The plaintiff, Green, is a resident of Montana. The trust company is a Minnesota corporation. The Cartersville company is a South Dakota corporation, organized there in December, 1911. It does business and has its principal office in Minneapolis, though it did not obtain the required license until after the transactions here involved. Its connection with the state of its birth has never been more than nominal.

On November 23, 1911, the Rosebud company and the plaintiff, Green, entered into a contract of sale of certain Montana lands, the contract before mentioned. This contract was executed in Montana by the Rosebud company and was delivered by its resident, J. E. Edwards, to Green at Minneapolis, and was by the latter signed there. It was then returned to Montana. It was delivered as the result of negotiations had in Minnesota. It was originally executed for use in a sale attempted by Green as agent of the Rosebud company, which was not completed. One C. H. Wagner and one W. O. Williams were interested with Green in this contract. This the Rosebud company knew. It was at the time contemplated by Green and his associates that a corporation would be organized to take over the lands included in the contract. The Cartersville company was organized under the laws of South Dakota for this purpose. Green, Wagner, and Williams, together with a

resident of South Dakota, were its incorporators.

The contract of November 23, 1911, contained this provision relative to the trust deed: "Said trust deed or mortgage, trust deeds or mortgages, executed in conformity with the terms hereof, in other respects to contain such terms and provisions as are ordinarily contained in like indentures and instruments within the state of Montana, and to be in such form as the party of the first part shall desire and elect at the time of the execution thereof."

On December 6, 1911, Green made a formal assignment of the contract to the Cartersville company. On December 20, 1911, the Rosebud company deeded the Montana lands to the Cartersville company. Edwards, the president of the Rosebud company, executed the deed in Minnesota and delivered it. It was attested by Beattie, the secretary of the company, and the corporate seal attached, apparently in Montana.

On December 20, 1911, the Cartersville company executed and delivered to the trust company a mortgage in the form of a trust deed to secure the promissory notes representing the unpaid purchase price. The notes ran to the Rosebud company. They were delivered to Edwards at Minneapolis and by him given to the Rosebud company in Montana. Of the purchase price \$25,000 was paid in cash or in notes accepted in lieu of cash. The balance of the purchase price was represented by notes. One note for the sum of \$25,000 was payable on January 1, 1913, and one for \$772.21 and 163 for \$1,000 each were payable on January 1, 1918. The amount secured by the trust deed was \$188,772.21. These notes drew interest at the rate of 6 per cent per annum, payable annually, and the usual coupons were attached. The notes contained this provision: "And it is agreed that any unpaid principal or interest after the same becomes due shall bear interest at the rate of 8 per cent per annum, payable annually."

The coupons contained this provision: "This coupon note bears interest at the rate of 8 per cent per annum after maturity."

The Minnesota statute provides as follows: "Contracts shall bear the same rate of interest after they become due as before, and any provision in any contract, note, or instrument providing for an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest

before maturity." Gen. Stat. 1913, § 5805; Rev. Laws 1905, § 2733.

The provision for an increase of interest after maturity is valid under the Montana law. Its effect under the Minnesota law is to forfeit all interest reserved. *Chase v. Whitten*, 62 Minn. 498, 65 N. W. 84.

Under the facts recited, the question is whether these notes are governed by the Montana law and are valid, or whether they are governed by the Minnesota law and are so far invalid as to result in a forfeiture of the interest.

If the intent of the parties is expressed, or an actual intent is found, either that the Minnesota law govern, or that the Montana law govern, such intent must be given effect. If the intent is not expressed or an actual intent found, the court must find the presumed intent, and such presumed intent then fixes the governing law.

In *Dacey on Conflict of Laws*, pp. 560, 561, these rules are stated:

"When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention determines the proper law of the contract and, in general, overrides every presumption.

"When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract, and from the general circumstances of the case, and such inferred intention determines the proper law of the contract."

In this case no intent was expressed. Neither, as we shall see, can an actual intent that the Minnesota law or the Montana law governs be found.

In a search for the actual intent of the parties when none is expressed there is an element of legal jugglery. Usually parties to transactions of this nature, referable to one state or another, or in part to one state and in part to another, have no unexpressed but actual intent as to the law which shall control. The question of what law governs does not suggest itself to them. Why should it? They engage in a transaction from which each hopes to profit, intending that it will be carried out as agreed. In looking at the case before us it is evident that the Cartersville company could not have had, consistently with an honest purpose, when it made the mortgage and notes aggregating \$188,772.21, evidencing deferred payments on land for which it had made an initial payment of but \$25,000, all of the deferred payments, except \$25,000, running for six years, an actual intent L.R.A.1916D.

that the interest reserved, aggregating upwards of \$60,000, need not be paid; and it is evident that the Rosebud company could not have intended, consistently with ordinary business sagacity, when it received the notes, that none of the interest promised it need be paid; and it is evident that the trust company, acting in a trust capacity, could not have intended taking a deed of trust, securing notes payable to the beneficiary of the deed, on which, contrary to their terms, no interest need be paid.

The suggestion is not that a transaction is free of usury because the parties to it do not know that there is a usury law. The contrary is true. If they contract for forbidden interest, though without moral wrong, not knowing that there is a usury law to violate, they are subject to the penalties of usury. 29 Am. & Eng. Enc. Law, 2d ed. 464. But when the circumstances determinative of the governing law are equivocal, and the determination of what the governing law is must be made by resorting to the presumed intent of the parties as to what law shall govern,—that of one state, which leaves the transaction valid, or that of the other, which makes it usurious and illegal,—a strong presumption is indulged that the intent was to contract with reference to the law of the state where the transaction is valid; and the presumption in a particular case may be conclusive.

It is competent for the parties to select any state, provided the transaction is referable in part to that state, as the one having the governing law, if this is done without an intent to evade the usury law. "It is doubtless essential to the application of this principle that one or more of the important elements of the contract, or significant circumstances of the transaction, shall have had their situs at the place whose law would uphold the contract." 2 Whart. Conf. L. 3d ed. p. 1200. The parties cannot arbitrarily assign their contract to a particular state. *American Freehold Land & Mortg. Co. v. Jefferson*, 60 Miss. 770, 30 Am. St. Rep. 587, 12 So. 464. Effect can be given to the presumed intention that the law of a particular state shall be the governing law only when such state has a vital connection with the transaction; or where elements of the contract, important in determining the governing law, have their situs in such state. 39 Cyc. 899; 2 Whart. Conf. L. 3d ed. pp. 1198 et seq.

The transaction here in question was vitally related to Montana. The Rosebud company was a resident of Montana. So were its officers and stockholders. The

plaintiff, who was the vendee in the contract of November 23, 1911, and a promoter and incorporator and a large stockholder of the Cartersville company, resided there. The contract of sale was signed there, and was returned there, though originally intended for a different transaction. The land conveyed was there. The mortgage was drafted there. It was for unpaid purchase money and was secured upon lands located there. The notes were negotiable in Montana and non-negotiable in Minnesota. The Cartersville company covenanted in the trust deed to pay the taxes and assessments levied in Montana, including irrigation taxes. It had the right by the trust deed to sell portions of the mortgaged lands at not less than specified prices, and upon payment of a certain percentage of the price received, was entitled to a release of the mortgage as to the lands sold. It covenanted to keep the buildings, fences, ditches, and other improvements on the Montana lands in repair. It was contemplated by the November contract that the mortgage should contain, as it did, clauses usual to Montana mortgages. The connection between the transaction here involved and Montana was not artificial.

Opposed to the claim that the presumed intent was that the law of Montana should be the governing law, and supporting the contention that the Minnesota law should be presumed to be intended to be the governing law, these considerations are urged: The notes were signed, delivered, and payable in Minnesota. The trust deed, and the deed of the lands except as to the signature of the secretary, were executed here. Both were delivered here. The mortgagee was a corporation of this state. The mortgagor had its principal office in Minnesota. All of the negotiations relative to the transaction were had in Minnesota.

There was no intent to evade the usury law. The Cartersville company, the Rosebud company, and the trust company had no thought of engaging in other than a lawful and honest transaction. Indeed, there was no greed for interest. If the notes had provided for interest at 8 or 10 per cent from the beginning, instead of an advance from 6 to 8 per cent on principal and interest in default, more interest would have been received and the Minnesota law would not have been offended.

The courts go far in giving effect to the presumption that the parties intended their contract to be performed in the state where it could be validly performed according to L.R.A.1916D.

its terms, rather than in a state where it would be wholly or in part invalid. Thus, in *Mott v. Rowland*, 85 Mich. 561, 48 N. W. 638, the court said: "It cannot be presumed that the parties intended to enter into an illegal contract. The presumption is rather in favor of its validity. The law will presume an honest intention, unless there is something in the nature of the transaction or in the proofs to establish the contrary."

In *Hieronymus v. New York Nat. Bldg. & L. Asso.* (C. C.) 101 Fed. 12, affirmed in 46 C. C. A. 684, 107 Fed. 1005, the court said: "And it is well settled by the decisions of the United States Supreme Court that a contract is governed by the law with a view to which it is made; and it is to be presumed, in the absence of any express declaration or controlling circumstances to the contrary, that the parties had in contemplation a law according to which their contract would be upheld, rather than one by which it would be defeated."

Other cases, valuable because of their statement or discussion of the principle, but not cited because parallel in their facts, are the following: *Miller v. Tiffany*, 1 Wall. 298, 17 L. ed. 540; *New England, Mortg. Secur. Co. v. Vader* (C. C.) 28 Fed. 265, 270; *Newman v. Kershaw*, 10 Wis. 333; *Jackson v. American Mfg. Co.* 88 Ga. 756, 15 S. E. 812; *Whitlock v. Cohn*, 72 Ark. 83, 80 S. W. 141; *Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264; *Cromwell v. Sac. County*, 96 U. S. 51, 24 L. ed. 681; *United States Sav. & L. Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006. And see 22 Am. & Eng. Enc. Law, 2d. ed. 1330; 39 Cyc. 899; 2 Whart. Conf. L. 3d ed. § 510g.

There is nothing in *Finnes v. Selover*, 102 Minn. 334, 113 N. W. 883; *Walsh v. Selover*, 109 Minn. 136, 123 N. W. 291, or *True v. Northern P. R. Co.* 126 Minn. 72, 147 N. W. 948, at variance with the views expressed.

Applying the rules stated, we hold that the law of Montana was the proper law of the contract, and that its law, under which the transaction involved is valid, is the governing law. Under the facts, putting them as favorably to the plaintiff as is possible, it would be intolerable to require or to permit the Cartersville company to disavow its assumed obligation to pay interest on the purchase money notes. The law will conclusively presume the Montana law to be the intended governing law.

Order affirmed.

Petition for rehearing denied.

OKLAHOMA SUPREME COURT.

MIDLAND SAVINGS & LOAN COMPANY,

Plff. in Err.,

v.

DANIEL W. BEATS et al.

(— Okla. —, 150 Pac. 888.)

Building and loan association — statutory authority.

1. A building and loan association incorporated within the state of Colorado under the laws of that state may loan its accumulations to members upon such plan of repayment provided for in its by-laws, and may charge, contract for, and recover a premium upon such plan as may be provided for in the by-laws or note or other evidence of indebtedness taken by such association, all of which notes shall be in form non-negotiable. Section 6, p. 125, Colo. Laws 1897.

For other cases, see Building and Loan Associations, III. b, in Dig. 1-52 N. S.

Same — premium — competitive bidding.

2. According to the by-laws of the plaintiff in error association, adopted pursuant to the statute, in addition to interest at the rate of 7½ per cent per annum, such premium could be charged as provided for in the note, bond, or other evidence of indebtedness taken by the company, provided the premium so charged should not exceed 62½ cents per month on each \$100 borrowed. Held, when the premium fixed in the note was less than that authorized in the by-laws, the same was a proper item of charge for money loaned. Held, further, that under § 6, p. 125, Colo. Laws 1897, a building and loan association organized within that state and under its laws may loan its accumulations, when the by-laws of the association so provide, without the necessity of competitive bidding.

For other cases, see Building and Loan Associations, III. b, in Dig. 1-52 N. S.

Conflict of laws — contract.

3. As a general rule, it is within the power of the contracting parties, by the express terms of their contract or undertaking, to establish the place according to the laws of which the validity and construction of the contract shall be determined.

For other cases, see Conflict of Laws, I. b, 1, in Dig. 1-52 N. S.

Same — foreign contract — interest.

4. A first mortgage bond and real estate mortgage given by a resident of the Indian Territory in September, 1907, upon land located in said territory, to a foreign building and loan association, solvable according to the laws of Colorado, is uninfluenced by § 1523, Comp. Laws 1909 (§

1326, Rev. Laws 1910), providing that foreign building and loan associations shall not charge a rate of interest, or interest and premiums, in excess of 1 per cent per month upon the amount loaned, and making any charge over and above said rate usurious.

For other cases, see Conflict of Laws, I. b, 2, in Dig. 1-52 N. S.

(July 13, 1915.)

ERROR to the District Court for Pittsburg County to review a judgment in plaintiff's favor for less than the amount claimed, in an action brought to recover a balance alleged to be due on a bond, and to foreclose a mortgage given in satisfaction thereof. Reversed.

The facts are stated in the opinion.

Messrs. Robert N. McMillen and A. J. Bryant, for plaintiff in error:

The court clearly erred in holding that the Colorado statute, which it found governed the contract, required that the loan in question should be submitted to competitive bids among the stockholders of the company.

6 Cyc. 149, and notes; Thompson, Bldg. & L. Asso. § 188, p. 377; Steinman v. Midland Sav. & L. Co. 78 Kan. 479, 96 Pac. 860; Manship v. New South Bldg. & L. Asso. 110 Fed. 961; Gale v. Southern Bldg. & L. Asso. 117 Fed. 732; Zenith Bldg. & L. Asso. v. Heimbach, 77 Minn. 97, 79 N. W. 609; Clarksville Bldg. & L. Asso. v. Stephens, 26 N. J. Eq. 355; New Jersey Bldg. L. & Invest. Co. v. Bachelor, 54 N. J. Eq. 600, 35 Atl. 745; International Bldg. & L. Asso. v. Wall, 153 Ind. 554, 55 N. E. 431; United States Sav. & L. Co. v. Rider, 155 Ind. 704, 58 N. E. 674; Boleman v. Citizens' Loan & Bldg. Asso. 114 Wis. 217, 90 N. W. 199; Sheldon v. Birmingham Bldg. & L. Asso. 121 Ala. 278, 25 So. 823; Beyer v. National Bldg. & L. Asso. 131 Ala. 369, 31 So. 113; Beckley v. United States Sav. & L. Co. 147 Ala. 195, 40 So. 655; Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597; McNamara v. Oakland Bldg. & L. Asso. 131 Cal. 336, 63 Pac. 670; Sover v. Mercantile Mut. Bldg. & L. Asso. 93 Mo. App. 302; Callison v. Trenton Bldg. & L. Asso. 98 Mo. App. 677, 72 S. W. 477; Johnson v. Southern Bldg. & L. Asso. 121 Ala. 524, 26 So. 201; Southern Bldg. & L. Asso. v. Rector, 38 C. C. A. 686, 98 Fed. 171; National Bldg. & L. Asso. v. Ballard, 126 Ala. 155, 27 So. 971; United States Sav. & L. Co. v. Shain, 8 N. D. 136, 77 N. W. 1006; Hieronymus v. New York Nat. Bldg. & L. Asso. 101 Fed. 12.

Contracts made in one place to be performed in another must be construed ac-

Headnotes by SHARP, J.

Note. — For conflict of laws as to usury, see annotation following this case, post, 750. L.R.A.1916D.

cording to the law of the place of performance.

Reeve v. Ladies' Bldg. Asso. 56 Ark. 335, 18 L.R.A. 129, 19 S. W. 917; Farmers' Sav. & Bldg. & L. Asso. v. Ferguson, 69 Ark. 352, 63 S. W. 797; Clarke v. Taylor, 69 Ark. 612, 65 S. W. 110; Hough v. Maupin, 73 Ark. 518, 84 S. W. 717.

Messrs. Stuart, Cruce, & Cruce also for plaintiff in error.

Mr. Wallace Wilkinson, for defendants in error:

All of the transactions in making the contract were made within the state of Oklahoma and the contract was an Oklahoma contract and subject to its laws.

Etna Bldg. & L. Asso. v. Rough, 32 Okla. 735, 124 Pac. 24; Washington Nat. Bldg. Loan v. Invest. Asso. v. Stanley, 38 Or. 319, 58 L.R.A. 816, 84 Am. St. Rep. 793, 63 Pac. 489; Meroney v. Atlanta Bldg. & L. Asso. 116 N. C. 882, 47 Am. St. Rep. 841, 21 S. E. 924; Martin v. Johnson, 84 Ga. 481, 8 L.R.A. 170, 10 S. E. 1092; Dickinson v. Edwards, 70 N. Y. 573, 33 Am. Rep. 671; Jackson v. American Mortg. Co. 88 Ga. 756, 15 S. E. 812; Royal Loan Asso. v. Forter, 68 Kan. 468, 75 Pac. 484, 1 Ann. Cas. 794; Parker v. Van Buren, 20 Colo. 217, 36 Pac. 900.

Sharp, J., delivered the opinion of the court:

On September 3, 1907, at Kiowa, Indian Territory, the defendant in error, Daniel W. Beats, gave the plaintiff in error, the Midland Savings & Loan Company, of Denver, Colorado, his first mortgage bond or note in the principal sum of \$500, and as part security therefor on said day executed a real estate mortgage on lot numbered 4 in block numbered 63 in the town of Kiowa. According to the terms of said bond, the maker thereof obligated himself to pay or cause to be paid to the said company, at its office in the city of Denver, the sum of \$13.25 monthly, on or before the last day of each month, of which sum \$8.25 was a monthly instalment due upon 15 shares of the capital stock of said company, the sum of \$3.13 monthly interest due upon said principal sum, and the further sum of \$1.87 as monthly premium upon said principal sum, and in addition thereto such fines as should accrue upon said stock, interest, and premium, according to the by-laws of the company; payment to be made until said principal sum should be paid in full as therein provided for. Default in the payment having been made, the company, on the 9th day of February, 1911, instituted its action in the district court of Pittsburg county, to recover of the maker of said bond the alleged balance due, and L.R.A.1916D.

to foreclose the mortgage in satisfaction thereof. The defendants, other than Daniel W. Beats, it was claimed, asserted some interest or lien upon the real estate described, which was junior and inferior to the liens of the plaintiff, and for the purpose of determining and foreclosing such interest said defendants were made parties. Trial being had, special findings of fact were made and returned by the trial court, and judgment entered for plaintiff in the sum of \$196.25; the court also decreeing the sale of the real estate in settlement of the judgment. Among other things the court found that plaintiff was a building and loan association, incorporated and organized under the laws of the state of Colorado, with its principal office at Denver, Colorado, and that said association sold stock and loaned money to its subscribers only; that the 15 shares of stock sold said Beats were assigned to the company as collateral security for the loan made by it; that the contract entered into between said parties by its terms was to be governed by and construed according to the laws of the state of Colorado; that the by-laws introduced in evidence by plaintiff were in force, at the time of the execution of the various instruments affecting said loan; and, further, that under the laws of the state of Colorado in force at the time, the plaintiff was required to submit its loan to competitive bids of its stockholders, which fact the court found plaintiff had failed to prove, and that therefore "the loan became and was a straight loan of money from the plaintiff to the defendant, and that the defendant was not bound under the by-laws of the state of Colorado to all the penalties, forfeitures, and payment of stock, as is provided for in their by-laws [statutes]."

Thereafter, and within the time allowed by law, plaintiff filed its motion for a new trial, including therein, among other grounds: "Error in the assessment of the amount of recovery, the same being too small."

The one contention urged in this court in the supplemental brief of the plaintiff in error is that under the laws of the state of Colorado a fixed premium may be agreed upon by the parties to the loan without the necessity of competitive bidding. Plaintiff both pleaded and proved various provisions of the statutes of Colorado, §§ 1, 3, 6, 7, pp. 121, 122, 125, Sess. Acts 1897. Section 1 in part reads as follows: "Any association of not less than three persons hereafter incorporated under the laws of this state, which shall be organized within this state for the purpose of raising a fund by the collection of dues or stated pay-

ments from its members, to be loaned among its members, shall, in furtherance of such purpose, and after having complied with the requirements of this act, be authorized and empowered to levy, assess, and collect from its members such sums of money, by rates of stated dues, fines, interest on loans advanced, and premiums bid by members for the right of precedence in taking loans, as the corporation may provide for in its constitution or by-laws."

By §§ 6 and 7 it was provided:

"Section 6. Every such corporation organized under the laws of the state of Colorado may loan its accumulations to members upon such plan of repayment as provided by its by-laws. They may charge, contract for, and recover a premium upon such a plan as may be provided for in the by-laws or note or other evidence of indebtedness taken by such association, all of which notes shall be in form non-negotiable.

"Section 7. No premiums, fines, or interest on such premium that may accrue to the said association, according to the provisions of this act, shall be deemed usurious; and the same may be collected as debts of like amount are now by law collected in this state; but no fees for non-payment of dues shall exceed 5 per cent per month for the first sixty days, and 2 per cent per month thereafter."

In § 28 of the by-laws of the company it was provided: "All loans shall bear interest at the rate of 7½ per cent per annum, and such premium as may be provided for in note, bond, or other evidence of indebtedness taken by the company, all of which shall be in form non-negotiable: Provided that such premium shall not exceed 62½ cents per month on each \$100 borrowed. Interest and premium shall be due and payable monthly, at the home office of the company on or before the 1st day of each month from time loan is closed until fully paid."

It will be noted that the premium called for is designated by reference to the bond or other evidence of indebtedness. The bond signed by Beats and accepted by the company provided, as we have already seen, for the payment of the sum of \$13.25 monthly, on or before the last day of each month, of which sum \$8.25 constituted the monthly instalment due upon 15 shares of stock issued to said Beats, and the sum of \$3.13 monthly interest due upon the amount of the loan, and the sum of \$1.87 premium payable monthly upon said principal sum or loan, and also such fines as might accrue upon such stock, interest, and premium according to the by-laws of the company, until the principal sum was paid in full, L.R.A.1916D.

by said shares of capital stock having reached their par value, or until otherwise paid as therein provided, when the obligation should become void. By § 7 of the act it was provided that no premiums, fines, or interest on such premiums that may accrue to the association, according to the provisions of the act, should be deemed usurious, and that the same might be collected as debts were at the time by law collected in the state of Colorado.

In holding that, under the Colorado statute, plaintiff was required to submit its loans to competitive bids of its stockholders, it is clear the court erred. Whatever may be the authority given the company under § 1 of the statute, it is not necessary to determine. We are concerned only with § 6, under which, admittedly, the loan was made. This section authorized the loan of the company's accumulations to members upon such plan of repayment as provided for by its by-laws, and stipulated that the company could charge, contract for, and recover a premium upon such plan as might be provided for in its by-laws or note or other evidence of indebtedness taken by such association. With reference to the premium, the by-law enacted under authority of the statute provided that in addition to the interest fixed at 7½ per cent per annum, such premium could be charged in the note, bond, or other evidence of indebtedness as therein provided for, conditioned only that the same should not exceed 62½ cents per month on each \$100 borrowed. The premium fixed in the bond was \$1.87, payable monthly, or less than that authorized in the by-law. The loan being made under authority of § 6 of the statute, and of the by-laws of the association, and the bond providing for the payment of a fixed monthly premium, there was no warrant of law for the trial court holding it was necessary that plaintiff established the fact that it had submitted the loan to a competitive bidding; otherwise, it could not recover such sums as authorized in the by-laws. The claim here made was urged in *Steinman v. Midland Sav. & L. Co.* 78 Kan. 479, 96 Pac. 860, where the same provisions of the Colorado statutes were before the court. Answering the contention, the court said: "It is also urged that as there was no competitive bidding for the loan, there could be no premium in fact, and that the provision therefor was an evasion of the usury laws; but the statute of Colorado, in connection with the by-laws, which were a part of the contract, provides for such premiums, and in following the rule in the *Solomon Case*, 71 Kan. 185, 79 Pac. 1077, we must hold the party bound by its terms."

In *Boleman v. Citizens' Loan & Bldg. Asso.* 114 Wis. 217, 90 N. W. 199, referring to the statutes of Wisconsin on the subject of loans of this character, the supreme court of that state said: "It is worthy of note that corporations of this kind, organized under our present statutes, are authorized to adopt fixed rates of premium and interest on loans. This was evidently done in deference to the fact that horizontal or uniform premiums, based upon a just profit to the association, have been demonstrated in actual experience as being more to the advantage of the association, and as of more fairness to the members desiring loans, than the other plan."

A statute similar in its meaning came under review by the supreme court of Indiana in *International Bldg. & L. Asso. v. Wall*, 153 Ind. 554, 55 N. E. 431. Referring to this statute, which in § 9 thereof provides: "It shall be competent and lawful for the borrower from such association to agree, in writing, upon a given rate of premium in addition to the interest to be paid upon each loan, without bidding. All contracts heretofore made between any borrower and any such association for the payment of any premiums, with or without any bidding, are hereby legalized" (Ind. Laws 1897, p. 287),—the court held that whether or not, prior to the taking effect of the act, an agreement for premium by rate, instead of in gross, was authorized by statute, was a question unnecessary to decide; however, no new rights having intervened, the legislature might ratify acts it might have authorized; and it was further said that, as the legislature had power to authorize building and loan corporations to take premiums, it could permit its corporate creatures to exercise that power in any mode it saw fit.

By statute, in Illinois, a building and loan association may by its by-laws dispense with the offering of its money in open meeting, and in lieu thereof loan its money at a rate of interest and premium fixed by its by-laws, and either with or without premium, deciding the preference or priority of loans by priority of applications for loans of its stockholders. *Collins v. Cobe*, 202 Ill. 469, 66 N. E. 1079.

In *Beckley v. United States Sav. & L. Co.* 147 Ala. 195, 40 So. 655, the contention was made that the contract was usurious, and that the premium should be added to and included as a part of the interest. There, as in § 7 of the Colorado statute, it was expressly provided that premiums should not render the contract usurious. Referring to the manner of making the loan, it was held that, because the money was not put up to the highest bidder, the

mortgage was not thereby invalid or the loan usurious,—citing, in support of its conclusion, *Zenith Bldg. & L. Asso. v. Heimbach*, 77 Minn. 97, 79 N. W. 609.

In 1895 a somewhat similar statute was adopted in the state of Missouri, which was before the court of appeals in *Cover v. Mercantile Mut. Bldg. & L. Asso.* 93 Mo. App. 302. In sustaining the company's right to recover a fixed premium, the court said: "Defendant association, after the enactment of the statute of 1895, adopted a by-law authorizing the loan of its funds at a premium of 60 cents per share monthly. The loans in controversy, as we have just seen, were made at a premium of 40 cents per share, and, being thus less than that authorized by the by-laws, no complaint can be heard from the borrower that the by-law was not complied with. We therefore hold that defendant's demanding and exacting of plaintiffs a fixed premium, without competitive bids, was authorized by the statute aforesaid."

After reviewing the early statutes and decisions of the courts of that state, and referring to the change in the statute brought about by the passage of the act of May 1, 1891 (88 Ohio Laws, p. 469), which omitted the former condition of competitive bidding as to the premium paid, and in criticizing the practice prevalent under the earlier statutes, it is said in *Cramer v. Southern Ohio Loan & T. Co.* 72 Ohio St. 395, 69 L.R.A. 415, 74 N. E. 200, 2 Ann. Cas. 990: "The legislature, we must assume, had a reasonable motive for this material change, for before that time this court, in the cases cited under the former law, held that, if the premium was not bid for precedence in obtaining the loan, it was usurious in case it and the interest exceeded the legal rate to be charged under the interest laws. We think a reason for the change in the statute may be readily found. Experience with competitive bidding did not tend to fairness and equality among the members. The amounts of premiums bidden at different times and by different borrowers were not uniform. At one time competition was stronger than at another, thus increasing the sum to be paid. There was opportunity at least for fictitious competition to run the premium up; and, whatever the premium, high or low, the dividends were the same to all. The member who paid the high rate of premium received no greater dividend than the one who paid the lowest. There was no certain standard, and the rights of members thus varied with the seasons, or the financial stress in which the borrower might be found. The old law defeated the principle of mutuality, which is the basic

principle of such associations. Now all borrowers are treated as upon a common level, and the premium is uniform, and all fare alike in that respect, and, of course, share alike in the dividends to be credited. Therefore the present law is not vicious, as declared by one of our circuit courts, but, on the contrary, it is fair, and is sanctioned by the rule of mutuality."

In *Manship v. New South Bldg. & L. Asso.* (C. C.) 110 Fed. 845, referring to the subject of loans by building associations, and after reviewing a number of the authorities, the opinion in part reads: "In my judgment, when there is no legislative prohibition, such as is found in Ohio, premiums may be fixed by contract, just as interest may be fixed thereby, and it seems to me certain that, in view of the present extent of building and loan association interests in the United States, fixed premiums are better calculated to put all the members of such associations on an equal footing than premiums fixed by open bidding, where the amount of same would not be fixed upon any business basis, but would only be determined by the financial exigencies and necessities of those who might be bidding for the particular sum of money offered."

To the same effect is the decision in *Gale v. Southern Bldg. & L. Asso.* (C. C.) 117 Fed. 732, where, after citing the Alabama statute and the decisions of the supreme court of that state (*Sheldon v. Birmingham Bldg. & L. Asso.* 121 Ala. 278, 25 So. 820, and other local decisions), the court holds that building and loan associations, under the statute, have the right, if their by-laws so provide, to lend on a fixed premium, which, together with the interest charged eo nomine, exceeds the interest rate allowed to be charged by other lenders. Other cases bearing upon and supporting the rule announced are *Borrowers' & Investors' Bldg. Asso. v. Eklund*, 190 Ill. 257, 52 L.R.A. 637, 60 N. E. 521; *Co-operative Sav. & L. Asso. v. Fawick*, 11 S. D. 589, 79 N. W. 847; *New Jersey Bldg. L. & Invest. Co. v. Bachelor*, 54 N. J. Eq. 800, 35 Atl. 745; *Beyer v. National Bldg. & L. Asso.* 131 Ala. 363, 31 So. 113.

It is true that some courts condemn the practice of charging fixed premiums, on the theory that it is a gross perversion of the whole spirit and design of the building and loan association scheme; and we may add that, since these institutions are liable to abuse, they must be guarded carefully to prevent them from being used as mere contrivances by which money lenders may evade the usury laws. It was never intended originally to have classes among shareholders,—one class being lenders exclusive-

ly, and the others borrowers only; one furnishing the money to be loaned for as high a premium as could be secured, and the other borrowing at such rates as his necessities forced him to submit to. There is, however, nothing in the record before us to authorize a finding that the plan by which the company transacted its business in the Indian Territory was to circumvent and avoid the law relating to usury.

Nor is there anything in *Ætna Bldg. & L. Asso. v. Rouch*, 32 Okla. 735, 124 Pac. 24, in conflict with our present views. It appears from that case, under the laws of Kansas, as well as the laws of Oklahoma, at the time in force, it was required as a condition precedent to the charging and collecting of a premium that the loan should be bid by the stockholder making application therefor, which was not done, but that, on the other hand, the company without right arbitrarily charged the premium as a part of the loan contract. The present case not being affected by the former statutes in this state, the opinion is not controlling.

Many of the states have statutes not unlike that of Colorado, and we know of no decision in which the validity of such statute, where called in question, has not been upheld and given effect. Section 17, art. 17, chap. 17, Stat. 1893 (§ 1503 Comp. Laws 1909), authorized loans to be made by building and loan associations by competitive bidding. This statute was amended in 1913 (chapter 200, § 4, p. 446, Sess. Laws 1913), by providing that any building and loan association may by its by-laws dispense with the offering of its moneys for bid, and in lieu thereof loan or advance its moneys to members at such rate of interest, or interest and premium, as may be provided for by the by-laws; and provides, further, that such premium to be paid in instalments shall not be deemed usurious, but shall be taken to be the payment as it falls due, and the same shall be lawful in so far as the said premium, together with interest, shall not exceed 1 per cent per month. Thus, it appears that our own state has changed its laws so as to authorize, within certain limitations, fixed premiums upon loans by building and loan associations. The statutes of the different states pertaining to loans of building and loan associations may be found in an appendix to *Thornton & B. Bldg. & L. Asso.* pp. 664-914. Indeed, counsel for defendant in error have not sought to defend the judgment upon the ground on which it was based, but instead say: (1) That the contract was an Oklahoma contract; and (2) the rate of interest, being in excess of 12 per cent was in violation of § 1523, Comp.

Laws 1909, prohibiting a foreign building and loan association to charge any rate, on account of interest and premium, in excess of 1 per cent per month upon the amount loaned.

The court found, as already seen, that the contract by its terms was to be governed by and construed according to the laws of Colorado. In this the trial court was correct. Where not forbidden by law, a contract of a foreign building and loan association, which is not usurious under the laws of the state where the association is domiciled, and where the obligations are payable, cannot be attacked for usury in the state where the land mortgaged is situated. *Bedford v. Eastern Bldg. & L. Asso.* 181 U. S. 228, 45 L. ed. 834, 21 Sup. Ct. Rep. 597. The parties having in good faith contracted that the laws of Colorado should control, and there being no statute in force in the Indian Territory, forbidding nonresident building and loan companies from transacting business and making loans of the character under review, the parties must be held to a performance of their respective undertakings. *Midland Sav. & L. Co. v. Solomon*, 71 Kan. 185, 79 Pac. 1077; *United States Sav. & L. Co. v. Beckley*, 137 Ala. 119, 62 L.R.A. 33, 97 Am. St. Rep. 19, 33 So. 934; *Pioneer Sav. & L. Co. v. Cannon*, 96 Tenn. 599, 33 L.R.A. 112, 54 Am. St. Rep. 858, 36 S. W. 386; *United States Sav. & L. Co. v. Shain*, 8 N. D. 136, 77 N. W. 1006; *Bennett v. Eastern Bldg. & L. Asso.* 177 Pa. 233, 238, 34 L.R.A. 595, 55 Am. St. Rep. 723, 35 Atl. 684; *Hieronymus v. New York Nat. Bldg. & L. Asso.* (C. C.) 101 Fed. 12; *Dicey, Conf. L.* pp. 563, 567.

The case is unaffected by act Cong. February 18, 1901, chap. 379, 31 Stat. at L. 794, for that act by its express terms is confined to banks and trust companies authorized to do business in the Indian Territory. *Brewer v. Rust*, 20 Okla. 776, 95 Pac. 233; *Taylor v. Merrell*, 22 Okla. 18, 97 Pac. 571; *Sulphur Bank & T. Co. v. Medlock*, 25 Okla. 73, 105 Pac. 321. Neither is the case influenced by the statutes of

Arkansas in force by congressional enactment in the Indian Territory, making all contracts for a greater rate of interest than 10 per centum per annum void, both as to principal and interest (§ 4732, *Mansfield's Dig.*), for the reason that the rate of interest paid by *Beats* was contingent upon the length of time required to mature the shares of stock. It was so held in *Lindsay v. Chickasha Bldg. & L. Asso.* 39 Okla. 12, 130 Pac. 570, and is the settled rule of decision in Arkansas. *Reeve v. Ladies' Bldg. Asso.* 56 Ark. 335, 18 L.R.A. 129, 19 S. W. 917; *Taylor v. Van Buren Bldg. Asso.* 56 Ark. 340, 19 S. W. 918; *Roberts v. American Bldg. & L. Asso.* 62 Ark. 572, 33 L.R.A. 744, 54 Am. St. Rep. 309, 36 S. W. 1085; *Black v. Tompkins*, 63 Ark. 502, 39 S. W. 553. See also *Spain v. Hamilton* (*Spain v. Brent*) 1 Wall. 604, 17 L. ed. 619. Regardless, then, of the terms of the agreement making the contract solvable according to the laws of Colorado, we find that it inveighed against no policy of the territory where the contract was entered into. Being a valid and binding contract, it remains unaffected by any change in our form of government brought about by the admission of the states into the Union. Const. § 1, art. 25.

Answering the claim that under § 1523, Comp. Laws 1909 (§ 1326, Rev. Laws 1910), any rate charged by a foreign building and loan association in excess of 1 per cent per month upon the amount loaned should be usurious and subject such company or association to the penalties for usury, provided under the laws of this state, it need only be said that the statute has no application, for the reason that the transaction arose in the Indian Territory prior to statehood.

Having determined that the trial court erred in its construction of the Colorado statutes, it follows that the judgment must be reversed, and the cause remanded, with instructions to proceed further in accordance with the views herein expressed.

All the Justices concur.

Annotation—Conflict of laws as to usury.

The earlier cases on the question now under annotation are cited and analyzed in a previous note,¹ to which references will be made throughout the present annotation in support of the principles and rules therein stated, without again citing or setting out those cases. That note is also referred to for some points which are not touched in the present

annotation, because they have received no further development in the later cases. The applicability to cases involving interstate elements, of statutes forbidding corporations to plead usury, has been elsewhere treated.² The question whether the Federal courts are bound by the decisions of the state

¹ 62 L.R.A. 33. L.R.A. 1916D.

² See note to *Stack v. Detour Lumber & Cedar Co.* 16 L.R.A.(N.S.) 616

courts in relation to usury is not within the scope of this annotation.³

This annotation proceeds upon the assumption that if a contract is governed in respect of usury by the law of a state or country other than that in which the action is brought, the contents of that law has been proven or conceded. The proper course when that is not true, including the presumption to be indulged in regard to the foreign law, is elsewhere treated.^{3a}

As affected by penal or remedial character of usury law, or by public policy of forum.

It is a well-established principle of private international law, operating by way of exception to the general principles that would otherwise refer a contract to a foreign law, that the courts of one state or country will not execute the penal laws of another.⁴ This principle has been applied to usury laws in so far as they merely impose a penalty by way of punishment for the exaction of excessive interest.⁵ There may, however, be some doubt as to the propriety of the application of the principle to usury laws in view of the strict and narrow criterion of penal laws in an international sense, adopted by the United States Supreme Court in a leading case.⁶

An interesting and somewhat puzzling question has arisen where the foreign statute, instead of declaring the contract void for usury, merely provides for the forfeiture of a certain amount measured by usurious interest exacted,—e. g., two or three fold such usurious interest. Some courts in that case have refused to give effect to the foreign statute, even when interposed as a defense to an action upon the contract, notwithstanding

that the statute contemplated that the amount of the forfeiture might be deducted from the amount otherwise recoverable, and judgment rendered for the balance only, for the reason that such statute was penal only, and did not affect the validity of the contract.⁷ The better view seems to be that a defense based on such a statute should be allowed.⁸

If usury statutes were regarded as remedial rather than substantive, it would follow that the law of the forum on the subject should be applied irrespective of the proper law of the contract. But while in a few cases the courts have refused to apply the usury law of another state for the reason that its provisions were remedial, and not substantive,⁹ there seem to be no cases in which a foreign contract—i. e., a contract which, as regards matters of substance, is governed by the law of another jurisdiction—has been subjected to the local law upon the theory that its provisions were remedial.^{9a} The usury laws often strike at the very foundation of the contract and declare it void; and it is universally agreed that the courts of another state or country will recognize the effect of the foreign statute in that respect and refuse to enforce the contract.¹⁰ Upon the other hand, while the courts, as above shown, sometimes refuse to apply the usury statute of another state or country upon the ground that it is penal or remedial, they generally agree that if the contract is free from usury tested by the proper law, i. e., the law governing the substantive rights of the parties, it will be enforced according to its tenor, notwithstanding that it would be usurious by the law of the forum.^{10a} There are

³ See on that question note in 40 L.R.A. (N.S.) 428.

^{3a} See notes in 67 L.R.A. 33; 34 L.R.A. (N.S.) 261; and 38 L.R.A. (N.S.) 40.

⁴ 5 R. C. L. 1033.

⁵ See note in 62 L.R.A. 42.

⁶ Thus, in *Huntington v. Attrill* (1892) 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, not, however, involving the question of usury, the court said: "The question whether a statute of one state which in some aspects may be called penal is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by wrongful act." It is to be observed, however, that the criterion thus declared is stricter than the facts of the case required; and the courts have generally L.R.A.1916D.

adopted a broader criterion in this regard. See *Whart. Conf. L.* 3d ed. § 4b.

⁷ See note in 62 L.R.A. 42.

⁸ *Ibid.*

⁹ See note in 62 L.R.A. 45.

^{9a} Such an attempt was made in *Shrichand v. Lacon* (1906) 22 Times L. R. (Eng.) 245, in respect of the provisions of the English moneylenders' act to the effect that "where proceedings are taken in any court" by a money lender for the recovery of money lent, the court may reopen the transaction. But Mr. Justice Ridley was of a different opinion, and held that the act was inapplicable to a loan made and payable in India. And his conclusion was followed by Mr. Justice Darling in *Velchand v. Mannars* (1909) 25 Times L. R. (Eng.) 329.

¹⁰ See note in 62 L.R.A. 42.

^{10a} This is, of course, assumed by the cases cited throughout this note and the earlier note in support of the various prin-

but few real exceptions to this principle.^{10b} It is true, as subsequently pointed out, that considerations of public policy have doubtless influenced the decisions in cases which have referred the question of usury in the contracts of foreign building and loan associations to the local law; but in these cases there were many circumstances—e. g., the residence of the borrower, the location of the property by which the loan was secured, and the localization of the business of the association—tending to give a local character to the contract, and so subject it to the local law as to usury as its proper law, and not merely as the law of the forum.

General principles governing choice of law; intention.

Although the courts not infrequently profess to refer the question whether or not a contract is usurious to the law of the place where the contract was made, or the law of the place of perform-

ciples and rules for ascertaining the governing law, though in some instances the application of these principles and rules has led to the selection of the law of the state in which the action was brought as the governing law, not because the *lex fori*, as such, controls, but because of circumstances connecting the contract or transaction with that state so as to make its law the proper law by which to determine the substantive rights of the parties. Naturally the point that it is not contrary to the public policy of the forum to enforce a contract valid by the proper law, but usurious if tested by the law of the forum, emerges more clearly in cases in which the only possible conflict was between the law of the state which was beyond question the situs of the contract and law of the forum as such. See note in 62 L.R.A. 77. See also *Baxter v. Beckwith* (1914) 25 Colo. App. 322, 137 Pac. 901.

^{10b} But see a few cases in note 62 L.R.A. 77.

^{10c} See note in 62 L.R.A. 44.

In *Barras v. Young* (1915) 185 Mich. 496, 152 N. W. 219, where a resident of Michigan, while temporarily in Nevada, wrote to another resident of Michigan proposing to give the latter a deed of trust on real property in the latter state, and the deed of trust was drawn up and sent to Nevada, where it was executed and returned to Michigan, the court took the view that the minds of the parties met in Michigan and that the contract was to be regarded as a Michigan contract, and also it seems to have assumed that the law of Michigan as the place of performance would prevail. As the contract in this case was not usurious tested by the law of Michigan, it would seem that the result might have been referred to the rule of the text. L.R.A.1916D.

ance,^{10c} the fundamental principle, established by the overwhelming weight of authority, is to ascertain the intention of the parties as to the real situs of the contract and to apply that law with reference to which, in good faith, and not with the purpose of evading the law of the real situs of the contract, they intended to contract.¹¹

It follows that when the parties have by an express stipulation in their contract designated the governing law, that stipulation is conclusive, and the law of the place so designated will determine the question whether or not the contract is usurious, if the parties acted in good faith with no purpose of evading the law of the real situs of the contract.¹² The express stipulation of the parties, however, is not controlling if made in evasion of the law of the real situs of the contract, or if contrary to the public policy of the forum.¹³ When, as is usually the case, the parties have not

¹¹ See note in 62 L.R.A. 44 et seq. cases cited and analyzed.

The general rule is recognized, either expressly or impliedly, by the great majority of the cases on the subject, and underlies most of the specific rules subsequently referred to throughout the note. A good statement and discussion of the principle will be found in the recent case of *Crawford v. Seattle, R. & S. R. Co.* (1915) 86 Wash. 628, ante, 732, 150 Pac. 1155. The earlier note and cases there cited, however, should be consulted for the history of the rule and the reasons for its adoption.

¹² See cases cited in note in 62 L.R.A. 45; see also *infra*, note 36.

In *Midland Sav. & L. Co. v. Solomon* (1905) 71 Kan. 185, 79 Pac. 1077, involving a loan made by a building and loan association of Colorado to a resident of Kansas, the court observed that, the contract having been made in Colorado, and the sums due upon it having been made payable there, the presumption of law is that it is solvable in that state, but such a presumption is a rebuttable one, and, if nothing further appeared, the court would have the right to take into consideration extraneous facts in ascertaining the true intention of the parties; but the express provision of the contract in suit, that it was to be performed in Colorado and in all respects to be governed by, and entitled to the benefit of, the laws of that state, precluded further inquiry as to the intention of the parties, though, of course, their intention was subject to the test of good faith.

To the same effect is *Goode v. Colorado Invest. Loan Co.* (1911) 16 N. M. 465, 117 Pac. 856.

¹³ *Washington Nat. Bldg. & L. Assn. v. Piper* (1908) 31 App. D. C. 434, 14 Ann. Cas. 734. And see also *infra*, note 37.

expressed their intention as to the governing law by an express stipulation in the contract, it is necessary to infer or presume it from the terms of the contract in connection with the circumstances surrounding the transaction.

As subsequently shown, the courts have formulated rules of broad application for ascertaining the intention of the parties in this respect, or imputing an intention to them, but obviously from the nature of the question these rules are not hard and fast rules,—like the rule, for instance, that the *lex rei sitæ* determines the requisites of the execution of a deed of real property,—but each rule rests upon an inference or presumption as to the intention of the parties drawn from one or more of the terms of the contract or circumstances of the transaction. They are therefore merely *prima facie*, and one rule may give way to another as additional circumstances appear, or all may yield to circumstances that have never become the basis of a formulated rule, but that nevertheless rebut the presumption upon which the formulated rules rest.¹⁴ It is necessary, therefore, before applying any of the formulated rules, to examine the case in hand to ascertain if there are any facts or circumstances, whether the basis of a formulated rule or not, that either overcome the presumption upon which the rule rests, or show that the parties acted in bad faith and with an intent to evade the usury law of the real situs of the contract. The inference as to

the intention of the parties must be drawn from the contract itself, viewed in the light of the situation of the parties and the circumstances attending the transaction. Though the question may involve the consideration of a wide range of circumstances, it is one of law for the court, rather than of fact for the jury.¹⁵

Rule that law upholding the contract will be applied.

So far as the question of interest generally is concerned, the broadest of the rules formulated for ascertaining the intention of the parties, or imputing an intention to them, with reference to the governing law, is that they will be presumed to have intended to contract with reference to the law of the place of payment; and so in general the question as to the right to interest or the rate of interest is referred to the law of the place of payment, conformably to the presumed intention of the parties.¹⁶ The question as to interest, however, as distinguished from usury, is not within the scope of the present note.

So far as concerns the question whether or not the contract or transaction is usurious, the broadest of the formulated rules,—which, however, as already shown, is *prima facie* merely—is that the parties will be presumed to have intended to contract with reference to a law that would uphold their contract rather than with reference to a law that would invalidate it in whole or in part.¹⁷

This presumption cannot be invoked

¹⁴ See opinion in *Crawford v. Seattle R. & S. R. Co.* (Wash.) *supra*, which states the principles on the subject substantially in the language of the text.

¹⁵ The statement of the text on this point rests upon what the courts have apparently done in the cases, and upon general principles, rather than on express declarations in the case on the specific point.

In *Crawford v. Seattle, R. & S. R. Co.* (Wash.) *supra*, the court observed that the presumption as to the intention of the parties was one of fact, and not of law; but the court apparently had in mind merely what is stated in the text, that there is no hard and fast rule on the subject, and that the inference must be based on the particular circumstances attending the contract in question.

In *Davis v. Tandy* (1904) 107 Mo. App. 437, 81 S. W. 457, in reply to the contention that in case of a contract made in one place to be performed in another, where the contract itself does not specify which law is to govern, it cannot be shown by parol evidence that the parties intended that the law of the place where it was made was to govern, as that would be contradicting or

varying a written contract, the court observed that the authorities did not seem to so regard it; oral evidence is considered, not as contradicting the writing, but rather as showing by the situation and surrounding circumstances what was meant or intended by the writing. Apparently, however, the court had reference to oral evidence showing the circumstances of the transaction, and not to oral evidence relating directly to the intention of the parties.

¹⁶ See note in 62 L.R.A. 37.

¹⁷ See note in 62 L.R.A. 49 et seq.

The vast majority of the cases cited in this and the earlier note either expressly or impliedly recognize this rule, although, as implied in the text, it is sometimes overborne by other circumstances indicating a contrary intention, or more frequently because the parties intended to evade the law of the place to which the contract is really referable, or because it would be contrary to the public policy of the forum to give effect to their presumed intention. A good statement of the *prima facie* rule is found in *Crawford v. Seattle, R. & S. R. Co.* (Wash.) *supra*. For the history and grounds of the rule, however, see cases cited in note

for the purpose of referring the contract to the law of a state which is not the situs of any of the vital elements or significant circumstances of the transaction. In other words, the intention of the parties must be directed toward the law of some place that has a vital, and not merely a fictitious, relation to the transaction.¹⁸ In most cases the result of the application of the rule has been to refer the contract either to the law of the place where it was made or to the law of the place where it was performable. The rule, however, is not necessarily confined to those alternatives. In some instances, the circumstances may be such as to indicate that the parties in good faith intended to contract with reference to the law of a place other than that in which the contract was technically made or performable. Thus, the residence or domicile of one of the parties in a certain state has

occasionally, in connection with other circumstances, been regarded as sufficient to indicate a bona fide intention to contract with reference to the law of that state, although neither the *lex loci contractus* nor the *lex loci solutionis*.¹⁹ But while the residence of a party to the contract is, or may be, a significant fact, yet it is only a fact to be taken into consideration with other facts in determining what law the parties had in view, and will readily yield to a manifest intention to contract with reference to the law of some other place.²⁰ Again, the place where the preliminary negotiations for the contract took place, though technically neither the *lex loci contractus* nor *lex loci solutionis* of the completed contract, may, in connection with other circumstances, be entitled to consideration in drawing the proper inference as to the intention of the parties.²¹

in 62 L.R.A. 49 et seq. The most numerous or apparent exceptions to this principle are the cases referred to *infra* involving contracts of foreign building and loan associations. They are accounted for in part by the exception, inherent in the principle itself, that the intention must be bona fide, and in part by the existence in these cases of numerous circumstances tending to give the transaction a local situs and thus to support an inference of an intention to contract with reference to the local law, and in part to considerations of public policy peculiar to this class of contracts.

¹⁸ See opinion in *Green v. Northwestern Trust Co.* (Minn.) ante, 739.

¹⁹ In *Crawford v. Seattle, R. & S. R. Co.* (1915) 86 Wash. 628, ante, 732, 150 Pac. 1155, the court applied the law of Washington as presumably that with which the parties intended to contract, although the bonds in question, which were secured by real property in Washington, were in terms payable in Illinois; this without reference to the question whether the contract was to be regarded technically as made in Washington. The result was based not only on the presumption that the parties intended to contract with reference to a law that would uphold the contract, but also on the presumption drawn from the terms of the bonds and circumstances of the transaction as a whole.

So, in *Jackson v. American Mortg. Co.* (1891) 88 Ga. 756, 15 S. E. 812, which contains a clear statement of the principle that the presumed intention of the parties is the criterion where there is no intent to evade the usury law of the place to which the contract is referable, the law of Georgia, by which there was no usury, was applied to notes which were payable in New York and finally delivered there, though signed by the maker in Georgia, the notes being secured by a mortgage on real prop-

erty in the latter state. The court emphasized the residence of the borrower in Georgia as a circumstance pointing to an intention to contract with reference to the law of that state. The opinion suggests that, even admitting that there was no complete and final delivery of the notes and mortgage until they were put into the hands of the agent of the lender in New York, yet to effectuate the intention of the parties, and to accomplish the purposes of justice, such manual delivery there ought, on the doctrine of relation, to refer back to time and place of signing the instruments.

But where a person who had purchased a lot of land lying in Georgia procured another to advance money with which to pay the balance of the purchase price, and a deed was made by the vendor to such other person, and a bond for title was executed by him, he agreeing to convey the land to the vendee upon payment of notes given to him by such vendee, and all these papers were executed in Georgia, and where it did not appear that payment was to be made or the contract consummated in any way elsewhere, the usury law of this state, and not that of the state of Florida, applied to the contract and conveyances so made, although the negotiations and parol agreements preceding the execution of the papers may have taken place in Florida. *First Nat. Bank v. Rambo* (1915) 143 Ga. 665, 85 S. E. 840. So held notwithstanding that by law of Georgia the contract was usurious.

²⁰ *J. I. Case Threshing Mach. Co. v. Tomlin* (1913) 174 Mo. App. 512, 161 S. W. 286. This is assumed in most of the cases cited *infra*, note 36.

²¹ See note in 62 L.R.A. 73, under heading, "Which contract to be regarded; contract of principal and surety."

But in *Knowp v. Carver* (1908) 74 N. J.

When contract is usurious by *lex loci contractus* but not by *lex loci solutionis*.

When a contract would be usurious if tested by the law of the place where it is made (*lex loci contractus*), but not by the law of the place where it is performable (*lex loci solutionis*), the latter law will generally be applied in the absence of any objection based on the public policy of the forum, or of any circumstances tending to rebut the presumption that the parties intended to contract with reference to the law of the place of performance, or any indication of an intent to evade the law of the place to which the contract was referable.²²

The result in this situation is sometimes referred to the general presumption that the parties intended to contract with reference to the law of the place of performance, rather than of the place of the making of their contract, but is more often referred to the presumption that the parties intended to contract with reference to a law that would uphold, rather than one that would invalidate, their contract. Upon the present hypothesis the two presumptions are coincident so far as the results are concerned.

When contract is usurious by *lex loci solutionis*, but not by *lex loci contractus*.

When a contract would be usurious tested by the law of the place where it is performable, but not by the law of the place where it was made, the presumption that the parties intended to

contract with reference to a law that would sustain, rather than one that would invalidate, their contract, generally prevails over the presumption that they intended to contract with reference to the law of the place of performance; and so generally in this situation the law of the place where the contract is made will, in accordance with the presumed intention of the parties, prevail over the law of the place where it is performable.²³ The rule, however, may, of course, be defeated by circumstances indicating an intention to contract with reference to the law of some place other than that where the contract was made,²⁴ or indicating that there was an attempted evasion of the law of the place to which the contract was really referable.²⁵

Effect of mortgage security; place where money is to be used; *lex loci considerationis*.

It is frequently declared in very general terms that contracts in relation to real property are governed by the *lex rei sitæ*, but, as shown in another note,²⁶ that principle is subject to many qualifications and exceptions.²⁷ And so, while there is some slight authority, especially in the earlier cases, for the view that the question of usury as affecting a mortgage is to be referred to the *lex rei sitæ* as such, the overwhelming weight of authority is to the effect that, a mortgage being a mere incident of the debt, the law of the place where the property is situated governs neither in respect of the debt itself nor the mortgage, so far as usury is concerned.²⁸ The rule ap-

Eq. 449, 70 Atl. 660, the court applied the law of New Jersey, by which the contract was usurious, notwithstanding that some of the preliminary negotiations for the loan were conducted in Philadelphia, upon the ground that the land was situated in New Jersey, the contract was to be performed there, the money was paid there, the papers executed and the entire transaction consummated there.

²² See note in 62 L.R.A. 51 et seq.

²³ See note in 62 L.R.A. 55 et seq.

See also *Whitlock v. Cohn* (1904) 72 Ark. 83, 80 S. W. 141.

²⁴ Thus, in *J. I. Case Threshing Mach. Co. v. Tomlin* (Mo.) supra, the law of Missouri, where the notes were payable, was applied, although it rendered the contract usurious, rather than the law of Kansas, where the maker resided and where the notes were executed, according to which the notes would not be usurious. This was upon the ground that the other circumstances of the case, which are too numerous to set out here, indicated that the contract was a Missouri contract, and overcame the pre-

sumption that the parties intended to contract with reference to a law that would uphold, rather than one which would invalidate, it.

²⁵ See infra, note 37, for illustrations of this exception. The exception is, of course, inherent in the conditions of the rule itself.

²⁶ Note to *Hughes v. Winkelman*, L.R.A. 1916A, 1007.

²⁷ Ibid.

²⁸ See notes in 55 L.R.A. 933; 62 L.R.A. 61; and 4 L.R.A.(N.S.) 1191. Later cases expressly sustaining this rule are *Walker v. Lovitt* (1911) 250 Ill. 543, 95 N. E. 631; *Midland Sav. & L. Co. v. Solomon* (1905) 71 Kan. 185, 79 Pac. 1077; *Manhattan L. Ins. Co. v. Johnson* (1907) 188 N. Y. 108, 9 L.R.A.(N.S.) 1142, 80 N. E. 658, 11 Ann. Cas. 223; *Exchange Bank v. McMillan* (1907) 76 S. C. 561, 57 S. E. 630; *Bank v. Doherty* (1906) 42 Wash. 317, 4 L.R.A.(N.S.) 1191, 114 Am. St. Rep. 123, 84 Pac. 872.

The usury statute of New York involved in *Manhattan L. Ins. Co. v. Johnson* (1907) 188 N. Y. 108, 9 L.R.A.(N.S.) 1142, 80 N. E.

plies with respect to chattel mortgages as well as to mortgages on real estate.²⁹ The location of the mortgaged property is, however, frequently an important circumstance in determining the intention of the parties with reference to the governing law, or in testing their good faith, and may affect the question whether it would be contrary to the public policy of the forum to give effect to the law of the other state.³⁰

There is some slight authority for the view that the law of the place where the money constituting the consideration for the contract is to be used governs the question as to usury.³¹ This, however, is contrary to the great weight of authority. As a matter of fact, the place where the money is to be used has received but little consideration, even as a circumstance indicating the intention of the parties as to the governing law, though doubtless in some circumstances it may have a legitimate bearing on that question.³²

The doctrine that the law of the place where the consideration is received should govern in respect of usury has been advocated with great ability by Prof. Minor in his work on Conflict of Laws, § 179, but has little support from the cases as opposed to the general prin-

ciples and the subordinate rules previously stated, based on the presumed intention of the parties. The place where the consideration is received may doubtless in some cases be considered in connection with other circumstances as bearing on the presumed intention of the parties.³³

Renewal contracts.

When a new contract made and payable in one state is based upon, or is in renewal of, a contract made and payable in another, it would seem upon principle that the question whether or not the new contract is usurious should be determined by the law of the place where it (the new contract) was made and payable. This, at least, is true so far as concerns the question whether or not the new obligation is usurious upon its face. Even when the contract is not usurious on its face, and the question of usury depends upon the amount of the pre-existing indebtedness, it still seems that the question is ultimately to be determined by the proper law of the new contract, although the result of the application of that law (i. e., the question whether by that law the contract is usurious) depends upon the result of the application of the law governing the original contract.³⁴ To illustrate, if a

658, 11 Ann. Cas. 223, provides that "all bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, . . . whereupon or whereby there shall be reserved or taken or secured . . . any greater sum or greater value for the loan or forbearance of any money, goods, or other things in action, than is above described, shall be void." Gray, J., said: "What we are asked to hold is that the law of the place where the property happens to be shall govern, rather than the law of the place where the loan was made, of which the conveyance was but an incident. In my opinion, the meaning or intent of our usury statute is that the validity of the conveyance or mortgage is determined by the validity of the agreement of the parties, and I think the law of the place of its making governs as to that."

The rule stated in the text is also supported by the results in many other cases. For example, as shown in the note in 62 L.R.A. 65, and *infra*, note 36, many cases have applied the law of the state in which a building and loan association was domiciled, notwithstanding that the suit was to foreclose a mortgage on real property in another state, by the law of which the transaction would have been usurious.

²⁹ *Trower Bros. v. Hamilton* (1904) 179 Mo. 205, 77 S. W. 1081; *Casner v. Hoskins* (1913) 64 Or. 282, 128 Pac. 841, 130 Pac. 55.

³⁰ See *infra*, note 37. L.R.A.1916D.

³¹ See note in 62 L.R.A. 62.

³² *Ibid*.

³³ See note in 62 L.R.A. 63 et seq.

³⁴ In *Scott v. Fabacher* (1910) 100 C. C. A. 147, 176 Fed. 229, a contract was made and performable in Texas by which the lender was to receive in addition to interest a part of the profits which the borrower might realize upon a certain transaction then in contemplation; subsequently, a new note was given in Louisiana, where the borrower resided, for an amount representing the lender's share of the profits according to the original agreement. The court held that the contract was usurious by the law of Texas, but did not say that the law of Texas would supplant the law of Louisiana. So far as any facts to the contrary appearing in the opinion are concerned, the result might have been expressed in the formula that the law of Louisiana governed as to whether or not the note in suit was usurious, but that the law of Texas must be consulted to determine whether at the time the note in Louisiana was given there was any indebtedness constituting a consideration. Obviously, upon the assumption that, by the law of Texas, the promise to pay the lender a share of the profits was void for usury, there was no consideration for the note, which was made in Louisiana, and it would therefore be invalid even according to the law of that state, and even if it were to be assumed that the note would not have been void by that law if

note for \$1,080, bearing interest at 8 per cent, is made and payable in a state in which that rate of interest is allowed, the question whether it is usurious depends upon the amount of the indebtedness for which it was given. If it appears that the note represented the principal and interest at 8 per cent for one year, on a loan for \$1,000 made and payable in another state in which 6 per cent interest is the maximum rate, it is apparent that the new note is usurious, even tested by the law of the place where it is made and payable, even though, on the present hypothesis, it would not have been if the original note had been made and payable in that state. This is simply an illustration of the point, which has many other illustrations, that an element affecting the result of the application of the law of one state may have antecedently received its character from the law of another state. While in the case supposed the result is practically the same as if the law governing the original contract had been directly applied to the new one, the distinction is of some practical importance when the question concerns the law by which the consequences of the usury are to be determined. The adoption of the view that the proper law of the original obligation governs the question whether the new obligation is usurious naturally leads to the conclusion that the question as to the consequences of usury is also to be determined by that law,³⁵ whereas, in the other view, the conclusion would seem to be that the conse-

quences of usury should be determined by the governing law of the new contract, and they may be quite different from those which would follow from the other law.

Contracts of foreign building and loan associations.

The contracts of foreign building and loan associations are subject to the general principles previously formulated in this note for the determination of the governing law with respect to usury; but they possess certain features peculiar to them as a class, affecting the application of those principles, which make it desirable to consider them separately.

The typical situation in this class of cases presents a note or bond payable at the home office of the association, made by a resident of another state (the state in which the question arises), secured by a mortgage on real property in the latter state; a contract valid if governed by the law of the former state, but usurious if governed by the law of the latter state. In some cases the contract is regarded as made (i. e., consummated) in the state of the borrower's residence, and in others in the state of the association's domicil. In some of the cases the contract expressly stipulates that it is to be governed by the law of the state where the association is domiciled. There is, however, considerable variation between the cases as to the facts bearing upon the localization of the business of the foreign association, and that to some extent accounts for the difference in the

the original contract, as well as the new contract, had been made in that state.

³⁵ This was the view taken in *Bowman v. Miller* (1874) 25 Gratt. (Va.) 331, 18 Am. Rep. 686, holding that, a note payable in Virginia, and not usurious on its face, was to be governed as to the effect of usury by the law of Maryland, by which only the illegal interest is forfeited, a recovery of the principal and legal interest being permitted, rather than by the law of Virginia, which avoids the entire contract. The decision was upon the ground that the renewal was not a novation of the previously existing debt, and the contract was still a Maryland contract to be governed by the law of Maryland.

And upon the authority of the *Bowman Case*, it was held in *Miller v. Prudential Bkg. & T. Co.* (1907) 63 W. Va. 107, 59 S. E. 977, that the law of West Virginia, by which a contract is not wholly void for usury, was applied rather than the law of New York, where the notes in question were made and payable, by which usury renders a contract void in toto, for the reason that the notes were merely in renewal of a con-

tract governed by the law of West Virginia, and were usurious only because the original contract was usurious. As suggested in the text, the notes in question, upon the assumption that they were based on a previous transaction which, by the proper law of that transaction (West Virginia), was usurious, would be usurious even tested by the law of New York, for the reason that on this assumption they would represent an amount in excess of the debt due. They would be none the less usurious because it was necessary to apply the law of West Virginia to the old obligation to determine the amount of the debt, or because neither the old nor new obligation would have been usurious if both had been governed by the law of New York. Clearly, if the notes had been usurious upon their face tested by the law of New York, the law of New York would have fixed the consequences for engaging in the unlawful transaction; and it is not apparent why it should not fix the consequences for engaging in the transaction in question, which was equally contrary to the law of New York.

decisions. Regarding simply the results of the cases which have dealt with the situation above outlined, the cases appear to be in hopeless conflict. This conflict, however, does not indicate a difference of view as to the fundamental principles previously stated for the determination of the governing law with respect to usury. It is due in part to a difference in the facts and circumstances, in part to a difference of opinion among the courts as to the inference to be drawn as to the intention of the parties or as to their good faith; and in part, doubtless, to the difference of opinion as to whether the enforcement of the foreign contract would be contrary to the public policy of the forum.

In many cases presenting the typical situation above outlined, the courts have, in accordance with the presumed intention of the parties, referred the question of usury to the law of the domicile of the association, by which the contract was not usurious, although it would have been usurious by the local law.³⁶

³⁶ See cases cited in note in 62 L.R.A. 64. Later cases belonging to the same class are *Lewis v. Clark* (1904) 64 C. C. A. 138, 129 Fed. 570; *Allen v. Riddle* (1904) 141 Ala. 621, 37 So. 680 (involving express stipulation that all contracts should be deemed made at home office); *Beckley v. United States Sav. & L. Co.* (1906) 147 Ala. 195, 40 So. 655, following decision in (1902) 137 Ala. 119, 62 L.R.A. 33, 97 Am. St. Rep. 19, 33 So. 934, on former appeal; *Midland Sav. & L. Co. v. Solomon* (1905) 71 Kan. 185, 79 Pac. 1077 (express stipulation that contract is to be governed by the law of the domicile of the association); *Steinman v. Midland Sav. & L. Co.* (1908) 78 Kan. 479, 96 Pac. 860 (express provision that contract is to be governed by the law of the domicile of association); *Jenkins v. Union Sav. Asso.* (1916) — Minn. —, 155 N. W. 765 (finding of agreement that contract should be governed by the law of the domicile of association); *MIDLAND SAV. & L. Co. v. BEATS*, ante, 745; *Legg v. Midland Sav. & L. Co.* (1916) — Okla. —, 154 Pac. 682; *Equitable Bldg. & L. Asso. v. Corley* (1905) 72 S. C. 404, 110 Am. St. Rep. 615, 52 S. E. 48; *Columbian Bldg. & L. Asso. v. Rice* (1903) 68 S. C. 236, 47 S. E. 63, 1 Ann. Cas. 239 (notwithstanding that the by-laws permitted members to make payment to local treasurer, who, however, is declared to be agent of member, and not of association); *Middle States Loan Bldg. & Constr. Co. v. Miller* (1905) 104 Va. 464, 51 S. E. 846.

³⁷ See cases cited in note in 62 L.R.A. 67. Later cases belonging to that class are *Washington Nat. Bldg. & L. Asso. v. Pifer* (1908) 31 App. D. C. 434, 14 Ann. Cas. 734 (notwithstanding express stipulation that contract should be governed by the law of L.R.A.1916D.

Upon the other hand, many cases involving such a situation have applied the local law notwithstanding that the effect was to render the contract usurious, whereas by the law of the domicile of the association it would not have been usurious.³⁷

Without passing upon the question of conflict of laws as an independent question, the position taken in the latter class of cases has been held by the United States Supreme Court to involve no denial of "full faith and credit" to the public acts and records of the state where the association is domiciled.³⁸

It is apparent from what has already been said that the results in the latter class of cases involve the refusal to apply either the *prima facie* rule which rests upon the presumption that the parties intended to contract with reference to the law of the place of payment, or the rule that they intended to contract with reference to the law of the place which will uphold their contract rather than one which will invalidate it,—the

domicil of the association); *Washington Nat. Bldg. & L. Asso. v. Conley* (1908) 31 App. D. C. 439; *Washington Nat. Bldg. & L. Asso. v. Hill* (1908) 31 App. D. C. 440; *Washington Nat. Bldg. & L. Asso. v. Nichols* (1908) 31 App. D. C. 441; *Royal Loan Asso. v. Forter* (1904) 68 Kan. 468, 75 Pac. 484, 1 Ann. Cas. 794 (loan made through local board); *Hoskins v. Rochester Sav. & L. Asso.* (1903) 133 Mich. 505, 95 N. W. 566 (expressly decided on authority of *National Mut. Bldg. & L. Asso. v. Birch* (1900) 124 Mich. 57, 83 Am. St. Rep. 311, 82 N. W. 837, set out in the note in 62 L.R.A. 69); *Cobe v. Summers* (1906) 143 Mich. 117, 106 N. W. 707 (holding that the fact that the local board organized in Michigan was not expressly provided for in the articles of the association did not affect the question); *Land Title & T. Co. v. Fulmer* (1904) 24 Pa. Super. Ct. 256 (mortgage executed to a Pennsylvania corporation as trustee for the foreign association); *Galletley v. Strickland* (1906) 74 S. C. 394, 54 S. E. 576 (by-laws permitted payments to be made to local treasurer, and they were so made); *Floyd v. National Loan & Invest. Co.* (1901) 49 W. Va. 327, 54 L.R.A. 536, 87 Am. St. Rep. 805, 38 S. E. 653; *Miller v. Prudential Bkg. & T. Co.* (1907) 63 W. Va. 107, 59 S. E. 977 (decided on authority of *Floyd Case*).

³⁸ *National Mut. Bldg. & L. Asso. v. Brahan* (1903) 193 U. S. 635, 48 L. ed. 823, 24 Sup. Ct. Rep. 532, affirming (1902) 80 Miss. 407, 57 L.R.A. 793, 31 So. 840, cited in note in 62 L.R.A. 67; this case was followed by *National Mut. Bldg. & L. Asso. v. Farnham* (1904) 194 U. S. 630, 48 L. ed. 1158, 24 Sup. Ct. Rep. 858, affirming (1902) 81 Miss. 364, 33 So. 2, also cited in note in 62 L.R.A. 67.

two rules, on the present hypothesis, being coincident. The cases of this class do not ordinarily repudiate those rules, but regard the situation in question as presenting an exception. They do not always make it clear whether the exception rests upon the ground that the other circumstances of the case overcame the presumption upon which the general rules rest, or indicated that the purpose of the parties was to evade the local usury law, or upon the ground that it would be contrary to the public policy of the forum to give effect to the contract. When these cases are examined with reference to the particular circumstances upon which the courts based their decision that the state of the borrower's residence was the real situs of the contract, or that the attempt to refer the contract to the law of the domicile of the association was for the purpose of evading the usury law of the former state, it will generally be found that, while each case depends to a certain extent upon its own circumstances, and while the location of the premises, the place where the proceeds of the loan were received and were to be used, and other circumstances are sometimes mentioned, yet the main distinguishing circumstance is the localization of the business of the foreign association within the state.³⁹ The fact that payments were permitted to be made to local officers or boards has sometimes been given considerable weight in favor of applying the local law.⁴⁰

It is difficult to institute a comparison in this regard between the cases that apply the law of the domicile of the association and those that apply the local

law, for the reason that the latter naturally place greater emphasis than do the former upon the facts respecting localization. Doubtless many of the cases applying the law of the domicile of the association have done so notwithstanding facts indicating a considerable localization of the business of the association.⁴¹

There are two opposing principles of public policy involved in the question of usury in the contracts of foreign building and loan associations. Upon the one hand, the courts which apply the law of the domicile of the association are doubtless influenced by the recognition of the desirability, even the necessity, in view of the mutual character of these associations, of subjecting their contracts to a common law. Upon the other hand, the courts that apply the local law are often clearly influenced by the view that it would be contrary to public policy to place foreign associations in a better position as regards usury than that occupied by domestic associations, and that the local policy concerning usury should be preserved notwithstanding the features of the contracts which point to the law of the domicile of the association as the proper law.⁴² Doubtless the relative importance of these general considerations has had as great, if not greater, effect on the actual results than the particular facts of the individual cases.

Law determining consequences of usury.

As already shown, the governing law of the question whether or not a contract or transaction is usurious is gen-

³⁹ See note in 62 L.R.A. 68.

⁴⁰ See note in 62 L.R.A. 69.

In the later case of *Galletley v. Strickland* (1906) 74 S. C. 394, 54 S. E. 576, the court said that the turning point was the relation of the local treasurer to the association; (a Virginia corporation) that if he was the agent of the borrower to transmit to the association, then payments to him could not operate to remove the inference that payments were to be made at the home office; but if he was the agent of the association, then it would seem that the parties contemplated a contract to the effect that payment was to be either in Virginia or at the local branch in South Carolina, in which case the contract was performable in South Carolina, and is distinguishable from the contract in the *Rice Case* because of the provision in that case that the local treasurer was the agent of the member. No reference was made in this case to the South Carolina statute referred to at page 65 of the note in 62 L.R.A. L.R.A.1916D.

⁴¹ See note in 62 L.R.A. 70.

⁴² Thus in *Floyd v. National Loan & Invest. Co.* (1901) 49 W. Va. 327, 54 L.R.A. 536, 87 Am. St. Rep. 805, 38 S. E. 653, the court declared that "a foreign corporation coming into this state to transact business must conform to the law of this state, if there be any, regulating similar corporations organized under the laws of this state; and its contract, although in terms solvable in the foreign state in which such corporation has its domicile, must be such a contract as a similar domestic corporation is authorized to make, or the courts of this state cannot enforce, or permit the enforcement of, its performance." The court further observed that the case involved the status in the state of a foreign building and loan association that has complied with the statutory conditions of doing business in the state and the nature of the contract which it can make under such conditions.

erally determined by reference to the actual or presumed intention of the parties. But when the contract is usurious by the law of any place to which it might reasonably be referred,—and, as already shown, this condition ordinarily, though not necessarily, obtains when it is usurious both by the *lex loci contractus* and the *lex loci solutionis*,—the weight of authority, although there is a conflict on the point, is to the effect that the consequences of the usury are to be determined by the *lex loci contractus* rather than by the *lex loci solutionis*.⁴³ The reason for the rule seems to be that, the parties, *ex hypothesi*, having made an invalid and illegal contract according to both the *lex loci contractus* and *lex loci solutionis*, there is

no question as to their intention, and that the penalty or consequence of their entering into an unlawful contract is necessarily to be determined by the law of the place where the contract is made.

Some cases have apparently taken the view that the consequences of exacting usury are to be determined by the law of the forum, irrespectively of the proper law of the contract.⁴⁴ The better view, however, seems to be that the consequences of the usury pertain to the substantive rights of the parties, and are not to be determined by the *lex fori* as such,⁴⁵ though it may be otherwise when a party asks for affirmative relief from a usurious contract made and payable in another state.⁴⁶

⁴³ See cases cited in note in 62 L.R.A. 60; and later case *Davis v. Tandy* (1904) 107 Mo. App. 437, 81 S. W. 457. But see contra cases cited at page 61, and also *Ringer v. Virgin Timber Co.* (1914) 213 Fed. 1001, and *Jewell v. Wright* (1864) 30 N. Y. 259, 86 Am. Dec. 372.

The hypothesis of the proposition as stated in the earlier note (62 L.R.A. 60), though correct as applied to the cases there cited, is somewhat too narrow and specific for the purposes of a general proposition. It should embrace the usurious character of the contract by any law to which it might be reasonably referred, since occasionally, as already shown, a contract, although usurious both by the *lex loci contractus* and *lex loci solutionis*, may be referred to the law of some other place by which it is not usurious.

⁴⁴ See note in 62 L.R.A. 77, especially *Meares v. Finlayson* (1899) 55 S. C. 105, 32 S. E. 986.

So, in *Granite City Nat. Bank v. Cross* (1911) 188 Ill. App. 242, while the court referred the question whether or not the note was usurious to the law of Missouri, where it was made and payable, yet, having found that it was usurious by the law of Missouri, it applied a statute of Illinois, which permits a recovery of only the principal where the debt is usurious, and the rule of that state to the effect that all payments made on interest shall be applied on the principal, upon the ground that the law of the forum governed as to the mode and extent of the remedy.

⁴⁵ See note in 62 L.R.A. 77.

So, in *Trower Bros. Co. v. Hamilton* (1904) 179 Mo. 205, 77 S. W. 1081, it being held that the note and chattel mortgage in question were Kansas contracts, the law of that state, which requires usurious payments to be applied as payments of the principal and interest, but does not invalidate the lien of the security, was applied rather than the law of Missouri, by which the lien would be invalidated.
L.R.A.1916D.

In *Bowman v. Miller*, 25 Gratt. (Va.) 331, 18 Am. Rep. 686, *supra*, note 35, the court arguendo takes the position that the law of the place which determines whether or not a contract is usurious is to be applied in determining the effect of usury, and that if the contract in suit was governed by the law of Maryland, and was usurious by the law of that state, it was governed as to the effect of usury by the law of Maryland, by which only the illegal interest is forfeited and recovery of the principal and legal interest is permitted, rather than by the law of Virginia, *lex fori*, by which the entire amount, principal and interest, would be forfeited.

It will be observed that though the cases cited *supra*, note 43, differ as to whether the *lex loci contractus* or *lex loci solutionis* governs as to the consequences of usury, they assume that the question relates to the substantive rights of the parties, and is not governed by the *lex fori* as such.

In *Davis v. Tandy*, for example, the court, upon the assumption that the contract was usurious both by the law of Texas, where it was made, and by the law of Missouri, where it was payable, expressly held that the law of Texas as *lex loci contractus* would prevail over the law of Missouri as *lex loci solutionis* as to the consequences of the usury, and necessarily assumed that the *lex loci contractus* would prevail over the *lex fori*, although the question was not discussed from that point of view.

While in *Miller v. Prudential Bkg. & T. Co.* (1907) 63 W. Va. 107, 59 S. E. 977, *supra*, note 35, the law of West Virginia, in which state the action was brought, was applied in determining the consequences of usury. This was because, in the view which the court took, that the law was the proper law of the contract, and not because it was the law of the forum.

⁴⁶ Note in 62 L.R.A. 78.

WEST VIRGINIA SUPREME COURT
OF APPEALS.C. D. DOTSON, Plff. in Err.,
v.EFFIE A. SKAGGS, Exrx., etc., of John S.
Summers, Deceased.

(— W. Va. —, 87 S. E. 460.)

Bills and notes — indorsement by maker — effect.

1. A negotiable note payable to the maker and another jointly, not partners, indorsed in blank by the maker, does not imply a promise by the maker to pay such joint payee.

For other cases, see Bills and Notes, III. b, 2, in Dig. 1-52 N. S.

Same — possession.

2. Possession of such note by either joint payee is presumptively possession by both. *For other cases, see Evidence, II. k, in Dig. 1-52 N. S.*

Same — action by joint payee.

3. A declaration on such note by one joint payee holding the note, indorsed in blank by the other, who is also the maker, is bad on demurrer.

For other cases, see Pleading, VII. c, in Dig. 1-52 N. S.

Appeal — judgment on matters not in issue — reversal.

4. A final judgment for defendant upon issues joined upon a bad declaration, to which a demurrer was interposed and overruled, will not be reversed for error in overruling the demurrer, when it plainly appears from the averments and proof that the declaration cannot be amended without introducing a new cause of action. In such case plaintiff is not prejudiced by an affirmance, because the judgment is no bar to a cause of action in no wise pleaded or otherwise in issue.

For other cases, see Appeal and Error, VII. m, 2, in Dig. 1-52 N. S.

(December 14, 1915.)

ERROR to the Circuit Court for Greenbrier County to review a judgment in defendant's favor in an action brought to recover the amount alleged to be due on a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. R. F. Dunlap and Thomas Coleman, for plaintiff in error:

The note, being made payable to Summers himself as one of the payees, was invalid as to him, but he completed the execution of the note as maker when he placed his name on the back thereof.

Headnotes by WILLIAMS, J.

Note. — As to effect of note made payable to order of maker and another, see annotation following this case, post, 763. L.R.A.1916D.

Pickering v. Cording, 92 Ind. 306, 47 Am. Rep. 147; Dan. Neg. Inst. § 130; Parsons, Bills & Notes, 17, 18; Dubois v. Mason, 127 Mass. 37, 34 Am. Rep. 336. See also Hall v. Burton, 29 IH. 321, 81 Am. Dec. 310; Smalley v. Wight, 44 Me. 442, 69 Am. Dec. 113; Scull v. Edwards, 18 Ark. 24, 56 Am. Dec. 294.

One may make a valid and binding signature to a note by the use of a name or term of description which he has adopted for that purpose.

4 Am. & Eng. Enc. Law, 2d ed. 109, and footnote, No. 9.

In the absence of any competent evidence disproving or tending to disprove the claim of the plaintiff, the plaintiff is entitled to a judgment non obstante veredicto.

Mason v. Harper's Ferry Bridge Co. 28 W. Va. 652.

A judgment non obstante may be entered not alone because of defects shown on the mandatory record, but also when there is no competent evidence in support of the verdict.

Murray v. Blackledge, 71 N. C. 492; Holland v. Kindregan, 155 Pa. 156, 25 Atl. 1077.

Mr. Thomas N. Read, for defendant in error:

John S. Summers could not be held as maker of the note under the circumstances, but only as indorser.

Bank of Huntington v. Hysell, 22 W. Va. 142; National Exch. Bank v. McElfish Clay Mfg. Co. 48 W. Va. 406, 37 S. E. 541.

Williams, J., delivered the opinion of the court:

C. D. Dotson sued Effie A. Skaggs, executrix of John S. Summers, deceased, in assumpsit upon a negotiable note. Defendant demurred to the declaration, and the demurrer was overruled, and she pleaded the general issue and non est factum, and tendered another special plea of limitations, which, on motion of the plaintiff, was rejected. The trial of the issues joined resulted in a verdict and judgment for defendant, and plaintiff is here on writ of error.

The note and indorsements thereon are as follows:

Parkersburg, W. Va., Sept. 25, 1903.
\$1,500.

Four months after date we promise to pay to the order of C. D. Dotson and John S. Summers fifteen hundred dollars. Value received, negotiable and payable at the Second National Bank of Parkersburg.

Steamer John S. Summers,
John S. Summers, Owner.

Indorsements on back of note: "C. D. Dotson. John S. Summers."

It is proven by competent witnesses that the signature, "Steamer John S. Summers, John S. Summers, Owner," and the name "John S. Summers" on the back of the note, are in the handwriting of John S. Summers, deceased. He must have intended, by the use of that signature, to become the maker of the note. 1 Dan. Neg. Inst. 6th ed. § 75. He made it payable to himself and C. D. Dotson jointly, and why he made it in that form does not appear. Although made before the new negotiable instruments act was passed, the note was negotiable under the old statute, being payable at a bank in this state. A negotiable note payable to the order of the maker is a nullity until indorsed by him and negotiated. 1 Dan. Neg. Inst. § 130. One cannot be both maker and payee at the same time. He cannot be both debtor and creditor by the same transaction, and, to give any effect to such a note, the maker must negotiate it. However, in this instance the maker is not sole payee, but joint payee with another; the two not being general partners. What, then, is the legal effect, as concerns the original parties, of the indorsement in blank by the joint payee, who is also maker? Does it pass legal title to the other? Certainly not, because, not being partners, it would require their joint indorsement to pass title.

"If several persons, not partners, are payees or indorsees of a bill or note, it should be indorsed by all of them, unless it be expressed to be payable to the order of either of them, or to the order of certain ones of them, in which cases their indorsement would suffice." 1 Dan. Neg. Inst. § 684.

"Where negotiable paper is payable to two or more persons, there is no presumption that one indorses and transfers it for the others, and if the title is to be transferred, it must be by the indorsement of all." *Kaufman v. State Sav. Bank*, 151 Mich. 65, 18 L.R.A.(N.S.) 630, 123 Am. St. Rep. 259, 114 N. W. 863.

"If a note be made payable to several persons, not partners, it can only be transferred by a joint indorsement of all of them; but, when it is made to two or more persons as partners, it may be transferred by the indorsement of any one of them." *Ryhiner v. Feickert*, 92 Ill. 305, 34 Am. Rep. 130.

"The joint payee of a promissory note cannot indorse it either in his own name alone, or in his own name and that of his copayee. They are not considered partners, either in a commercial or legal sense of the term." *Wood v. Wood*, 16 N. J. L. 428.

That no presumption of a partnership arises from the fact that they were joint payees was decided in the following cases also: *Sayre v. Frick*, 7 Watts & S. 383, L.R.A.1916D.

62. Am. Dec. 249, and *Haydon v. Nicoletti*, 18 Nev. 290, 3 Pac. 473. The last-cited case also holds that joint payees must all join in the transfer of title.

Possession of the note by Dotson does not import exclusive ownership by him. Being a joint note, possession by one is presumptively possession of both. *Wood v. Wood*, supra, and *Brown v. Dickenson*, 27 Gratt. 690. Both could not have physical possession at the same time; hence possession by either is presumptively a joint possession.

No doubt Dotson, by adding his indorsement in due course, could have passed title to a third party, but that he did not do. Summers by his indorsement did not become liable to Dotson. As between the two he was not technically an indorser, because one joint payee cannot pass title; it requires a joint indorsement to do so; and that was never done. True, Dotson's name also appears on the back of the note, but that gives it no additional effect, as he claims to be the sole owner of it. He avers in his declaration that he has been the owner of the note ever since it was indorsed by Summers; that by such indorsement he became liable to pay him the full amount of the note. The declaration avers no other promise, nor was there any attempt to prove any promise, other than what the note and indorsement import, and they do not imply a promise to Dotson, the joint payee. The legal import of Summers' indorsement was implied authority to Dotson to negotiate the note, which he did not do, but could have done by completing the indorsement and passing title to a third party. Whatever interest, if any, Dotson has in the note, is purely equitable, and no action at law can be maintained upon it. We are cited to no authorities for the proposition that one joint payee becomes liable to the other by his indorsement in blank, and we have been unable to find any in support thereof.

The supreme court of Virginia, in *Citizens' Nat. Bank v. Walton*, 96 Va. 435, 31 S. E. 890, held that an assignment of his interest in a negotiable note by one joint payee to the other, and a subsequent transfer of the note, in due course, by such other, to a third party, rendered the former liable to the holder as if he had indorsed it in blank. But the contrary effect was given to the same kind of an assignment in a similar case by the appellate court of Indiana. *Bond v. Holloway*, 18 Ind. App. 251, 47 N. E. 838. However, the point decided in those cases is not exactly the question presented in this case. Here the note was never negotiated, and is now in the hands of one of the original parties, who is suing to recover on the note from the estate of the other. Not exactly in point, but

apropos to the question here involved, see *Pitcher v. Barrows*, 17 Pick. 361, 28 Am. Dec. 306, and *Reid v. Windsor*, 111 Va. 825, 69 S. E. 1101.

There being no liability by one joint payee to the other because of his indorsement in blank of a negotiable note, it necessarily follows that Summers's estate is not liable to Dotson on the note sued on. The declaration, averring no other grounds of liability, fails to state a good cause of action, and the demurrer thereto should have been sustained. The overruling of the demurrer is cross assigned as error, and, in disposing of the case, this is the first assignment to be considered. This error would be sufficient cause for reversing the judgment and remanding the cause, with leave to plaintiff to amend his declaration, if we did not see that he cannot be prejudiced by an affirmance. It clearly appears from the averments of the declaration and the proof that plaintiff will be unable to amend without averring new matter which, in legal effect, would constitute a new cause

of action, and, as to such, the judgment in the present suit would not be a bar. *State v. McEldowney*, 54 W. Va. 695, 47 S. E. 650; *Doonan v. Glynn*, 28 W. Va. 715; and *Western Min. & Mfg. Co. v. Virginia Cannel Coal Co.* 10 W. Va. 250.

Defendant was entitled to a judgment upon the issue of law presented by the demurrer, but, having obtained a final judgment on the facts, it would be needless to reverse it in order that another might be rendered in her favor on the law. Wherefore we will affirm the judgment. In view of the court's rulings in the matter of instructions to the jury, which mainly accord with our view of the law as herein expressed, except defendant's peremptory instruction, which was improperly refused, we do not understand why the demurrer was not sustained.

Numerous other assignments and cross assignments are made, but, in view of the conclusion already reached, it is not necessary to consider them.

Annotation—Effect of note made payable to order of maker and another.

Authority on the effect of a note made payable to the order of the maker and another is limited. It is stated in *Jeneson v. Jeneson* (1872) 66 Ill. 259, that payment of a note given to the heirs of a certain person, of whom the maker is one, can only be enforced in a court of equity.

A statute the purpose of which is that a party who makes an instrument negotiable in form payable to his own order shall be estopped from asserting, as against one who brings an action upon the instrument, that he has not indorsed it, where he has received a valid consideration therefor, is stated in *Main v. Hilton* (1880) 54 Cal. 110, to apply as well where the instrument is payable to the maker and to a third person (in case it has been indorsed by such third person) "as where it is made payable to the maker alone." It appears from the statement of facts, however, that L.R.A.1916D.

the note sued upon in this case was signed by one of the payees and others. It was indorsed by the other payee, and delivered for a valuable consideration.

The note involved in *Pease v. Dwight* (1848) 6 How. (U. S.) 190, 12 L. ed. 399, was made payable to a firm, of which the maker was a member, and another, but it was shown that the latter had no interest in the note, and the only question in the case was whether one who had taken the note upon the indorsement of the firm alone could maintain an action thereon. As to this question, that is, indorsement by one of two joint payees or indorsees of the bill or note, see note to *Kaufman v. State Sav. Bank*, 18 L.R.A.(N.S.) 630.

As to a negotiable instrument naming in the alternative two or more payees, see note to *Voris v. Schoonover*, 50 L.R.A.(N.S.) 1097. W. A. E.

WASHINGTON SUPREME COURT.
(Department No. 2.)

CHARLES SALLY, Appt.,

v.

WHITNEY COMPANY, Resp't.

(— Wash. —, 154 Pac. 1089.)

Adjoining owners — filling space between buildings — injury by water — liability.

One who, in constructing a building close to a brick wall on the adjoining lot, chokes the intervening space with debris so that, in a normal rainfall, it holds the water against the wall until it soaks through and injures wainscoting on the other side, is liable for such injury.

For other cases, see *Adjoining Owners*, in Dig. 1-52 N. S.

(February 17, 1916.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to recover damages for injury to plaintiff's building by water, alleged to have been caused by defendant's negligence. Reversed.

From the findings in this case it appeared that plaintiff's wall was not exactly perpendicular, and did not extend quite to the edge of the lot, so that the space between the two walls varied from an inch at the bottom to about 2 inches at the top.

Further facts appear in the opinion.

Messrs. Vanderveer & Cummings, for appellant:

Defendant's acts were the proximate cause of plaintiff's damage.

29 Cyc. 490; *Rosenbaum v. Shoffner*, 98 Tenn. 624, 40 S. W. 1086; *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64, 12 Am. Neg. Rep. 366; *Akin v. Bradley Engineering & Machinery Co.* 48 Wash. 97, 14 L.R.A. (N.S.) 586, 92 Pac. 903; *Detzur v. B. Stroh Brewing Co.* 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948, 5 Am. Neg. Rep. 371; *Hollidge v. Duncan*, 199 Mass. 121, 17 L.R.A. (N.S.) 982, 85 N. E. 186; *Texas & P. R. Co. v. Carlin*, 189 U. S. 354, 47 L. ed. 849, 23 Sup. Ct. Rep. 585.

The damage suffered by plaintiff was such as should have been contemplated by a reasonably careful and prudent man.

Bohrer v. Dienhart Harness Co. — Ind. App. —, 45 N. E. 669; *Detzur v. B. Stroh Brewing Co.* 119 Mich. 282, 44 L.R.A. 500, 77 N. W. 948, 5 Am. Neg. Rep. 371; *Buckner v. Stock Yards Horse & Mule Co.* 221

Note. — As to liability for damages caused by filling space between building and wall of adjoining building, see annotation following this case, post, 765. L.R.A.1916D.

Mo. 700, 120 S. W. 766; *Williams v. San Francisco & N. W. R. Co.* 6 Cal. App. 715, 93 Pac. 123; *Beaning v. South Bend Electric Co.* 45 Ind. App. 261, 90 N. E. 786.

Mr. George R. Biddle, for respondent:

In the absence of the evidence upon which the court below based its findings, the appellate court will presume that the evidence was sufficient to support the decree.

Nelson v. McPhee, 59 Wash. 103, 109 Pac. 305.

Bausman, J., delivered the opinion of the court:

Plaintiff sues in damages the builder of a structure adjoining his own, who allowed mortar and other debris to choke a long and very narrow space lying between the two, and belonging to the land on which plaintiff's building rested. In the following season the ordinary rainfall saturated this debris until the absorbed or collected water oozed through plaintiff's common brick wall, 12 inches in thickness, and injured the wainscoting inside.

Liability in tort, exceeding that of contract, cannot safely be defined. Each case must be decided upon its own facts. On the one hand, the law does not wish to punish too severely the careless man; on the other, it is he that is at fault in some degree when the damaged party may not be at fault at all. The former must not, accordingly, expect easy limitations. And the law holds him liable in two classes of consequences from his fault; one, where purely physical or natural causes set in motion go beyond what ordinarily follows; and, second, where an intervening cause appears in an unexpected meddler who makes things worse.

In *Eskildsen v. Seattle*, 29 Wash. 583, 589, 70 Pac. 64, 12 Am. Neg. Rep. 366, we quoted with approval the Lord Chief Justice's statement of the law in *Byrne v. Wilson*, 15 Ir. C. L. Rep. 332, that the tortfeasor's liability is "not only for the immediate consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence, or of negligence in breach of a duty." This he held applicable where a defendant stage driver's negligence tipped the coach into a canal lock, and yet no injury would have come to plaintiff save for the blunder of a lock keeper who turned in the water. In *Akin v. Bradley Engineering & Machinery Co.* 48 Wash. 97, 14 L.R.A. (N.S.) 586, 92 Pac. 903, we applied the same doctrine with more rigor to him who left dynamite in a field where a child chanced to come upon and blast it. There we expressed the view that the child's exploding a piece of this dynamite by means of a dry battery which

she obtained was not too remote a consequence to be answered for under the rule, though we then put the rule in these words: "Where a negligent act or omission sets in operation a train of occurrences resulting naturally in the injury complained of, such negligent act or omission is deemed to have been the proximate cause, or to have contributed thereto."

In the *Eskildsen Case*, Seattle was held liable for injuries to a boy who, when his foot was caught in a defective street, was run over by a negligently operated locomotive of a railway company, and this decision was approved as upholding, proximate cause in another case (*Thoresen v. St. Paul & T. Lumber Co.* 73 Wash. 99, 107, 131 Pac. 645, 132 Pac. 860), where, under different facts, a third person's negligence contributed to the ultimate mischief.

Here the result came of a succession of physical causes naturally convening. Sooner or later this choking must have some effect on the wall; if not in one season, then in two or three or more. This is not, let it be remembered, a case of unprecedented rains; for the lower court expressly found the rainfall to have been normal. Now, the builder is presumed to have known that this debris would absorb and obstruct rain,

that in this climate rain in considerable quantities must fall, and that rain stopped and collected against a wall must tend to soak into or through it. That it would probably soak through a 3 inch wall the builder would have to admit, and the most he can say is that he did not believe that it would ever penetrate a 12 inch wall. In short, defendant but debates degree. He has set in conjunction two natural forces, and merely argues that he did not think they would go so far. He must respond to the consequence. It was he who was in fault, not the plaintiff; and he must make at his own peril estimates as to the effect of natural forces set in motion. He is in a far poorer position to complain than if he were held liable for the capricious or unexpected act of a third person.

Allowing to the findings of the lower court all proper presumptions of fact, we are nevertheless of opinion that it was in error.

The judgment is reversed, with instructions to enter one in favor of plaintiff for his ascertained damages, \$1,011.85.

Morris, Ch. J., and Holcomb, Main, and Parker, JJ., concur.

Annotation—Liability for damages caused by filling space between building and wall of adjoining building.

As appears from its title, this note lies in narrow compass, and no case other than *SALLY v. WHITNEY Co.* ante, 764, has been found exactly within its scope.

Probably the reason why in that case no stress is laid on the fact that the space where the debris was thrown was beyond the lot on which the defendant had built, was that the narrowness of this space, from 1 to 2 inches, makes it fairly clear that the fall of debris therein was largely, if not entirely, accidental, as distinguished from the case of purposely throwing debris upon a neighbor's land.

In *Abrey v. Detroit* (1901) 127 Mich. 374, 86 N. W. 785, the plaintiff's building was near a park bridge "approach," but on a much lower grade, with a narrow strip between, which was not a public highway; the plaintiff had no right to use this strip for a passageway, but he obtained a license to use it, and built a sidewalk at or near the grade of the roadway; the city later filled in this strip between the roadway and the plaintiff's building with earth, without any protection whatever to his building, breaking and injuring it and in part L.R.A.1916D.

filling his basement. The court, in sustaining a verdict for the plaintiff against the city, said: "In filling this space the defendant was bound to exercise the same care as though the land were owned by a private individual. Plaintiff was not under obligation to build a wall to protect against the dirt thrown in. When one places a bank on his own land, above his neighbor's, he is bound to erect a retaining wall or structure sufficient to keep the dirt from encroaching upon his neighbor's land. The case comes within the maxim, 'Sic utere tuo ut alienum non lædas.'"

In this connection it is interesting to refer to cases of throwing or placing earth or sand against a neighbor's wall.

In *Davis v. Evans* (1891) 37 N. Y. S. R. 714, 13 N. Y. Supp. 437, it was held that a landowner who piled a quantity of sand against the brick wall of his neighbor's building, breaking it in, must respond in damages. The court said: "The use by the defendant of his premises in a manner that injured the property of the plaintiff was wrongful, and rendered the defendant liable for the damage which resulted from such use."

The same was held in *Barnes v. Mas-*

terson (1899) 38 App. Div. 612, 56 N. Y. Supp. 939, 6 Am. Neg. Rep. 143, where the sand broke down the plaintiff's house and destroyed the personal property he had therein. The court said: "There can be no doubt that there was an invasion of the plaintiff's property right for which the persons responsible for the injury were liable to him in damages. The wall was wholly on the plaintiff's land, and the occupant of the adjacent lot had no right whatever to make use of it as a retaining wall for the support of material stored on that lot, any more than he would have had the right to cut openings into it and place beams therein for the purpose of supporting a building or other structure. Sand or gravel will not stand vertically without support, and, therefore, wherever it is deposited in such a way that the sides are vertical, it exerts a lateral thrust on the supports. There was no right whatever in the party storing the sand to impose this pressure or thrust on the plaintiff's wall. The act itself was wrongful, and either a trespass or a nuisance. This doctrine should not be carried to an extreme, and we do not say that where a man leans his walking stick or a stepladder against his neighbor's wall, but on his own land, this would give a cause of action. But wherever the placing of articles or material against the neighboring wall creates pressure sufficient in any way to weaken or injure it, then the property rights of the owner of the wall are violated. (Davis v. Evans (N. Y.) supra.) The action is brought not for a trespass or a nuisance, but for negligence. We do not see, however, that the form of the action has any very material bearing on the case, for the deposit of sand against the plaintiff's wall so as to injure or destroy it might be charged as negligence as well as a trespass, and the jury have found it to be such by their verdict."

In *Hutchinson v. Schimmelfeder* (1861) 40 Pa. 396, 80 Am. Dec. 582, the court affirmed a judgment for the plaintiff where the trial court had charged the jury, *inter alia*, as follows: "If two persons own adjoining lots which lie below the grade of the street on which they front, and either wishes to grade his lot up to the street, he must build a wall on his own ground, or in some other way keep the dirt within his own line. He cannot so fill up his own lot as to let the earth pass over his line on the lot of his neighbor; and if the latter has built a wall and erected a house within his own line, the former is not at

liberty either to build to his neighbor's wall, or throw earth against it so as to spring it out of line, or do it any other injury; and if he does so, he is responsible in damages. If the plaintiff's house was built of improper materials, and the injury to the walls resulted from that cause, the plaintiff cannot recover for that injury. In other words, if the injury to the walls was not caused by the defendant heaping up the earth against them, he cannot recover for that injury, but still the plaintiff would be entitled to recover nominal damages, at least, if the defendant covered up for several feet the small strip of ground between his line and the wall of his house."

So, if a landowner whose lot is below street grade raises his lot to the grade, he may not call on his neighbor to share in the expense of supporting the embankment. *Fisher v. Green* (1852) 1 Phila. (Pa.) 382.

And if an owner on a higher level makes such a fill on his lot that his lower neighbor has to strengthen the wall of his house to stand the extra strain, this is actionable, as it also is to cause dirt to fall on the lower neighbor's lot. *McKnight v. Denny* (1901) 198 Pa. 323, 47 Atl. 970.

So, in *Knight v. Dunbar* (1891) 83 Me. 359, 22 Atl. 216, the plaintiff recovered (in an action on the case) where the defendant had deposited earth on his land which pressed the plaintiff's fence over on his land, carrying some of the newly deposited earth with it.

So, in a similar situation, the plaintiff was held entitled to an injunction. *Berry v. Fleming* (1903) 87 App. Div. 53, 83 N. Y. Supp. 1066.

But where the plaintiff's wall was 2 and $\frac{1}{2}$ feet beyond his line on the defendant's land, the plaintiff could not recover for the defendant's heaping of earth against the wall, breaking it down. *Harvey v. Philadelphia* (1856) 2 Phila. (Pa.) 165.

For liability for injuries from matter precipitated upon adjoining property, see the note to *Bishop v. Readsboro Chair Mfg. Co.* 36 L.R.A.(N.S.) 1171.

For right to discharge water, snow, or ice from roof upon premises of adjoining owner, see the note to *Shea v. Gavitt*, L.R.A.1916A, 693.

Other questions of collateral interest are treated in notes cited in Index to L.R.A. Notes, under the title, "Adjoining Owner."

For extent of trespasser's liability for consequential injuries resulting from the trespass, see the note to *Wyant v. Crouse*, 53 L.R.A. 626. B. B. B.

IOWA SUPREME COURT.

STATE OF IOWA
v.

JAMES GARDNER, Appt.

(— Iowa, —, 156 N. W. 747.)

Prostitution — conviction of male.

1. A male person cannot be punished under a statute making it a crime for any person to resort to a house of ill fame for the purpose of prostitution.

For other cases, see Prostitution, in Dig. 1-52 N. S.

Evidence — cross-examination — reason for change of opinion.

2. A witness who had testified that he gave testimony in two other cases and in one contradicted that given in the other may, on cross-examination be asked why he changed his opinion.

For other cases, see Witnesses, II. b, in Dig. 1-52 N. S.

Criminal law — insufficiency of indictment — instruction to acquit.

3. Acquittal cannot be directed for insufficiency of the indictment if the statute provides that such question may be raised by demurrer or by motion in arrest of judgment.

For other cases, see Trial, II. d, 3, in Dig. 1-52 N. S.

Trial — motion in arrest of judgment — questioning sufficiency of indictment.

4. A motion in arrest of judgment for failure to give an instruction to acquit because of insufficiency of indictment is not sufficient to raise the question of the sufficiency of the indictment.

For other cases, see Criminal Law, II. f, in Dig. 1-52 N. S.

Lewdness — what constitutes guilt.

5. One is guilty of resorting to a house of ill fame for the purpose of lewdness who visits such place to commit an act of lewdness as the term is understood in the accepted usage of language.

For other cases, see Disorderly Houses, in Dig. 1-52 N. S.

Trial — giving requested instructions.

6. An instruction that one cannot be convicted of resorting to a house for the purpose of lewdness unless the jury was convinced that such was his purpose satisfies a request that he cannot be convicted if he resorted to the place for a mere friendly visit.

For other cases, see Trial, III. b, in Dig. 1-52 N. S.

Lewdness — single offense — liability.

7. A single offense is sufficient to sustain

a conviction of resorting to a house of ill fame for the purpose of lewdness.

For other cases, see Disorderly Houses, in Dig. 1-52 N. S.

Trial — instructions — irrelevant.

8. An instruction not relevant to the evidence in the case is properly refused.

For other cases, see Trial, III. b, in Dig. 1-52 N. S.

Definition — house of ill fame.

9. A house of ill fame is one visited by persons of both sexes for the purpose of having unlawful indiscriminate sexual intercourse.

For other cases, see Disorderly Houses, in Dig. 1-52 N. S.

Appeal — refusal of requested instruction.

10. There is no error in refusing a requested instruction fully covered by the court in its own instructions.

For other cases, see Trial, III. b, in Dig. 1-52 N. S.

(March 14, 1916.)

APPEAL by defendant from a judgment of the District Court for Plymouth County convicting him of resorting to a house of ill fame, for the purpose of prostitution and lewdness. Reversed.

Statement by Salinger, J.:

Defendant appeals from a conviction on the charge that he resorted to a house of ill fame for the purpose of prostitution and lewdness.

Mr. T. M. Zink, for appellant:

Before defendant can be convicted, it must be shown that Lillie Lawrence and Richard Lawrence kept a house of ill fame within the definition of such a house as expressed by the decisions of the courts.

State v. Chauvet, 111 Iowa, 689, 51 L.R.A. 630, 82 Am. St. Rep. 539, 83 N. W. 717; State v. Mullen, 35 Iowa, 207; State v. Render, 163 Iowa, 339, 144 N. W. 298; State v. Lee, 80 Iowa, 81, 20 Am. St. Rep. 401, 45 N. W. 545; 5 Cyc. 676; 9 Am. & Eng. Enc. Law, 2d ed. 518; Wright v. Paige, 36 Barb. 438; State v. Smith, 29 Minn. 193, 12 N. W. 524; State v. Irvin, 117 Iowa, 470, 91 N. W. 760; State v. McDavitt, 140 Iowa, 344, 132 Am. St. Rep. 275, 118 N. W. 370; Boswell v. State, 48 Tex. Crim. Rep. 47, 122 Am. St. Rep. 731, 85 S. W. 1076; People v. Salmon, 148 Cal. 303, 2 L.R.A.(N.S.) 1186, 113 Am. St. Rep. 268, 83 Pac. 42; Beard v. State, 71 Md. 275, 4 L.R.A. 675, 17 Am. St. Rep. 540, 17 Atl. 1044, 8 Am. Crim. Rep. 173; State v. Calley, 104 N. C. 858, 17 Am. St. Rep. 704, 10 S. E. 455; 9 Am. & Eng. Enc. Law, 2d ed. 520; State v. Lee, 80 Iowa, 83, 20 Am. St. Rep. 401, 45 N. W. 545; State v. Gill, 150

Note.—As to whether a male may be convicted of resorting to house of ill fame for the purpose of lewdness or prostitution, see State v. Rayburn, L.R.A.1915F, 640, and footnote thereto.
L.R.A.1916D.

Iowa, 211, 129 N. W. 821; State ex rel. Slater v. McDonald, 121 Minn. 207, 141 N. W. 112.

Defendant was not guilty of committing lewdness within the meaning of the statute.

State v. Marvin, 12 Iowa, 505; State v. Shaw, 125 Iowa, 422, 101 N. W. 109; State v. Kirkpatrick, 63 Iowa, 557, 19 N. W. 660; State v. Ruhl, 8 Iowa, 447; State v. Irvin, 117 Iowa, 469, 91 N. W. 760; State v. Mitchell, 149 Iowa, 365, 128 N. W. 378; State v. McDavitt, 140 Iowa, 342, 132 Am. St. Rep. 275, 118 N. W. 370; Jackson v. State, 116 Ind. 464, 19 N. E. 330; State v. Williams, 94 Minn. 319, 102 N. W. 722; State v. Chandler, 132 Mo. 155, 53 Am. St. Rep. 483, 33 S. W. 797; Bird v. State, 27 Tex. App. 635, 11 Am. St. Rep. 214, 11 S. W. 641; Cannon v. United States, 116 U. S. 55, 29 L. ed. 561, 6 Sup. Ct. Rep. 278; Sweeney v. State, 59 Neb. 269, 80 N. W. 816, 15 Am. Crim. Rep. 28; Bodiford v. State, 86 Ala. 67, 11 Am. St. Rep. 20, 5 So. 559; Carotti v. State, 42 Miss. 334, 97 Am. Dec. 465; State v. Poyner, 57 Wash. 489, 107 Pac. 181; Wright v. State, 108 Ala. 60, 18 So. 941; Richey v. State, 19 Ann. Cas. 655, note; People v. Salmon, 148 Cal. 303, 2 L.R.A.(N.S.) 1187, 113 Am. St. Rep. 268, 83 Pac. 42.

Evidence of reputation of a house being one of ill fame is not sufficient to sustain a conviction, there must be other evidence of the immoral purposes for which the house is kept and used.

Botts v. United States, 83 C. C. A. 646, 155 Fed. 50, 12 Ann. Cas. 272; State v. Steen, 125 Iowa, 312, 101 N. W. 96; State v. Burns, 145 Iowa, 590, 124 N. W. 600; State v. Lee, 80 Iowa, 75, 20 Am. St. Rep. 401, 45 N. W. 545; State v. Hendricks, 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93.

Defendant had the right to know the reason of the witness Laura Heigner for the changes and contradictory statements she made in her testimony, and the court erred in sustaining the objections of the state to the questions asked her by defendant.

People v. Payne, 131 Mich. 474, 91 N. W. 740; Dikeman v. Arnold, 78 Mich. 455, 44 N. W. 410; 40 Cyc. 2492, 2493; State v. Caron, 118 La. 349, 42 So. 960; Bennett v. State, 95 Ark. 100, 128 S. W. 853; Chicago R. Co. v. Handy, 208 Ill. 81, 69 N. E. 917; Alward v. Oakes, 63 Minn. 190, 65 N. W. 271.

Messrs. George Cosson, Attorney General, and Wiley S. Rankin, for the State:

A conviction may be had under an indictment charging with having been found in a certain house, leading a life of prostitution and lewdness, without proof of actual sexual intercourse.
L.R.A.1916D.

State v. Shaw, 125 Iowa, 422, 101 N. W. 109.

The crime of lewdness may be committed in different ways and forms. Prostitution is the common lewdness of a woman for gain; lewdness is irregular indulgence of the animal desires.

State v. Toombs, 79 Iowa, 741, 45 N. W. 300.

In the prosecution for keeping a bawdy-house, evidence of the general reputation of its inmates and frequenters is admissible.

State v. Lyon, 39 Iowa, 379.

Where a woman is in possession and control of a dwelling house, she being in control of the house, and occupying it for the purpose of prostitution and lewdness, this would make it a place kept for that purpose, within the meaning of the law. Proof of a single act of prostitution would be sufficient to justify a conviction.

State v. Russell, 95 Iowa, 408, 64 N. W. 281.

The statute does not require that the place be used habitually or for any considerable length of time for the prohibited purposes in order to constitute the offense in question.

State v. Lee, 80 Iowa, 88, 20 Am. St. Rep. 401, 45 N. W. 545.

The reputation of a house may be shown to enable the jury to determine whether it is a house of ill fame or not.

State v. Moore, 78 Iowa, 494, 43 N. W. 273.

Where evidence given by witnesses more or less familiar with the reputation of the house and the practices of persons stopping at it is submitted to the jury, and, while there may be a difference of opinion as to the weight and preponderance of the evidence, a verdict will not be interfered with to the extent of granting a new trial.

Ibid.

In prosecutions under § 4943, for resorting to, occupying, and inhabiting a house of ill fame, it is permissible to show the character and reputation of the house as well as testimony as to character and reputation of the inmates of the house.

State v. Burns, 145 Iowa, 588, 124 N. W. 600; State v. Beebe, 115 Iowa, 128, 88 N. W. 358; State v. Porter, 130 Iowa, 690, 107 N. W. 923.

If the character of the house is established as a house of ill fame, the intent and purpose of those resorting thereto is a matter of inference.

State v. Gill, 150 Iowa, 210, 129 N. W. 821.

It is not necessary that anyone see the indiscreet exposure or act, to convict, if it be in fact shown, or act committed. An

exposure to one person is sufficient to bring the offense within the statute.

State v. Banguess, 106 Iowa, 107, 78 N. W. 508; *Com. v. Wardell*, 128 Mass. 52, 35 Am. Rep. 357; *State v. Juneau*, 88 Wis. 180, 24 L.R.A. 857, 43 Am. St. Rep. 877, 59 N. W. 580; 25 Cyc. 212, note.

Prior and subsequent acts of intimacy may be shown.

Crane v. People, 168 Ill. 395, 48 N. E. 54; 25 Cyc. 216; *Hill v. State*, 137 Ala. 66, 34 So. 406; *Wright v. State*, 108 Ala. 60, 18 So. 941.

The fact that prostitutes were kept at a house is proof of knowledge on the part of the keeper that the house was, in fact, a house of ill fame. Knowledge may be established by indirect evidence, and positive proof of knowledge is not required.

State v. Schaffer, 74 Iowa, 705, 39 N. W. 89; *State v. Steen*, 125 Iowa, 307, 101 N. W. 96; *State v. Wells*, 46 Iowa, 662; *Johnson v. State*, 32 Tex. Crim. Rep. 504, 24 S. W. 411; *Forbes v. State*, 35 Tex. Crim. Rep. 24, 29 S. W. 784; *Graeter v. State*, 105 Ind. 271, 4 N. E. 461.

To establish the fact that a house is a house of ill fame, it is sufficient to prove that for a limited time prostitution or lewdness has been carried on therein.

State v. Lee, 80 Iowa, 75, 20 Am. St. Rep. 401, 45 N. W. 545; *State v. Young*, 96 Iowa, 262, 59 Am. St. Rep. 371, 65 N. W. 160; *State v. Gill*, 150 Iowa, 210, 129 N. W. 821; *People v. Mallette*, 79 Mich. 600, 44 N. W. 962.

Salinger, J., delivered the opinion of the court:

1. The statute (Code, § 4943) makes it a crime to resort to a house of ill fame "for the purpose of prostitution." We have to determine whether the trial court erred in holding that both men and women are within this statute. While in a broad sense "prostitution" means "the setting one's self to sale or of devoting to infamous purposes what is in one's power," it will not be questioned that the word is in this statute used in a narrower sense, and is the equivalent of sexual prostitution. Such prostitution is the conduct of a prostitute as such.

An allegation in an indictment that a female was enticed away with the intent of rendering her a prostitute is equivalent to an allegation that it was done for the purpose of prostitution. *Nichols v. State*, 127 Ind. 406, 26 N. E. 839.

A "prostitute" is "a woman who practices illicit intercourse with men for hire" (*Worcester's Dict.*; *Zimmerman v. McMakin*, 22 S. C. 372, 53 Am. Rep. 722; *Sheehy v. Cokley*, 43 Iowa, 185, 22 Am. Rep. 236); one L.R.A.1916D

"who prostitutes her body for hire" (*Peterson v. Murray*, 13 Ind. App. at page 423, 41 N. E. 837); a "female" given to indiscriminate lewdness or promiscuous sexual intercourse for gain (*Carpenter v. People*, 8 Barb. 603, 611; *State v. Stoyell*, 54 Me. 24, 89 Am. Dec. 716; *Davis v. Sladden*, 17 Or. 259, 21 Pac. 140, 142). "Prostitution" in its more restricted sense is the practice of a female offering her body to an indiscriminate intercourse with men. *State v. Stoyell*, 54 Me. 24, 89 Am. Dec. 716; *Haygood v. State*, 98 Ala. 61, 13 So. 325; *State v. Goodwin*, 33 Kan. 538, 6 Pac. 899, 901, 5 Am. Crim. Rep. 1; *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 372; *Osborn v. State*, 52 Ind. 526, 528, 1 Am. Crim. Rep. 25; *Miller v. State*, 121 Ind. 294, 23 N. E. 94, 95; *State v. Brow*, 64 N. H. 577, 15 Atl. 216, 217; *Carpenter v. People*, 8 Barb. 603, 610; *State v. Toombs*, 79 Iowa, 741, 45 N. W. 300; *State v. Ruhl*, 8 Iowa, 447, 453; *Com. v. Cook*, 12 Met. 93, 97; *People v. Demouset*, 71 Cal. 611, 12 Pac. 788, 789, 7 Am. Crim. Rep. 1. It is the act or practice of prostituting or offering the body to an indiscriminate intercourse with men; common lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire,—and it is said same is considered a heinous offense "for which the woman may be punished." 2 *Bouvier's Dict. Rawle's Rev.*, p. 785. And see *State v. Gibson*, 111 Mo. 92, 19 S. W. 981; *Bunfill v. People*, 154 Ill. 640, 39 N. E. 566; and *Century Dictionary*. While cases hold there may be prostitution though there be no desire for gain (*State v. Clark*, 78 Iowa, 492, 43 N. W. 273; *State v. Rice*, 56 Iowa, 431, 9 N. W. 343; *State v. Thuna*, 59 Wash. 689, 140 Am. St. Rep. 902, 109 Pac. 331, 111 Pac. 768, all that speak on the point agree that it is the practice of a woman only.

It follows that both "prostitute" and "prostitution" have such a fixed meaning in the approved usage of the language, and such peculiar and appropriate meaning in law, as that, if we give effect to such meaning, the statute in question does not contemplate that a man can be a prostitute or can practice prostitution, and does not intend to punish him for what he cannot do; for one cannot purpose to do what he knows is impossible. If a man cannot commit prostitution, he cannot go to a place for the purpose of prostitution. Having acquired such meaning, and we having ascertained "what is the appropriate and well-authorized meaning of the term," we should hold that "in this sense the legislature is supposed to have used it." *State v. Ruhl*, 8 Iowa, 453. The terms "prostitution" and "lewdness" as used in the statute are by

a general rule of construction to be construed according to their most usual and best-understood signification. *Bunfill v. People*, 154 Ill. 640, 39 N. E. 566; *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 376. And see also *Com. v. Cook*, 12 Met. 97.

2. Since the statute does not, in terms, include men, we need not and do not pass upon whether the legislature could effectively declare that men can be guilty of "prostitution." We may for the purposes of the argument assume such power exists. Thus we reach the question whether, though it was well understood that prostitution was the act of a woman, the legislature intended § 4943 to include men. The trial court charged such was the intention. It said that, though "when we use the word 'prostitute,' we mean a woman, and [though] prostitution is legally defined as the act or practice of offering the body to indiscriminate intercourse with men," yet this section of the Code does "include men as well as women," because it uses the words, "prostitution or lewdness." The position of appellee is that the statute includes men because it makes it a crime "for any person" to resort to a house of ill fame for the purpose of prostitution. The view expressed by the trial judge simply begs the question. It is a declaration that, though the legislature, which imposes a punishment for resorting for the purpose of prostitution, knew prostitution is the conduct of none but women, and though the punishment provided can have effect as to women, the very use of the word "prostitution" proves the punishment was intended to apply to men.

As to the position of appellee, while it is true that ordinarily the words, "any person," include both men and women, this is not always so. As in all other cases, the rule of reason controls as to the interpretation of these words.

Section 4756 punishes rape upon a female committed by "any person." Literally construed, these words would authorize a woman, or the husband of a woman assaulted, to be punished for rape, as principals. And so of § 4758, which prohibits "any person" to have carnal knowledge of "any female" imbecile or rendered insensible; and since a four-year-old child is a "person" (*Sutton v. State*, 122 Ga. 158, 50 S. E. 61), such child could, on the theory of appellee, be guilty of rape, or of carnal knowledge of an imbecile, or of a woman by it rendered insensible. No court would so interpret "any person." If it were claimed that a statute like § 4762, which makes it a crime for "any person" to seduce or debauch a female, contemplated a seduction and debauchment by a female, it would be

held that "any person" should not be so construed, because it must be assumed the legislature believed the woman could not commit the offense. If the claim were that the words included all who entered a dwelling in the nighttime by means of any breaking, it would be held they did not include the owner of such dwelling, not because the owner could not thus enter, but because the legislature could not in reason have intended to include him. But, whether the words are held not to include some person because the legislature knew he could not commit what is forbidden, or because it is clear for some other reason that it could not have been intended to include him in the general words, the rule of construction to be deduced from either or both cases is to exclude him, if it be clear for any reason that it was not intended to include him. We think the point within this rule. The legislature knew "prostitution" was generally understood to be something that men could not, and women could, be guilty of, and that this interpretation was settled in law. It used the word in the settled sense, and "any person" to avoid repetition. The statute forbids: (1) Resort to a house of ill fame for the purpose of prostitution; (2) for the purpose of lewdness; (3) using such house for prostitution; (4) occupying such house for such purpose; (5) inhabiting such house for such purpose; (6) using such house for the purpose of lewdness; (7) occupying same for such purpose; (8) inhabiting same for such purpose. The legislature knew it was matter of common knowledge that some of these can be committed by both men and women, and some by women only. It therefore refrained from labeling four of these as applying to women only. In the light of this, it is plain that "any person" was intended to mean "any person who can be guilty of any of these;" that the purpose was to save words regarded as needless, rather than to enlarge a class of offenders. In effect, the statute is within the reasoning of cases like *State v. Cooster*, 10 Iowa, 453, and *State v. Brandt*, 41 Iowa, 593. It is its purpose to enable the state to indict in the alternative, to charge an offense that can be committed by men and women, or by men or women, or by women alone,—not to permit men to be punished for what all understood they could not do. It is against reason, so long as any other explanation can be found, to suppose that a legislature which knew that all persons believed prostitution could not be practiced by a man intended to declare that it could, and omitted to put so radical an innovation into unmistakable language. No statute that imposes a five-year imprisonment in the penitentiary

should be construed to work such a change unless its words compel such interpretation.

When § 943 was enacted it was settled that men could not be guilty of prostitution. Hence they did not become punishable for prostitution unless this was effected by enacting that statute. We said in *Caster v. McClellan*, 132 Iowa, at page 505, 109 N. W. 1021: "The general rule is, however, that words must be construed according to their natural meaning. And in the case of a statute which imposes a liability which, but therefor, would have no existence, a strict construction must be given not only to the particular words employed, but to the act generally."

Where a statute provided that all persons should be denied the right to form or be in any manner interested, either directly or indirectly, in any trust as defined by the act, it was held, against the argument that the law was unconstitutional because it prohibited two or more farmers from agreeing not to sell their wheat to a neighboring mill for less than so much per bushel, that the general language of statutes will be limited to such persons and subjects as it is reasonable to presume the legislature intended it should apply. *State v. Smiley*, 65 Kan. 240, 67 L.R.A. 903, 69 Pac. 199. In *Rohlf v. Kasemeier*, 140 Iowa, 182, 23 L.R.A. (N.S.) 1284, 132 Am. St. Rep. 261, 118 N. W. 276, 17 Ann. Cas. 750, a case cited by the appellee, there was under consideration the construction of a statute making it unlawful for any persons to combine to fix the price of any article of merchandise or commodity. We held that the practice of medicine and surgery was labor, and did not come within the purview of the act, and we said: "Moreover, it is well settled that in construing any statute all the language shall be considered, and such interpretation placed upon any word appearing therein as was within the manifest intent of the body which enacted the law. Much, of necessity, depends upon the context and upon the usual and ordinary significance of the language used."

We believe both reason and authority justify us in refusing to give said general words the effect the state claims for them. The rule ejusdem generis is an avoidance of giving to general words a strict construction inconsistent with the general scope of what they are found in. It is that, where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only to persons or things of the same general nature or class as those enumerated. 36 Cyc. p. 1119; *State v. Campbell*, 76 Iowa, 122, 40 N. W. 100; *State v. Eno*, 131 Iowa, 619, 109 N. W. 119, 9 Ann. Cas. L.R.A. 916D.

856; *Brown v. J. H. Bell Co.* 146 Iowa, 89, 27 L.R.A. (N.S.) 407, 123 N. W. 231, 124 N. W. 901, Ann. Cas. 1912B, 852; *State v. Wignall*, 150 Iowa, 650, 34 L.R.A. (N.S.) 507, 128 N. W. 935; *Den ex dem. Low v. Goldtrap*, 1 N. J. L. 272, 274, 275; *State ex rel. Balch v. Fry*, 186 Mo. 198, 85 S. W. 328.

In *Dowell v. Vicksburg & M. R. Co.* 61 Miss. 529, it is held that the words, "any person," in a statute declaring that a railroad shall be liable for any damages or injury which may be sustained by any person from a locomotive or cars, do not embrace employees of the road. In *Carle v. Bangor & P. Canal & R. Co.* 43 Me. 271, 15 Am. Neg. Cas. 305, a statute making a railroad corporation liable for damages sustained by "any person" by the neglect of its servants is held to be limited to such persons as were not the servants of the corporation, and who sustained damages without any contributory fault. See *Sala v. Chicago, R. I. & P. R. Co.* 85 Iowa, 683, 52 N. W. 664. In *Miller v. Coffin*, 19 R. I. 164, 36 Atl. 8; *Sullivan v. Missouri P. R. Co.* 97 Mo. 113, 10 S. W. 854; *Atchison, T. & S. F. R. Co. v. Farrow*, 6 Colo. 505; *Lutz v. Atlantic & P. R. Co.* 6 N. M. 490, 16 L.R.A. 819, 30 Pac. 913; *Proctor v. Hannibal & St. J. R. Co.* 64 Mo. 122, and *Connor v. Chicago, R. I. & P. R. Co.* 59 Mo. 292, in a statute permitting the representatives of "any person" who shall die from any injury resulting from or occasioned by the negligence of any person or employee while running a train of cars, the words, "any person," are held not to include a servant whose death was occasioned by the negligence of a fellow servant.

In *Dixon v. Western U. Teleg. Co.* (C. C.) 68 Fed. 631, it is held that a statute providing that every corporation shall be liable in damages for personal injuries suffered "by any employee while in its service where such injury resulted from the act or omission of any person," etc., does not impose liability upon the employer for injuries resulting from the act or omission of the person injured. It is said that, while the language employed is capable of a construction as broad as is contended for, it will not be given such construction if to do so would lead to absurd or unjust consequences, and that the natural import of the words of a statute, according to the common use of them, when applied to the subject-matter, is to be regarded as expressing the intention of the legislature, unless it is repugnant to the acknowledged principles of justice and sound public policy, in which case the words ought to be enlarged or restrained so as to comport with those principles, unless the intention of the legis-

lature is clearly and manifestly repugnant to them, and that, therefore, it is required that the words, "any person," be limited so as not to include the person injured. And see *Jewell v. Sumner Twp.* 113 Iowa, 49, 84 N. W. 973.

The words, "any person," in a statute providing for the taking of affidavits of any person for the purposes of a motion when required by his adversary, are applicable only to those persons who may, by existing laws, be subjected to this species of examination; wherefore it is held a party to an action cannot be compelled by the adverse party to make the affidavit for the purposes of a motion. *Hodgkin v. Atlantic & P. R. Co.* 5 Abb. Pr. N. S. 74.

A statute requiring county officers to permit examination of documents by any person is to be limited to persons who have an interest of some sort, great or small, to be subserved by such examination. *Boylan v. Warren*, 39 Kan. 301, 7 Am. St. Rep. 551, 18 Pac. 176. The right of any person to contest the validity of a will is to be limited to any person having an interest in the subject-matter of the contest. *Campbell v. Fichter*, 168 Ind. 645, 81 N. E. 662, 11 Ann. Cas. 1089; *Crawfordsville Trust Co. v. Ramsey*, 178 Ind. 258, 98 N. E. 180. A statute giving a lien to every laborer or miner who shall perform labor in opening, developing, or operating any coal mine upon all the property of the person, firm, or corporation owning or operating such mine, and used in the construction or operation thereof, does not give such lien upon the property of the owner of miners employed by an operating lessee of the mine. *Caster v. McClellan*, 132 Iowa, 502, 109 N. W. 1020. In *Powers v. Hocking Valley R. Co.* 31 Ohio C. C. 488, a statute relating to the lease of railroads, and making the lessor and lessee jointly liable for all rights of action accruing to any person for any negligence or default growing out of the operation and maintenance of such railroad, is held to cover obligations of the lessor and lessee to the public, and hence not to apply to an action for negligence by an employee of the lessee against the lessor and lessee.

A corporate charter providing that, if "any person" chosen to be warden shall refuse to accept the office, he shall suffer a forfeiture, means, considering the direct provision of the same charter, only such persons as are by the terms of the charter eligible to such office. *Tobacco Pipe Makers' Co. v. Woodroffe*, 7 Barn. & C. 838, 5 Dowl. & R. 530, 4 L. J. K. B. 301. And in *United States v. Palmer*, 3 Wheat. 631, 4 L. ed. 477, it is said that "any person or persons," as used in the Constitution, relating to those who commit mis-

prison of treason or felony, are necessarily confined to any person or persons owing allegiance to the United States, though the words in themselves are broad enough to comprehend every human being.

In *State v. Brown*, 38 Kan. 390, 16 Pac. 260, 8 Am. Crim. Rep. 165, there was construed a statute punishing any person who was drunk in any highway, public place, or in his own house, etc., and it was held that "any person" should be construed to mean only such persons as act voluntarily in the performance of the interdicted act, that hence it does not include idiots, insane persons, and children under seven years of age, babes, and persons who have been made drunk by force or fraud, and carried into a public place; and that, therefore, one who innocently drinks of liquor which intoxicates him, without an idea that it would make him drunk, is to be held not guilty of the offense prescribed by the statute, though it in terms is made applicable to any person.

In *State v. Olson*, 108 Iowa, a case cited by appellee, we said on page 668, 77 N. W. 333: "The words, 'unmarried person,' in the indictment, taken alone, do not show whether that unmarried person was man or woman; but it is not in this narrow sense that we are to construe this indictment. The law has never recognized that the crime of seduction can be committed by any other than male persons, nor upon any other than female persons."

And see *Davis v. State*, 95 Ark. 555, 129 S. W. 530.

Though the briefs have not called it to our attention, we do not overlook our statute rule that "words importing the masculine gender only may be extended to females." Code, § 48, ¶ 3. It does not operate where its application violates reason and nullifies the intent of the legislature.

On the meaning to be given the words, "any person," the citations for the state, *Crane v. People*, 168 Ill. 395, 48 N. E. 54, and *Hill v. State*, 137 Ala. 66, 34 So. 406, are irrelevant. So is *Williams v. Poor*, 65 Iowa, at 413, 21 N. W. 753, cited by appellant. We are unable to see how *Com. v. Lavonsair*, 132 Mass. 1, and *State v. Phillips*, 26 N. D. 206, 49 L.R.A. (N.S.) 470, 144 N. W. 94, Ann. Cas. 1916A, 320, cited by appellant, or *United States v. Cannon*, 4 Utah, 122, 7 Pac. 369, and *Purdy v. People*, 4 Hill, 384, cited by appellant, bear upon anything in this appeal, and *State v. Myers*, 10 Iowa, 448, *State v. Smith*, 46 Iowa, 670, *State v. Shaw*, 125 Iowa, 422, 423, 101 N. W. 109, presented by appellant, and *Com. v. Goodall*, 165 Mass. 588, 43 N. E. 520, and *State v. Burns*, 145 Iowa,

588, 124 N. W. 600, cited by appellee, have very remote, if any, bearing, and whatever is said in the last as to resorting is said as to a woman defendant. The substance of the decision is as to the admissibility of evidence on reputation. *State v. Toombs*, 79 Iowa, 741, 45 N. W. 300, upon which the state puts some reliance, was the case of a woman charged with keeping a house of ill fame, and does not touch the point now in consideration. The following citations on part of appellant are relevant to nothing involved in this appeal: *State v. Moore*, 78 Iowa, 495, 43 N. W. 273; *State v. Haaty*, 121 Iowa, 507, 96 N. W. 1115; *Wright v. Paige*, 86 Barb. 438; *Cannon v. United States*, 116 U. S. 55, 29 L. ed. 561, 6 Sup. Ct. Rep. 278; *Com. v. Sliney*, 126 Mass. 49; and *Sweeney v. State*, 59 Neb. 269, 80 N. W. 815, 15 Am. Crim. Rep. 28.

The indictment charges that defendant feloniously resorted to a house of ill fame "for the purpose of prostitution and lewdness." The jury was directed to give time and energy which should have been expended on the consideration of a real case, to considering whether defendant was guilty of something not prohibited by the statute under which he was indicted. At the least, it was made possible for the jury to find that defendant resorted for the purpose of lewdness, because the jury thought he went to the house for the purpose of prostitution. To create such a situation is error. *O'Brien v. People*, 28 Mich. 214. This might have been error had the jury disregarded prostitution by its verdict. But it appears by the verdict that it was or may have been a basis for the verdict. And the court by constructions overruling a motion in arrest of judgment, and entering sentence equally upon either finding, affirmatively put the element of prostitution into the case as a co-ordinate factor.

In all the steps which work a holding that § 4943 punishes men for resorting to a house of ill fame for the purpose of prostitution, the trial court was in error. For this we are constrained to order a reversal, notwithstanding the argument of the representatives of the state that "this is a crime which affects the very foundation of society," that no sense of justice and no theory of fairness permits the holding a man to be innocent and a woman guilty, and that "this defendant is so plainly guilty that he should not have complained of any kind of treatment in the lower court, and is so flagrantly guilty that the finding of the lower court should be sustained. This court does not pass upon the guilt or innocence of this defendant de novo. Both as to those who may be guilty and those who may be innocent it is our duty to give to L.R.A.1916D.

statutes which impose degrading imprisonment a construction which avoids the punishment of accused where the statute proceeded under imposes no punishment. *Fahnestock v. State*, 102 Ind. 156, 1 N. E. 377; *Bunfill v. People*, 154 Ill. 640, 39 N. E. 567. In the last case it is said that prosecutions for even such offenses as this "can only be conducted under and in accordance with the statutes," and that errors entitle the defendant to a new trial because "the law warrants it and the court doth give it." We do not administer lynch law, which at times executes men because it is believed they are guilty of something, and felt they should be hung, on general principles.

II. The witness *Laura Heigner* testified she had been a witness in *State v. Deviney*, and that on that trial she testified that she had had improper relations with Deviney and him only, and she repeated the statement on the instant trial. She testified also that she had been a witness in the case of *State v. Lawrence*, and, as such witness, had said that she had such relations with forty different men in Mrs. Lawrence's house, and that the Brose girl was present. She testifies that both statements are true, in her opinion. Thereupon she was asked to say why she testified thus differently as to this matter on different trials, to say why she had changed her testimony since a witness in *State v. Deviney*, to say when she first made up her mind to testify differently in the instant case, to say why she changed her testimony upon the trials of these various cases, and to say whether anyone told her to change her testimony for the instant case. To this objections were sustained, that it is immaterial, irrelevant, unfair, because there is no evidence that some of the alleged contradictory statements were made, and that it is improper cross-examination. We think the examination was neither irrelevant nor immaterial, and that for the purpose of cross-examination at least it appeared sufficiently the witness had changed her testimony substantially as the questions indicate, and that therefore the examination was not unfair. See Abstract, 91-99. See *State v. Cater*, 100 Iowa, 505, 515, 69 N. W. 880. Was it improper cross-examination?

State v. Caron, 118 La. 349, 42 So. 963, approves the text in *Roscoe* that cross-examination may go to any subject, however remote, if it bear on testing the character or credibility of the witness. Inquiries into the feelings or disposition of the witness to conceal or pervert the truth are not to be excluded as being collateral. *Alward v. Oakes*, 63 Minn. 190, 65 N. W. 270. To say the least, it is proper, where a wit-

ness admits the existence of a variance between his testimony and his statements on other occasions, to examine him as to the motives inducing the variance. 7 Enc. Ev. 69. In *State v. Pulley*, 63 N. C. 8, a witness admitted that he had on a former occasion denied the truth of a statement he was then making, and it is held to be admissible thereupon to ask him why he had thus formerly made denial. The accused in a criminal case should be given very large liberty in proving the motives which induced a change in the testimony of a witness from favorable to accused to favorable to the state. *People v. Dillwood*, 4 Cal. Unrep. 973, 39 Pac. 438; *Galveston, H. & S. A. R. Co. v. Porfert*, 1 Tex. Civ. App. 716, 20 S. W. 870.

Where a party changes his testimony after a reversal by the supreme court and admits having read the opinion, he may be asked on cross-examination if he did not change his statement because he had seen the ground on which the case was reversed. *Galveston, H. & S. A. R. Co. v. Porfert*, supra. Where prosecutrix changes her testimony as to the time when intercourse occurred and admits her former testimony to have been false, it is error to sustain an objection to the question why she had given such former false testimony. *People v. Payne*, 131 Mich. 474, 91 N. W. 739.

It is our opinion that the objections should have been overruled.

III. Defendant asked the court to direct the jury to acquit on the ground that the indictment fails to charge the crime of lewdness. The offer asserts, *inter alia*, that the indictment fails to state any facts; that it sets out no acts constituting lewdness, nor states with whom committed. In effect, the offered instruction attempts to operate as a demurrer to the indictment. It is not required that we pass upon whether the indictment is well criticized. The statute permits the points raised by the offer to be raised by demurrer (Code, § 5328), or by motion in arrest of judgment (§ 5426). Either method of attack being sustained, it is often possible to cure the defect by a new accusation. We think it fairly appears to be the legislative intent that such an attack upon the indictment shall not be made at a time when to sustain it must result in a final acquittal; that the defendant may not decline to use his right to demur nor anticipate his right to proceed by motion in arrest, and substitute for both an offered instruction which, if given, works an acquittal, thus obtaining a result which the employment of neither of the other methods would yield. Why provide for a demurrer, with power of resubmission, if same be sustained? Why provide

for a second opportunity to demur by means of a motion in arrest if, at the pleasure of the defendant, neither may be used, and an acquittal be obtainable by attacking the indictment by means of an offered instruction? Who would ever use demurrer or motion in arrest if this be permissible? We can see no justification for the defendant's waiting until all the evidence has been taken on both sides to so present a demurrer to the indictment; no reason why he should not present it before the trial is actually begun; why, having passed this point, he should be allowed to anticipate the time, if ever it shall come, when he needs present a motion in arrest of judgment. To make him proceed either at the one time or the other, rather than between the two, is not only orderly procedure, but absolutely fair to both the state and the defendant. It takes nothing justly due from defendant, and, as said, avoids the making said two statutes idle.

The nearest that the motion in arrest of judgment and for new trial comes to attacking the indictment is a statement that the court erred in not giving each and every paragraph of the instructions asked by the defendant. Waiving the question of definiteness in assignment, it remains the fact that this is merely a repetition of the exception taken to the refusal to give said offered instruction. As we hold that it was right to refuse the instruction, it was also right to overrule that part of the motion in arrest of judgment which complains of the refusal to give such instruction.

We must decline to review the sufficiency of the indictment with reference to charging facts, because no attack recognized by law was below made upon the indictment. This disposition of the attack upon the indictment, and also that almost all of them are irrelevant on such attack, makes the following citations of appellant ineffective: *State v. Wasson*, 128 Iowa, 320, 101 N. W. 1125; *State v. Chicago, B. & Q. R. Co.* 63 Iowa, 508, 19 N. W. 299; *State v. Potter*, 28 Iowa, 554; *State v. McKinney*, 130 Iowa, 370, 106 N. W. 931; *State v. Brandt*, 41 Iowa, 607, 608; *State v. Martin*, 125 Iowa, 715, 101 N. W. 637; *State v. Brown*, 47 Ohio St. 102, 21 Am. St. Rep. 790, 23 N. E. 747, 8 Am. Crim. Rep. 373; *State v. Bauguess*, 106 Iowa, 107, 78 N. W. 508; *State v. Ashpole*, 127 Iowa, 680, 104 N. W. 281; *Cosgrove v. State*, 37 Tex. Crim. Rep. 249, 66 Am. St. Rep. 802, 39 S. W. 367. And so are *Webb v. State*, 106 Ala. 52, 18 So. 491, and *Com. v. Wardell*, 128 Mass. 52, 35 Am. Rep. 357, cited by the state.

IV. The court charged that lewdness is

the unlawful indulgence of the animal desires, and is also legally defined to be lustful and licentious behaving, such as unchastity, sensuality, and debauchery. It is urged this does not define lewdness clearly, nor with sufficient fullness. The definitions presented by the defendant through offered instructions were: (1) That lewdness, within the meaning of the statute, is the living or dwelling together of a man and woman who are not married to each other, as if they were; (2) living with and having illicit sexual intercourse with but one woman to whom defendant is not married, and with whom he dwells as if he were married to her; (3) habitually living or dwelling with some woman as his wife and habitually having illicit sexual intercourse with her without being married to her.

The authorities cited to sustain the claim that it was error to reject these indicate appellant labors under the misconception that he is charged with a course of incontinent living, or with habitual illicit relationships, or with offending by creating public scandal. He is accused of neither. He is not charged with open adultery or leading a life of lewdness, but of resorting to a house of ill fame to commit lewdness; i. e., to do lewd acts. That is one reason why the citations are irrelevant. It is not relevant that resort on a single occasion for a lewd purpose fails to prove leading a life of lewdness. *State v. McDavitt*, 140 Iowa, 342, 132 Am. St. Rep. 275, 118 N. W. 370. That merely decides that "one swallow does not make a summer." And so of the fact that a single act of lewdness is not the "lewd and lascivious conduct" punished as such by statute. *State v. Marvin*, 12 Iowa, 499. Such statutes use "conduct" in the sense of customary behavior. It is self-evident, but not material, that a single act of illicit intercourse will not sustain a conviction for living in open adultery. *Bird v. State*, 27 Tex. App. 635, 11 Am. St. Rep. 214, 11 S. W. 641; *Bodiford v. State*, 86 Ala. 67, 11 Am. St. Rep. 20, 5 So. 559; *People v. Salmon*, 148 Cal. 303, 2 L.R.A. (N.S.) 1186, 113 Am. St. Rep. 268, 83 Pac. 42. And see too *Wright v. State*, 108 Ala. 60, 18 So. 941; *Carroti v. State*, 42 Miss. 334, 97 Am. Dec. 465; *Richey v. State*, 172 Ind. 134, 139 Am. St. Rep. 362, 87 N. E. 1032, 19 Ann. Cas. 654. Equally manifest that such an act does not justify conviction for open and notorious cohabitation and adultery. *People v. Salmon*, 148 Cal. 303, 2 L.R.A. (N.S.) 1186, 113 Am. St. Rep. 268, 83 Pac. 42. It is, of course, true, and equally, of course, irrelevant, that resorting for an isolated act of intercourse does not warrant conviction for lewd and vicious association L.R.A.1916D.

and cohabitations, or for open and gross lewdness, and that clandestine intercourse does not violate a statute forbidding lewdly and lasciviously abiding and cohabiting. *State v. Chandler*, 132 Mo. 155, 53 Am. St. Rep. 483, 33 S. W. 797. Such statutes inhibit the unlawful living together as only man and wife may lawfully live. Of course, no isolated act of illicit intercourse is that. See *State v. Poyner*, 57 Wash. 489, 107 Pac. 181. Nor are holdings material that some acts of lewdness do not constitute the one who practises them a prostitute, nor her conduct prostitution. *Bunfill v. People*, 154 Ill. 640, 39 N. E. 565; *State v. Brow*, 64 N. H. 577, 15 Atl. 216.

In *State v. Mitchell*, 149 Iowa, 362, 128 N. W. 378, Mr. Justice Ladd makes this distinction clear. The case involves the charge of conspiracy to induce two females to commit the crimes of adultery and lewdness and to become prostitutes. An instruction which defines lewdness to be "the unlawful indulgence of the animal desires" is held to be inadequate and misleading, because the essence of the indictment is an attempt to induce the women to lead an incontinent life, and the instruction compels conviction if the conspiracy was no more than to procure their willing presence for the purpose of committing a single act of incontinence,—an act which would constitute neither lewdness nor prostitution. It is said the case differs from keeping a house of ill fame, resorted to for the purpose of prostitution and lewdness, in that on indictment for the last the term "lewdness" is employed in the ordinary sense as meaning a lustful, lecherous, lascivious, or libidinous act. In other words, while on the charge of leading a life of lewdness, or inducing others to lead such or to become prostitutes, there may not be a conviction merely because there was an unlawful indulgence of the animal desires or lustful and licentious behaving, such as unchastity, sensuality, and debauchery, where the charge is resorting for the purpose of lewdness, it is sufficient that the place was visited for the purpose of committing an act of "lewdness," as the term is understood in the accepted usage of the language.

V. There is evidence from which the jury might have believed that some of the visits of the defendant to the house occupied by Richard and Lillie Lawrence were visits of friendship. Defendant complains of the refusal of instructions that he might lawfully go to a house of ill fame if his purpose was that of friendly visiting, and the failure to give an equivalent direction. We think there was not such failure. The court once, if not oftener, instructed that

the jury could not find defendant guilty unless convinced beyond reasonable doubt that he resorted to or used the said house "for the purpose of prostitution or lewdness." This is, of necessity, a charge that defendant could not be convicted for visiting said house for the purpose of friendly visiting. One who goes to the dwelling of his friend for the purpose of visiting as a friend does not resort to it for the purpose of prostitution. A direction, then, that it is only a visit with the last-named purpose that can convict is fairly equivalent to an instruction that visits for any other purpose are not covered by the indictment.

2. There is a line of cases which hold, in effect, that private incontinence and resort to a place for a single night for the purpose of lewdness does not come within the statute provision against leading a life of lewdness, and that incontinence by a householder with a servant in his household is not within the statute. See *State v. McDavitt*, 140 Iowa, 344, 132 Am. St. Rep. 275, 118 N. W. 370; *State v. Irvin*, 117 Iowa, 469, 91 N. W. 760; and *People v. Pinkerton*, 79 Mich. 110, 44 N. W. 180. Complaint is made of refusal of an instruction in effect that there could be no conviction unless it was found defendant frequently resorted to the house of the Lawrences for the purpose charged in the indictment, and that one or an occasional visit to an alleged house of ill fame for such purpose will not warrant a conviction. We have to say that, if the jury was warranted to find that the defendant resorted to said house for said purpose at all, it was also warranted in finding that he so resorted many times. If, then, we were to concede the rule invoked by defendant, it would still be proper to refuse said instruction, because, while the jury might find that there was no resorting for the purpose charged in the indictment, there is no theory of the evidence upon which it could find that the resorting done, if any, was occasional merely, or that defendant resorted there but once. We are, however, disinclined to affirm such a rule. *O'Brien v. People*, 28 Mich. 214, does not hold that the offense of resorting is not made out unless the visits are frequent. The exact decision is that "to hold that when such persons resort to such places no criminal purpose can be inferred would be absurd." While, as said, it does not sustain the contention of the defendant, it does meet his claim, also made, that the court should have charged defendant's visits to this house should be presumed to be for an innocent purpose. In *State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454, this very question was determined. It was there argued that to resort to such places is not to go merely once, but to go and go again,—to make a practice of going. The court said that, while the etymology of the word lends some support to this argument, yet "the definitions given in the lexicons show that whatever may have been its original meaning it no longer means anything more in the connection in which it is employed in the statute than to go once."

VI. There is no merit in the contention that it was error to refuse a charge, in effect, that it would not constitute the house one of ill fame because Lillie Lawrence alone therein had sexual intercourse with various men named in the indictment, and that to constitute it such house it must further be found that other women were kept or made their habitation there for the purpose of indiscriminate intercourse. While it is true that such acts of illicit commerce by the proprietor are not ordinarily sufficient to give the house this character (9 Am. & Eng. Enc. Law, 520; *State v. Lee*, 80 Iowa, 76, 20 Am. St. Rep. 401, 45 N. W. 545), even this is not always so (*State v. Young*, 96 Iowa, 262, 59 Am. St. Rep. 371, 65 N. W. 160; *State v. Gill*, 150 Iowa, 210, 129 N. W. 821). Be that as it may, no theory of the evidence made the instructions asked relevant. We may assume, for the sake of argument, the jury might have found no woman resorted to the Lawrence house for illicit sexual commerce, but there was no evidence whereupon it might find that no one but Lillie Lawrence practiced such commerce in that house. Moreover, the court defined a house of ill fame to be one "visited by persons of both sexes for the purpose of having unlawful, indiscriminate sexual intercourse," and thus clearly negated the thought that the acts of Lillie Lawrence alone could give the house that character.

2. Defendant asked instructions defining a house of ill fame, the essence of which is that it is a place of resort inhabited by more than one woman actually engaged in prostitution. The court charged, instead, that it is a house visited by persons of both sexes for the purpose of having unlawful, indiscriminate sexual intercourse, and defendant complains of both acts. We are of opinion that *State v. Wilson*, 124 Iowa, 264, 99 N. W. 1060, and *People v. Hampton*, 4 Utah, 258, 9 Pac. 508, sustain the action of the trial court, and that *State v. Clark*, 78 Iowa, 493, 43 N. W. 273, does so in effect. While *King v. People*, 83 N. Y. 587, and *Beard v. State*, 71 Md. 275, 4 L.R.A. 675, 17 Am. St. Rep. 536, 17 Atl. 1044, 8 Am. Crim. Rep. 173, are rightly decided, they do not hold that the defini-

tion given by the trial court is incorrect. *State v. Mullen*, 35 Iowa, 207; *State v. Toombs*, 79 Iowa, 741, 45 N. W. 300; *State v. Calley*, 104 N. C. 858, 17 Am. St. Rep. 704, 10 S. E. 455; *State v. Chauvet*, 111 Iowa, 689, 51 L.R.A. 630, 82 Am. St. Rep. 539, 83 N. W. 717; *Boswell v. State*, 48 Tex. Crim. Rep. 47, 122 Am. St. Rep. 731, 85 S. W. 1076; *State v. Irvin*, 117 Iowa, 469, 91 N. W. 760; and *State v. Lee*, 80 Iowa, 75, 20 Am. St. Rep. 401, 45 N. W. 545, cited by appellant, are not relevant to the point now in consideration. Neither are *State v. Beebe*, 115 Iowa, 128, 88 N. W. 358; *People v. Mallette*, 79 Mich. 600, 44 N. W. 963; *Johnson v. State*, 32 Tex. Crim. Rep. 504, 24 S. W. 411; *Graeter v. State*, 105 Ind. 271, 4 N. E. 461; *State v. Schaffer*, 74 Iowa, 704, 39 N. W. 89; *State v. Steen*, 125 Iowa, 307, 101 N. W. 96; and *State v. Wells*, 46 Iowa, 662, cited by appellee. All but one of these last deal with what evidence will make it a jury question whether the proprietor of a house of ill fame knew the house was of that character and consented to what was being done therein.

3. The defendant asked the court to charge that, while evidence of the general reputation of the Lawrence house is admissible, there may be no conviction on that alone, and there must be some other evidence showing that such house was actually kept and used as a house of ill fame. No doubt this is the law. *State v. Hendricks*, 15 Mont. 194, 48 Am. St. Rep. 666, 39 Pac. 93; *State v. Steen*, 125 Iowa, 307, 101 N. W. 96; *Botts v. United States*, 83 C. C. A. 646, 155 Fed. 50, 12 Ann. Cas. 272. And see *State v. Porter*, 130 Iowa, 690, 107 N. W. 923. But the refusal of the request to charge is not error because the court seems to have fully adopted this theory in its own instructions. In ¶ 5 the jury is

told they should carefully consider testimony received regarding the general reputation of the house and the like, also to consider the things that were said and done in and about the same, the coming and going of people to and from it, and all the facts and circumstances shown in evidence, and from these to determine the real character of the house, which seems to be an instruction that the reputation is to be dealt with as merely one item in the proof. In instruction 10 the jury was further charged that, while evidence of general reputation of the house is admissible, the defendant cannot be convicted on that alone, and that there must be some other evidence tending to show that the house was of the character charged, and that in considering this question the jury should consider all the facts and circumstances shown upon the trial, including the testimony with regard to the general reputation of the house.

VII. Instructions offered, and one ground of the motion in arrest of judgment, assert there was no evidence to sustain the verdict. We are of opinion that these instructions were rightly refused, and this ground of the motion in arrest rightly overruled. *State v. Rayburn*, — Iowa, —, L.R.A. 1915F, 640, 153 N. W. 59, decided by us June 18, 1915, fully supports several holdings herein announced, and is in no respect in conflict with this opinion. See *State v. Gill*, 150 Iowa, 210, 129 N. W. 821.

For what is pointed out in the first and second division of this opinion, the cause must be remanded for a new trial.

By stipulation this is the order in *State v. James Deviney*, appellant.

Evans, Ch. J., and Ladd and Gaynor, JJ., concur.

KANSAS SUPREME COURT.

OGALLAH ELEVATOR COMPANY, Appt.,
v.
FRED HARRISON.

(97 Kan. 289, 154 Pac. 1016.)

Master and servant — outside earnings — duty to account.

1. The rule that a servant must account to his master for earnings received from outside employment ordinarily relates to

Headnotes by DAWSON, J.

Note. — As to right of principal or employer to earnings by agent or servant who undertakes extraneous work, see annotation following this case, post, 782. L.R.A.1916D.

employment in the same kind of business in which his master is engaged, and does not relate to the servant's earnings in another kind of business in which his master is not interested and which is not inimical or prejudicial to his master's business.

For other cases, see *Master and Servant*, I. a, in *Dig. 1-52 N. 8*.

Same — independent business.

2. The plaintiff employed the defendant to manage its business of buying and selling grain and coal, and to keep open during business hours its offices and warehouses, and to keep its books and accounts. The defendant, with the knowledge and acquiescence of plaintiff, undertook for another employer the business of selling flour, a business which the plaintiff had considered and decided not to engage in. No complaint was made that the defendant neg-

lected plaintiff's business on account of the other employment. Held, that the defendant's earnings in the sale of flour are his own property, and the plaintiff has no legal claim thereto.

For other cases, see Master and Servant, I. a, in Dig. 1-52 N. S.

Principal and agent — business manager — liability for bad debts.

3. Ordinarily a manager of a business is not a guarantor of its credits extended nor an insurer against mistakes, and in the absence of negligence he is not personally liable for an uncollectable debt.

For other cases, see Principal and Agent, III. in Dig. 1-52 N. S.

Evidence — earnings — establishment.

4. Where an elevator company lays claim to moneys earned and collected by its manager for the use of its scales, and the jury finds that the amount collected was somewhere between \$12 and \$30, and that the manager paid out between \$10 and \$25 for help in operating the scales, and that the manager retained no part of the earnings to his own use, the plaintiff fails to establish its cause of action.

For other cases, see Evidence, II. in Dig. 1-52 N. S.

Appeal — incompetent evidence — non-prejudicial error.

5. Prejudicial error cannot be based upon the admission of incompetent testimony when it is not shown to have improperly affected the result.

For other cases, see Appeal and Error, VII. m, 3, a, (5), in Dig. 1-52 N. S.

(February 12, 1916.)

APPEAL by plaintiff from a judgment of the District Court for Trego County in defendant's favor in an action brought to recover an amount paid out by him without authority from plaintiff while acting as plaintiff's agent, and to recover certain money collected by defendant from the sale of flour and for the use of plaintiff's scales. Affirmed.

The facts are stated in the opinion.

Mr. Herman Long, for appellant:

It was error to permit witnesses to give their conclusions as to the effect of conversations and transactions material to the issues involved.

State v. Nolan, 48 Kan. 723, 29 Pac. 568, 30 Pac. 486; Shepard v. Pratt, 16 Kan. 209; Eagle Mfg. Co. v. Jennings, 29 Kan. 657, 44 Am. Rep. 668; Marshall v. Weir Plow Co. 4 Kan. App. 615, 45 Pac. 621; Diehl v. State, 157 Ind. 549, 62 N. E. 51; State v. Brown, 86 Iowa, 121, 53 N. W. 92; Hibbard v. Russell, 16 N. H. 410, 41 Am. Dec. 733.

Evidence of the acts and declarations and agreements of individual members of the board of directors, without any showing that they were authorized in any man-

ner to transact business for the plaintiff, was inadmissible.

Cook, Corp. 6th ed. §§ 712, 713, 716, 726, and cases there cited; First Nat. Bank v. Drake, 35 Kan. 564, 57 Am. Rep. 193, 11 Pac. 445; Asher v. Sutton, 31 Kan. 286, 1 Pac. 535; Robins Min. Co. v. Murdock, 69 Kan. 596, 77 Pac. 596; J. I. Case Plow Works v. Pusifer, 79 Kan. 177, 98 Pac. 787; Johnson v. McLain Invest. Co. 79 Kan. 423, 131 Am. St. Rep. 302, 100 Pac. 52; Dodge v. Childs, 38 Kan. 526, 16 Pac. 815; Cherokee & P. Coal & Min. Co. v. Dickson, 55 Kan. 62, 39 Pac. 691; Missouri P. R. Co. v. Johnson, 55 Kan. 344, 40 Pac. 641; Atchison, T. & S. F. R. Co. v. Osborn, 58 Kan. 768, 51 Pac. 286; Walker v. O'Connell, 59 Kan. 306, 52 Pac. 894; Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co. 59 Kan. 111, 52 Pac. 71.

Evidence of the action of the board of directors ordering a dismissal of the action, and revoking the authority theretofore given to the president of the board, was improperly admitted.

Wigmore, Ev. § 1061; Harrington v. Lincoln, 4 Gray, 563, 64 Am. Dec. 95; Colburn v. Groton, 66 N. H. 151, 22 L.R.A. 763, 28 Atl. 95; Gilleland v. Schuyler, 9 Kan. 569.

It was error to admit in evidence the contents of the report of an auditing committee which had been appointed to examine the defendant's books of account.

Atchison, T. & S. F. R. Co. v. Burks, 78 Kan. 515, 18 L.R.A.(N.S.) 231, 96 Pac. 950; 1 Dill. Mun. Corp. Orig. § 242, 4th ed. § 305; Carroll v. East Tennessee, V. & G. R. Co. 82 Ga. 452, 6 L.R.A. 214, 10 S. E. 163; Atchison v. King, 9 Kan. 550.

The burden of proof on all of the negative allegations was placed upon the plaintiff, contrary to well-established rules of evidence.

Farmers' Warehouse Assn. v. Montgomery, 92 Minn. 194, 99 N. W. 776; Green v. Macy, 36 Ind. App. 560, 76 N. E. 264; Warren v. Holbrook, 95 Mich. 185, 35 Am. St. Rep. 554, 54 N. W. 712; Boyles v. Bradley, 79 Kan. 844, 101 Pac. 477; Woodson Mach. Co. v. Morse, 47 Kan. 429, 28 Pac. 152; Bank of Commerce v. Schlegel, 66 Kan. 509, 72 Pac. 210.

It was error to instruct the jury that if the president of the plaintiff company, with proper authority, agreed in good faith with the defendant that he might handle flour on his own account for the Wheatland Elevator Company and retain for his own use all compensation received for so doing, the plaintiff cannot recover for any moneys received by defendant for such services.

Asher v. Sutton, 31 Kan. 286, 1 Pac. 535; Cook, Corp. 6th ed. § 716; Zimmerman v.

Knox, 34 Kan. 245, 8 Pac. 104; Atchison, T. & S. F. R. Co. v. Wells, 56 Kan. 222, 42 Pac. 699; Meyer v. Reimer, 65 Kan. 822, 70 Pac. 869; Raper v. Blair, 24 Kan. 374.

It was error to instruct that if the president or a majority of the directors knew of the acts of defendant, and permitted him to continue in this course, there can be no recovery.

Union P. R. Co. v. Milliken, 8 Kan. 647; Hasie v. Connor, 53 Kan. 720, 37 Pac. 128; First Nat. Bank v. Drake, 29 Kan. 311, 44 Am. Rep. 646; First Nat. Bank v. Drake, 35 Kan. 564, 57 Am. Rep. 193, 11 Pac. 445; Davis v. Morgan, 117 Ga. 504, 61 L.R.A. 148, 97 Am. St. Rep. 171, 43 S. E. 732; King v. Duluth, M. & N. R. Co. 61 Minn. 482, 63 N. W. 1105; McCarty v. Hampton Bldg. Asso. 61 Iowa, 287, 16 N. W. 114.

An instruction making a recovery depend upon the question whether the defendant's work for the Wheatland Elevator Company interfered with his duties to the plaintiff, or lessened the value of his services to the plaintiff, is erroneous.

Jackson v. Seevers, 115 Iowa, 370, 88 N. W. 931; Howe v. Savory, 51 N. Y. 631; Amory v. Wood, 51 N. Y. 644; Kinney v. Mahoning Mills, 13 Pa. Super. Ct. 573; Sumner v. Nevin, 4 Cal. App. 347, 87 Pac. 1105; Leach v. Hannibal & St. J. R. Co. 86 Mo. 27, 56 Am. Rep. 408; Mechem, Agency, § 471; Seaburn v. Zachmann, 90 App. Div. 218, 90 N. Y. Supp. 1005.

A mistake which an ordinarily prudent man might have made is not sufficient to excuse defendant.

Rose v. Douglass Twp. 52 Kan. 451, 39 Am. St. Rep. 354, 34 Pac. 1046; State use of Wyandot County v. Harper, 67 Am. Dec. 363, and note, 6 Ohio St. 607.

No instruction on fraud should have been given to mislead the jury.

Raper v. Blair, 24 Kan. 374; Union P. R. Co. v. Fray, 31 Kan. 739, 3 Pac. 550; Zimmerman v. Knox, 34 Kan. 245, 8 Pac. 104; Cobe v. Coughlin Hardware Co. 83 Kan. 522, 31 L.R.A.(N.S.) 1126, 112 Pac. 115; Fish v. Poorman, 85 Kan. 244, 116 Pac. 898; Smith v. Edelstein, 92 Ill. App. 38; Granrud v. Rea, 24 Tex. Civ. App. 299, 59 S. W. 841.

Messrs. E. A. Rea, Lee Monroe, James A. McClure, and C. M. Monroe, for appellee:

The court did not err in its instruction regarding the burden of proof.

McCormick v. Holmes, 41 Kan. 265, 21 Pac. 108; Badger Min. & Mill. Co. v. Ellis, 76 Kan. 796, 92 Pac. 1114; People's Gas Co. v. Fletcher, 81 Kan. 84, 41 L.R.A.(N. S.) 1161, 105 Pac. 34; 38 Cyc. 1749-1750.

Plaintiff is estopped to object to the outside work by having acquiesced therein. L.R.A.1916D.

Wallace v. DeYoung, 98 Ill. 638, 38 Am. Rep. 108; 16 Cyc. 714.

Handling the flour did not conflict with defendant's duties.

5 Labatt, Mast. & S. § 2037; 26 Cyc. 1020; Jaffray v. King, 34 Md. 217; Hillsboro Nat. Bank v. Hyde, 7 N. D. 400, 75 N. W. 781; Williams v. Crane, 153 Mich. 89, 116 N. W. 554; Clarke v. Kelsey, 41 Neb. 766, 60 N. W. 138; Wheeler & T. Co. v. Dahms, 50 Ill. App. 531; Bailey v. Sibley Quarry Co. 166 Mich. 321, 129 N. W. 17; Hermann v. Littlefield, 109 Cal. 430, 42, Pac. 443; Stone v. Bancroft, 139 Cal. 78, 70 Pac. 1017, 72 Pac. 717; Shoemaker v. Acker, 116 Cal. 239, 48 Pac. 62.

The court required the proper measure of proof to establish fraud.

20 Cyc. 120.

Dawson, J., delivered the opinion of the court:

The Ogallah Elevator Company brought this action against Fred Harrison, who served as its manager from November, 1909, until March, 1912, to recover \$40.90 which he had paid to one Jeff Belveal without authority, and to collect from Harrison \$180 which he had earned and received for the sale of flour for a rival elevator company while in the plaintiff's employment, and also to collect from defendant \$40 which he had collected from various persons for the use of plaintiff's scales.

The defendant answered by pleading the statute of limitations and an audit and settlement as to the Belveal item, that the money received for the use of plaintiff's scales had been paid out with plaintiffs consent for work and labor, and that the sale of flour for the rival elevator did not interfere with his duty to plaintiff, and that plaintiff lost nothing thereby, and that he had done this work with the knowledge and consent of plaintiff and its officers.

Plaintiff replied that any settlement touching the Belveal item and for the use of the scales had been procured by defendant's fraud and concealment, and made without authority and without its knowledge of ratification; and that if any officer consented to or acquiesced in defendant's employment to sell the rival elevator's flour, it was without authority from plaintiff.

The special findings and general verdict were in favor of defendant. The plaintiff assigns many errors in the admission and exclusion of evidence, in the instructions, and in the general result. Such of these as may have been of sufficient consequence to affect the final result will be noted.

1. Much of appellant's brief is devoted to its claim to the \$180 earned by the de-

defendant in the sale of flour for a rival elevator. The plaintiff was engaged in dealing in grain and coal. It was not engaged or concerned in the business of dealing in flour. It had considered the advisability of doing so, but on account of lack of funds it decided not to undertake it. The defendant's employment required him to attend to its business and keep its funds and accounts, and its offices and warehouses were to be opened for business from 7 o'clock A. M. until 6 o'clock P. M., or later, if business demanded it. It was clearly shown that the plaintiff knew, through the only way a corporation can know, by notice to its president and directors, that the defendant was handling this flour, and it took no action to stop it as inimical to its business. If the plaintiff had any grievance on this account, its action would be for breach of contract or in tort. It certainly has no legal claim to defendant's earnings. The case is not to be considered as if the plaintiff itself were dealing in flour and had employed the defendant for that purpose.

The president of the plaintiff company testified:

"I remember the occasion of his (defendant's) accepting employment from the Wheatland Elevator Company; before he accepted that employment there had been talk about handling flour by the directors of the Ogallah Elevator Company at a meeting that they held; it had been discussed at different times while I was on the board, and the company was financially embarrassed, and wasn't able to build a building, so that they could handle this stuff, and they didn't feel as though they would like to go in debt in order to handle it; we supposed naturally that the sale of flour would draw trade for our other business. We were buying wheat, some corn, and handling coal. . . . I can recollect it, it had been talked through the board, and we all understood it, and the stockholders all knew it, and I said, as far as I am personally concerned, that you can handle that flour, providing that it don't interfere with our other business; I don't know how soon he commenced handling the flour after that; I did learn of it after he commenced; I understood all the time he was handling it that he was getting pay from the Wheatland Elevator Company and I understood that he was keeping that pay for himself; I never made any objections to this because it was talked among the board, and a number of the board, and while they didn't all of them, didn't sanction it, they didn't say for him not to handle it. They all knew it and they L.R.A.1916D.

never objected; that is, to the board. It wasn't brought up before the board as I remember; the reason for this was talked over among themselves that he wasn't getting hardly enough wages to justify him in staying there, and he had a position offered him for more wages, and we, I think part of the board, perhaps all of it, I couldn't say, agreed to let him—agreed that if he handled that, he could use—collect the money for his own affairs. I got that started wrong. The intention was to help out his salary, and he was talking of leaving, and I says: 'We can't afford to let Fred go; we have had him here ever since the elevator started, and he knows more about the business, and he came here green and inexperienced, and he didn't know anything about bookkeeping, and had to learn everything, and after we had learned him, or he had learned himself rather, that I thought best that we keep him right on the job, and by helping his salary out on the side by handling this flour, why, he was willing to stay with us a little while longer. This was talked over in a general way. I don't say it was talked over at the board, but in a general way, and the outsiders and the stockholders all knew of this thing, because I talked with different ones, both stockholders and directors.'"

Whether this situation of affairs is viewed as an acquiescence on the part of the plaintiff is found by the jury (10 Cyc. 1065; 16 Cyc. 714), or as showing the nature of plaintiff's claim to defendant's earnings in the sale of the flour, the result was correct. *Wheeler & T. Co. v. Dahms*, 50 Ill. App. 531; *Hillsboro' Nat. Bank v. Hyde*, 7 N. D. 400, 75 N. W. 781; *Clarke v. Kelsey*, 41 Neb. 766, 60 N. W. 138; 26 Cyc. 1020; 5 Labatt's Mast. & S. § 2037.

The gist of the cases just cited is to the effect that the employer cannot claim as his own the earnings of his servant from an independent employment on an unrelated business. The appellant recognizes this rule, but has been led astray in its application. Its idea appears to have been that since the dealing in flour could have been associated conveniently with the plaintiff's grain and coal business, it was entitled to the earnings on the flour business. Moreover, plaintiff's long acquiescence in defendant's outside employment estops it to claim his outside earnings.

2. Turning next to the item of \$40.90 which was alleged to have been paid to Belveal without authority. While not directly pleaded by defendant that it was paid out by mistake, the plaintiff was apprised of that fact. Plaintiff's counsel said

as much in his opening statement to the jury. The evidence showed that the plaintiff owed Belveal for wheat, and Belveal owed the plaintiff for coal, and in settling accounts the defendant as agent for the plaintiff paid Belveal \$40.90 too much. It was clearly shown to have been an innocent mistake, and when discovered it was charged against Belveal's account. No fair interpretation of defendant's contract of employment bound him as a guarantor of the credits extended by the plaintiff. Technically, counsel for appellant is right in his contention that defendant should have pleaded that he paid out his money by mistake. But when plaintiff knew this fact, as shown by the opening statement of its counsel, and it was clearly established and uncontroverted by the evidence, shall we now, on account of defendant's failure to plead the mistake, reverse this case and send it back to the trial court, which would, in furtherance of justice, permit him to amend his answer in that particular? Since there is no dispute as to the fact, and plaintiff does not even suggest that it was misled, and does affirmatively show that it was fully apprised of the facts, the revised Code (Civ. Code, §§ 141, 581 [Gen. Stat. 1909, §§ 5734, 6176]) forbids a reversal on such a ground. *Root v. Cudahy Packing Co.* 94 Kan. 339, 345, 147 Pac. 69; *Hamilton v. Atchison, T. & S. F. R. Co.* 95 Kan. 353, 359, 360, 148 Pac. 648.

3. Appellant has some slight ground for his complaint touching the rulings of the court on the admission of evidence relating to the moneys collected by defendant for the use of the scale. The authorities cited, which show that the plaintiff was not entitled to defendant's earnings in the sale of flour, an independent business from that in which the plaintiff was engaged, are just as precise and definite to the effect that defendant's earnings within the scope of the employer's business belong to his employer. Moreover, the keeping of an accurate account of the moneys which in any way pertained to plaintiff's business was one of the matters clearly covered by defendant's employment, and this duty and obligation ought not to be lightly excused by informal assent on the part of individual officers or directors. But the facts based upon competent testimony are shown by the findings of the jury.

"(7) Did the defendant during his employment by the plaintiff do certain weighing for compensation on plaintiff's scales without accounting to said association for such compensation? Answer: Yes.

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"(8) If you answer No. 7 'Yes,' how much money did he receive for such weighing? Answer: Amount not shown to be less than twelve or more than thirty dollars.

"(9) How much money did Fred Harrison pay out on account of help in the matter of weighing hay? Answer: Amount not shown to be less than ten or more than twenty-five dollars.

"(10) Did Fred Harrison retain for his own use any of the money taken by him on account of weighing hay? If so, how much? Answer: No."

These findings fail to show that the defendant owed the plaintiff anything on this item. He did fail to keep an account. He did not appropriate the scale earnings to his own use. So said the jury. How, then, can it be material whether the evidence which was introduced was competent or incompetent to show whether the plaintiff had authorized by positive sanction or by acquiescence the appropriation of the scales' earnings to defendant's personal use?

We have carefully considered the other questions presented, but do not deem it necessary to comment on them. We note the appellant's criticisms of the trial court's many adverse rulings to its objections to the evidence. Most of the evidence objected to covered the action of the board of directors ordering a dismissal of this suit, and the attitude of individual officers and directors towards the appropriation of the scales' moneys by the defendant. As we view the case, the evidence was probably incompetent, but we fail to trace prejudicial error to its admission.

In the voluminous abstracts and copious briefs which show clearly the diligence and zeal with which counsel for both litigants have presented this cause, these controlling facts appear: (a) The plaintiff has no legal claim on defendant's earnings on the sale of the Wheatland Company's flour; (b) the defendant was not personally liable for the money paid to Belveal by mistake; and (c) while defendant was bound by his contract of employment to keep an accurate account of the scales' earnings, and failed to do so, he did have authority to pay out these moneys, and did pay them out for services in plaintiff's behalf, and the jury found that none of the scales' moneys were appropriated to the defendant's private use.

Thus the issuable and controlling facts have all been settled by the jury adversely to plaintiff's contention: and since no prejudicial error can be detected, the judgment must be affirmed.

Petition for rehearing denied.

Annotation—Right of principal or employer to earnings by agent or servant who undertakes extraneous work.

The earlier cases on the question under annotation will be found in the note to *Barber v. National Carbon Co.* 5 L.R.A. (N.S.) 1154, which covers the general question as to the rights of employer and employee with respect to things produced by the labor of the employee.

As to right of master to inventions of servant, see also note to *Pressed Steel Car Co. v. Hansen*, 2 L.R.A. (N.S.) 1172.

As to right of principal to recover from broker or other agent commissions which he received from other party to the contract, see note to *Easterly v. Mills*, 28 L.R.A. (N.S.) 952.

As to servant's right to tips received by him, see note to *Polites v. Barlin*, 41 L.R.A. (N.S.) 1217.

As to duty of partner to account for part profits realized from transactions independently of firm, see note to *Shrader v. Downing*, 52 L.R.A. (N.S.) 389.

Since the cases reported in the note in 5 L.R.A. (N.S.) 1154, it was held in *Shepard Pub. Co. v. Harkins* (1905) 9 Ont. L. Rep. 504, that a servant under contract to devote all his time and attention to his employer's business, and to engage in no other business, was not liable to account to his employers for his earnings by doing work in a different capacity, especially where he did not use time which should be devoted to his employer's business. In the course of its opinion the court said that "the covenant of an employee to devote his entire time to the undertaking of his employer must, moreover, receive a reasonable construction. It cannot, for instance, be deemed to require that the employee should give to the service hours of the day or night usually devoted to rest and recreation. It does impose upon him an obligation to employ diligently in advancing that undertaking or business of his principal to which he has agreed to devote himself during such hours as it is customary for men in positions such as his to work, all the time and ability he can bestow advantageously to his principal. Even during those hours of the day usually devoted to work of the kind for which he is engaged the servant is not obliged by such a covenant to sit in idleness. *Nemo tenetur ad inutilia*. If he is unable to utilize his time for the benefit and advantage of his employer at that for which he is employed, he may, without becoming liable to account for bene-

fits so acquired, make other use of it not inconsistent with the discharge of the duties to his employer which he has undertaken. To hold otherwise would be in effect to place the employee of the present day in a position little, if at all, better than that of the villain of former times. . . . If the agent or servant undertakes in that capacity work outside the scope of his employment, his principal or master is, if he wishes to take them, entitled to earnings or profits so made. The only right which the servant or agent can have against his master is a possible claim for extra remuneration. But if he neither uses time which belongs to his employer or engages in competitive undertakings, an agent or servant doing work in some other capacity is not accountable to his employer for his earnings from such work."

So, also, an employee of a corporation which conducts a general store, who is appointed postmaster, is entitled to the commissions which the government pays on the amount of business done by the postoffice, although an officer of the corporation may have been influential in securing the appointment and the corporation may have furnished a place in which to keep the postoffice. *Bailey v. Sibley Quarry Co.* (1910) 166 Mich. 321, 129 N. W. 17.

And in *Williams v. Crane* (1908) 153 Mich. 89, 116 N. W. 554, as no loss occurred to the employer by reason of his absence, one who worked the farm of another under an agreement that the relation should be that of an employee and employer was held not to be obliged to deduct from moneys due him, an amount he earned by doing work for third persons.

In *Genco v. Remington* (1905) 100 App. Div. 223, 91 N. Y. Supp. 898, the plaintiff was employed by the defendants, the operators of a canning factory, to secure sufficient help to take care of such crops as they might have for canning purposes, and he was to receive a stipulated sum per week for looking after the help. A nonsuit was granted by the trial court in an action to recover the compensation, it appearing that the plaintiff had received an amount in excess of his claim from farmers, for whom, with the knowledge and acquiescence of defendants, he superintended the picking of peas at such time as there were no peas to be picked for defendants.

The decision was reversed upon the ground that the evidence at least presented a question for the jury whether the money so received belonged to defendants.

It will be noted that in the above cases the extraneous work was not such as conflicted with the interests of the employer. Where, however, the earnings are from any business which gave the employee an interest conflicting with his duty to his employer, the employer is entitled to claim the earnings.

Thus an employee of a real estate broker under contract to devote his entire time to his employer's business, which contract was terminable on fifteen days' notice, who, upon the termination of a contract for the management of an estate which his employer had with the

owner of the estate, takes a renewal of such contract for himself instead of for his employer, and then notifies his employer of his intention to terminate his employment, must account to his employer for any commissions received in the management of such estate from the time he undertook the management until the expiration of the fifteen-day notice given by him to his employer to terminate the employment. *Sumner v. Nevin* (1906) 4 Cal. App. 347, 87 Pac. 1105.

And see also *Sheppard Pub. Co. v. Harkins* (Ont.) supra, which held such earnings as came to the employee in any business engaged in without his employer's consent, which conflicted with his duty to his employer, belonged to the employer. J. H. B.

KANSAS SUPREME COURT.

MARY J. JACOBS

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Appt.

(97 Kan. 247, 154 Pac. 1023.)

Railroad — crossing accident — silence of warning bell.

1. It is such negligence as will prevent a recovery for injuries sustained, for a driver of an automobile to attempt to cross a railroad track at a grade crossing without looking or listening for the approach of a train, although an electric warning bell is maintained at the crossing and the bell is not ringing.

For other cases, see Railroads, II. c, 2, in Dig. 1-52 N. S.

Same — absence of signal — wantonness.

2. Enginemen in charge of a locomotive attached to a passenger train, who cut off the steam and apply the air one quarter of a mile before reaching a street crossing in a small city, and who suppose that an electric warning bell stationed at the crossing is ringing, are not guilty of wantonness, although they fail to ring the engine bell or sound the whistle for the crossing, and

Headnotes by MARSHALL, J.

Note. — As to right of traveler to rely on automatic signals at crossing, see annotation following this case, post, 788.

The question whether wantonness or willfulness, precluding defense of contributory negligence, may be predicated of the omission of a duty before the discovery of a person in a position of peril on a railroad or street railway track, is discussed in a note L.R.A.1916D.

although they go through the city at the rate of 45 miles per hour.

For other cases, see Railroads, II. d, 3, in Dig. 1-52 N. S.

(February 12, 1916.)

APPEAL by defendant from a judgment of the District Court for Sedgwick County in plaintiff's favor in an action brought to recover damages for the death of her husband, alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. William R. Smith, Owen J. Wood, Alfred A. Scott, and Harlow Hurley, for appellant:

Deceased was guilty of contributory negligence as matter of law, and plaintiff cannot recover.

Butts v. Atchison, T. & S. F. R. Co. 94 Kan. 328, 146 Pac. 1142; *Adams v. Atchison*, T. & S. F. R. Co. 93 Kan. 475, 144 Pac. 999; *Gage v. Atchison*, T. & S. F. R. Co. 91 Kan. 253, 137 Pac. 938, Ann. Cas. 1915B, 410; *Gilbert v. Missouri P. R. Co.* 91 Kan. 711, 139 Pac. 380; *Corley v. Atchison*, T. & S. F. R. Co. 90 Kan. 70, 133 Pac. 555, Ann. Cas. 1915B, 764; *Atchison*, T. & S. F. R. Co. v. *Willey*, 60 Kan. 819, 158 Pac. 472, 6 Am. Neg. Rep. 515; *Northern P. R. Co. v. Tripp*, 136 C. C. A. 302, 220 Fed. 286.

to *Atchison*, T. & S. F. R. Co. v. *Baker*, 21 L.R.A.(N.S.) 427.

Generally, as to the care required of the driver of an automobile at railroad crossings, see notes to *New York C. & H. R. R. Co. v. Maidment*, 21 L.R.A.(N.S.) 794; *Brommer v. Pennsylvania R. Co.* 29 L.R.A.(N.S.) 924, and *Walters v. Chicago, M. & P. S. R. Co.* 46 L.R.A.(N.S.) 702.

It has been held error to permit proof of the rules of an employer intended only for the guidance of employees, upon the theory that they tend to show what duty the defendant owed to the public in the operation of its trains, and hence a violation of any of them, being a breach of such duty, is evidence of negligence.

Fonda v. St. Paul City R. Co. 71 Minn. 438, 70 Am. St. Rep. 341, 74 N. W. 167; *Louisville R. Co. v. Gaugh*, 133 Ky. 467, 118 S. W. 276; *Alabama G. S. R. Co. v. Clark*, 136 Ala. 450, 34 So. 917; *Isackson v. Duluth Street R. Co.* 75 Minn. 27, 77 N. W. 433, 5 Am. Neg. Rep. 178.

The giving of instructions as to what would constitute wilful and wanton negligence on the part of the train operatives was error.

Atchison, T. & S. F. R. Co. v. Baker, 79 Kan. 183, 21 L.R.A.(N.S.) 427, 98 Pac. 804; *Gilbert v. Missouri P. R. Co.* 91 Kan. 711, 139 Pac. 380, 92 Kan. 697, 142 Pac. 270.

Messrs. John W. Adams and George W. Adams, for appellee:

There is no testimony showing or tending to show that the deceased did not look and listen before going upon the railroad track. Hence the presumption would be that he both looked and listened when approaching the crossing.

Atchison, T. & S. F. R. Co. v. Baumgartner, 74 Kan. 148, 85 Pac. 822, 10 Ann. Cas. 1094.

One placed in a position of danger by the negligent act of another, requiring immediate and rapid action, without time to deliberate as to the better course to pursue, is not held to the strict accountability as one in more favorable circumstances, as contributory negligence is not attributable to one for failure to exercise his best judgment in such a case.

Kansas City-Leavenworth R. Co. v. Langley, 70 Kan. 453, 78 Pac. 858; *Tousley v. Pacific Electric R. Co.* 166 Cal. 457, 137 Pac. 31; *Senft v. Western Maryland R. Co.* 246 Pa. 446, 92 Atl. 553; *International & G. N. R. Co. v. Isaacs*, — Tex. Civ. App. —, 168 S. W. 872; *Galveston, H. & S. A. R. Co. v. Linney*, — Tex. Civ. App. —, 163 S. W. 1035; *International & G. N. R. Co. v. Neff*, 87 Tex. 303, 28 S. W. 283; *Mark v. St. Paul M. & M. R. Co.* 30 Minn. 493, 16 N. W. 367; *Lundien v. Ft. Dodge, D. M. & S. R. Co.* 166 Iowa, 85, 147 N. W. 308.

At the time of the accident, the jury found that the electric bell was not ringing when the train approached the crossing, and no other signals given, so that deceased had a right to assume that no train was approaching the crossing, and that he could pass in safety.
L.R.A.1916D.

Dusold v. Chicago G. W. R. Co. 162 Iowa, 441, 142 N. W. 213; *Davitt v. Chicago G. W. R. Co.* 164 Iowa, 216, 145 N. W. 483, 6 N. C. C. A. 420; *Grand Rapids & I. R. Co. v. Cox*, 8 Ind. App. 29, 35 N. E. 183; *Tobias v. Michigan C. R. Co.* 103 Mich. 330, 61 N. W. 514; *Cleveland C. O. & St. L. R. Co. v. Carey*, 33 Ind. App. 275, 71 N. E. 244; *Richmond v. Chicago & W. M. R. Co.* 87 Mich. 374, 49 N. W. 623; *Hughes v. Kelly*, 2 Va. Dec. 588, 30 S. E. 387; *St. Louis Southwestern R. Co. v. Matthews*, 34 Tex. Civ. App. 302, 79 S. W. 71; *Farrell v. Erie R. Co.* 70 C. C. A. 396, 138 Fed. 29; *Barrett v. Delano*, 187 Mo. App. 501, 174 S. W. 181; *Dolph v. New York, N. H. & H. R. Co.* 74 Conn. 538, 51 Atl. 525.

Defendant was guilty of reckless, wanton negligence which was sufficient to sustain the verdict.

Atchison, T. & S. F. R. Co. v. Baker, 79 Kan. 183, 21 L.R.A.(N.S.) 427, 98 Pac. 804; *McClain v. Chicago, R. I. & P. R. Co.* 89 Kan. 24, 130 Pac. 646, Ann. Cas. 1914C, 699; *Memphis & C. R. Co. v. Martin*, 117 Ala. 367, 23 So. 231; *Sanders v. Charleston & W. C. R. Co.* 93 S. C. 543, 77 S. E. 289; *Easterling v. Atlantic Coast Line R. Co.* 91 S. C. 546, 75 S. E. 133; *Batson v. Greenville & K. R. Co.* 95 S. C. 206, 78 S. E. 885; *Cleveland C. C. & St. L. R. Co. v. Starks*, — Ind. App. —, 91 N. E. 565; *Heidenreich v. Bremmer*, 260 Ill. 439, 103 N. E. 275; *Elgin, J. & E. R. Co. v. Duffy*, 191 Ill. 489, 61 N. E. 432; *Rowe v. Southern R. Co.* 85 S. C. 23, 66 S. E. 1056; *Central of Georgia R. Co. v. Partridge*, 136 Ala. 587, 34 So. 927; *Eskridge v. Cincinnati, N. O. & T. P. R. Co.* 89 Ky. 367, 12 S. W. 580; *Lacey v. Louisville N. R. Co.* 81 C. C. A. 352, 152 Fed. 134; *Louisville & N. R. Co. v. Orr*, 121 Ala. 489, 26 So. 35; *Birmingham Southern R. Co. v. Powell*, 136 Ala. 232, 33 So. 875; *Louisville & N. R. Co. v. Loyd*, 186 Ala. 119, 65 So. 153; *Weatherly v. Nashville, C. & St. L. R. Co.* 166 Ala. 575, 51 So. 959; *Alabama G. S. R. Co. v. Russey*, 190 Ala. 239, 67 So. 445; *Birmingham R. & Electric Co. v. Pinckard*, 124 Ala. 372, 26 So. 880.

Marshall, J., delivered the opinion of the court:

In this action the plaintiff seeks to recover for the death of her husband, caused by the negligence of the defendant. The defense was contributory negligence on the part of the deceased. The plaintiff recovered judgment. The defendant appeals.

John H. Jacobs, the husband of the plaintiff, met his death by driving his automobile on the defendant's tracks in front of a swiftly moving passenger train. This occurred on Saturday afternoon at the

crossing of the principal street in Valley Center. The defendant maintained an electric bell at this crossing. The jury made special findings of facts as follow:

"(2) For how long a distance east of the railroad track at the crossing in question could one traveling on the highway continuously have in sight a train stationed a quarter of a mile northward of the crossing? Ans. Twenty-eight feet."

"(6) Was the electric bell at the crossing in question ringing when the said train approached said crossing? Ans. No.

"(7) Were the engineer and firemen each at his post of duty and in his particular place on the engine as the train in question approached and passed over the crossing in question? Ans. Yes.

"(8) How far was the engine from the crossing in question when the fireman first discovered that the automobile would probably not be stopped in time to avoid a collision with the engine? Ans. One hundred fifty feet.

"(9) How far was the automobile from the crossing when the fireman first discovered that said automobile would probably not be stopped before it got on the crossing in the way of the engine? Ans. Fifteen feet.

"(10) After the fireman on the engine discovered, if he did discover, that the automobile would probably go upon the crossing in the way of the engine, what could have been done by him or the engineer that was not done to prevent the collision in question? Ans. Nothing.

"(11) How far was the automobile in question from the crossing when the fireman first saw it approaching the crossing? Ans. Fifty feet.

"(12) What particular place on the pilot or engine first came in contact with the automobile? Ans. Side of pilot back 3 feet from the point.

"(13) How far from the crossing did the engineer make his service application of air as the train approached Valley Center, if same was made at all? Ans. One-quarter mile.

"(14) What, if anything, would have prevented said Jacobs from seeing or hearing the approaching train in time to have avoided the collision if he had taken the pains to look and listen for same when he was about 25 feet from the crossing? Ans. Nothing.

"(15) If you find that the engineer cut off steam before he came to the crossing, state how far from said crossing he made such cut-off? Ans. One-quarter mile.

"(16) If you find that the negligence of those in charge of the engine caused the injury and death in question, state in what L.R.A.1916D.

such negligence consisted? Ans. Excessive speed.

"(17) What was the usual rate of speed at which this mail train in question usually passed over the crossing in question at Valley Center prior to the date of the collision in question? Ans. Thirty-five miles.

"(18) Was the said Jacobs guilty of negligence on his own part which contributed to his injury and death at the time and place in question? Ans. No.

"(19) Did the engineer and firemen as they approached the crossing in question, suppose that the electric bell at the crossing would ring automatically as the engine approached the said crossing? Ans. Yes."

"(21) Give speed of train at time of collision in question. Ans. Forty-five miles."

"(24) At what rate of speed was the automobile running when 20 feet from the crossing? Ans. Ten miles.

"(25) Name the different signals given of the approach to the crossing in question by the train in question. Ans. None."

1. The fourteenth finding establishes that the deceased did not look nor listen for the approach of a train before driving on the track. *Beech v. Missouri, K. & T. R. Co.* 85 Kan. 90, 116 Pac. 213; *Cleveland, C. C. & St. L. R. Co. v. Coffman*, 30 Ind. App. 462, 64 N. E. 235, 66 N. E. 179; *Tobias v. Michigan C. R. Co.* 103 Mich. 330, 61 N. W. 518.

The vital question in this case is: Did the failure of the electric bell to ring relieve the deceased of the obligation to look and listen before attempting to cross the track? The plaintiff seeks to have the rule in *McClain v. Chicago, R. I. & P. R. Co.* 89 Kan. 24, 130 Pac. 646, Ann. Cas. 1914C, 699, applied in this case. There this court said: "Ordinarily, if a traveler proceeds across a railroad track without taking the precaution to ascertain if there is a train in dangerous proximity he does so at his peril. The application of this rule is modified to some extent by the circumstance that gates have been erected and watchmen employed at crossings. In such case a traveler is not required to exercise the same vigilance when he approaches a track as he would at crossings not so guarded." 89 Kan. 30.

Human intelligence guarded the crossing and operated the gate in that case. In the present case an electrical, mechanical device was intended to give warning of approaching trains. Sometimes this bell would not ring when trains were passing, and at other times it rang when no train was in sight. An electric bell, which at most can be nothing but a warning of an approaching train to those who listen, cannot be classed with a gate thrown across a street to prevent

passing over railroad tracks; neither can it be classed with a flagman who stands in the street and stops those who desire to cross when there is danger. It is more nearly analogous to the locomotive bell and whistle. Failure to ring the engine bell or sound the whistle does not relieve a traveler from the duty to look and listen before attempting to cross a railroad track. If the plaintiff's contention in this respect is correct, a railroad increases its responsibility and liability by putting in electric bells at highway and street crossings. The object in putting in electric bells is to promote public safety, not to increase railroad liability. Silence of such a bell is not an invitation to cross railroad tracks without taking the ordinary precautions.

In *McSweeney v. Erie R. Co.* 93 App. Div. 496, 499, 87 N. Y. Supp. 836, 838, an action for damages for injuries sustained at a crossing where there was an electric bell, the court said: "The exercise of due care required the deceased, under the circumstances, to look and listen for an approaching train, and the mere fact that the stationary signal bell was not ringing did not relieve him of the importation of negligence if he failed to exercise this degree of care."

In that case judgment for the railroad was rendered at the close of the plaintiff's evidence. To the same effect is *Cleveland, C. C. & St. L. R. Co. v. Heine*, 28 Ind. App. 163, 62 N. E. 455; *Cleveland, C. C. & St. L. R. Co. v. Coffman*, 30 Ind. App. 462, 64 N. E. 235, 66 N. E. 179, supports this position, although a new trial was ordered. But a new trial was requested by the defendant, not judgment on the findings. The plaintiff cites *Tobias v. Michigan C. R. Co.* 103 Mich. 330, 61 N. W. 518, to support his contention that it was the province of the jury to determine whether or not the deceased was guilty of contributory negligence in attempting to cross the railroad track without looking or listening when the electric bell was not ringing. The supreme court of Michigan there said that the question of contributory negligence should have been given to the jury, and reversed a judgment for the defendant because it was not given. A dissenting opinion in that case argues that the court should have directed a verdict for the defendant. *Wabash R. Co. v. McNown*, 53 Ind. App. 116, 99 N. E. 129, 100 N. E. 383, supports the majority opinion in the *Tobias Case*, supra. We think the better rule is that the failure of an electric bell to ring does not relieve one about to cross a railroad track of the imperative duty to look and listen before crossing; if he fails to do so, he is guilty of such contributory negligence as will

prevent his recovery for any injuries sustained, and there is nothing to submit to the jury.

It has been held that it is the positive duty of the driver of an automobile to stop, look and listen before crossing railroad tracks. *Atlantic Coast Line R. Co. v. Weir*, 63 Fla. 69, 41 L.R.A.(N.S.) 307, 58 So. 641, Ann. Cas. 1914A, 126; *Earle v. Philadelphia & R. R. Co.* 248 Pa. 193, 93 Atl. 1001; *Craig v. Pennsylvania R. Co.* 243 Pa. 455, 90 Atl. 135; *Brommer v. Pennsylvania R. Co.* 29 L.R.A.(N.S.) 924, 103 C. C. A. 135, 179 Fed. 577; *New York C. & H. R. R. Co. v. Maidment*, 21 L.R.A.(N.S.) 794, 93 C. C. A. 413, 168 Fed. 21; *Bason v. Alabama G. S. R. Co.* 179 Ala. 299, 60 So. 922; 2 R. C. L. 1206.

On the other hand, it has been held that the driver of an automobile is not under all circumstances, as a matter of law, required to stop before crossing a railroad track. *Dickinson v. Erie R. Co.* 81 N. J. L. 464, 37 L.R.A.(N.S.) 150, 81 Atl. 104; *Pendroy v. Great Northern R. Co.* 17 N. D. 433, 117 N. W. 531; *Hull v. Seattle, R. & S. R. Co.* 60 Wash. 162, 110 Pac. 804; 2 R. C. L. 1206.

This state follows the rule last stated. *Denton v. Missouri, K. & T. R. Co.* 90 Kan. 51, 56, 47 L.R.A.(N.S.) 820, 133 Pac. 558, Ann. Cas. 1915B, 639. See also *Atchison, T. & S. F. R. Co. v. Hague*, 54 Kan. 284, 45 Am. St. Rep. 278, 38 Pac. 257; *Chicago, R. I. & P. R. Co. v. Williams*, 56 Kan. 333, 43 Pac. 246, 11 Am. Neg. Cas. 545; *Chicago, R. I. & P. R. Co. v. Hinda*, 56 Kan. 758, 762, 44 Pac. 993; *Atchison, T. & S. F. R. Co. v. Powers*, 58 Kan. 544, 550, 50 Pac. 452; *Atchison, T. & S. F. R. Co. v. Holland*, 60 Kan. 209, 216, 56 Pac. 6; *Atchison, T. & S. F. R. Co. v. Willey*, 60 Kan. 819, 822, 58 Pac. 472, 6 Am. Neg. Rep. 515; *Johnson v. Chicago, R. I. & P. R. Co.* 80 Kan. 456, 461, 103 Pac. 90. More than a dozen times this court has said that a traveler must look and listen for approaching trains before attempting to cross railroad tracks, and that if he fails to do so, and is injured in consequence thereof, damages cannot be recovered for such injury. *Leavenworth L. & G. R. Co. v. Rice*, 10 Kan. 426; *Union P. R. Co. v. Adams*, 33 Kan. 427, 6 Pac. 529; *Clark v. Missouri P. R. Co.* 35 Kan. 350, 355, 11 Pac. 134; *Atchison, T. & S. F. R. Co. v. Townsend*, 39 Kan. 115, 119, 17 Pac. 804; *Atchison, T. & S. F. R. Co. v. Priest*, 50 Kan. 16, 22, 31 Pac. 674; *Roach v. St. Joseph & I. R. Co.* 55 Kan. 654, 658, 41 Pac. 964; *Atchison, T. & S. F. R. Co. v. Willey*, 60 Kan. 819, 58 Pac. 472, 6 Am. Neg. Rep. 515; *Burns v. Metropolitan Street R. Co.* 66 Kan. 188, 191, 71 Pac. 244; *Metropolitan Street R. Co. v. Ryan*, 69

Kan. 538, 540, 77 Pac. 267; Hoopes v. Atchison, T. & S. F. R. Co. 72 Kan. 422, 83 Pac. 987; Union P. R. Co. v. Entsminger, 76 Kan. 746, 749, 92 Pac. 1095; Chicago, R. I. & P. R. Co. v. Wheeler, 80 Kan. 187, 191, 101 Pac. 1001; Beech v. Missouri, K. & T. R. Co. 85 Kan. 90, 116 Pac. 213; Adams v. Atchison T. & S. F. R. Co. 93 Kan. 475, 144 Pac. 999; Butts v. Atchison, T. & S. F. R. Co. 94 Kan. 328, 146 Pac. 1142.

The driver of an automobile is under the same or a more imperative duty to look and listen before crossing railroad tracks. Gage v. Atchison, T. & S. F. R. Co. 91 Kan. 253, 137 Pac. 938, Ann. Cas. 1915B, 410; Northern P. R. Co. v. Tripp, 136 C. C. A. 302, 220 Fed. 286; Horandt v. Central R. Co. 78 N. J. L. 190, 73 Atl. 93; Elder v. Pittsburgh, C. C. & St. L. R. Co. 186 Ill. App. 199; Glick v. Cumberland & W. Electric R. Co. 124 Md. 308, 92 Atl. 778; Ft. Wayne & N. I. Traction Co. v. Schoeff, 56 Ind. App. 540, 105 N. E. 924; Allison v. Chicago, M. & St. P. R. Co. 83 Wash. 591, 145 Pac. 608. The rule requiring one about to cross a railroad track to look and listen applies in a city as well as in the country. Burns v. Metropolitan Street R. Co. 66 Kan. 191, 71 Pac. 244; Metropolitan Street R. Co. v. Ryan, 69 Kan. 538, 540, 77 Pac. 267; Northern P. R. Co. v. Tripp, 220 Fed. 286, 136 C. C. A. 302; Horandt v. Central R. Co. 78 N. J. L. 190, 73 Atl. 93; Elder v. Pittsburgh C. C. & St. L. R. Co. 186 Ill. App. 199; Allison v. Chicago, M. & St. P. R. Co. 83 Wash. 591, 145 Pac. 608. The deceased was guilty of contributory negligence, such as will prevent the plaintiff's recovery in this action, unless those in charge of the engine were guilty of wantonness.

2. The plaintiff contends that the deceased lost his life through the wanton conduct of those in charge of the engine. This contention is based on the failure of the enginemen to ring the bell and sound the whistle, and on the high rate of speed at which the train was run through Valley Center. Against this the jury found that the service application of air was applied and the steam cut off one-quarter of a mile before reaching the crossing, and that the enginemen supposed the electric bell at the crossing was ringing. Although contributory negligence on the part of the deceased will excuse the defendant for its negligence, yet wantonness on the part of the defendant will avoid the deceased's contributory negligence and render the defendant liable. Kansas C. R. Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203; Union P. R. Co. v. Adams, 33 Kan. 427, 429, 6 Pac. 529; Kansas City, Ft. S. & G. R. Co. v. Kelly, 36 Kan. 655, 59 Am. Rep. 596, 14 Pac. 172, 3 Am. Neg. Cas. 437; Union P. R. Co. v. L.R.A.1916D.

Dunden, 37 Kan. 1, 14 Pac. 501; Kansas P. R. Co. v. Whipple, 39 Kan. 531, 540, 18 Pac. 730; Tennis v. Interstate Consol. Rapid Transit R. Co. 45 Kan. 503, 25 Pac. 876; Atchison, T. & S. F. R. Co. v. Todd, 54 Kan. 551, 559, 38 Pac. 804; Missouri P. R. Co. v. Cooper, 57 Kan. 185, 190, 45 Pac. 587; Cummings v. Wichita R. & Light Co. 68 Kan. 218, 220, 74 Pac. 1104, 1 Ann. Cas. 708, 15 Am. Neg. Rep. 548; Tempfer v. Joplin & P. R. Co. 89 Kan. 374, 379, 131 Pac. 592.

Negligence is not presumed. It must be proved. Missouri P. R. Co. v. Haley, 25 Kan. 35; Jackson v. Kansas City, L. & S. K. R. Co. 31 Kan. 761, 3 Pac. 501; Atchison, T. & S. F. R. Co. v. Tindall, 57 Kan. 719, 48 Pac. 12, 2 Am. Neg. Rep. 141; Byland v. E. I. du Pont de Nemours Powder Co. 93 Kan. 288, 294, L.R.A.1915F, 1000, 144 Pac. 251; Willis v. Skinner, 94 Kan. 621, 624, 147 Pac. 60; Union P. R. Co. v. Mahaffy, 4 Kan. App. 88, 46 Pac. 187. Wantonness, like negligence, is not presumed, but must be proved. Chicago, R. I. & P. R. Co. v. Lacy, 78 Kan. 622, 626, 97 Pac. 1025. This court has often said that whether negligence in a particular case is shown is ordinarily a question for the jury, but when the facts are undisputed or are definitely found by the jury, and only one conclusion can be drawn therefrom, it becomes a question of law for the court. Kansas P. R. Co. v. Butts, 7 Kan. 308; Wade v. Electric Co. 94 Kan. 462, 469, 147 Pac. 63, and numerous cases intervening. The same rule applies when wantonness is the issue. Campbell v. Kansas City, Ft. S. & M. R. Co. 55 Kan. 536, 543, 40 Pac. 997; Missouri P. R. Co. v. Cooper, 57 Kan. 185, 191, 45 Pac. 587; Chicago, R. I. & P. R. Co. v. Lacy, supra; Gilbert v. Missouri P. R. Co. 91 Kan. 711, 139 Pac. 380.

This court has reversed judgment in several cases because there was not sufficient evidence to justify the finding of the jury that the injury was caused by wantonness. Central Branch Union P. R. Co. v. Henigh, 23 Kan. 347, 359, 33 Am. Rep. 167; Kansas P. R. Co. v. Whipple, 39 Kan. 531, 18 Pac. 730; Kansas City, Ft. S. & G. R. Co. v. Kier, 41 Kan. 671, 21 Pac. 774; Missouri P. R. Co. v. Cooper, 57 Kan. 185, 191, 45 Pac. 587; Chicago, R. I. & P. R. Co. v. Lacy, 78 Kan. 622, 626, 97 Pac. 1025; Gilbert v. Missouri P. R. Co. 91 Kan. 711, 139 Pac. 380; McCullough v. Missouri P. R. Co. 94 Kan. 349, 146 Pac. 1005. This court has sustained a judgment where the trial court denied relief to the plaintiff for the reason that the evidence was not sufficient to establish wantonness. Campbell v. Kansas City, Ft. S. & M. R. Co. 55 Kan. 536, 543,

40 Pac. 997. In *Chicago, R. I. & P. R. Co. v. Lacy*, 78 Kan. 622, 97 Pac. 1025, this court said:

"To constitute wilful negligence there must be a design, purpose, or intent to do wrong or to cause the injury." 78 Kan. 629.

"Reckless disregard of security, wantonness or other equivalent of bad faith, and the wilful or malicious disposition to injure all involved something else than negligence." *Missouri P. Co. v. Walters*, 78 Kan. 39, 41, 96 Pac. 347.

"The conduct of the employees in charge of an engine in failing to take measures for the protection of a person upon the track can be characterized as wanton, 'in the sense in which that word is used in this connection, only when they actually know of his presence, or when the situation is substantially the same as though they had such knowledge,—when such knowledge may fairly be imputed to them. It is not enough for that purpose that the exercise of ordinary diligence would have advised them of the fact, for their omission of duty in that regard amounts only to negligence. Nor is it enough that they know someone might be in the place of danger; the probability must be so great—its obviousness to the employees so insistent—that they must be deemed to realize the likelihood that a catastrophe is imminent and yet to omit reasonable effort to prevent it because indifferent to the consequences." *Atchison, T. & S. F. R. Co. v. Baker*, 79 Kan. 183, 187, 21 L.R.A.(N.S.) 427, 98 Pac. 804, 806.

In *Union P. R. Co. v. Mitchell*, 56 Kan. 324, 43 Pac. 244, this court approved an instruction which defined reckless conduct as an indifference to the rights of others, an

indifference whether wrong is done or not, and which told the jury that the defendant could be held liable only for injuries inflicted which were wilful, wanton, or malicious, or which were so grossly negligent as to amount to wantonness. Many of our courts hold that wantonness precluding a defense of contributory negligence cannot be predicated on the omission of a duty before the discovery of a person in a position of peril on a railroad track. Note, in 21 L.R.A.(N.S.) 427-442.

Why did the enginemen make the service application of air? Why did they cut off the steam when a quarter of a mile away from the crossing? What effect shall be given to their supposition that the electric bell was ringing? The only answer to these questions is that they did consider the possibility of persons attempting to cross the railroad track, and had regard for their safety.

Taking into consideration the facts found by the jury in this case—the failure of the enginemen to ring the bell and sound the whistle, the rate of speed at which they were accustomed to go through Valley Center, the rate at which they went through on the day of the accident, the application of the air, the cutting off of steam, the supposition that the electric bell was ringing, and the conditions existing at the crossing,—we are compelled to say as a matter of law that the enginemen were not guilty of wantonness. *Gilbert v. Missouri P. R. Co.* 91 Kan. 711, 139 Pac. 380, supports this conclusion.

The judgment is reversed, with direction to the trial court to enter judgment for the defendant.

Petition for rehearing denied.

Annotation—Right of traveler to rely on automatic signals at crossing.

For a discussion of the general question of the duty of a traveler approaching railway crossings as to the place and direction of observation, see note to *Wallenburg v. Missouri P. R. Co.* 37 L.R.A.(N.S.) 135.

As to the conduct of a flagman, or absence from his post, as affecting liability for injury at a crossing, see note to *Roby v. Kansas City Southern R. Co.* 41 L.R.A.(N.S.) 355.

For the duty of one crossing a railroad track as affected by the flagman's signal to proceed, see *Union P. R. Co. v. Rosewater*, 15 L.R.A.(N.S.) 803.

For the effect of the failure of a railroad company to give the customary signals at a highway crossing, upon the duty of a traveler to look and listen, see L.R.A.1916D.

Cooper v. North Carolina R. Co. 3 L.R.A.(N.S.) 391, and note.

As to the duty of a traveler going upon a railroad crossing when the gates are open, see *Koch v. Southern California R. Co.* 4 L.R.A.(N.S.) 521, and note.

It is difficult to deduce from the cases any definite rule as to the extent to which a traveler on a highway may rely upon automatic safety devices placed at railroad crossings for his protection. The cases seem to agree that the presence of such devices at a crossing may properly be regarded as having some effect upon the care required of a highway traveler, but some of the cases, while apparently recognizing this principle, require such additional pre-

cautions upon the part of the traveler, when considering a concrete example, that there seems to be no practical difference between the care required when an automatic device is present and that required when no such device is maintained.

About all that may be said is that a traveler approaching a crossing at which he knows an automatic signal is maintained, while entitled to place some reliance upon the indication of safety which silence of the signal implies, is nevertheless bound to use such care in addition as an ordinarily prudent man would use under such circumstances.

Although a railroad company is under no original obligation to place a signal bell or gong at a particular crossing, yet, if it has done so and has maintained the same for a long time, travelers approaching the crossing have a right to presume, if the bell or gong is not ringing, that they may pass over the crossing safely if, in the exercise of due care and caution, nothing appears to the contrary, but the failure of the company to ring the signal bell at the crossing, or to give other due and proper warning of the approach of a train, would not excuse a traveler approaching the crossing from the exercise of reasonable care and caution, such as an ordinarily prudent and careful man would exercise under similar circumstances, the presumption being in the case of a deceased traveler that he was in the exercise of reasonable care and caution unless the evidence rebuts that presumption. *Welch v. Baltimore & O. R. Co.* (1908) 7 Penn. (Del.) 140, 76 Atl. 50.

Although there was no legal obligation requiring a railroad to maintain an automatic electric bell at a crossing, where it did in fact maintain such a bell it was proper to show that it did not work, on both the question of defendant's negligence and of plaintiff's freedom from blame. *Henn v. Long Island R. Co.* (1900) 51 App. Div. 292, 65 N. Y. Supp. 21; motion for leave to appeal denied (1900) 52 App. Div. 625, 65 N. Y. Supp. 1135.

Though a railroad company is not required to keep or maintain an electric bell at a crossing, yet when it voluntarily keeps and maintains such a bell the traveling public have a right to rely upon it to the extent of presuming that it will correctly indicate the danger, or serve the warning which it was intended that it should give. *Wabash R. Co. v. L.R.A.* 1916D.

McNown (1912) 53 Ind. App. 116, 99 N. E. 126, 100 N. E. 383.

In *Cleveland, C. C. & St. L. R. Co. v. Heine* (1902) 28 Ind. App. 163, 62 N. E. 455, the court reversed a general verdict in favor of decedent's administrator with instructions to sustain the railroad company's motion for judgment on answers to interrogatories which were to the effect that deceased, after crossing the most southerly track, looked and listened for an approaching locomotive, but did not again look before going upon the track upon which he was struck, because of his reliance upon the failure of the signal bells to ring, the court saying: "Although the signal bells were maintained for the purpose of warning travelers, which fact decedent knew, and although decedent had the right to presume that no train or locomotive was approaching, because the signal bells were not ringing, yet this did not excuse him from the use of his senses of sight and hearing to ascertain for himself whether a train or locomotive was, in fact, approaching. The failure to give the signals raised the presumption of safety, but such failure was no more than a circumstance which could properly be taken into consideration in determining the ultimate question of whether he did exercise the degree of care required or not. And, in determining whether he did exercise such care, his conduct at the time is to be judged in the light of such presumption. . . . So that, although there was a failure to give the signals, he was still required to look for an approaching locomotive if by looking he could have seen it, and he was required to listen for an approaching locomotive if by listening he could have heard it, and his failure to do so was negligence. And when the jury say that after he had passed the obstruction upon the most southerly track, and before he went upon the track upon which he was struck, he could have looked to the westward and have seen the locomotive approaching in time to have avoided the collision, had he not depended on the warning bells, they are not excusing the omission of the duty resting upon decedent to look for a train or locomotive before going upon the track. The duty to look still rested upon him, notwithstanding the signals were not given, and if he had looked he could have seen the locomotive in time to have avoided the collision."

In *Headley v. Denver & R. G. R. Co.* (1915) — *Colo.* —, 154 Pac. 731, it is held that the fact that an automatic bell

was out of order and failed to ring in no wise relieved a person about to cross the track from taking ordinary precaution for his own safety, the court saying: "While there are cases which hold that a silent signal bell or an open gate may operate to excuse a traveler from looking and listening for an approaching train, and the question should be submitted to a jury under proper instructions, the weight of authority and best reasoned cases are to the contrary. It is a matter of common knowledge that electric bells or even gates are liable to be out of order, and common prudence would not permit one to rely solely thereon."

Where the evidence indicates that the occupants of a buggy drove on a crossing confident of their safety because of the silence of a stationary signal bell, when a momentary halt within 23 feet of the track, or a glance when the buggy reached that spot in the direction from which the train was approaching, would have avoided the accident, they were without the observance of that care which the law imposed upon them notwithstanding the omission of the signal. *McSweeney v. Erie R. Co.* (1904) 93 App. Div. 496, 87 N. Y. Supp. 836.

In *Cleveland, C. C. & St. L. R. Co. v. Sivey* (1905) 27 Ohio, C. C. 248, where there was some evidence that the automatic bell at the crossing was not ringing, the court said: "Even upon the theory of plaintiff below that it is the duty of the railway company to keep the gong in order, nevertheless the traveler may, in view of other noises, be bound in the exercise of ordinary care, to stop and listen for the ringing of the gong."

In *Conkling v. Erie R. Co.* (1899) 63 N. J. L. 338, 43 Atl. 666, it is held that the fact that an electric gong at a crossing was out of order and did not ring as usual did not justify in any degree the neglect of the plaintiff to exercise caution in approaching the crossing.

But in New Jersey, a statute passed subsequently to the above case, P. L. 1909, p. 137, provides that where a device has been provided at a crossing for the safety of travelers, and such a device is out of order or is not operating, the company shall post a notice to that effect, and that when no notice is posted, "no plaintiff shall be barred of the action because of the failure of the person injured or killed to stop, look, and listen before passing over said crossing," and under this statute where an automatic electric bell was not ringing when the L.R.A.1916D.

locomotive that killed deceased was approaching, and there was no notice posted at the crossing that the bell was out of order, such a condition absolved the intestate from stopping, looking, and listening. *Fernetti v. West Jersey & S. R. Co.* (1915) 87 N. J. L. 268, 93 Atl. 576.

Evidence that the railroad company maintained an automatic bell at a railroad crossing, and that it was not ringing at the time of the accident, is admissible to throw some light on the plaintiff's contributory negligence as well as upon the defendant's negligence. *Cleveland, C. C. & St. L. R. Co. v. Coffman* (1902) 30 Ind. App. 462, 64 N. E. 233, 66 N. E. 179.

In *Chicago & A. R. Co. v. Pearson* (1897) 71 Ill. App. 622, where evidence was admitted to show that an electric alarm bell which had been maintained at the crossing at which deceased was killed had, on the day of the accident, been cut out so that at the time of the injury it was not in operation, without any count in the declaration in any way referring to such bell having been removed, the court held that the admission of such evidence was error, saying that the jury could only have inferred from such evidence that it was negligence to have taken the alarm bell out under the circumstances, and that the deceased, not observing its alarm, as they doubtless believed he was accustomed to do, was thereby led to his death; but that, had any count of the declaration been predicated upon such theory, the point might properly have been submitted to the jury.

Where an electric bell had not been operated for more than a year, and the duties of deceased had taken him near the crossing nearly every day, the jury was not at liberty to conjecture or guess that he could have been ignorant of the condition of the bell. *Wellenhofer v. New York, L. E. & W. R. Co.* (1893) 66 Hun, 634, 50 N. Y. S. R. 111, 21 N. Y. Supp. 866.

And one who was about to cross a railroad track at a crossing at which an electric signal bell was maintained must have known that the bell was not in order from the fact that it was not ringing while a train bound in the opposite direction from the one by which he was injured was passing, he being within less than 45 feet of the crossing when such train came upon and passed over it. *Headley v. Denver & R. G. R. Co.* (1915) — Colo. —, 154 Pac. 731.

The negligence of a railway company

consisting in the silence of the electric gong at the crossing was among the facts from which due care or negligence on the part of the deceased was to be found, and while the erection of gongs or other devices at a highway or street crossing to warn travelers of approaching trains does not excuse a traveler from exercising ordinary care or caution, the same degree of care and caution is not required of him as if there were no such device, and the jury has a right to infer that the deceased had placed some reliance upon the fact that the electric gong failed to sound as the engine approached the crossing, and was thereby misled. *Kimball v. Friend* (1897) 95 Va. 125, 27 S. E. 901.

In *Tobias v. Michigan C. R. Co.* (1894) 103 Mich. 330, 61 N. W. 514, it was held that where the evidence that deceased failed to look for trains at the crossing was such that the court should have directed a verdict in favor of defendant but for the question of the maintenance of an electric bell at the crossing, the court reversed a decision in favor of the defendant because of failure to charge, as requested by plaintiff, that if deceased did not know of any fault in the condition of the bell, the fact that it was not ringing might be taken into consideration with other facts in the case as bearing upon the question of deceased's contributory negligence, the court saying: "It cannot be said that the deceased would have no right to rely upon the ringing of this electric bell to warn him of the approach of the train. If the electric bell had rung, it would have given him warning. That he expected it to ring might make him less cautious in looking for the coming of a train."

Upon an appeal from a second trial of the above case in (1896) 110 Mich. 440, 68 N. W. 234, a judgment for defendant was sustained. An instruction to the jury which in substance left it to the jury, if it found that the bell failed to give a warning, and that plaintiff was ignorant of the fact that the bell was liable to fail, and that he did in fact rely upon it, to say whether a reasonably prudent man would have relied upon the bell at all, and if he would, how far, as a reasonably prudent man, he should have relied upon it, was not open to the objection that it eliminated any right of the deceased to in any degree rely upon the ringing of the bell to warn him of the approach of the train because it contained a statement that "I do not want you to understand that the L.R.A.1916D.

presence of that electric bell diminished the caution or care required of an approaching traveler, for it did not."

In *Hicks v. New York, N. H. & H. R. Co.* (1895) 164 Mass. 424, 49 Am. St. Rep. 471, 41 N. E. 721, where plaintiff, after stopping to look and listen at some distance from the track, knowing that an electric gong was maintained at the crossing and noticing that it was not ringing, drove on without again stopping to look and listen, it was held that his conduct after he started forward might properly be affected to some degree by the fact that the electric bells were not ringing.

That an automatic bell had been provided at a crossing, and that decedent knew of it and relied thereon, were relevant facts, the weight of which was for the jury in connection with other circumstances; but an instruction to the jury that, if the automatic bell did not sound, deceased had a right to presume that the way was clear, was error, as such failure is not in itself sufficient to justify an indifference to other means of warning, but it is only a circumstance to be taken into consideration in determining whether due and proper care was exercised. *Southern Indiana R. Co. v. Corps* (1906) 37 Ind. App. 586, 76 N. E. 902.

When an automatic signal is out of order, so that it rings when no train is approaching, a traveler familiar with such fact may ignore its meaning and rely upon other precautions for his own safety the same as if the automatic signal were not present.

Where a driver knew that an electric bell was out of order so that its being silent gave no assurance of safety, and its ringing was no certain indication of danger, the situation as to him was the same as if a bell had never been placed at the crossing. *Maryland Electric R. Co. v. Beasley* (1912) 117 Md. 270, 83 Atl. 157.

Where evidence was admitted that the signal bell maintained at a crossing was ringing at the time of the accident, it was proper to admit in rebuttal evidence tending to show that the bell was out of order at times and that it would ring continuously when there was no train at or near the crossing, in connection with evidence that deceased frequently used the crossing, which tended to show knowledge on his part of the bell's unreliability. *Wells v. Baltimore & O. S. W. R. Co.* (1910) 153 Ill. App. 23.

So, where an electric signal bell was so arranged that it would ring when

cars were standing on the track as well as when a train was approaching, and, because of the number of trains and cars usually standing, it was ringing almost continuously, so that persons who traveled on the road knew of that fact and gave little heed to the ringing of the bell, while the ringing of the bell at the time of an accident was a circumstance to be considered by the jury in connection with other evidence tending to show that the company had provided a sufficient warning of the approaching train,

and that the plaintiff was not exercising ordinary care for her own safety, her attempt to cross the tracks after looking for trains when near to it, although the bell was ringing, was not such contributory negligence as would authorize either the jury or the court to disregard her claim for damages, the ringing of the bell being no notice that a moving train was near the crossing under such circumstances. *Cincinnati, N. O. & T. P. R. Co. v. Champ* (1907) 31 Ky. L. Rep. 1054, 104 S. W. 988. R. L. S.

MARYLAND COURT OF APPEALS.

SCHOOL SISTERS OF NOTRE DAME,
Appt.,
v.

REUBEN R. KUSNITT, Trading as Good-year Hospital Rubber Company.

(125 Md. 323, 93 Atl. 928.)

Sale — mistake as to identity of seller — effect.

1. One who, in buying goods from an agent, is misled into the belief that the seller is a large corporate manufacturer, with whom he intends to deal, when in fact it is an individual who buys his stock from manufacturers, is not bound on the contract because of absence of consent to deal with the other party; and it is immaterial that knowledge as to the identity of such other party is of no importance in the formation of the contract.

For other cases, see Sale, III. c, in Dig. 1-52 N. S.

Pleading — admission of amount due — estoppel to deny contract.

2. One who, in the affidavit to his plea in an action on contract, admits a portion of the claim as required by statute, is not estopped from denying the contract if plaintiff failed to take judgment for the amount so admitted.

For other cases, see Pleading, I. m, in Dig. 1-52 N. S.

Sale — neglect to return unopened package — effect.

3. Mere failure to return an unopened package of goods delivered by one with whom there was no contract to purchase them does not raise an obligation to pay for them if there was no demand for their surrender.

For other cases, see Contracts, I. b, in Dig. 1-52 N. S.

(February 10, 1915.)

Note. — For right to avoid contract because of mistake as to identity of other party thereto, see annotation following this case, post, 801.
L.R.A.1916D.

APPPEAL by defendant from a judgment of the Superior Court of Baltimore City in plaintiff's favor in an action brought to recover an amount alleged to be due for rubber goods sold by plaintiff's agent to defendant. Reversed.

The facts are stated in the opinion.

Messrs. Harry M. Benzinger and Henry H. Dinneen, for appellant:

It was incumbent upon the plaintiff to prove the execution of the contract by someone acting on behalf of the defendant.

Horne v. Plumley, 97 Md. 282, 54 Atl. 971.

Even though the execution of the agreement had been conceded, such concession would not have relieved the plaintiff of the necessity of proving the authority of the agent to bind the corporation.

Fifer v. Clearfield & C. Coal & Coke Co. 103 Md. 1, 62 Atl. 1122; *Schutz v. Jordan*, 141 U. S. 213, 35 L. ed. 705, 11 Sup. Ct. Rep. 906; *Moore v. Patterson*, 28 Pa. 505.

The intention of the parties governs in the making and construction of all contracts.

Pollock, Contr. 3d ed. p. 609; *Bannerman v. White*, 31 L. J. C. P. N. S. 28, 10 C. B. N. S. 844, 8 Jur. N. S. 282, 4 L. T. N. S. 740, 9 Week. Rep. 784.

Since mutual consent is essential to every agreement, and agreement is generally essential to contract, there can as a rule be no binding contract where there is no real consent.

Humble v. Hunter, 12 Q. B. 309, 17 L. J. Q. B. N. S. 350; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Lucas v. DeLa Cour*, 1 Maule & S. 249, 14 Revised Rep. 426; *Arkansas Valley Smelting Co. v. Belden Min. Co.* 127 U. S. 382, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308; 9 Cyc. 757, ¶ 2; *Anson*, Contr. 8th ed. p. 163; *Roof v. Morrisson*, 37 Ill. App. 41; *Cundy v. Lindsay*, L. R. 3 App. Cas. 459, 47 L. J. Q. B. N. S. 481, 38 L. T. N. S. 573, 26 Week. Rep. 406, 14 Cox, C. C. 93, 6 Eng. Rul. Cas.

211; *Fifer v. Clearfield & C. Coal & Coke Co. supra.*

The declarations of an agent are not admissible to bind the principal under any circumstances until the agency is first clearly established.

Wilson v. Kelso, 115 Md. 162, 80 Atl. 895; *Marshall v. Haney*, 4 Md. 511, 59 Am. Dec. 92; *Atwell v. Miller*, 11 Md. 359, 69 Am. Dec. 206.

There being no express contract declared on, the burden was upon the plaintiff to show that the goods had been tendered or delivered in accordance with the provisions of the order.

Brager v. Levy, 122 Md. 554, 90 Atl. 102; *Young v. Mertens*, 27 Md. 114; *Glenn v. Rogers*, 3 Md. 312.

Plaintiff assumed the burden of proving that the sisters intended dealing with him, and having failed, he cannot rely on a promise not made to him.

Consumers' Ice Co. v. E. Webster, Son & Co. 32 App. Div. 592, 53 N. Y. Supp. 56; *Paine v. Loeb*, 37 C. C. A. 434, 96 Fed. 164; *Winchester v. Howard*, 97 Mass. 393, 93 Am. Dec. 93; *Gordon v. Street* [1899] 2 Q. B. 641, 69 L. J. Q. B. N. S. 45, 48 Week. Rep. 158, 81 L. T. N. S. 237, 15 Times, L. R. 445; *Barcus v. Dorries*, 64 App. Div. 109, 71 N. Y. Supp. 695; *Fox v. Tabel*, 66 Conn. 397, 34 Atl. 101; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Boulton v. Jones*, 2 Hurlst. & N. 564, 27 L. J. Exch. N. S. 117, 3 Jur. N. S. 1156, 6 Week. Rep. 107; *Holtz v. Schmidt*, 59 N. Y. 253; *Arkansas Valley Smelting Co. v. Belden* Min. Co. 127 U. S. 387, 32 L. ed. 248, 8 Sup. Ct. Rep. 1308; *Humble v. Hunter*, 12 Q. B. 310, 17 L. J. Q. B. N. S. 350; *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184, 3 Mor. Min. Rep. 63; *Concord Coal Co. v. Ferrin*, 71 N. H. 33, 93 Am. St. Rep. 496, 51 Atl. 283; *Gregory v. Wendell*, 40 Mich. 432; *Fifer v. Clearfield & C. Coal & Coke Co.* 103 Md. 1, 62 Atl. 1122.

Messrs. Frank, Emory, & Beeuwkes and C. Howard Millikin, for appellee:

Defendant is estopped by its pleadings and admissions to claim that it believed plaintiff to be a corporation.

Mobberly v. Mobberly, 60 Md. 376; *Scanlon v. Walshe*, 81 Md. 118, 48 Am. St. Rep. 488, 31 Atl. 498.

A mistake as to the person with whom the contract is made avoids the contract only when it is material for one party to know with whom he is contracting and when he has a definite person in view.

Brantly, Contr. 2d ed. § 68, p. 157; *Kerr, Fr. & Mistake*, 4th ed. p. 484; *Smith v. Wheateroft*, L. R. 9 Ch. Div. 223, 47 L. J. Ch. N. S. 745, 39 L. T. N. S. 103, 27 Week. Rep. 42; *Clement v. British American L.R.A.* 1916D.

Assur. Co. 141 Mass. 298, 5 N. E. 847; *Stoddard v. Ham*, 129 Mass. 383, 37 Am. Rep. 369; *Consumers' Ice Co. v. E. Webster, Son & Co.* 32 App. Div. 592, 53 N. Y. Supp. 56; *Benjamin, Sales*, 1906, 5th ed. p. 91; *John Weber & Co. v. Hearn*, 49 App. Div. 213, 63 N. Y. Supp. 41.

When a mistake as to the person contracted with results from a fraudulent misrepresentation, a contract arises voidable at the option of the defrauded party.

1 *Mechem, Sales*, § 267, p. 252; *Brantly, Contr.* 2d ed. p. 158; *John Weber & Co. v. Hearn*, 49 App. Div. 213, 63 N. Y. Supp. 41; *Benjamin, Sales*, 1906, 5th ed. p. 91; *Edmunds v. Merchants' Despatch Transp. Co.* 135 Mass. 283.

Under these circumstances the contract may be avoided for fraud, and is not void on account of mistake.

Brantly, Contr. 2d ed. p. 161; *Gordon v. Street* [1899] 2 Q. B. 641, 69 L. J. Q. B. N. S. 45, 48 Week. Rep. 158, 81 L. T. N. S. 237, 15 Times, L. R. 445; *King's Norton Metal Co. v. Edridge, M. & Co.* 14 Times L. R. 98; *Standard Horseshoe Co. v. O'Brien*, 91 Md. 751, 46 Atl. 346.

The act of the defendant in accepting a part of the goods sold thereunder, and especially in reaffirming that act, after full knowledge of the alleged representation, amounts to a full and complete ratification of the contract.

Brantly, Contr. 2d ed. pp. 190, 200; *Mechem, Sales*, § 1806; *Benjamin, Sales*, 7th ed. 958, 959; 9 Cyc. 438; *White v. Miller*, 132 Iowa, 144, 8 L.R.A. (N.S.) 727, 109 N. W. 465; *Estes v. Reynolds*, 75 Mo. 563; *Lyon v. Bertram*, 20 How. 149, 154, 155, 15 L. ed. 847, 849, 850; *Eclipse Bicycle Co. v. Farrow*, 199 U. S. 581, 587, 50 L. ed. 317, 320, 26 Sup. Ct. Rep. 150.

A purchaser who, upon tender, refuses on a particular ground to accept goods, cannot thereafter justify such refusal upon another ground.

Littlejohn v. Shaw, 159 N. Y. 188, 53 N. E. 810; *Meincke v. Falk*, 61 Wis. 623, 50 Am. Rep. 157, 21 N. W. 786; *Corcoran v. Henshaw*, 8 Gray, 267; *Peterson Bros. v. Mineral King Fruit Co.* 140 Cal. 624, 74 Pac. 162; *Olcese v. Mobile Fruit & Trading Co.* 112 Ill. App. 281, affirmed in 211 Ill. 539, 71 N. E. 1084; *Baird Bros. v. Pratt*, 6 Ind. Terr. 38, 89 S. W. 648; *Sutton v. Risser*, 104 Iowa, 631, 74 N. W. 23; *Naas v. Welter*, 92 Minn. 404, 100 N. W. 211; *Bonney v. Blaisdell*, 105 Me. 121, 73 Atl. 811; *Ginn v. W. C. Clark Coal Co.* 143 Mich. 84, 106 N. W. 867, 107 N. W. 904; *Parkins v. Missouri P. R. Co.* 72 Neb. 831, 101 N. W. 1013; *Gould v. Banks*, 8 Wend. 563, 24 Am. Dec. 90; *Keswick v. Rafter*, 35 App. Div. 508, 54 N. Y. Supp. 850, affirmed in 165 N.

Y. 653, 59 N. E. 1124; O'Donohue v. Leggett, 134 N. Y. 40, 31 N. E. 269, affirming 29 N. Y. S. R. 983, 8 N. Y. Supp. 426; Knox v. Schoenthal, 36 N. Y. S. R. 595, 13 N. Y. Supp. 7; Hayden v. Demets, 53 N. Y. 426; Newbery v. Furnival, 56 N. Y. 638; Smith v. Pettee, 70 N. Y. 13; Manda v. Etienne, 93 App. Div. 609, 87 N. Y. Supp. 588; Drucklieb v. Universal Tobacco Co. 106 App. Div. 470, 94 N. Y. Supp. 777; Hanley v. Combs, 48 Or. 409, 87 Pac. 143; United Fruit Co. v. Bisese, 25 Pa. Super. Ct. 170; Kelly v. Berry, 39 Wis. 669; Hess v. Kaufherr, 128 App. Div. 526; Hill v. Fruita Mercantile Co. 42 Colo. 491, 126 Am. St. Rep. 172, 94 Pac. 354.

Thomas, J., delivered the opinion of the court:

This appeal is from a judgment recovered in the superior court of Baltimore city by Reuben R. Kusnitt, trading as the Goodyear Hospital Rubber Company, against the School Sisters of Notre Dame, a corporation for \$900. The suit was on the common counts, to which the defendant pleaded that "it was never indebted" and "did not promise as alleged."

Joseph S. Holstein, the only witness for the plaintiff, testified that he was the agent of the Goodyear Hospital Rubber Company and traveled "for them," and that on the 28th of October, 1913, he called at Notre Dame College, on Charles Street avenue, Baltimore, and asked for the Sister Superior. When Sister M. Florentine, the Sister Superior, appeared, he exhibited to her samples of rubber goods, and, after receiving from her an order for ice bags and water bags, he talked with her and another sister about matting for the back stairs of the building. Sister M. Florentine sent for another sister to show him the stairs in order that he might measure them. After he measured the back stairs, he asked the Sister Superior "why they did not have the other stairs in front done at the same time," and she said, "No; she could not afford that at the time." He told her the result of his measurement of the back stairs and the prices of the matting, and she asked him what it would cost, and he replied that he could not tell her; that no rubber man could tell her that in advance; but that it would cost 30 cents a pound. He then wrote the following order or contract, which he and the Sister Superior signed:

Goodyear Hospital Rubber Company,
Hartford, Conn.
Goodyear's Famous Rubber Goods of Every
Description.

Shipped via Penn. R. R. as soon as possible. When ship: Date, Oct. 28, 1913.
L.R.A.1916D.

1%, 10 days; net, 30 days. Terms:
Subject to sight draft without notice.

Sold to Notre Dame College, City, Charles St. Ave., State, Baltimore, Md.

All claims must be made within one day after receipt of goods or no allowance will be made.

We, the above-named institution and purchaser, agree to take the following goods as specified below:

$\frac{1}{2}$ doz. M. W. B.\$25 per dozen
 $\frac{1}{2}$ doz. Z. E. P. Ice Bags 15 per dozen
260 pieces 5/16 ($\frac{1}{2}$) Plain Black Matting
11" x 36", at 30¢ per pound.

Special price:

14 pieces 5/16 ($\frac{1}{2}$) Plain Black Matting
8" x 30", at 30¢ per pound.
12 pieces 5/16 ($\frac{1}{2}$) Plain Black Matting
24" x 36", at 30¢ per pound.
2 pieces 5/16 ($\frac{1}{2}$) Plain Black Matting
2" x 36", at 30¢ per pound.
1 #7 In. Ring, \$1.50 ea.
Bevel all edges. Send nails.
Frt. to be deducted Off of Bill.

1 Perf. mat. $\frac{3}{4}$ " Thick 3'x3', name in white N. D. M., as donation.

No chg. 1 Perf. 5'x3' Notre Dame College, white, no Chg., as donation.

Customers should read contract over carefully before signing and should obtain a duplicate from agent. All goods are made special to order and cannot be canceled under any condition.

N. B.—This contract is binding when signed by the customer, and the agent accepting same, by signing it, binds the Goodyear Hospital Rubber Co.

Name of Institution: Notre Dame College.

Signature of Purchaser: Sr. M. Florentine.

J. S. Holstein, Agent.

He further testified that he was at Notre Dame College about an hour and a half; that he did not know the name of the Sister Superior until she signed the contract; that the water bottles, ice bags, and invalid ring were shipped to Notre Dame College by express and received by the defendant, and that the other goods mentioned in the order or contract were shipped by freight and tendered to the college; that it took 2,980 pounds of matting to fill the order, which, at 30 cents a pound, amounted to \$894, and that the amount due plaintiff for the goods ordered was \$900.15.

On cross-examination he testified as follows:

Q. Who is the Goodyear Hospital Rubber Company?

A. The Goodyear Hospital Rubber Company is a concern in Hartford, Connecticut, owned by R. R. Kusnitt.

Q. Who did you tell the sisters of Notre

Dame the Goodyear Hospital Rubber Company was?

A. I did not make any assertion who it was.

Q. Did you tell the sisters of Notre Dame who you represented?

A. Yes, the Goodyear Hospital Rubber Company, of Hartford, Connecticut.

Q. Did you tell them what it was?

A. A rubber concern.

Q. Did you tell the sisters of Notre Dame, at the time plaintiff's exhibit No. 1 (the contract or the order for the goods) was signed, that the Goodyear Hospital Rubber Company was a large firm or corporation in which you were interested as an officer?

A. No, sir; I did not.

Q. Didn't you tell them that the reason for your making these remarkably low prices for the goods offered to be sold was because the winter season was approaching and you had a large factory, and in order to keep the men employed during the winter you offered these prices, which were virtually cost prices?

A. I made the assertion that to keep our factory busy during the winter season, that was the reason I gave for these low prices, and it was true; but any factory we buy goods of is our factory.

Q. Then, as a matter of fact, at the time you made that statement to the sisters, you did not have a factory, did you?

A. We call it our factory when we are under contract to buy certain output.

Q. Did Reuben R. Kusnitt, on the 28th of October, 1913, own any factory?

A. He did not own a factory.

Q. There was no such corporation as the Goodyear Hospital Rubber Company?

A. Well, we did not claim that it was a corporation.

Q. Did you tell the school sisters of Notre Dame, at the time this contract was entered into, that R. R. Kusnitt was the Goodyear Hospital Rubber Company?

A. I did not, because I did not deem it was necessary.

Q. Did you tell them at that time that you were selling these goods below their real value?

A. I did, and so they were.

Q. And didn't you tell them that the members of the corporation that you represented would raise a racket with you, but that you would stand for it, or words to that effect?

A. I do not recall any such statement.

Q. Didn't you tell them that you were selling these goods at that price so as to L.R.A.1916D.

keep your men employed during the winter season?

A. I did.

After stating that the three sisters he mentioned were not together when the contract was signed; that it was signed "in triplicate;" that Sister Florentine left the room while he was packing his goods, and that he left a signed copy of the contract in the room for her, he was shown the following letter, which he said was a letter from the Goodyear Hospital Rubber Company:

Goodyear Hospital Rubber Co., Hartford, Conn.

Goodyear's Famous Rubber Goods of Every Description.

November 17th, 1913.

Notre Dame College, Charles Street Ave., Baltimore, Md.

Rev. Sister M. Florentine, Supr.—

Dear Madam:

Please find enclosed copy of your contract, which is exactly as the original. This matting is for your stairs in back of building. You will also find enclosed bill of lading for matting shipped to-day.

Respectfully yours,

Goodyear Hospital Rubber Co.,

By R. R. Kusnitt, Manager.

RRK/H.

Enclosures.

The witness stated that that was the way the plaintiff usually signed; that the goods referred to were shipped from the warehouse of the plaintiff at 46 Village street, Hartford, Connecticut; and further testified as follows:

Q. That is not your warehouse now?

A. No, sir.

Q. Who, as a matter of fact, manufactured these goods?

A. The Goodyear India Rubber Glove Company, of Maggatuck, Connecticut, manufactured part.

Q. What part did the Goodyear India Rubber Glove Company manufacture?

A. The sundry parts,—the ice and water bags and the invalid ring.

Q. And who manufactured the other part?

A. The people who make the same stuff, the Goodyear,—the genuine Goodyears.

Q. What is the name of that concern?

A. The Jersey Car Spring & Rubber Company of Jersey City, New Jersey.

Q. They manufactured all the matting?

A. Yes, sir.

Q. Who are the "genuine" Goodyear Rubber people?

A. Well, there are 150 Goodyears in the

United States; that is an uncopyrighted name.

Q. One hundred and fifty of them in the United States?

A. Yes. I guess you could count a thousand.

Q. Well, why do you call them genuine if there are 150 of them?

A. That is too much for me to answer; they are all genuine.

Sister Mary Florentine, when asked to state the circumstances under which she signed the contract, said: "On the 28th of October, 1913, the portress telephoned to my office telling me that there was an agent in the parlor exhibiting rubber goods, or wanted to sell rubber goods. I came over and found Mr. Holstein there, and he showed me some ice bags and water bottles. I thought they would be of use in the infirmary. I sent for the infirmarian, Sister Mortana, and asked her if she would like to have some of them, and she stated that she would like to have one-half dozen of each. He spoke of the matting, and told us what it cost. Then he said, 'In the meantime, you are going to take these anyhow, so sign for these.' I signed for the ice bags and water bottles, and so did he. Then Sister Mortana took him to the back stairs, and he came back again, and I don't know whether he told me how many steps there were, but I think there were about 130 to a stair. He said it would be \$1.25 a step. I said: 'Oh, no; we could not spend that much money. It would be about \$300.' And he said: 'Oh, no; it will not be more than \$150 or \$200.' Then I sent for Sister Meletia and spoke to her about it, and she advised not to do it, but he insisted it would not be over \$200, so I sent him out with another sister to measure the stairs, and I thought he was about to fill out another paper when I was called out. I returned later, and I found him on the way to the door. I went to the portress and asked her whether the man had left a paper for me, and she said no."

When asked if she got a copy of the order, she said: "No, I got no copy. There was no copy left. I looked in the parlor where he was, and there was no copy. Then it struck me that perhaps he had written the order on the same paper which I had signed for the water bottles and ice bags, and I was very much troubled about it, and I wrote a registered letter, to be sure that he would get it, countermanding the whole order."

Plaintiff's counsel was then asked to produce the letter, and he said he had no letter dated October 28th, but produced one dated L.R.A.1916D.

October 29th, which the witness said was the letter she referred to, and which is as follows:

College of Notre Dame of Maryland
Charles Street Ave., Baltimore.

Goodyear Hospital Rubber Co., Hartford, Conn.

Gentlemen:—

This morning a representative of your company called regarding rubber goods. We gave him an order for $\frac{1}{2}$ dozen ice bags and $\frac{1}{2}$ dozen water bottles. We also gave him an order for rubber for our back stairs. We had no idea that it would cost so much, but since he left we calculated and find it would be more than we could afford to spend for the next two years. We now recall the order for the rubbers for stairs. You may send us the water bags and the hot water bottles, but consider the order for the rubber for stairs canceled for the present. We may get it later, but not now.

Very truly,

Oct. 29, '13. Sister Mary Florentine.

Sister Florentine stated that the letter was written on the same day that the contract was signed, and that she received a reply to it from the Goodyear Hospital Rubber Company, but had mislaid it and could not find it. Counsel for the plaintiff produced the following copy of it, which the defendant offered in evidence:

Hartford, Conn., October 30, 1913.

College of Notre Dame of Maryland, Rev. Sister Mary Florentine, Superior, Charles Street Ave., Baltimore, Md.

Dear Madam:

We have just received your registered letter at 4:15 this afternoon, in which you state that you wish to cancel your order for rubber matting to some date in the near future. We are very sorry we cannot comply with your wishes, as your order has gone into the works last night and stock is being made up for your contract and will be ready for shipment within a few days, as our factory is working day and night. You have bought these goods at a very low figure and there ought to be no reason why they should not last as long as the institution does. The matting is guaranteed for twenty-five years. Thanking you for your kind order and hoping that our business relations will be the same in the future as they have been in the past, we beg to remain,

Respectfully yours,

Goodyear Hospital Rubber Co.,
....., Manager.

The defendant then offered in evidence

further correspondence with the Goodyear Hospital Rubber Company, in which she asked for a copy of the contract, and then Sister Florentine further testified that, after she received the telegram, she sent two of the sisters up to Hartford, Connecticut, to make inquiry concerning the company, as she was "very doubtful about it;" that at the time she signed the contract the only items it contained were the one-half dozen hot water bags at \$25 per dozen and one-half dozen ice bags at \$15 per dozen; that she did not know that the other items were put on that paper, but thought he was putting them on another to be signed; that Mr. Holstein told her that the matting for the back stairs would not cost \$300, and perhaps not \$200; that there were about 130 steps in each flight of stairs, or about 260 steps in the two flights, and that at first he spoke of the matting costing about \$1.25 a step; that she calculated and saw that it would be about \$300, and he said, "Oh, no; possibly 50 or 75 cents each, and they will not be more than \$200, and possibly only \$150;" that she did not receive a copy of the contract from the defendant until she received the bill for the goods and the bill of lading in the letter of November 17, 1913; that, when the goods arrived by freight, she consulted an attorney, who advised her not to receive them, and that she then telephoned to the station and advised the railroad company to return them, and that she thought the railroad company had done so until a few days later, when she received a postal from the terminal warehouse saying that the goods were there and would be sold at auction in a few days; that she then called up Camden station and asked them why they did not return the goods, and they said that they had written to Hartford, but had gotten no answer; that, at the time she ordered the goods, Mr. Holstein told her that he was a member of the Goodyear Hospital Rubber Company; that he was the only one who could give them the rubber at such reduced rates, and that, when he went back to Hartford, they would call him down for it; that the reason he did it was because the factory had a great many men, and they did not have much to do at that time of the year; that she asked him if the factory was in Hartford, and he said, "No," it was right outside of Hartford; that she never heard of Mr. Kusnitt, and never heard his name; that Mr. Holstein told her that the Goodyear Hospital Rubber Company was a company—a corporation—of which he was a member, and that she therefore ordered the goods from him. On cross-examination she stated that the School Sisters of Notre Dame is a corporation and con-L.R.A.1916D.

trols and operates the Notre Dame College; that she is the president and treasurer of the college, and is called the "Superior;" that the only items in the contract when she signed it were the water bags and ice bags, and, when asked if she had received them, she said a box came to the college during her absence by express and was received by one of the sisters, probably the portress; that it had never been opened and it was still at the college, and that she had never offered to return it to the Goodyear Hospital Rubber Company; that Mr. Holstein told her that the Goodyear Hospital Rubber Company was a company, or a firm, and that he was one of the members, and that it had a factory outside of Hartford; that he said he had a number of men engaged in the factory, and that they did not have much work to do at that season, and that that was the reason he could give her the rubber cheaper; that he said the company had the factory, and that it was run by their men, and that they paid them; that she could not say positively that he used the word "corporation," but that he did use the word "firm or company." The testimony of Sister Florentine in regard to the circumstances under which the contract was signed by her, and the items it contained when she signed it, etc., was corroborated by the testimony of the other two sisters who were present; and Sister Meletia, who was the dean and secretary of the college, further testified that she recollected very positively that Mr. Holstein said that the Goodyear Hospital Rubber Company "was a corporation;" that she inquired about the "peculiarity of the name," and that he said "a corporation had the right to any name that they liked;" that she asked how he could give rates that seemed to her "preposterous," and that he said he was allowed to do that because they "had a big concourse of men, and they were dull at that season, and it was better to get a little something than nothing;" that on November 13th, she went to Hartford, Connecticut, taking Sister Mortana with her, to find out about the Goodyear Hospital Rubber Company, "because she felt convinced that there was some chicanery about the transaction, and she thought that, if she could meet the president of the corporation, she could have an understanding with him;" that she found no institution at all of that name, although she made careful inquiry, looked at the city directory and the telephone directory, went to every shop that had the word "Goodyear" attached to it, or where rubber goods were sold, inquired at the city hall and at police headquarters, and asked "the head man at the postoffice;" that while she was in

Hartford she telephoned to Mr. Holstein's house, and spoke to a woman who said she was Mrs. Holstein, and that she told her that Mr. Holstein was in California or Wyoming and would not return for several months; that she asked her if there was not someone to represent him, and that she replied that unfortunately there was nobody in town; that she then asked her if there was not an office or warehouse or some place where she could meet the officials of the corporation, and that Mrs. Holstein replied there was a warehouse, but that it was very dilapidated and in a miserable part of the town.

During the trial the defendant reserved twenty-seven exceptions, the last being to the ruling of the court below on the prayers and special exceptions to plaintiff's prayers; but, in the view we take of the case, it will only be necessary to consider one of them.

The evidence to which we have referred at some length shows conclusively that the sisters who made the contract in this case on behalf of the defendant thought they were contracting with, and intended to contract with, a company or corporation which owned a large factory in or just outside of Hartford, Connecticut, and employed a great number of men engaged in the manufacture of goods of the character mentioned in the contract; and it also shows that they were led to so believe by the statements and representations of the witness Holstein. It is true he denies that he said that the Good-year Hospital Rubber Company was a corporation, but he admits he told them that he represented a company of that name, and does not deny that he told them that the company had a factory just outside of Hartford where it employed a number of men in manufacturing goods of the kind he offered to sell, and that he was willing to give them the goods mentioned at a reduced rate in order to keep his men employed during the winter season; that there was in fact no such corporation, company, or factory, and that the sisters who represented the defendant in the negotiations never knew or heard of the plaintiff in this case until the suit was brought, and never intended to contract with him, must be conceded.

In Anson on Contracts, 11th ed. § 183, the learned author, in speaking of "mistake as to the identity of the person with whom the contract is made," refers to the cases of *Boulton v. Jones*, 2 Hurlst. & N. 564, 27 L. J. Exch. N. S. 117, 3 Jur. N. S. 1156, 6 Week. Rep. 107, and *Cundy v. Lindsay*, L. R. 3 App. Cas. 459, 47 L. J. Q. B. N. S. 481, 38 L. T. N. S. 573, 26 Week. Rep. 406, 14 Cox, C. C. 93, 6 Eng. Rul. Cas. 211, as follows: "In *Boulton v. Jones*, Boulton had taken over the business of one Brocklehurst,

with whom Jones had been used to deal, and against whom he had a set-off. Jones sent an order for goods to Brocklehurst. Boulton supplied them without any notice that the business had changed hands. When Jones learned that the goods had not come from Brocklehurst, he refused to pay for them, and it was held that he need not pay. 'In order to entitle the plaintiff to recover, he must show that there was a contract with himself.' In *Cundy v. Lindsay*, a person named Blenkarn, by imitating the signature of a respectable firm named Blenkiron, induced AB to supply him with goods which he afterwards sold to X. It was held that an innocent purchaser could acquire no right to the goods, because as between AB and Blenkarn there was no contract. 'Of him,' says Lord Cairns, 'they knew nothing, and on him they never thought. With him they never intended to deal. Their minds never even for an instant of time rested upon him, and as between him and them there was no consensus of mind which could lead to any agreement or contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides should be required.' The result of the two cases is no more than this: That if a man accepts an offer which is plainly meant for another, or if he becomes party to a contract, by falsely representing himself to be another, the contract in either case is void. In the first case, one party takes advantage of the mistake, in the other he creates it."

In note 2 to page 169 it is said: "The same result follows if the seller is induced to contract with B on his representation that he is acting as agent for the named person."

Mr. Benjamin, in his work on Sales of Personal Property, 4th ed. § 60, after reviewing the English and American cases, says: "Where a person passes himself off for another, or falsely represents himself as agent for another, for whom he professes to buy, and thus obtains the vendor's assent to a sale, and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the person thus deceiving him." He then refers to certain cases where the contracts were held void on the ground of fraud, and says, "But they were equally void for mistake." Mr. Brantly, in the 2d edition of his work on Contracts, says (p. 160.): "It is well settled that if a man falsely represents that he is the agent of another and thus obtains possession of property, there is no sale, and the transaction is void. In this instance the seller intends to contract, not with the person before him, but with a principal, who is either nonexistent or

has not authorized the contract. There is consequently no meeting of minds between the seller and buyer. The offer or declaration of will by the seller is not met by a corresponding will on the part of any buyer, and the offer to sell, not being made to the party present, cannot be accepted by him."

He says also: "That, where goods are ordered of one person and supplied by another, the latter has no claim against the purchaser *ex contractu*, unless he appropriates them after notice of the substitution, in which case he assents to the change." p. 168.

The same rule is expressed in 9 Cyc. 401, 402, as follows: "Mistake as to the identity of the other party arises where a person contracts with another believing him to be the one with whom he intends to contract, while, as a matter of fact, it is another person. Here, whether the mistake arises through the other's fraud, as when he falsely represents himself to be another, or accepts an offer which is meant for another, there is no agreement. One who enters into an agreement has a right to know with whom he is agreeing; and when a person intends to contract with another, he cannot be compelled to accept a third person as the other party to the contract."

In *Humble v. Hunter*, 12 Q. B. 310, Lord Denman announces the rule in the statement: "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract."

And in *Arkansas Valley Smelting Co. v. Belden Min. Co.* 127 U. S. 379, on page 387, 32 L. ed. 246, 248, 8 Sup. Ct. Rep. 1308, the Supreme Court says: "But everyone has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, 'You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.'"

In the case of *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9, the court said: "To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and, upon the facts stated, no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found that it had bought out the business of the Citizens' Ice Company, until after the delivery and con-

sumption of the ice. . . . There was no privity of contract established between the plaintiff and defendant, and, without such privity, the possession and use of the property will not support an implied assumption. *Hills v. Snell*, 104 Mass. 173, 177, 6 Am. Rep. 216. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff. . . . A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract. . . . In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. . . . If he had received notice and continued to take the ice as delivered, a contract would be implied."

In the case of *Edmunds v. Merchants' Despatch Transp. Co.* 135 Mass. 283, "the swindler introduced himself as a brother of Edward Pape, of Dayton, Ohio; . . . the plaintiffs understood that they were selling, and intended to sell, to the real Edward Pape," and the court held that there was no contract with him, because the swindler who acted as his agent had no authority, and that there was no contract of sale made with anyone, and that the relation of vendor and vendee never existed between the plaintiffs and the swindler.

In the case of *Rodliff v. Dallinger*, 141 Mass. 1, 55 Am. Rep. 439, 4 N. E. 805, wool was delivered to a broker with the understanding that it was sold to an undisclosed manufacturer. It turned out that the broker in fact was not acting for the undisclosed principal, and the court held that there was no contract of sale.

In the case of *Barnes v. Shoemaker*, 112 Ind. 512, 14 N. E. 367, where the goods ordered by one person were supplied by another, the supreme court of Indiana held that the acceptance and use of the goods, without notice that they were so supplied, would not warrant a recovery because "one of the indispensable elements of a contract—the mutual consent of the contracting parties"—was absent, and that, to support a recovery for goods sold and delivered, there must be a contract, either express or implied, between the person who ordered and the one who supplied the goods.

The cases of *Roof v. Morrisson*, 37 Ill. App. 37, *Consumers' Ice Co. v. E. Webster, Son & Co.* 32 App. Div. 592, 53 N. Y. Supp. 56, and *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184, 3 Mor. Min. Rep. 63, are to the same effect.

In this state the case of *Fifer v. Clear-*

field & C. Coal & Coke Co. 103 Md. 1, 62 Atl. 1122, is directly in point. There the contract was made in the name of the Cambria Coal Company by one who represented that he was the agent of the company. The defendant was led to believe and thought that the Cambria Coal Company was a corporation. The evidence disclosed that there was no such corporation, and that the agent in fact represented the plaintiff, Clarence A. Fifer, who was trading as the Cambria Coal Company. In disposing of the case, Judge Page, speaking for this court, said: "The testimony shows that the contract entered into by the appellee was with the Cambria Coal Company, which, so far as the record discloses, was a fiction, not representing any corporation or association. It is clear, from all the evidence, that the appellee and its agents, during the whole time the negotiation for the sale of the coal were going on, thought they were dealing with a corporation."

After referring to some of the evidence in the case, he said further: "It is therefore clear that the appellee supposed it was dealing with a corporation, and not with an individual; and, furthermore, the evidence will show that this belief on its part was induced by the conduct of Deitrich, the agent of the appellant. The law applicable to such a state of facts is thus stated in Anson on Contracts, 8th ed., p. 163. Mistakes as to the identity of the person with whom the contract is made 'arise where A contracts with X, believing him to be M; that is, where the offerer has in contemplation a definite person with whom he intends to contract.' The author cites in support of this position the cases of Boulton v. Jones, 2 Hurlst. & N. 564, 27 L. J. Exch. N. S. 117, 3 Jur. N. S. 1156, 6 Week. Rep. 107; Cundy v. Lindsay, L. R. 3 App. Cas. 459, 47 L. J. Q. B. N. S. 481, 38 L. T. N. S. 573, 26 Week. Rep. 406, 14 Cox, C. C. 93, 6 Eng. Rul. Cas. 211. In the latter case, where 'a person named Blenkarn imitating the signature of a respectable firm named Blenkiron, induced AB to supply him with goods which he afterwards sold to X, it was held an innocent purchaser could acquire no right to the goods, because as between AB and Blenkarn there was no contract.'"

After quoting the statement of Lord Cairns in that case, and citing the case of Roof v. Morrisson, supra, this court further said: "The author in a note adds: These cases must be distinguished from those where B deals with A, supposing A to be acting for himself, when in fact A is acting for an undisclosed principal, X. Applying these principles to the undisputed evidence in the case, it seems that the appellee was led to suppose that it was dealing with

a corporation. . . . It did not intend to contract with an individual, and was misled by Deitrich in so doing. There was therefore no valid contract between the appellee and the appellant, and the latter cannot maintain this suit."

It is urged on behalf of the appellee that a mistake as to the identity of the party with whom the contract was made only avoids the contract when it is material for one party to know with whom he is contracting and when he has a definite person in view. Of course, the mistake does not arise where one of the parties has no definite person in view with whom he intends to contract. As said in Anson on Contracts, § 184: "It cannot arise in the case of general offers which anyone may accept, such as offers by advertisement or sales for ready money."

But to hold that the rule only applies where the defendant can show that it was important for him to know with whom he was contracting, or that he had a reason for not wanting to contract with the plaintiff, would be to lose sight of the principle upon which the rule rests. If a person has a right to contract with whom he pleases, and another cannot be thrust upon him without his consent, he cannot be held to have contracted with a person other than the one he contemplated.

In the case of Boulton v. Jones, supra, the defendant had a set-off against the party with whom he thought he was dealing; and in the case of Boston Ice Co. v. Potter, supra, it was urged that the rule should not apply unless there was a similar reason why the contract should not be enforced. In answer to this contention the court in the latter case said: "The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the nonexistence of a set-off raise an implied assumpsit."

. . . The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party."

In the case at bar the sisters who represented the defendant never knew or heard of Reuben R. Kusnitt, but thought they were contracting with, and intended to contract with, a company or corporation engaged in manufacturing goods of the kind

they ordered. They had in view a definite person with whom they intended to contract; and, as there was no such person or company, there was no contract. This is not the case of dealing with an agent, supposing him to be acting for himself. Holstein represented that he was acting for a company or corporation which in fact did not exist.

The cases of *Stoddard v. Ham*, 129 Mass. 383, 37 Am. Rep. 369, and *Clement v. British American Assur. Co.* 141 Mass. 298, 5 N. E. 847, cited and relied upon by the appellee, are not in conflict with the Massachusetts cases to which we have already referred. In *Stoddard v. Ham*, the court said: "It was not a case of mistaken identity. The plaintiffs knew that they were dealing with Leonard. They did not mistake him for the defendant. Nothing was said as to any other party to the sale. The conclusion is unavoidable that the contract was with him."

And in *Clement v. British American Assur. Co.*, the court said: "If A deals with B without any inquiry as to his identity, and, in consequence of the dealing, B's position is changed, as a general rule A would be estopped from setting up that he supposed he was dealing with another person, and thus defeating the contract."

It is quite apparent that these cases do not depart from the rule adhered to in the other Massachusetts cases referred to, and which applies to a case where the agent leads one to believe that he is contracting with a company or corporation that does not in fact exist.

The suit was brought under the practice act in force in Baltimore city, and, as the defendant in the affidavit to its pleas admitted the plaintiff's claim to the extent of \$21.50, the appellee contends that it is estopped from denying that it contracted with him. This contention, however, is fully disposed of in the case of *Laubheimer v. Naill*, 88 Md. 174, 40 Atl. 888, where this court held that, if the plaintiff fails to take a judgment for the amount admitted to be

due, the defendant is not bound by his admission in the affidavit to his plea.

It is conceded that the express package containing the water bottles, ice bags, and invalid ring, amounting to \$21.50, was received by the defendant. But at the time the defendant received the package it did not know that it had been shipped by the plaintiff, and the evidence shows that it has never been opened and is still at the college. So far as the record shows, there has been no demand by the plaintiff for these goods, and no conversion of or refusal to return them. As the defendant did not order or contract to purchase them from the plaintiff, and did not know, when they were received, that they had been furnished by him, there was no express or implied contract to pay for them, unless we are to hold that one person can make another his debtor without the latter's consent. In *Randolph Iron Co. v. Elliott*, 34 N. J. L. 184, 3 Mor. Min. Rep. 63, supra, the court held that, where goods come into the possession of the defendant under such circumstances, assumpsit cannot be maintained unless the plaintiff shows that there has been a subsequent demand and a refusal or conversion of the goods. If the defendant had received the goods with the knowledge that they had been shipped by the plaintiff, or had appropriated them to its use after notice that they were furnished by him, or upon demand by the plaintiff had refused to surrender them, a very different principle would apply. But the mere fact that they are in the possession of the defendant under the circumstances disclosed by the record does not impose upon it the burden of returning them, or establish an implied contract to pay for them.

It follows from what we have said that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and that the defendant's third prayer should therefore have been granted.

Judgment reversed without a new trial, with costs to the appellant.

Annotation—Right to avoid contract because of mistake as to identity of other party thereto.

The right to avoid a contract because of mistake as to the identity of the other party thereto is based upon the right of a party to choose with whom he will enter into contractual relations. No reason need be given for the manner of exercising this right of choice. For some reason satisfactory to himself a man may be willing to deal with a certain person but not with another on precisely the L.R.A.1916D.

same terms. Everyone has this right, that is, to select and determine with whom he will contract; he may not have another person thrust upon him without his consent. The reputation of a certain person or firm may be such that the party desires to contract with him and him only. If a mistake arises and such a party contracts with another in the belief that he is contracting with the de-

sired person, the contract may be avoided. It is more accurate to say that no contract exists.¹ This rule applies where the mistake arises without any fraudulent conduct, at least no more

fraudulent conduct than nondisclosure of facts.²

In some cases stopping short of express representations, deceptive appearances are created which amount to

¹In denying to a purchaser of ore upon credit the right to assign the contract so as to vest in his assignee his rights under the contract, the court in *Arkansas Valley Smelting Co. v. Belden Min. Co.* (1887) 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308, states that everyone has a right to select and determine with whom he will contract, and one cannot have another person thrust upon him without his consent.

No mistake as to identity authorizing a rescission of the contract arises from the fact that goods ordered of a firm whose business office was in one state were shipped from the firm's factory in another state. *Baird Bros. v. Pratt* (1905) 6 Ind. Terr. 38, 89 S. W. 648, judgment reversed on other grounds in (1906) 10 L.R.A.(N.S.) 1116, 78 C. C. A. 515, 148 Fed. 825.

²In *Roof v. Morrisson* (1890) 37 Ill. App. 37, a wholesale merchant accustomed to sell goods to a partnership, who took a credit order from the firm after it had been changed into a corporation without any notice of the change, was held to have the right to avoid the contract and recover the goods, after an assignment by the corporation. No notice of the dissolution of the partnership was published in the newspapers of the city in which the business was located, nor was any notice sent to the wholesale dealer. The only change that was made in the name of the firm was the dropping of the symbol "&" from the old partnership name.

A consumer who contracted with an ice company to furnish him ice is not liable upon a contract implied from the delivery and acceptance of the ice, to another company which purchased the business of the first company and supplied him with ice without notifying him of the change. *Boston Ice Co. v. Potter* (1877) 123 Mass. 28, 25 Am. Rep. 9.

A dealer who received an order for goods from what he supposed to be an established firm may recover the goods where, as a matter of fact, they were ordered by another doing business under a similar name, while he was an undischarged liquidating debtor. *Re Reed* (1876) L. R. 3 Ch. Div. (Eng.) 123, 45 L. J. Bankr. N. S. 120, 34 L. T. N. S. 664, 24 Week. Rep. 904.

A lessor who entered into an agreement modifying the lease, with a corporation of the same name as the original lessee, organized under the laws of a different state and constituting a different corporation, though with the same officers and members, may avoid the contract, since there was no intention to contract with the second corporation. *Brighton Packing Co. v. Butchers' Slaughter & Melting Asso.* (1912) 211 Mass. 398, 97 N. E. 780. The lessor had no knowledge of the change in the cor- L.R.A.1916D.

porate organization, and this was kept hidden from him; the lease, as modified, was sought to be enforced by an assignee thereof, and it was claimed that the lessor had estopped himself from making a claim that the modified agreement was invalid by recognizing the assignee and permitting him to incur great expense on the strength of the agreement and in reliance upon its validity and expectation of its fulfilment. This position was held not maintainable, as all the conduct of the lessor grew out of and was based upon his belief that he had made a valid agreement with the original corporation, a belief which was wholly erroneous and was caused by the second corporation's fraudulent concealment of the truth.

One who borrowed money believing it to be the money of a certain person, to whom she executed a note for the money so borrowed, cannot be held liable in a suit in assumpsit to third person, although the money was in fact his money as he claimed. *Langdon v. Hughes* (1904) 113 Ill. App. 203.

An owner of goods who delivers them on credit on a supposed contract of sale, to one professing to act for a well-known firm, but fraudulently intending to appropriate the goods to himself and another, partners in a business of a different kind, may maintain trover against an auctioneer who makes advances upon the goods in good faith and sells then to repay himself before notice. *Hardman v. Booth* (1863) 1 Hurlst. & C. (Eng.) 803, 9 Jur. N. S. 81, 32 L. J. Exch. N. S. 105, 7 L. T. N. S. 638, 11 Week. Rep. 239. It is stated by Pollock in rendering the opinion that there never was any contracting mind; that the owners of the goods thought they were dealing with the well-known firm to whom they sent the goods; that this was the form of the contract, but it had no substance.

Cundy v. Lindsay (1878) L. R. 3 App. Cas. (Eng.) 459, 47 L. J. Q. B. N. S. 481, 38 L. T. N. S. 573, 26 Week. Rep. 400, 14 Cox, C. C. 93, 6 Eng. Rul. Cas. 211, is sufficiently set out in the opinion in *School Sisters v. Kusnirt*, ante, 792.

See *Boulton v. Jones*, sufficiently set out in the opinion in *School Sisters v. Kusnirt*.

It is stated in *Randolph Iron Co. v. Elliott* (1870) 34 N. J. L. 184, 3 Mor. Min. Rep. 63, that the relation of vendor and purchaser does not exist between a company that has filled an order for iron given to another, and the person who ordered the iron; but that after demand of the iron and refusal to return it, or after actual conversion, trover would lie; or after sale of the ore by the purchaser the tort might be waived and assumpsit maintained.

One who purchased for use in a building stone which he thought or supposed was

fraud.⁵ In such a case the reason for avoiding the contract is much stronger than in the absence of fraud. For here, as in the case of express fraudulent representations as to the identity of the party with whom the negotiations are being conducted, an element additional to mistake is introduced, viz., that of fraud.⁴ The party thus mistaken as to the identity of the 'other party to the

contract has the right to avoid the contract.⁵

In some cases the contract is treated as voidable merely.⁶ This, however, is inaccurate. As stated in the introduction, it is more accurate to say that no contract exists in such a case. To use a convenient expression, the contract is wholly void.⁷

It is not necessary for any damage to

the property of a corporation, but which was in fact the property of an official of the corporation, cannot defeat an action to recover for goods sold and delivered on the theory that he did not contract with the owner. *Pizzutielle v. Graham* (1907) 56 Misc. 584, 106 N. Y. Supp. 1099. The theory of the court is not clear. Apparently the action was brought on the contract of sale, although in the opinion there is at least some language indicating a recovery upon an implied contract arising from the use of the goods purchased, the court stating that the purchaser cannot, after obtaining the property, hold it and yet refuse to pay for it.

⁵ Where, at a public sale by an administrator of the goods of his decedent's estate, another put up a horse at the sale as the property of the estate, the purchaser of the horse, thinking it to be the property of the estate, is not, upon discovery of the fact as to the ownership, bound to take it. *Barker v. Keown* (1896) 67 Ill. App. 433. The fraud practised upon the purchaser is stated to furnish sufficient reason for rescinding the purchase.

One who bids upon chattels at a public auction of the effects of a decedent, the stock bid upon being the property of another person, may avoid the contract upon discovery of the real ownership of the property. The auctioneer who was conducting the sale in this case was ignorant of the ownership of the stock sold. *Thomas v. Kerr* (1868) 3 Bush. (Ky.) 619, 96 Am. Dec. 262. This amounts to a fraud which entitles the purchaser to repudiate the sale upon discovery thereof.

One who was induced to borrow money and give a note to a money lender who had attained an evil reputation so that the borrower was not willing to contract with him, by means of the fraudulent concealment of his identity by such lender, may revoke the contract upon discovery of the fraud. *Gordon v. Street* [1899] 2 Q. B. (Eng.) 641, 69 L. J. Q. B. N. S. 45, 81 L. T. N. S. 237, 48 Week. Rep. 158, 15 Times L. R. 445.

See *Hardman v. Booth* (Eng.) supra.

⁴ It has been stated that whether the contract is created by fraud or innocent mistake, the legal effect is the same. *Roof v. Morrisson* (1890) 37 Ill. App. 37. Apparently what is meant here by "legal effect" is that in either case the right to rescind exists.

⁵ A party intending to purchase a monument of a certain person, who is induced to enter into a contract with another upon L.R.A.1916D.

the false and fraudulent representations of the other that he is the agent of the party with whom the first party intended to contract, may avoid such contract. *Fox v. Tabel* (1895) 66 Conn. 397, 34 Atl. 101.

One who purchased a pair of oxen of one who had them in his possession may revoke the contract upon discovering that the oxen in fact belonged to another with whom he did not choose to deal, if the person with whom the purchaser dealt made representations which might properly be found to be representations that the title to the oxen was exclusively in him. *Winchester v. Howard* (1867) 97 Mass. 303, 93 Am. Dec. 93.

A seller may avoid a contract, or rather no contract exists, in case one who has stolen a certificate of deposit represents himself to be the one whose name appears in the certificate, and obtains goods giving the certificate as security. *Loeffel v. Pohlman* (1892) 47 Mo. App. 574. It was held in this case that the owner could maintain an action for conversion against an officer who had secured the goods upon the arrest of the purchaser, and had delivered them to the jailer for the prisoner, who was sentenced to the penitentiary.

A vendor who negotiated with what he supposed to be a firm that had been doing business in his city for a considerable time, and that was represented by the persons doing business with him to be the old firm, is not bound by the contract where, as a matter of fact, the members of the old firm, together with another, had formed a corporation by the same name with a small capital stock, only a small part of which was paid in, since he had the right to rely upon the financial ability of the firm with which it was understood the contract was made. *Consumers' Ice Co. v. E. Webster, Son & Co.* (1898) 32 App. Div. 592, 53 N. Y. Supp. 56, followed (1903) 79 App. Div. 350, 79 N. Y. Supp. 385.

One who is led by the misrepresentations of an agent to believe that he is dealing with a committee of Congress in the purchase of certain books may avoid the contract where it appears that Congress has nothing to do with the distribution of the books in question; and it is immaterial that the precise books for which the party bargains are tendered to him. *Barcus v. Dorries* (1901) 64 App. Div. 109, 71 N. Y. Supp. 695.

⁶ *Fox v. Tabel* (Conn.) supra (there is no decision in this case to this effect, however).

⁷ *Loeffel v. Pohlman* (Mo.) and Con-

have been sustained by the fraud. It is enough that it induced the execution of a contract with one with whom the defrauded party did not intend to contract.⁸

In other cases of mistake as to the party with whom a contract is made, induced by the fraud of another, relief has been based on the ground of fraud rather than on the ground of mistake.⁹

In case of sales, the doctrine has sometimes been limited to sales on credit.¹⁰

The cases heretofore discussed in which a party has been allowed to avoid a contract for mistake as to the identity of the party with whom the contract is made have been cases in which the party intended to contract with some definite person or firm which he had in mind, or intended not to contract with the person or firm with which the so-called contract was actually made. The doctrine of these cases has been extended to a mistake as to the character of the other party, e. g., as to whether it is a corporation or an individual. Accordingly, a coal company which entered into an agreement to furnish coal on credit, with what it supposed was a corporation with paid-up capital and a legal status, was held entitled to avoid the contract upon discovery that there was no corporation, but an individual doing business in an assumed name, where the belief that the coal company was dealing with a corporation was induced by the conduct of an agent of the individual thus transacting business.¹¹

It is a matter of considerable doubt whether the mistake in *SCHOOL SISTERS v. KUSNITT*, and that in *Fifer v. Clearfield Coal & Coke Co.* are such mistakes as authorize the avoidance of the contract under the principles applicable to mistake as to identity. As stated above, a mistake as to the identity of a

party prevents the formation of any contract. Consequently, no rights are acquired under it. In case of a sale by a mistaken party, the right of the vendor to recover the goods after delivery, or their value, is not cut off by the intervention of a bona fide purchaser. In such a case recovery may be had of the bona fide purchaser in the absence of estoppel. But recovery of a bona fide purchaser has been denied¹² in case of a mistake induced by fraud such as was involved in the sale of coal above mentioned and in the purchase in the *KUSNITT CASE*. In the case in which recovery was thus denied, an individual named Wallis adopted the name of "Hallam & Company," had letter heads printed indicating "Hallam & Company" as a large firm, and ordered goods of a manufacturer; it was held that until the contract of sale was disaffirmed the person could give a good title to the goods to a bona fide purchaser for value. In discussing the person with whom the contract was made, it is stated that it was clearly made with the writer of the letters, that if it could have been shown that there was a separate entity called Hallam & Company, and another entity called Wallis, then the case might have come within the doctrine of *Cundy v. Lindsay* (set out in *SCHOOL SISTERS v. KUSNITT*), but there was only one entity, although trading it might be under an alias. Consequently, there was held to be a contract by which the property passed to the impostor so as to enable him to pass title to a bona fide purchaser. It is clear that in the sale by the coal company and in the purchase involved in the *KUSNITT CASE* the intention was to contract with the principals of the respective agents through whom the contracts were made.

It seems reasonably clear that the true basis of relief in such cases is fraud.

sumers' Ice Co. v. Webster, Son & Co. (N. Y.) supra; *Re Reed* (1876) L. R. 3 Ch. Div. (Eng.) 123, 45 L. J. Bankr. N. S. 120, 34 L. T. N. S. 664, 24 Week. Rep. 904; *Cundy v. Lindsay* (1878) L. R. 3 App. Cas. (Eng.) 459, 47 L. J. Q. N. S. 481, 38 L. T. N. S. 573, 26 Week. Rep. 400, 14 Cox, C. C. 936, 6 Eng. Rul. Cas. 211; *Hardman v. Booth* (1863) 1 Hurlst. & C. (Eng.) 803, 9 Jur. N. S. 81, 32 L. J. Exch. N. S. 105, 7 L. T. N. S. 638, 11 Week. Rep. 239.

⁸ *Fox v. Tabel* (Conn.) and *Barcus v. Dorries* (N. Y.) supra.

⁹ A vendor who is induced by the fraudulent representations of one with whom he is dealing, to believe he is selling to the state, may reclaim the goods from such person upon discovering the fraud. *La Salle* L.R.A.1916D.

Pressed Brick Co. v. Coe (1896) 65 Ill. App. 619.

It is not incumbent upon the vendor in such case to prove that the person making the misrepresentation obtained the goods with intent not to pay for them. (Ill.) *Ibid*.

¹⁰ *Roof v. Morrisson* (1890) 37 Ill. App. 37; and see *Clement v. British American Assur. Co.* (1886) 141 Mass. 298, 5 N. E. 847, supra.

See *infra* for discussion of materiality of the mistake.

¹¹ *Fifer v. Clearfield Coal & Coke Co.* (1906) 103 Md. 1, 62 Atl. 1122. And see *SCHOOL SISTERS v. KUSNITT*, ante, 792.

¹² *King's Norton Metal Co. v. Edridge, M. & Co.* (1897) 14 Times L. R. (Eng.) 98.

That a party contracting with the "A Company," for example, does not have the right to avoid the contract upon discovery that the "A Company" is a partnership instead of a corporation, as he supposed, or that it is an individual doing business under that name, seems reasonably clear in the absence of fraud.¹³

If the real basis for relief in such cases is fraud, in order that relief be granted on this ground the case must be brought within the rules applicable to fraud. It is not within the scope of the present note to discuss these rules, nor their application to specific facts.¹⁴ It may be stated, however, in passing, that one of them is that, in order that fraud may be the basis for rescission, it must have resulted in injury.¹⁵

On the theory that the mistake as to the identity of the other contracting party is immaterial,¹⁶ relief has been denied in certain cases. In an action for specific performance of a contract for the sale of land in which the defense was error as to the person with whom the contract was made,¹⁷ the court, in denying this defense, approves the statement in Pothier, *Traite des Obligations*, § 14, to the effect that whether error in regard to the person with whom a contract is made destroys the consent and annuls the agreement depends upon circumstances; that whenever the consideration of the person with whom one is willing to contract enters as an element into the contract which one is willing to make, error with regard to the person destroys that one's consent and consequently annuls the contract. On the contrary, when the consideration of

the person with whom one thinks he is contracting does not enter at all into the contract, and he would have been equally willing to make the contract with any person whatever as with the one with whom he thought he was contracting, the contract ought to stand. The court states that the defendant has not shown that he would have been unwilling to enter into a contract on the same terms with anybody else, and that being so this defense must fail. In this case the purchaser purchased for the benefit of other parties to whom the vendor claimed he was unwilling to sell.

So, in an action to recover damages for breach of a charter party, the libellant was held entitled to recover notwithstanding a defense that the defendant was induced to enter into the agreement by reason of false and fraudulent representations as to the ownership of the boat. It was held that the proof failed to establish this defense; but on the question of identity of parties the court states regarding the defendant's contention that he did not know the person with whom he contended the agreement was made, but did know the libellant unfavorably, that by his own showing the defendant was entirely willing to enter into an agreement with a total stranger, which is hardly compatible with the theory that the owner's character was such an important factor in making the contract. It is further stated that it is entirely clear from the testimony that charters are made by canal men with very little reference as to the character of the owner of the boat. The defendant was not called upon to pay

¹³ It is stated obiter in *John Weber & Co. v. Hearn* (1900) 49 App. Div. 213, 63 N. Y. Supp. 41, where one entering into a contract believed he was doing business with a partnership when in fact there was a corporation, that "it is not claimed that any representations were made during the negotiations leading up to the contract that there was a partnership, and, the work having been actually performed by the corporation, we do not think, in the absence of anything to show that the defendant was misled or injured by the fact that it was a corporation, and not a partnership that did the work, that he has any legal grievance in the absence of any actual misrepresentation that the Weber Company was a partnership, the work having been fully executed and performed. The fact that the defendant thought he was dealing with a partnership would not be a bar to the plaintiff's right to recover for the value of the work done by it as a corporation."

See *Mitchell v. Lapage* (Eng.) *infra*.

¹⁴ In *Mitchell v. Lapage* (1816) Holt, N. L.R.A.1916D.

P. (Eng.) 253, 17 Revised Rep. 633, one who had purchased hemp through a broker, of a firm which had changed its members, and who, upon the arrival of the hemp, had notice from the new firm of the arrival thereof, and who, after that notice, conferred with his broker, treating the contract as subsisting, was held not entitled to rescind his contract, unless he could show that he had been prejudiced. The only indication that the purchaser intended purchasing of the old firm was that the name of the old firm appeared in the bought note given by the broker.

¹⁵ 1 Elliott, Contr. § 91, p. 163; 1 Page, Contr. § 126, p. 206; 9 Cyc. 431. See *Mitchell v. Lapage* (Eng.) *supra*.

Where there is a mistake as to identity, no damage need be shown. See *supra*, note 8.

¹⁶ See discussion in *SCHOOL SISTERS v. KURNITT* upon materiality.

¹⁷ *Smith v. Wheatcroft* (1876) L. R. 9 Ch. Div. (Eng.) 223, 39 L. T. N. S. 103, 27 Week. Rep. 42, 47 L. J. Ch. N. S. 745.

the freight until the lumber was delivered to his consignee at the end of the journey.¹⁸

In the case of a purchase of goods, if the purchaser receives the goods and, after notice that they are furnished by another, appropriates them, he ratifies the filling of the order by the other person and there may be a recovery. Accordingly, a dealer who sends an order for books to one with whom he has been dealing, which order is turned over by the person to whom it is given to another by whom it is filled, ratifies the filling of the order by the other where he appropriates or converts the books after notice that the order is so filled by the other.¹⁹

One who purchased lumber of a lumber dealer who in turn purchased the lumber of a milling company and directed the milling company to bill the lumber directly to the first purchaser is liable to the milling company for lumber sent under the order, where bills were forwarded with each carload lot to the purchaser, made out to the milling com-

pany, since by remaining silent till the whole quantity of lumber had come to his hands, the purchaser impliedly ratified the purchase which the lumber merchant had made on his behalf.²⁰

One who purchased goods at a shop which he believed to be owned by a debtor cannot, when sued for the purchase price by one who had purchased the goods from the debtor, and was in possession of the shop at the time of the purchase, avoid defense on the ground that at the time of making the purchase he was ignorant of the transfer from the debtor to the then owner, where after delivery of the goods, but before he left the shop on the occasion of making the purchase, he was fully informed as to the transfer and retained the goods thereafter, since this amounts to a recognition of the real vendor.²¹

It cannot be said as a matter of law that the avoidance of the contract sixteen days after discovery of the fraud is delaying the avoidance unreasonably, especially if it is not found to be an unreasonable delay as a matter of fact.²²

¹⁸ *Dunbar v. Weston* (Fed.) *supra*.

The case of *Clement v. British American Assur. Co.* (1886) 141 *Mass.* 298, 5 *N. E.* 847, is not exactly in point. This was an action upon an insurance policy taken out by a firm in the name of one of the members, such name being used as a firm name. In the course of the opinion, however, the court, in discussing mistakes as to the identity of the person with whom the contract is made, states: "A mistake as to the identity of the person with whom a contract is made may or may not prevent the formation of the contract, according to circumstances. In the ordinary case of buying or selling for cash, the identity of the parties is entirely immaterial, and one party could not defeat the contract of sale by showing that he was mistaken as to the identity of the other; and in many cases where the question of identity is material, a party is estopped by his dealing with the other from setting up his mistake as to the identity of the other." Then follows the language quoted in the opinion in *SCHOOL SISTERS v. KUSNITT*, ante, 792, on estoppel.

¹⁹ *Barnes v. Shoemaker* (1887) 112 *Ind.* 512, 14 *N. E.* 367. At the time of filling the order the person who filled it sent a letter explaining why the order was filled by him. The purchaser admitted receiving the invoice, and did not deny that he received the letter which was sent with the invoice, but claimed that he did not pay any attention to it.

But see *SCHOOL SISTERS v. KUSNITT* as to receipt of goods.

²⁰ *Bearce v. Bowker* (1874) 115 *Mass.* 129. At the time of the receipt of the first bill by the purchaser, he called on the lum-

ber merchant and asked for an explanation, stating that he did not know the milling company and never bought any lumber of them. The lumber merchant replied that it was all right and he would fix it all right. No further attention was paid to it by the purchaser until he received a letter from the milling company stating that they were about to draw upon him for the amount of the lumber, when he again called on the lumber merchant and told him he had received a draft, but should give no attention to it, to which the lumber merchant made the same reply as before.

²¹ *Mudge v. Oliver* (1861) 1 *Allen* (Mass.) 74. See *Randolph Iron Co. v. Elliott* (1870) 34 *N. J. L.* 184, 3 *Mor. Min. Rep.* 63, *supra*, note 2.

One who orders goods from another as the principal in the transaction is, in the absence of notice, entitled to treat the goods received on the order as the property of such principal. *Belfield v. National Supply Co.* (1899) 189 *Pa.* 189, 69 *Am. St. Rep.* 799, 42 *Atl.* 131. The fact that the person of whom the goods are ordered does business as a broker is immaterial, unless the orders are given to him as a broker; but if before the goods are received the person ordering them has notice of their ownership by another, then he is bound to elect either to refuse the goods or to take them as the property of the real owner, and keeping them is an assumption of his liability to pay the real owner for them.

A similar holding appears in *Frame v. William Penn Coal Co.* (1881) 97 *Pa.* 309, a case of a purchase from an agent as the principal party.

²² *Fox v. Tabel* (1895) 66 *Conn.* 397, 34 *Atl.* 101.

Evidence that one who had been mistaken as to the identity of another of whom he had borrowed money rescinded the contract within nine days from the discovery of his mistake, or at the most within seventeen days from such discovery, warrants the jury in finding that he repudiated the contract as soon as, or within a reasonable time after, he discovered his mistake.²³

A number of cases of sales²⁴ of personal property have arisen in which the

owner of the property made a sale thereof through an impostor, to a responsible party whom the impostor claimed to represent, possession of the property being thus obtained by the impostor. Such transactions have uniformly been held to convey no title to the property. Consequently, the owner may recover the property,²⁵ or damages for its conversion, even from a purchaser in good faith,²⁶ or from the person with whom he thought he was dealing, to

²³ *Gordon v. Street* [1899] 2 Q. B. (Eng.) 641, 69 L. J. Q. B. N. S. 45, 81 L. T. N. S. 237, 48 Week. Rep. 158, 15 Times L. R. 445.

²⁴ See *Fifer v. Clearfield Coal & Coke Co.* (1906) 103 Md. 1, 62 Atl. 1122.

²⁵ A dealer in wool who refuses to sell to a broker, but, upon the broker's representation that he represents an undisclosed manufacturer in good credit with the dealer, sells to such manufacturer through the broker, may recover the wool as against one who has a bona fide claim for money loaned thereon to the broker, since the sale is void, or in other words the transaction does not amount to a sale because one of the supposed parties is wanting. *Rodliff v. Dallinger* (1886) 141 Mass. 1, 55 Am. Rep. 439, 4 N. E. 805.

A manufacturer of cheese who sells some of his product to a purchaser whom he believes to be a firm, through a commission merchant, and the commission merchant, knowing that the manufacturer believes the sale to be to the firm, does not correct his error, may recover the cheese of one to whom the commission merchant sells it, since no title passes because of the fraud. *Mayhew v. Mather* (1892) 82 Wis. 355, 62 N. W. 436. It is held immaterial in this case whether purchaser was bona fide or not, as the commission merchant had no title to transfer.

An owner of poultry who is induced to part with it upon the fraudulent representation of another that he is buying for a firm of which he is a member may recover of such other as for conversion. *McCrillis v. Allen* (1885) 57 Vt. 505.

See *Hentz v. Miller* (N. Y.) *infra*.

²⁶ In *Alexander v. Swackhamer* (1886) 105 Ind. 81, 55 Am. Rep. 180, 4 N. E. 433, 5 N. E. 908, a farmer delivered cattle into the possession of one who represented himself to be an agent of a well-known commission house. The cattle were driven to a shipping station and in the presence of the owner a bill of lading was delivered to the impostor, billing the cattle to the commission house in care of the impostor. The cattle were subsequently sold by the commission house to cattle dealers who in turn resold them. The delivery into the possession of the person who falsely impersonated a member of the firm did not pass title. It is stated that the owner contracted upon the supposition that he was selling to the commission house through the agency of a L.R.A.1916D.

member of that firm; that he did not agree to sell, or contemplate a sale, to any other person, nor did the person with whom he negotiated propose to purchase for himself or for any other than the commission house. Upon a petition for a rehearing it was contended that, by delivering the property to the impostor under the circumstances disclosed, the owner was estopped to assert as against the good faith purchaser that he had not by such delivery invested the impostor with apparent authority to sell the property. That he was so estopped was denied by the court, it stating that to constitute an estoppel the party sought to be estopped must have designedly done some act or made some admission inconsistent with the claim or defense which he proposed to set up, and another must have acted on such admission with his knowledge and consent.

A dealer who forwards bedsteads to a firm upon a fraudulent order of one not connected with the firm, but falsely representing himself to belong thereto, may recover of one who purchases the bedsteads of the impostor, who obtains them from the carrier by fraudulent representations. *Moody v. Blake* (1875) 117 Mass. 23, 119 Am. Rep. 394.

A dealer in cotton who, induced by the false and fraudulent representations of brokers that they represented and were authorized to purchase cotton for certain manufacturing companies, sold the same to the manufacturing companies, as he supposed, through the brokers, and allowed the brokers to cart the cotton away from the warehouse where it was stored, may recover of those to whom the cotton was fraudulently sold by the brokers. *Collins v. Ralli* (1880) 20 Hun (N. Y.) 246, affirmed in (1881) 85 N. Y. 637. This case was approved in *Hentz v. Miller* (1883) 94 N. Y. 64, an action in replevin to recover cotton of one to whom it had been sold. The fact that payment was guaranteed by the brokers was held to make no difference. The case was followed also in *Soltau v. Gerdau* (1890) 119 N. Y. 380, 16 Am. St. Rep. 843, 23 N. E. 864, a case involving a sale of rubber through a broker under facts similar to those existing in the *Collins Case*.

A vendor who sold goods to one upon his representation that he was a member of a firm in good credit, and shipped the goods to the firm, the impostor obtaining possession from the express company upon other

whom the impostor has sold,⁸⁷ in the absence of some element of estoppel.

That the owner may thus recover is true although the impostor sold to the

false and fraudulent representations, may recover against a bona fide purchaser of the goods, since the title to the goods never passed out of the vendor. *Dean v. Yates* (1872) 22 Ohio St. 388.

An owner of cotton who sells the same through a broker, believing that he is selling to a well-known firm, when in fact the broker is purchasing for himself, and afterwards disposes of the cotton, may recover of one who purchases the cotton from the broker. *Hollins v. Fowler* (1875) L. R. 7 H. L. (Eng.) 757, 44 L. J. Q. B. N. S. 168, 33 L. T. N. S. 73, 2 Eng. Rul. Cas. 410.

A manufacturing chemist who delivered some chemicals to one who presented an order therefor from one to whom they had been sold was held entitled to recover from one who in good faith advanced money thereon and subsequently sold the same to repay the loan, where the sale was made by the purchaser from the chemist, not to the person to whom delivery was made, but to another whom he claimed to represent. *Kingsford v. Merry* (1856) 1 Hurlst. & N. (Eng.) 503, 3 Jur. N. S. 68, 26 L. J. Exch. N. S. 68, 5 Week. Rep. 151.

A dealer who delivered a typewriter and cabinet to one who represented himself to be the agent of a third person, to whom the dealer thought he was selling the goods, and to whom they were charged, may recover the goods of one to whom the impostor sold. *Smith Premier Typewriter Co. v. Stidger* (1903) 18 Colo. App. 261, 71 Pac. 400. Likewise, a dealer who delivered a typewriter and desk to one who represented himself to be the manager of a corporation which was merely proposed, and which was in fact never organized, the dealer believing that he was dealing with the corporation, and charging the corporation with the goods sold, was held entitled to recover the property of one to whom it was sold by the supposed manager. *Wyckoff v. Vicary* (1894) 75 Hun, 409, 27 N. Y. Supp. 103. This decision, however, does not appear to be based on mistake as to identity.

A warehouseman who delivered goods to an imposter upon his representation that he was the agent of another and authorized to purchase on his behalf may recover in trover for the value of the goods from an auctioneer who sold the goods for the impostor. *Higgins v. Burton* (1857) 26 L. J. Exch. N. S. (Eng.) 342, 5 Week. Rep. 683.

See *Cundy v. Lindsay* (1878) L. R. 3 App. Cas. (Eng.) 459, 47 L. J. Q. B. N. S. 481, 38 L. T. N. S. 573, 26 Week. Rep. 400, 14 Cox, C. C. 936, 6 Eng. Rul. Cas. 211; *Hardman v. Booth* (1863) 1 Hurlst. & C. (Eng.) 803, 9 Jur. N. S. 81, 32 L. J. Exch. N. S. 105, 7 L. T. N. S. 638, 11 Week. Rep. 239.

But one who sells cotton to another believing him to be the agent of other persons, but intending at the time of the sale to part with his title to the person with whom he is dealing as such agent, and de- L.R.A.1916D.

livers the possession to him, cannot recover of the persons for whom the vendor thought the agent was acting, where they, ignorant of the representations of the pretended agent and without intention to defraud, purchased the cotton from him and paid him for it. *Hawkins v. Davis* (1876) 8 Baxt. (Tenn.) 506. In such a case the sale may be avoided for fraud while the agent retains possession, but until avoided title is in the agent, and after he has sold the property, the claim of the original vendor cannot defeat that of the purchaser.

So, one who dealt with a commission merchant in a sale of goods, saying nothing as to any other party to the sale, cannot recover in tort for the conversion of the property, from one to whom the commission merchant in turn sold it, where the commission merchant, who was in the habit of purchasing goods on his own account, honestly bought the goods for himself and sold them to the defendant as his own. *Stoddard v. Ham* (1880) 129 Mass. 383, 37 Am. Rep. 369.

⁸⁷ *Peters Box & Lumber Co. v. Lesh* (1888) 119 Ind. 98, 12 Am. St. Rep. 367, 20 N. E. 291, allowing recovery of the value of the lumber and logs, the owners of the logs were held not estopped in this case by reason of permitting the bills of lading to be made out in the name of the supposed agent.

A manufacturer of cheese who had sold to a certain firm through an agent on several occasions, and who, on the occasion out of which grew the controversy in question, sold to the same agent supposing the cheese was going to the same persons he had previously sold to, may reclaim the cheese so sold where the agent fraudulently sold it to a firm of which he was a member, and such firm transferred it to the firm to which the manufacturer had been accustomed to sell. *Kinsey v. Leggett* (1877) 71 N. Y. 387. The sale here was one for cash and the agent represented that the money for the cheese was on the way to the manufacturer,—a representation which was in fact untrue.

Where the owner of stock relied on the representations of an impostor that he was the agent of a well-known stock dealer, and agreed to sell the stock to the dealer on credit, and, in the belief that the impostor was such agent, delivered the chattels to him, when in fact he was not such agent, nor did he have authority to purchase for the dealer, as he well knew, the property in the stock does not pass from the owner, and the dealer who subsequently bought it of the impostor and converted it to his own use without knowledge of the fraud is liable to the owner for its value. The fact that the impostor at the time the stock was delivered to him paid the owner part of the price agreed on makes no difference except as to the amount of the recovery against

person with whom the owner thought he was dealing, and such person in turn sold to a bona fide purchaser.²⁸

Some of these sales have been sales for cash.²⁹ And in some in addition it was provided that title was to remain in seller until paid for.³⁰ In others, however, the sale was on time.³¹

In certain circumstances the right to recover has been limited to cases in which the right of a bona fide purchaser did not intervene.³²

Some cases involving actions against carriers for delivery of the goods to the wrong person contain principles bearing upon the present question. In one such case, where the vendor sold goods to a responsible party through one who without authority represented himself to be the agent of such party, it was held that there was no contract of sale made, and that the railroad company which delivered the goods to the swindler could not defend an action against it to recover the value of the goods so delivered on the ground that it delivered the goods to the real owner.³³

But where a swindler represents himself to be another who is a reputable and responsible merchant, and appears personally and buys goods of a dealer, there is a sale voidable only, but not void because the seller is induced to sell by

fraud. Consequently, a railroad company which delivered goods to the person who actually bought them is not liable in an action to recover the value of the goods on the theory that they were wrongfully delivered.³⁴ It is stated by the court that the seller could not have supposed that he was selling to any other person than the one present; that the sale is not defeated because the buyer assumed a false name or practised any other deceit to induce the vendor to sell, but there was a de facto contract by which the seller intended to pass the property and possession of the goods to the person buying them; that the carrier was guilty of no default or negligence in delivering them to this person; that it delivered them to the person who bought and owned them, and who went by the assumed name and thus answered the direction upon the package, and who was the person to whom the seller sent the goods.

So, a carrier which delivers goods to an impostor who assumes the name of a responsible merchant in a town, obtains a postoffice box, and thereafter enters into the correspondence through which the goods are bought, is not liable for delivering the goods to the impostor, since he is the person with whom the seller is in correspondence.³⁵ The facts

the dealer. *Hamet v. Letcher* (1881) 37 Ohio St. 356, 41 Am. Rep. 519.

The owner of grain who sold it through an impostor, thinking he was selling to another, may recover it although it was placed in the hands of a common carrier and the bill of lading assigned to the person to whom the owner thought he was selling for value on account of advances made thereon. *Decan v. Shipper* (1860) 35 Pa. 239, 78 Am. Dec. 334.

An owner of wool who dealt with one who represented himself to be a member of a well-known firm, and, in accordance with a contract of sale made with him, shipped his wool to the firm, may recover the wool or its value from the firm, although they have already paid the impostor for it. *Barker v. Dinsmore* (1872) 72 Pa. 427, 13 Am. Rep. 697.

A wholesaler who in selling goods mistakenly thinks the purchaser is the agent of a third party to whom the wholesaler intends to sell may recover the goods from the third party, who has taken possession under a chattel mortgage. *Kemper, H. & McD. Dry Goods Co. v. Kidder Sav. Bank* (1897) 72 Mo. App. 226.

²⁸ *Alexander v. Swackhamer* (1886) 105 Ind. 81, 55 Am. Rep. 180, 4 N. E. 433, 5 N. E. 908 (title to remain in the seller until paid for).

²⁹ *Peters Box & Lumber Co. v. Lesh* (Ind.) supra (promised draft was not sent); *Decan v. Shipper* (Pa.) supra. L.R.A.1916D.

A check from the agent for a balance claimed to be due was received and cashed in *Mayhew v. Mather* (1892) 82 Wis. 355, 52 N. W. 436, but the money tendered back before action was brought to recover the property.

³⁰ *Alexander v. Swackhamer* (Ind.) supra (payment by worthless check).

³¹ *Moody v. Blake* (1875) 117 Mass. 23, 119 Am. Rep. 394; *Hamet v. Letcher* (Ohio) supra; *Hollins v. Fowler* (1875) L. R. 7 H. L. (Eng.) 757, 44 L. J. Q. B. N. S. 168, 33 L. T. N. S. 73, 2 Eng. Rul. Cas. 410 (ten days' credit.)

³² Where a vendor sold goods to a person whom he erroneously believed to be a member of a firm to which he intended to sell, and such person, claiming and exercising ownership over the goods, resold them to another in pursuance of a fraudulent combination and purpose to cheat the owner out of his goods, he is entitled to a rescission of the contract and the recovery of the goods, unless the second purchaser sustains the character of a bona fide purchaser. *Howe v. Combs* (1897) 18 Ky. L. Rep. 1002, 38 S. W. 1052.

³³ *Edmunds v. Merchants' Despatch Transp. Co.* (1883) 135 Mass. 283.

³⁴ (Mass.) Ibid.

³⁵ *Samuel v. Cheney* (1883) 135 Mass. 278, 46 Am. Rep. 467.

See *King's Norton Metal Co. v. Edridge* (1897) 14 Times L. R. (Eng.) 98 supra.

in the last case are very similar to the facts in *Cundy v. Lindsay*.³⁶ The Massachusetts court states that it is not necessary, however, to decide whether the

property in the goods passed, because the liability of the common carrier does not necessarily turn upon it.

³⁶(1878) L. R. 3 App. Cas. (Eng.) 459, 47 L. J. Q. B. N. S. 481, 38 L. T. N. S. 573,

26 Week. Rep. 400, 14 Cox, C. C. 936, 6 Eng. Rul. Cas. 211. W. A. E.

MISSOURI SUPREME COURT.
(Division No. 1.)

WILLIAM LEAVEA

v.

SOUTHERN RAILWAY COMPANY.

(— Mo. —, 181 S. W. 7.)

Evidence — transaction with person since deceased — assault.

The statutory provision that in actions where one of the original parties to the cause of action is dead the other shall not be admitted to testify either in his own favor or in favor of any person to the action claiming under him, applies to exclude in an action against a railroad to recover damages for assault by its agent, since deceased, the testimony of the victim as to the assault.

For other cases, see Witnesses, I. c, in Dig. 1-52 N. S.

(December 2, 1915.)

CERTIFICATION by the St. Louis Court of Appeals for the determination by the Supreme Court of a question arising upon appeal by defendant from a judgment of the St. Louis Circuit Court in plaintiff's favor in an action brought to recover damages for an assault by defendant's agent. Reversed.

The facts are stated in the opinion.

Mr. Samuel B. McPheeters for defendant.

Messrs. Frank A. Thompson and Guy A. Thompson, for plaintiff:

Plaintiff was a competent witness.

Drew v. Wabash R. Co. 129 Mo. App. 459, 107 S. W. 478.

The petition was broad enough to allow the plaintiff to tell of his injuries to his back and shoulder, which he did. At the most it constitutes a very slight variance, which is waived unless an affidavit of surprise is filed setting out that it is a material variance.

Note.—The question whether statutes disqualifying a party as a witness because of death of other party apply to actions *ex delicto* is the subject of annotation following this case, post 811. L.R.A.1916D.

Fisher & Co. Real Estate Co. v. Staed Realty Co. 159 Mo. 562, 62 S. W. 443; *Mellor v. Missouri P. R. Co.* 105 Mo. 455, 10 L.R.A. 36, 16 S. W. 849; *Turner v. Chillicothe & D. M. City R. Co.* 51 Mo. 501; *Albin v. Chicago, R. I. & P. R. Co.* 103 Mo. App. 317, 77 S. W. 153; *Fischer v. Max*, 49 Mo. 405; *Litton v. Chicago, B. & Q. R. Co.* 111 Mo. App. 147, 85 S. W. 978.

Ralley, C., filed the following opinion:

Plaintiff brought suit in the circuit court of the city of St. Louis, Missouri, to recover damages on account of injuries claimed to have been inflicted upon him, in the form of an assault, by an alleged agent of defendant, while acting within the scope of his employment. Since said assault, and before the trial in the circuit court, the alleged agent, Teague, departed this life. Notwithstanding the prior death of Teague, who is charged with having made the assault, and thus created the cause of action, plaintiff was permitted, over the objection and exception of defendant, to detail in evidence at the trial his version of the controversy and the assault made upon him. To the offer of this evidence concerning all that was said and done by Teague, defendant's alleged agent and watchman at the time, an objection and exception was interposed, on the ground that Teague, the other party to the transaction in issue and on trial, was dead. The trial court overruled said objection, and permitted plaintiff to testify as to what was said and done between himself and Teague.

Upon the trial in the circuit court, the jury returned a verdict in favor of plaintiff for \$999 as compensatory damages, and \$1,000 as exemplary damages, and judgment was entered accordingly. Defendant filed a motion for new trial and in arrest of judgment in due time. The trial court ordered a remittitur so as to reduce the compensatory damages to \$500 and the exemplary damages to same amount. Thereupon the court, after a remittitur was entered, rendered judgment for \$1,000, and overruled defendant's motion for a new trial and in arrest of judgment. The case was duly appealed to the St. Louis court

of appeals, and the latter reversed and remanded the cause, on the ground that the trial court erred in permitting plaintiff to testify over defendant's objection, to the transactions and conversations which occurred between himself and Teague after the latter had died.

The opinion of the court of appeals was written by Judge Norton, and concurred in by each of the other judges of said court. The latter, deeming the conclusion reached to be in conflict with the opinion of Judge Broadbuss in *Drew v. Wabash R. Co.* 129 Mo. App. 459, 107 S. W. 478, on identically the same question, certified the case to this court, as provided by law under such circumstances. Counsel for appellant, at the oral argument of said cause here, announced with commendable fairness that the only question before us was whether the testimony of plaintiff in regard to the transactions and conversations between himself and Teague was competent under our statute.

The controversy is thus narrowed down to a construction of § 6354, Rev. Stat. 1909, which reads as follows: "No person shall be disqualified as a witness in any civil suit: . . . Provided, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party to such contract or cause of action shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him. . . ."

We have carefully examined the opinion of Judge Broadbuss in the *Drew Case*, supra, in connection with many other authorities in respect to the same subject, and have been unable to reach the conclusion that the disqualification called for in the above section of our statute does not apply in actions *ex delicto*. We can conceive of no good reason for applying the provisions of said section to actions upon contract which

would not apply with equal force to circumstances like those in the case at bar. We are therefore of the opinion that the *Drew Case* does not properly declare the law in respect to foregoing matter, and should not be followed.

The opinion of the St. Louis court of appeals herein is reported in 171 Mo. App. at pages 24 and following, 153 S. W. 500. It contains a full statement of the case, and presents an able review of the principles of law in regard to the matter under consideration. The conclusion reached by the above court in its treatment and disposition of this cause is accordingly affirmed.

In the recent case of *Eaton v. Cates*, — Mo. —, 175 S. W. 953, loc. cit., we construed § 6354, supra, in accordance with the views of the St. Louis court of appeals, supra. Cogent reasons for observing the above construction of said section of our statute will be found discussed in *Chandler v. Hedrick*, 187 Mo. App. loc. cit. 670, 173 S. W. 93; *Diggs v. Henson*, 181 Mo. App. 34, 163 S. W. 565; *Bone v. Friday*, 180 Mo. App. 577-581, 167 S. W. 599; *Taylor v. George*, 176 Mo. App. loc. cit. 222, 223, 161 S. W. 1187; *Leavea v. Southern R. Co.* 171 Mo. App. loc. cit. 27, 153 S. W. 500; *Lieber v. Lieber*, 239 Mo. loc. cit. 1, 143 S. W. 458; *Williams v. Edwards*, 94 Mo. 447, 7 S. W. 429; as well as other cases in this state.

The judgment of the St. Louis Court of Appeals is therefore affirmed, and the cause reversed and remanded, with directions to the Circuit Court to proceed with the case in accordance with the views here expressed.

Brown, C., not sitting.

Per Curiam:

The foregoing opinion of *Ralley, C.*, is hereby adopted as the opinion of the court.

All concur.

Annotation—Do statutes disqualifying party as a witness because of death of other party apply to actions *ex delicto*.

This note merely deals with the question whether statutes of the kind in question are applicable at all to actions *ex delicto*; and does not purport to deal with the admissibility or inadmissibility of particular testimony in such an action, assuming the applicability of the statute to the class of actions. No attempt has been made to gather cases which tacitly assume the applicability of the statute in a proper case to actions *ex delicto* without discussing the point.

While but few cases have expressly

considered and passed upon the question under annotation, these, with the exception of the *Drew Case*, infra, cited and disapproved in *LEAVEA v. SOUTHERN R. Co.* ante, 810, are in accord with the latter case, which affirmed the judgment of the St. Louis court of appeals in (1913) 171 Mo. App. 24, 153 S. W. 500. Thus, a statute excluding the testimony of a party to an action in his own behalf, after the death of his opponent, as to matters occurring during the life of the latter, and conversations had with him,

is not confined to cases of contracts, but applies to an action of trespass q. c. f. *Irwin v. Nolde* (1894) 164 Pa. 205, 30 Atl. 246.

And a statute excluding the testimony of parties in their own behalf when, at the time of the trial, "the party prosecuting, or the party defending, or any one of them, is an executor or an administrator," applies to an action on the case by an administrator for negligence in the operation of an automobile whereby the plaintiff's intestate was so injured that he subsequently died, to exclude the testimony of the defendant as to the circumstances of the accident. *Hallowach v. Priest* (1915) 113 Me. 510, 95 Atl. 146. The court said: "The statute makes no distinction between actions of contract and actions of tort. Nor do we think there is any distinction in reason. The statutory policy that living parties should not be permitted to tell their stories when the lips of adverse parties are sealed by death applies with equal force to torts and contracts. In torts, as in contracts, all the parties ordinarily are cognizant of the circumstances attending the tort. And if by reason of death some of them cannot testify, the others should not. That is the policy of the statute. And this policy has been enforced many times by the court."

And in *Di Nardi v. Standard Lime & Stone Co.* (1912) 3 Boyce (Del.) 369, 84 Atl. 124, which was an action for wrongful death brought by the administrator of the decedent, the applicability to actions ex delicto, of the Delaware statute providing "that in actions or proceedings by or against executors, administrators or guardians in which judgment or decree may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward," seems to have been recognized,—Woolley, J., saying: "The court appreciate that in an action ex delicto, where the cause of action is based upon an act of negligence, charged to the defendant, rather than upon a transaction or intercourse with the defendant, there must somewhere be a line dividing the testimony which, under the statute, the plaintiff may give in his personal capacity and which he may not give in his representative capacity." And it was held that certain testimony of the plaintiff was incompetent, and certain other testimony competent, depending upon whether it was or was not "as to any transaction with" the intestate.

L.R.A.1916D.

In *Drew v. Wabash R. Co.* (1908) 129 Mo. App. 459, 107 S. W. 478, however, it was held that the Missouri statute did not apply to disqualify the plaintiff as a witness in an action against a railroad company for the alleged wrongful act of one of its conductors in putting her off the train, by reason of the death of the conductor before the trial, "as this is not an action on contract, but ex delicto; nor was he a party to the cause of action within the meaning of the statute."

But, as noted above, this case is expressly disapproved by the supreme court of Missouri in *LEAVEA v. SOUTHERN R. Co.*, the court saying that it is of the opinion that the *Drew Case* does not properly declare the law in respect to the applicability of the provision of the statute in question to actions ex delicto.

In a few cases of actions ex delicto somewhat similar to *LEAVEA v. SOUTHERN R. Co.* it has likewise been held that a party to an action cannot, under statutes of the kind in question, testify to a transaction with an agent of the other party, where the agent has since died. Thus, in *Illinois C. R. Co. v. Martin* (1908) 33 Ky. L. Rep. 666, 110 N. W. 815, which was an action against a railroad company for personal injuries alleged to have been caused by the negligence of one of its engineers who was dead at the time of the trial, it was held that, under a statute providing that no person may testify for himself concerning any act done or omitted to be done by one who is dead, the plaintiff could not testify as to anything the engineer did or omitted to do, as "it has been repeatedly held that, where the agent with whom a transaction occurred is dead, the other party may not testify for himself as to the transaction."

And in *Cincinnati, N. O. & T. P. R. Co. v. Martin* (1912) 146 Ky. 260, 142 S. W. 410, which was also an action against a railroad company for personal injuries, it was held that, under a statute providing that no person shall testify for himself concerning any verbal statement of, or any transaction with, one who is dead, the plaintiff should not have been allowed to testify to a conversation between himself and one of the defendant's engineers in charge of a train, who was dead at the time of the trial. The court said: "We have repeatedly held that in a case of this kind the agent stands in the place of the principal under that section of the Code, and where the conversation was had with an agent, the opposing party cannot testify con-

cerning it, if the agent is dead when the testimony is offered to be given."

And in *Williams v. Edwards* (1887) 94 Mo. 447, 7 S. W. 429, which was an ejectment action, it was held that, "according to the rule laid down by Wharton," that "under statutes which exclude the surviving party to a contract, the death of a contracting agent excludes the surviving party who contracted with him," one who has made a contract with an agent of a corporation cannot, after the death of the contracting agent, testify in an action against the corporation concerning the contract or any admission or declaration of the agent with reference thereto.

The position that statutes of this kind are applicable to actions ex delicto is also supported, inferentially at least, by many cases which, apparently assuming the applicability, have held, in such actions, that testimony of the kind prohibited by the statutes was incompetent under the facts and circumstances appearing. Thus, for example, it has been held that a statute providing that no person shall testify for himself concerning any verbal statement of, or any transaction with, one who is dead when the testimony is offered to be given, prohibits a physician who is the defendant in an action by the administrator of a deceased person, for malpractice, from testifying for himself concerning conversations which he had with the decedent, or conditions which he discovered in performing various operations upon her, or the circumstances attending the various operations. *Barnett v. Brand* (1915) 165 Ky. 616, 177 S. W. 461.

And "where trover was brought by an administrator to recover a bond, the defendant in the suit was incompetent as a witness to testify that the plaintiff's intestate during her life had given the bond to such defendant. Code, § 3854." *Elsinger v. Beytagh* (1884) 74 Ga. 399.

Under a statute "disallowing the testimony of 'one of the original parties to the contract or cause of action in issue and on trial' in his own favor, where the other party is dead," the plaintiff in an action of trover, who claims title to the property in question by purchase from a former owner, since deceased, is incompetent to testify in his own behalf as to his purchase from or contract with the decedent, against the defendant, who claims title by purchase from the administrator of the estate of the decedent, as the plaintiff's purchase from or contract with the decedent is involved in the is-

sue on trial, although the conversion is the gist of the action; proof of the plaintiff's purchase being necessary to show the defendant's conversion. *Hall v. Hamblett* (1879) 51 Vt. 589.

And the plaintiff in an action of trespass and trover, who claims title to the property in question by virtue of his marriage to the former owner, since deceased, is incompetent to testify in his own behalf as to his marriage to the deceased, against the defendant, who took and claims the property as administrator of the deceased, as the deceased was "a party to the contract or cause of action in issue and on trial" within the meaning of the statute, although the alleged cause of action is, technically, the defendant's personal tort; the title to the property being the real matter in controversy, proof of which in the plaintiff, by showing his marriage to the deceased, is necessary to sustain the cause of action alleged. *Fitzsimmons v. Southwick* (1866) 38 Vt. 509.

And in *Brooks v. Goss* (1872) 61 Mo. 307, which was an action of trespass de bonis asportatis brought by an executor, it was held simply that, "as the executor did not offer himself as a witness the defendants were properly excluded."

Under a statute providing "that in all suits where an . . . administrator . . . is a party in a case, where a judgment may render either for or against the estate represented by such . . . administrator, . . . neither party shall be allowed to testify as a witness," etc.,—the defendant in an action of replevin brought by three coplaintiffs is incompetent to testify as a witness in his own behalf as to conversations between himself and one of the coplaintiffs, where the latter has died and his administrator has been substituted as a coplaintiff in the action. *Charles v. Malcott* (1879) 65 Ind. 184.

And under the Missouri statute, the plaintiff in an action of replevin is incompetent to testify as a witness in his own behalf in regard to the ownership of the property in question, where the defendant has died and his administrator has been made a party to the action. *Blobaum v. Gambs* (1874) 56 Mo. 183.

Under a statute providing "that in actions where one of the original parties to the contract, or cause of action, in issue and on trial, is dead, . . . the other party shall not be admitted to testify in his own favor," the defendant in a statutory action of ejectment by one claiming under the deceased grantee in a deed exe-

cuted by him, is not a competent witness in his own behalf as to the delivery or nondelivery of the deed, as it is the title to the premises in controversy, including all the means and documents which evidence and establish the right of the plaintiff to recover in the action, which is in issue and on trial, and the defendant is one of the original parties to the deed which evidences the title on which the plaintiff relies. *Chapman v. Dougherty* (1885) 87 Mo. 617, 56 Am. Rep. 469.

So, in *Hollister v. Young* (1868) 41 Vt. 156, which was an action of ejectment, a statute providing "that in all actions, except actions on book account, where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor,—was held to apply to the facts of the case as to the relations and interests of the parties.

And the defendant in an action of ejectment by the heir of the former owner is incompetent to testify in his own behalf as to an alleged contract between himself and the former owner by virtue of which he claims the premises in question, as this contract is "in issue" within the meaning of the statute, being within the substantial issues made by the evidence, although not within the merely formal issues made by the pleadings. *Pember v. Congdon* (1883) 55 Vt. 58.

And in *Napier v. Elliott* (1907) 152 Ala. 248, 44 So. 552, it was held that the plaintiff in an action of ejectment, who claimed title under a deed from her deceased father, was incompetent to testify as a witness in her own behalf, against the defendants, who claimed as heirs of the alleged grantor, as to conversations and transactions between herself and the deceased relative to the execution and delivery of the deed.

Similarly, a statute declaring that "a party or a person interested in the event (of an action) . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person," has been held to apply to an action brought by an administrator to recover damages for the wrongful killing of his intestate, to exclude the testimony of the defendant as to the transaction between himself and the plaintiff's intestate, which resulted in the latter's death, and as to his

conversation with the intestate at the time; the defendant's argument to the contrary having been "that, inasmuch as a cause of action arising out of the death of one person by reason of the wrongful or negligent acts of another . . . is not given to the estate of a deceased person for the purpose of general administration, but for the exclusive benefit of a husband, wife, or next of kin, the plaintiff is not an administrator in the ordinary acceptance of that term, but simply a trustee for a certain specified purpose." *Abelein v. Porter* (1899) 45 App. Div. 307, 61 N. Y. Supp. 144.

And under a statute allowing parties to testify on their own behalf, which expressly excepts from its operation a party or person interested in an action in which the adverse party sues as administrator, etc., the defendants in a statutory action for wrongful death, brought by an administratrix, for the use of the next of kin, are incompetent as witnesses as to matters anterior to the death of the intestate, although the damages in such an action are not strictly any part of the estate of the intestate, as they nevertheless come within the letter of the statute, and "the same reasons which justify the limitation of the general statute so as to silence adverse parties where the effect of the proceeding is to increase or decrease the estate seem equally cogent in a case like the present." *Forbes v. Snyder* (1880) 94 Ill. 374.

Likewise, under a statute providing that "in suits or proceedings in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against such estate,"—the defendant in a statutory action for wrongful death brought by the administrator of the deceased is incompetent to testify as a witness in his own behalf, notwithstanding the judgment, when recovered, inures to the benefit of the heirs of the decedent, regardless of the rights of creditors, as "this affords no sufficient reason why the plain letter of the statute . . . should be disregarded." *Hudson v. Houser* (1890) 123 Ind. 309, 24 N. E. 243.

And under a statute declaring "that in all suits where an executor, administrator or guardian is a party in a case where

a judgment may render either for or against the estate, represented by such executor, administrator or guardian, neither party shall be allowed to testify as a witness unless required by the opposite party, or by the court trying the cause,"—a defendant in a statutory action for wrongful death brought by the administrator of the deceased is incompetent to testify in his own behalf. *Sherlock v. Alling* (1873) 44 Ind. 184.

In *Kentucky Utilities Co. v. McCarty* (1916) — Ky. —, 183 S. W. 237, which was a statutory action for wrongful death brought by the father of the deceased, as administrator, it was held that he was incompetent to testify to a conversation which he had with his son, the decedent, and to a message sent by the son to the defendant, as the conversation and message constituted a "transaction" with the decedent, and the father was testifying "for himself," within the meaning of the Kentucky statute providing that no person shall testify for himself concerning any transaction with one who is dead when the testimony is offered to be given.

On the other hand, it has been held, in some cases of actions for wrongful death, that statutes of the class in question did not apply to render one of the parties incompetent as a witness in his own behalf,—not, however, because of inapplicability of the statutes to actions *ex delicto*, but because such actions for wrongful death, brought by or for the benefit of the widow or next of kin of the decedent, were not within the terms of the statute. Thus, for example, a statute excluding testimony as to transactions with or statements of a deceased person, in any action in which judgment may be rendered for or against his administrator, does not apply to a statutory action for wrongful death brought by the widow of the deceased in the name of his administrator, for the benefit of herself and an infant child of the deceased,—the administrator having refused to bring the action,—to exclude the testimony of the defendant as to the circumstances of the killing of the deceased, as the administrator is merely a nominal party, and the estate of his intestate has no interest whatever in the result of the suit, and no judgment can be rendered either for or against him which can affect the estate of his intestate. *Hale v. Kearly* (1874) 8 Baxt. (Tenn.) 49.

And a statute declaring that "no interest nor policy of law shall exclude a party or person from being a witness in L.R.A.1916D.

any civil proceeding;" provided, "this act shall not apply to actions by or against executors, administrators, or guardians, nor where the assignor of the thing or contract in action may be dead," has been held not to apply to a statutory action for wrongful death brought by the widow of the deceased, as "this action is not by or against an executor, administrator, or guardian; nor is the assignor of the thing in action dead. There is no assignment, either actually or constructively. If an action had been brought by Weiland [the deceased] to recover damages for injuries he had sustained, it would have survived to his personal representatives under the eighteenth section of the act of April, 1851, *supra*; and after his death the plaintiff in error would not have been competent to testify to matters which occurred during the life of Weiland. This action, however, was not brought by him, nor is it for the recovery of damages for injuries he sustained; but it is for injuries his wife sustained by his death. It is for a cause of action her husband never had. It arose on and after his death, and accrued to his widow." *Mann v. Weiland* (1876) 81 *Pa. 243.

So, in *McEwen v. Springfield* (1879) 64 Ga. 159, which was an action by a widow to recover damages for the killing of her husband, it was held that the defendants had properly been allowed to testify fully as to their version of the homicide,—the court saying: "Mrs. McEwen, who was the plaintiff and solely interested as such, had testified in the case and had given her version of the homicide of her husband, whose estate was in no way interested in the issue or cause of action on trial. The plaintiff was in life to confront the witnesses who were called to testify against her, the only party plaintiff interested in the cause of action or the issue on trial."

And a statute providing that "in all suits by or against heirs or devisees, founded upon a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of or in right of such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matters which occurred prior to the death of the ancestor," does not apply to an action for wrongful death. *Cincinnati, H. & I. R. Co. v. Cregor* (1898) 150 Ind. 625, 50 N. E. 760.

And in *Louisville, N. A. & C. R. Co. v. Thompson* (1886) 107 Ind. 442, 57 Am. Rep. 120, 8 N. E. 18, which was an action

by an administrator to recover for the death of his intestate, caused by the negligence of the defendant, the court, on denying a rehearing, in (1886) 107 Ind. 456, 9 N. E. 357, said: "We said in our former opinion, that even if it were conceded that the widow of Andrew Eichler [the plaintiff's intestate] was not a competent witness, no material error was committed in permitting her to testify [as all that was material in her testimony related to matters subsequent to her husband's death, or else to matters which were open to the knowledge of all persons who knew the parties], and we still adhere to that view; but we

are prepared to go further, and hold that she was a competent witness, for the statute does not apply to cases of tort resulting in the death of the husband. Neither § 498 nor § 499 of the code applies to a case like this, for the widow is not a party to the record, nor is her interest adverse to the estate, and the case is not one between heirs. The case is not 'founded on a contract with or demand against the ancestor' or 'to obtain title to or possession of property, real or personal,' but is an action to recover damages for a tort causing the ancestor's death." A. C. W.

NEW YORK COURT OF APPEALS.

RE PETITION OF WILLIAM W. FARLEY, State Commissioner of Excise, Appt., For Cancellation of a Liquor Tax Certificate Issued to William A. Thater, and Transferred to Catherine Cronin.

(213 N. Y. 15, 106 N. E. 756.)

Intoxicating liquor — consent by infant to license — effect.

Neither an infant nor his mere agent can give a valid consent to the conducting of a liquor business in such proximity to his property that the law requires the consent of its owner before the issuance of a license to conduct the business there.

For other cases, see Intoxicating Liquors, II. in Dig. 1-52 N. S.

(November 10, 1914.)

A PPEAL by petitioner from an order of the Appellate Division of the Supreme Court, Fourth Department, reversing an order of a Special Term for Onondaga County, revoking and canceling a liquor tax certificate transferred to respondent. Reversed.

The facts are stated in the opinion.

Mr. Louis M. King, and Mr. A. M. Sperry, for appellant:

The consents signed by Anna Carroll and Joseph Carroll, infants, are not valid and binding.

People v. Griesbach, 211 Ill. 35, 71 N. E. 874; *Thompson v. Eagan*, 70 Neb. 169, 97 N. W. 247.

An infant can neither himself, nor through any power which such infant con-

Note. — As to consent of infant or incompetent, or his guardian, committee, or agent, to a license for the sale of intoxicating liquors, see annotation following this case, post, 819.
L.R.A.1916D.

fers upon another, give consent for the traffic in liquor.

People v. Griesbach, supra.

The respondent herein has failed to establish by any evidence guardianship of the infants, or any sufficient agency or authority to grant consent for the infants.

McCoy v. Forbush, 104 App. Div. 215, 93 N. Y. Supp. 401.

The liquor tax law is a statute, penal in its nature, and should be strictly construed against the respondent herein.

Re Haight, 33 Misc. 544, 68 N. Y. Supp. 920; *People ex rel. Clausen v. Murray*, 5 App. Div. 442, 39 N. Y. Supp. 1130; *United States v. Hartwell*, 6 Wall. 395, 18 L. ed. 832; *Re Lyman*, 48 App. Div. 275, 62 N. Y. Supp. 846; *People ex rel. Cairns v. Murray*, 148 N. Y. 171, 42 N. E. 584.

Messrs. Welch & Parsons, for respondent:

The consents signed by said infants are valid and binding.

Re Sherry, 25 Misc. 361, 55 N. Y. Supp. 421; *Re Townsend*, 195 N. Y. 214, 22 L.R.A. (N.S.) 194, 88 N. E. 41, 16 Ann. Cas. 921; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *O'Donohue v. Smith*, 130 App. Div. 214, 114 N. Y. Supp. 536; *Smith v. Ryan*, 191 N. Y. 452, 19 L.R.A. (N.S.) 461, 123 Am. St. Rep. 609, 84 N. E. 402, 14 Ann. Cas. 505.

The statute was not intended to make it impossible to obtain a liquor tax certificate.

Re Clement, 101 N. Y. Supp. 447.

All statements contained in the application for the liquor tax certificate are presumed to be true, and the burden is on the excise department to show that such statements are not true.

Farley v. Scherno, 147 App. Div. 375, 132 N. Y. Supp. 170; *Rosendorff v. Haas*, N. Y. L. J. Dec. 18, 1907.

The revocation signed by Mrs. Barry is not valid and binding.

Re *Adriance*, 59 App. Div. 440, 69 N. Y. Supp. 314.

In order to cancel a certificate on the ground that a false statement was made in the application therefor, such false statement must be material.

Hawkins v. Thiel Bros. 165 N. Y. 188, 58 N. E. 884, 9 Am. Neg. Rep. 336; *Moulton v. Aeconcia*, 59 App. Div. 25, 69 N. Y. Supp. 14, affirmed in 168 N. Y. 645, 61 N. E. 1131.

The certificate is a contract between the person who received it, and the state, for the absolute right to traffic in liquor for one year, of which he can only be deprived by some violation of the law, so long as the statute is in force, and such right may be regarded in a sense as property of the holder.

Lyman v. Malcom Brewing Co. 160 N. Y. 96, 54 N. E. 577.

Hiscock, J., delivered the opinion of the court:

Application was made to the deputy commissioner of excise of the county of Onondaga for the transfer to respondent and to new premises of a liquor tax certificate theretofore issued to another person. The transfer was made by the commissioner, and later this proceeding was instituted to have such certificate canceled, on the ground that respondent's application for the issue of the certificate to her falsely stated that she had secured the requisite number of consents to the prosecution of said business in the new location.

The Liquor Tax Law (Consol. Laws, chap. 34, § 15, subdiv. 8), as amended (Laws 1911, chap. 643, § 2), provide that "when the nearest entrance to the premises described in said statement as those in which traffic in liquors is to be carried on is within 300 feet, measured in a straight line, of the nearest entrance to a building or buildings occupied exclusively for a dwelling, there shall also be filed simultaneously with said statement [on the application for a certificate] a consent in writing that such traffic in liquors be so carried on in said premises during a term therein stated, executed by the owner or owners, or by a duly authorized agent or agents of such owner or owners of at least two thirds of the total number of such buildings within 300 feet so occupied as dwellings."

The question whether respondent's statement that she had secured the requisite number of consents of owners of buildings occupied as dwellings within the prescribed limit is true depends on the further query whether infant owners of such dwellings may give a legal consent. There were one or more dwellings within 300 feet of the premises where respondent proposed to con-

duct her liquor business of which infants were owners, and consents in the form required by law were obtained from them and filed. If they are valid, the respondent had a sufficient number of consents; without them she did not have, and is not entitled to have her certificate and carry on her business.

We do not think that infant owners of property may give a valid consent to the issue of a liquor tax certificate.

At the outset we find in the liquor tax law various provisions which indicate a policy on the part of the state to prevent any relationship between infants and the sale of liquor, which we think are entitled to some consideration in interpreting the particular provision relating to consents.

Section 29 provides, in substance, that it shall be unlawful to sell, deliver, or give away liquor to any minor under the age of eighteen years, or to such minor for any other person.

Section 30 provides that it shall not be lawful to permit any minor under such age to sell or serve any liquors, or to enter or remain in any barroom where liquors are sold.

Section 21 of said law provides that no person under the age of twenty-one years shall traffic in liquor.

As we read these provisions it would seem to be a fair inference that a legislative policy which prohibited an infant from using, serving, or trafficking in liquors did not contemplate that he should be authorized to give a consent that some other person might carry on the business. And in entertaining this view sight is not lost of the argument made by the learned appellate division that because the legislature expressly prohibited certain acts such as those mentioned, it may be assumed that it did not intend to prohibit certain other acts which were not mentioned, such as the right of an infant to give a consent to traffic in liquors by another person. That argument, however, does not, in this case, seem to be very persuasive. The legislature might very well prohibit the specific acts which have been mentioned, and which, without express provision, were not unlawful, and rely on general principles for the proper decision of the question whether an infant might perform some other act, such as executing one of the consents required by the statute; and we therefore pass to the consideration, on such general principles, of the question whether an infant ought to be allowed to give such a consent.

The rule is well understood that attempted contracts by an infant are incomplete and imperfect, and do not become valid and binding except by the act or fail-

ure to act of the infant after he reaches the age of maturity. He is regarded as not having sufficient capacity to understand and pass upon questions involving contractual rights, and, therefore, a person dealing with him does so at his peril, and subject to the right of the infant to avoid his contract when he becomes of age.

It seems to us that an attempted consent by an infant to the issue of a liquor tax certificate and the prosecution of that business involves considerations which are in the nature of a property right, and is subject to the infirmities of infancy which would attach to an ordinary contract executed by a minor. It appears to have been assumed by the legislature that neighboring property used for dwellings might be affected by opening a saloon, as we very well know might be the case; and hence the requirement for consents thereto, which are to be given, not by persons dwelling within a certain radius, but by the persons who own property within that radius. If considerations of property rights are involved in giving such a consent, it would seem that the act of an infant should be safeguarded in the same way as would be an attempt on his part to sell, lease, or mortgage his real estate.

But, reverting to the principles governing an ordinary contract by an infant, it is urged that since his contracts are not void, but voidable, at his election, the same rule should be applied to a consent to the issue of a liquor tax certificate, and that such consent should be held valid until the infant, under proper conditions, disaffirms said act.

There are two answers to this proposition. In the first place, the principle which allows the executed contract of an infant to stand as valid unless the infant shall disaffirm the same after becoming of age is not practically adapted to such an instrument as a consent to the issue of a liquor tax certificate. In many cases, at least, the office of the certificate would have been completed and any injury flowing from the issue thereof consummated long before the infant would arrive at those years of maturity where the law would regard him as reaching for the first time sound discretion in such a matter.

But the more important objection to this theory rests on the distinction between an act of an infant which only affects himself and his property, and an act like that involved in the present proceeding, which is also of public consequence. If an infant makes a lease or sale of his real estate, it

legally touches no one but himself, and if, when he becomes of age, he chooses to affirm the contract, no one should object. But that is not the present case. The people of the state, acting within well-defined and established powers, have deemed it wise to regulate the traffic in liquor. The liquor tax law, with its many provisions, is sufficient evidence of the extent to which the legislature has attempted to do this. Amongst other things it has been deemed wise and very just that the prosecution of this traffic should not be permitted in certain localities occupied by dwelling houses unless a large proportion of the owners of such property are in favor of such traffic. As has already been said, a property owner, in consenting to the prosecution of this business, performs an act which might be regarded as affecting the value of his own property, and in that aspect no one has any interest in the question except himself. But, in addition to this, each owner of property within the prescribed limit has an interest in the execution of such a consent by every other property owner. His effective opposition or consent to the prosecution of the business depends on the action of other property owners, and he is interested in having such other property owners pass on the question intelligently and wisely. It is a matter of importance to every property owner in the neighborhood and to the people of the community that consents should not be given by persons whom the law regards as deficient in judgment and capacity to act. Every property owner is entitled to have every other property owner within the prescribed radius pass intelligently on the question whether it is best to have a saloon within the proposed area; and, of course, such intelligent action cannot be secured, either presumptively or actually, if infants may give such consents. In the present case the infants at the time in question were of the ages, respectively, of fourteen and ten years. Nobody would claim that they could pass with mature judgment on the question whether a saloon should be located at the proposed spot. Moreover, if these particular infants can execute valid consents, there is no reason why still younger children might not perform similar acts, until the process of securing consents from property owners where there happened to be infant owners would be made absurd and ridiculous, and any benefits anticipated from these provisions in securing a limited form of local option be lost.

While this question of the power of an infant to execute such a consent has not been heretofore decided by this court, authorities found in other states and entitled to great respect adopt the conclusion which we now reach, that such power is lacking. *Thompson v. Eagan*, 70 Neb. 169, 97 N. W. 247; *People v. Griesbach*, 211 Ill. 35, 71 N. E. 874.

The consent in question was not only signed by the infants personally, but also by "Martin J. McArdle, Agent for" said infants, and it is further urged by the respondent that this latter signature rendered the consent effective under that provision of the statute which authorizes a consent to be executed not only by the owner of premises, but also "by his duly authorized agent." We do not intend to hold that a consent to the issue of a certificate may not be executed on behalf of an infant by a guardian, or by some other person authorized in some unusual manner to execute such consent. We simply

do not pass on that question, as we do not regard it as here presented. It certainly is clear that an infant, who cannot himself execute a consent, cannot by himself and in any ordinary manner create an agent who will have greater powers than he himself possesses. The evidence makes it fairly apparent that whatever agency for the infants McArdle enjoyed sprang from the fact that he collected rents and managed the property. If there was any other agency or power of representation I think that evidence thereof should have been produced by the respondent, and such agency did not clothe the alleged agent with greater powers in respect of this consent than the infants themselves possessed.

The order of the Appellate Division should be reversed, and that of the Special Term affirmed, with costs in both courts.

Werner, Chase, Collin, Hogan, Miller, and Cardozo, JJ., concur.

Annotation—Consent of infant or incompetent, or his guardian, committee, or agent, to a license for the sale of intoxicating liquors.

In accordance with the decision in *Re Farley*, ante, 816, it was held in *People v. Griesbach* (1904) 211 Ill. 35, 71 N. E. 874, where the consent of the owners of neighboring property was necessary to the establishing of a liquor business, that an owner who was a minor could not consent. It is stated that the peace, morals, order, and safety of a community may be affected by the grant of a license to sell intoxicating liquor. Accordingly, those invested with the power to consent or refuse to consent to such establishment are charged with a duty to the public; that the proper discharge of this duty demands the consideration of the interest of all who are to be affected, and the exercise of mature judgment and discretion. The statutes prohibiting the sale to minors were urged also as a reason why a minor is incompetent to consent.

Certain minor children who were heirs to estates in the territory involved were held not entitled to be counted among the legal resident freeholders of the precinct, in *Thompson v. Eagan* (1903) 70 Neb. 169, 97 N. W. 247, and in the course of the opinion the court states that the statute never contemplated infant children, although residents and heirs to estates of inheritance in the precinct, as proper persons to sign a L.R.A.1916D.

petition for a license to sell intoxicating liquors; that this right was intended to be reserved for the full-grown resident freeholders of the precinct.

Under a statute making it unlawful to issue a license to keep a dramshop until a majority of the "assessed taxpaying citizens" in the block or square in which the dramshop is to be kept shall sign a petition asking for the same, it was held in *State ex rel. McCampbell v. County Ct.* (1886) 90 Mo. 593, 2 S. W. 788, that minors, resident in the city, who have guardians, and who own property, and are regularly assessed, should be counted in determining whether a petition presented for a dramshop license in the town or city is signed by a majority of the assessed taxpaying citizens; but whether they are to be counted in determining the whole number of taxpaying citizens, or the number who have signed the petition, is not made clear from the report. Apparently, however, the question was whether the minors should be counted in determining the whole number of assessed taxpaying citizens.

There is dictum in *People v. Griesbach* (Ill.) supra, that a person so insane as to be irresponsible cannot consent.

Some statutes provide for the signing of a consent by the guardian of an interested minor.

W. A. E.

OKLAHOMA SUPREME COURT.

JAMES G. SACKETT et al., Plffs. in Err.,
v.
MARTHA ROSE.

(— Okla. —, 154 Pac. 1177.)

Abstracts — liability of abstracter.

1. Under § 1, Wilson's Rev. Statutes 1903, an abstracter of title is liable on his bond to pay all damages that may accrue to any person by reason of any incompleteness, imperfection, or error in any abstract furnished by him and relied on by such person to his injury, and such liability is not confined to the person for whom he makes or furnishes an abstract.

For other cases, see Abstracts, in Dig. 1-52 N. S.

Statutes — construction — harmonizing.

2. In the construction of statutes, harmony, not confusion, is to be sought. Conflicts between different provisions of the statute are not to be held to exist, if harmony, by any reasonable construction of them, can be discovered. The true rule has often been said to be that where two acts or parts of acts are reasonably susceptible of a construction that will give effect to both and to the words of each, without violence to either, it should be adopted in preference to one which, though reasonable, leads to the conclusion that there is a conflict. There is no conflict between different provisions of a statute if there is a reasonable meaning of the words used, considering the manner of their use, which will bring them into harmony.

For other cases, see Statutes, II. a, in Dig. 1-52 N. S.

Evidence — parol — alteration of record.

3. The alteration of a record may be shown by parol evidence; such evidence not being within the rule excluding evidence to vary the record, but for the purpose of showing that the record in question is not the true record which was actually made.

For other cases, see Evidence, VI. l, in Dig. 1-52 N. S.

Damages — compensation.

4. Where a wrong has been done and the law gives a remedy, the compensation shall be equal to the injury, and the latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be in the situation which he would have occupied had not the wrong been committed.

For other cases, see Damages, III. e, in Dig. 1-52 N. S.

Same — mistake in abstract of title.

5. A party injured on account of the incompleteness or error in an abstract is en-

titled to all the damages proximately resulting from such injury.

For other cases, see Damages, III. e, in Dig. 1-52 N. S.

Same — duty to mitigate.

6. Where an injured party finds that a wrong has been perpetrated on him, he should use all reasonable means to arrest the loss. It is only incumbent on him, however, to use reasonable exertion and incur reasonable expense, and the question in such cases is always whether the act was a reasonable one, having regard to all the circumstances of the particular case.

For other cases, see Damages, III. s, in Dig. 1-52 N. S.

Evidence — burden of proof — mitigation of damages.

7. The burden of proving mitigation of damages is upon the party guilty of the tortious act or breach of contract.

For other cases, see Evidence, II. m, in Dig. 1-52 N. S.

Jury — disqualification — waiver.

8. A known ground of disqualification of a juror, before or during the progress of a trial, is waived by withholding it or failure to raise the objection until after the verdict.

For other cases, see Jury, II. b, in Dig. 1-52 N. S.

(January 4, 1916.)

ERROR to the Superior Court for Oklahoma County to review a judgment in plaintiff's favor in an action brought to recover damages for loss resulting from an incorrect abstract on certain property on which plaintiff loaned money and subsequently purchased. Remanded with instructions.

The facts are stated in the commissioner's opinion.

Messrs. George J. Eacock and Jennings & Levy, for plaintiffs in error:

An abstracter and his sureties on his bond are liable only to such person or persons for whom he may compile, make, or furnish the abstract.

Bremerton Development Co. v. Title Trust Co. 67 Wash. 268, 121 Pac. 69; Malory v. Ferguson, 50 Kan. 685, 22 L.R.A. 99, 32 Pac. 410; Symms v. Cutter, 9 Kan. App. 210, 59 Pac. 671; Thomas v. Guarantee Title & T. Co. 81 Ohio St. 432, 26 L.R.A. (N.S.) 1210, 91 N. E. 183, 2 N. C. C. A. 80; National Sav. Bank v. Ward, 100 U. S. 195, 25 L. ed. 621; Zweigardt v. Birdseye, 57 Mo. App. 462; Glawatz v. People's Guaranty Search Co. 63 N. Y. Supp. 691; Schade v. Gehner, 133 Mo. 252, 34 S. W. 576; Talpey v. Wright, 61 Ark. 275, 54 Am. St. Rep. 206, 32 S. W. 1072; Equitable Bldg. & L. Asso. v. Bank of Commerce & T. Co. 118 Tenn. 678, 12 L.R.A.

Headnotes by BOWLES, C.

Note. — As to liability of title abstracter, see annotation following this case, post, 826. L.R.A.1916D.

(N.S.) 449, 102 S. W. 901, 12 Ann. Cas. 470.

Where two sections of the same statute, or particularly two parts of the same section of the statute, are flatly contradictory of each other, that which is the latter in position will be deemed to govern and control.

Sutherland, Stat. Constr. § 220; Howard v. Bangor & A. R. Co. 86 Me. 387, 29 Atl. 1101; Omaha Real Estate & T. Co. v. Reiter, 47 Neb. 592, 66 N. W. 658; Ex parte Hewlett, 22 Nev. 333, 40 Pac. 97; Hand v. Stapleton, 135 Ala. 156, 33 So. 689; Sanford v. King, 19 S. D. 334, 103 N. W. 28; Gish v. Shaver, 140 Ky. 647, 131 S. W. 515; Branagan v. Dulaney, 8 Colo. 408, 8 Pac. 669; Re Richards, 37 C. C. A. 634, 96 Fed. 935; Brown v. Philadelphia County, 21 Pa. 42.

Where general terms or expressions in one part of the statute are inconsistent with more specific or particular provisions in another part of the same statute, the particular and specific provisions will be given effect as clearer and more definite expressions of the legislative will.

King v. Armstrong, 9 Cal. 368, 99 Pac. 527; Sanford v. King, 19 S. D. 334, 103 N. W. 28; State, Bartlett, Prosecutor, v. Trenton, 38 N. J. L. 67; Gish v. Shaver, 140 Ky. 647, 131 S. W. 515; Hodges v. Dawdy, 104 Ark. 583, 149 S. W. 656; McGrew v. Missouri P. R. Co. 230 Mo. 496, 132 S. W. 1076; Stadler v. Helena, 46 Mont. 128, 127 Pac. 454; Columbia Bank & T. Co. v. United States Fidelity & G. Co. 33 Okla. 543, 126 Pac. 556.

When a party offers in evidence a public record, parol evidence cannot thereafter be introduced by such party to impeach or contradict the record.

Richardson v. South Western Cotton Seed Oil Co. 15 Okla. 263, 81 Pac. 781; Yates v. People, 207 Ill. 316, 69 N. E. 775; Darr v. Darrow, 120 Iowa, 29, 94 N. W. 245; Toliver v. Brownell, 94 Mich. 577, 54 N. W. 302; Sweet v. Gibson, 123 Mich. 699, 83 N. W. 407; Union & Planters' Bank v. Memphis, 107 Tenn. 66, 64 S. W. 13; Hulbert v. Hammond, 41 Mich. 343, 1 N. W. 1040.

A person who is being damaged by the negligence or carelessness of another cannot sit idly by and make no reasonable efforts to prevent the increase in the damage to himself, and not notify the other party and thereby give him opportunity to prevent the increase in damage, and then seek to hold the other person responsible for the damage or the increased damage.

Washington County Abstract Co. v. Harris, — Okla. —, 149 Pac. 1075; Roberts v. Leon Loan & Abstract Co. 63 Iowa, 76, 18 L.R.A.1916D.

N. W. 702, 69 Iowa, 673, 29 N. W. 776; Mabb v. Stewart, 147 Cal. 413, 81 Pac. 1073.

Mr. James S. Twyford, for defendant in error:

The terms of the bond and the statute extend such liability to cover any damage sustained by and accruing to any person who relied upon such abstract, or to any person for whom such abstract was made.

1 Am. & Eng. Enc. Law, 2d ed. 1168; Young v. Lohr, 118 Iowa, 624, 92 N. W. 684; Allen v. Hopkins, 62 Kan. 175, 61 Pac. 750; Arnold v. Barner, 91 Kan. 768, 139 Pac. 404, 6 N. C. C. A. 965, Ann. Cas. 1915D, 446; Gate City Abstract Co. v. Post, 55 Neb. 742, 76 N. W. 471; Dickle v. Nashville Abstract Co. 89 Tenn. 431, 24 Am. St. Rep. 616, 14 S. W. 896; Goldberg v. Sisseton Loan & Title Co. 24 S. D. 49, 140 Am. St. Rep. 775, 123 N. W. 266; Western Loan & Sav. Co. v. Silver Bow Abstract Co. 31 Mont. 448, 107 Am. St. Rep. 435, 78 Pac. 774; Burton v. Larkin, 36 Kan. 246, 59 Am. Rep. 541, 13 Pac. 398; McLaren v. Hutchinson, 22 Cal. 187, 83 Am. Dec. 59.

Evidence must be objected to at the time offered, or the same is waived.

Jones v. Citizens' State Bank, 39 Okla. 393, 135 Pac. 373; State v. Hope, 100 Mo. 347, 8 L.R.A. 608, 13 S. W. 490.

A known disqualification of a juror at or before the trial, and not then raised, such disqualification is waived.

Horton v. State, 10 Okla. Crim. Rep. 294, 136 Pac. 177; Fooshee v. State, 3 Okla. Crim. Rep. 666, 108 Pac. 554.

The alteration of a record may be shown by parol evidence, such evidence not being within the rule excluding evidence to vary the record, but for the purpose of showing that the record in question is not the true record which was actually made.

10 Enc. Ev. 968; Louisville & N. R. Co. v. Malone, 116 Ala. 600, 22 So. 897; Olmsted v. Hoyt, 4 Day, 436; Sebastian v. Raas, 57 Ill. App. 417; Brier v. Woodbury, 1 Pick. 363; Herring v. Lee, 22 W. Va. 661; Dyer v. Brogan, 70 Cal. 136, 11 Pac. 589; Lowry v. McMillan, 8 Pa. 157, 49 Am. Dec. 501; Wilkinson v. Carter, 22 Neb. 186, 34 N. W. 351; Woodville v. Harrison, 73 Wis. 360, 41 N. W. 526; Mitchell v. Kintzer, 5 Pa. 216, 47 Am. Dec. 408.

Reduction of damages is always a question of fact for the jury.

Cobb v. Western U. Teleg. Co. 85 S. C. 430, 67 S. E. 549; 1 Sutherland, Damages, 152; Sedgw. Damages, 8th ed. 201-205.

A party claiming mitigation of damages is required to plead and prove the same.

Ramsay v. Meade, 37 Colo. 465, 86 Pac. 1018; Knapp v. Roche, 94 N. Y. 329; United States v. Mullen Fuel Co. 118 Fed. 663; Reed v. Union Cent. L. Ins. Co. 21

Utah, 295, 61 Pac. 21; Sedgw. Damages, ¶ 227; Merrill v. Blanchard, 7 App. Div. 167, 40 N. Y. Supp. 48; King v. Steiren, 44 Pa. 99, 84 Am. Dec. 419; Leonard v. New York, A. & B. Electro Magnetic Teleg. Co. 41 N. Y. 544, 1 Am. Rep. 446.

Bowles, C., filed the following opinion:

The defendant in error (plaintiff below) instituted this action in the superior court of Oklahoma county, against James G. Sackett, an abstractor of title, and Robert I. Sackett, Lizzie Jennings, and A. C. Farmer, bondsmen for said James G. Sackett, plaintiff in error (defendants below), hereinafter referred to respectively as "plaintiff" and "defendants," for damages resulting from an incorrect abstract on certain property in Oklahoma City on which the plaintiff loaned \$1,750 and subsequently thereto purchased what she thought was a fee title to said property. The defendant James G. Sackett, in making the abstract, prior to the loan above referred to, omitted in his certificate to disclose the existence of a judgment which was then a lien on said property, which said judgment was against one Dewaide, a former owner of the property, in favor of J. W. Morrison. After the plaintiff had purchased the property, said property was sold under said judgment and entirely lost to plaintiff. Plaintiff recovered judgment in the court below for the value of said property so lost to her; hence this appeal.

At the outset, we are called upon to construe § 1, Wilson's Revised & Annotated Statutes of 1903; plaintiff in error claiming that an abstractor is only liable for damages for any incompleteness, imperfections, or errors in any abstract furnished by him to the person or persons for whom he may compile, make, or furnish an abstract of title. The court below held that a party furnishing an abstract was liable in damages to any person relying upon said abstract to his detriment. We believe this construction of the statute clearly right. Section 1 reads as follows: "That it shall be unlawful for any person, firm or corporation to hold themselves out as abstractors and to engage in the business of abstracting title to real estate in any of the counties of the territory of Oklahoma, without first having executed and filed with the county clerk of the county in which said person, firm or corporation intends to engage in the business of abstracting, a bond, to be approved by the board of county commissioners of said county, with three or more good and sufficient sureties residing in the county, and worth not less than double the amount of the bond over and above all debts, liabilities and exemptions, in the

sum of \$5,000, conditioned that he will properly demean himself in the business of abstracting, and will pay all damages that may accrue to any person by reason of any incompleteness, imperfections or error in any abstract furnished by him, and will in no way mutilate, deface or destroy any of the records of the several offices to which he may have access, and that he will not in any way interfere with, hinder or delay the several county officers in the discharge of their duties, while using said records, in the prosecution of said business of abstracting: Provided, however, that the records shall in no case be taken from the county office to which they belong. The person, firm or corporation who shall execute and file said bond of \$5,000 for said purpose, shall, together with the sureties thereon, be liable on said bond to the territory of Oklahoma in the penalty of one hundred dollars (\$100); and to any county or person who shall be in any way damaged by any mutilation, injury or destruction of any record or records of the several county offices to which he or they may have access, to the amount of damage actually done said county or person; and to any person or persons for whom he or they may compile, make or furnish abstracts of title, to the amount of damage done to said person or persons by any incompleteness, imperfection or error made by said person, firm or corporation, in compiling said abstract."

This statute seemingly has two inconsistent provisions. The first part of the section provides that the abstractor shall give bond, etc., said bond conditioned that he will properly demean himself in the business of abstracting and pay all damages that may accrue to any person by reason of any incompleteness, imperfection, or error in any abstract furnished by him. The latter part of the same section provides that the abstractor and his bond shall be liable to the state or territory in the penal sum of \$100 and to any county for mutilating the records, etc., and to any persons for whom he or they may compile, make, or furnish abstracts of title, to the amount of damage done to said person or persons by any incompleteness, imperfection, or error made by such person, firm, or corporation in compiling said abstract.

It is clear that the former part of the section makes the abstractor liable to any person by reason of any error in any abstract furnished by him. The latter part of the section provides that the abstractor is liable to any one to whom he furnishes an abstract. It seems to us that these two expressions can be construed together without doing violence to either. The latter part of the section in no wise repeals, modi-

flies, or curtails the clear import and purpose of the legislature to make an abstractor liable to any person injured by relying upon his abstract as provided in the first part of the section. The liability in the first portion of the section is general. The latter part of the section provides that he is liable to the party to whom he furnishes the abstract, and does not undertake to confine or curtail his liability to any other person relying upon the correctness thereof to his injury. The section might well read: "The abstractor will pay all damages that may accrue to any person by reason of any incompleteness, imperfections, or error in any abstract furnished by him, and to any person or persons for whom he or they may compile, make, or furnish an abstract."

Would it be contended that the provisions, read together as above, indicated anything else than that the abstractor's liability extends to any person relying upon the abstract, whether it was furnished to him in the first instance or furnished to some other person?

This construction of the statute makes it a harmonious whole, and gives full effect to all of its provisions, and does violence to none. Harmony, not confusion, is to be sought for by statutory construction. Conflicts between different provisions of a statute are not to be held to exist, if harmony, by any reasonable construction of them, can be discovered. The true rule has often been said to be that where two acts or parts of acts would be reasonably susceptible of a construction that will give effect to both and to the words of each, without violence to either, it should be adopted, in preference to one which, though reasonable, leads to the conclusion that there is a conflict. There is no conflict between different parts of a statute if there is a reasonable meaning of the words used, considering the manner of their use, which will bring them into harmony. See *Atty. Gen. ex rel. Taylor v. Brown*, 1 Wis. 513; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 425; *Mason v. Ashland*, 98 Wis. 540, 74 N. W. 357.

Before we would be justified in applying the doctrine contended for by plaintiff in error, that, where two sections of the same statute or particularly two parts of the same section of a statute are flatly contradictory of each other, that which has the latterly position will be deemed to govern and control, we must first conclude that there is an irreconcilable conflict, which we cannot say of this statute. Having come to this conclusion, it is plain that the law as to agency and privity of contract has no application, and is therefore not considered.

L.R.A., 1916D.

It is next contended by plaintiff in error that the court below erred in permitting evidence to go to the jury for the purpose of contradicting the record as to when the judgment complained of in this case was rendered against Dewaide, the original owner of the property. The judgment docket showed on its face that this judgment was recorded on the 23d day of July, 1909; the abstractor made his abstract, or the extension thereof, March 18, 1909; the judgment was rendered February 17, 1909. The claim of plaintiff below was that the record had been changed; in other words, the judgment had been recorded on the 23d day of February and afterwards changed to read July 23d.

The evidence complained of was admitted, not for the purpose of impeaching the record, but for the purpose of showing that the record had been tampered with, and the judgment was actually recorded February 23d. The authorities cited by plaintiff in error, that the record of a court cannot be impeached in a collateral proceeding, are the law; but was this evidence admitted for that purpose? We think not. The evidence was introduced and admitted for the purpose of showing what the record actually was and for the purpose of ascertaining the truth. The alteration of a record may be shown by parol evidence, such evidence not being within the rule excluding evidence to vary the record, but for the purpose of showing that the record in question is not the true record which was actually made. See *Louisville & N. R. Co. v. Malone*, 116 Ala. 600, 22 So. 897; *Dyer v. Brogan*, 70 Cal. 136, 11 Pac. 589; *Wilkinson v. Carter*, 22 Neb. 186, 34 N. W. 351; *Woodville v. Harrison*, 73 Wis. 360, 41 N. W. 526; *Lowry v. McMillan*, 8 Pa. 157, 49 Am. Dec. 501.

In *Lowry v. McMillan*, supra, the court uses this language: The "record is entitled to great sanctity, in the law. But then it must be an honest record. It is in vain to talk of the danger of altering or explaining a record by parol; everything imbued with fraud must give way before credible sworn testimony."

Plaintiff in error again contends that the jury to which the case was tried was not impaneled and drawn according to law; in other words, that talesmen were ordered at a time when there were ample jurors on the regular panel present and qualified to try the case, and not otherwise engaged. This fact was known to counsel for plaintiff in error, if such was the fact, at or before the trial, according to their own affidavit. The record shows no objection made or exception saved to the impaneling of the jury at the time. This being true, such

disqualification was waived. *Horton v. State*, 10 Okla. Crim. Rep. 294, 136 Pac. 177; *Fooshee v. State*, 3 Okla. Crim. Rep. 666, 108 Pac. 554.

Defendant again assigns error in the refusal of the trial judge to give instruction No. A, as requested, which reads as follows: "You are further instructed that, if you find for the plaintiff in this case, you will find for her in a sum not to exceed \$1,047.90."

This instruction was requested upon the theory that the "Morrison judgment" against Dewaide, the judgment upon which the property was finally sold and the judgment which the defendant Sackett omitted from the abstract, was the extent of defendants' liability, upon the theory that it was the duty of the plaintiff, when she found that a wrong had been perpetrated upon her, to use all reasonable means to arrest the loss, and that she could not stand idly by and permit the loss to increase, and then to hold the wrongdoer liable for loss which she might have prevented; the evidence failing to show that the plaintiff did anything to lessen the damages.

It will be noted that no amount of diligence on her part could have averted the loss of the amount of the Morrison judgment. Satisfaction of the judgment was her only remedy; consequently, she was entitled to a judgment for that amount, but so far as a further judgment, for additional damages, was concerned, the duty to exercise ordinary care and reasonable diligence to mitigate the same rested upon her. It was only incumbent upon her, however, in this regard, to use reasonable diligence to mitigate the damages and to lessen the injury. The question in such cases is always whether the necessary acts to mitigate the damages were reasonable, having regard to all the circumstances of the particular case.

In *Uhlig v. Barnum*, 43 Neb. 584, 61 N. W. 749, the syllabus reads as follows: "Where two parties have made a contract, which one of them has broken, the other must make reasonable exertions to render his injury as light as possible; and he cannot recover, from the party breaking the contract, damages which would have been avoided, had he performed such duty."

In *Washington County Abstract Co. v. Harris*, — Okla. —, 149 Pac. 1075 (No. 4080), opinion by Judge Robberts, not yet officially reported, *Ira S. Hopkins*, on July 16, 1909, deeded to the plaintiff, *F. E. Harris*, certain lands in Washington county, and which deed was recorded on July 20, 1909. On July 19, 1909, *Ira S. Hopkins* deeded the same land to *Delilah B. Hopkins*. This deed was recorded on July 19, L.R.A.1916D.

1909. On or about the 21st of July, 1909, the plaintiff, *Harris*, through his agents, employed the *Washington County Abstract Company* to furnish an abstract of title to the land, and on July 21, 1909, the abstract company did furnish said abstract to *Harris*, but failed to show the deed from *Ira S. Hopkins* to *Delilah B. Hopkins*, which was recorded two days before the abstract was furnished to *Harris*. *Harris*, after receiving the abstract and relying on the same, paid \$500 for the land. *Delilah B. Hopkins* then sued *Harris* to quiet her title, and *Harris* gave notice to the abstract company and its sureties of that suit, and they refused to defend it. *Harris* defended the suit alone, was defeated, and afterward sued the abstract company. One item of damages recovered was the expense of the suit, including attorney fees. This case was appealed to this court, and one of the questions passed upon was whether or not the attorney fee and cost were proper items of damages. Judge Robberts in the opinion says: "Under such circumstances, evidently it was the duty of the defendant in that case (defendant in error herein) to use reasonable means, including necessary and reasonable expenses, to defeat, if possible, that cause of action, not only that he might reduce his own loss, but it was a duty he owed to the defendant (plaintiff in error herein) to reduce any damage he might sustain by reason of the erroneous abstract."

This case is squarely in point in our judgment, and decisive of the proposition at bar, and therefore binding upon us, as to the duty devolving upon the plaintiff to exercise reasonable diligence to reduce any damages she sustained by reason of the erroneous abstract, after she had notice.

Roberts v. Leon Loan & Abstract Co. 63 Iowa, 76, 18 N. W. 702, is a case in point. The syllabus reads as follows: "The defendant furnished plaintiff with an abstract of title, in which the period allowed for redeeming the land appeared by mistake to be ten days longer than it actually was. Plaintiff discovered the error a day before the expiration of the time allowed for redemption, but failed to obtain the money in time to redeem, and neglected to apprise defendant of the mistake. Held, that defendant was entitled to be informed of his mistake in time to enable him to avert the consequences, and that plaintiff could not recover damages without showing that such timely information was given, and that reasonable effort had been made to secure the money."

This case goes a step further than we concede to be the law, that a failure to notify the abstracter precludes a party

from recovery. A failure to notify the defendant in time to enable him to protect himself is a fact to go to the jury to aid them in determining whether plaintiff was negligent and failed to exercise ordinary care to reduce or lessen the damages.

The American and English Encyclopedia, vol. 8, p. 605, states the general rule to be: "As it is the duty of a party injured by a breach of contract or tort to make reasonable effort to avoid damages therefrom, such damages as might by reasonable diligence on his part have been avoided are not to be regarded as the natural and probable result of the defendant's acts. There can be no recovery, therefore, for damages which might have been prevented by reasonable efforts on the part of the person injured."

We believe these decisions and the text declare a doctrine consonant with honesty and fair dealing. To hold otherwise would be an absolute perversion of justice, and would many times work injuries destructive and ruinous in their consequences. However, reasonable diligence and ordinary care is all that is necessary or can, in justice, be required. Time, knowledge, opportunity, and expense are all to be taken into consideration in determining whether or not the party injured exercised ordinary care to lessen the loss and mitigate the damages. The want of ordinary care is a question of fact to be submitted to the jury and to be determined by them.

The instant case was tried upon the theory, on the part of the plaintiff, that she was entitled to recover all the damages proximately resulting to her on account of the mistake in the abstract, and that no duty devolved upon her to make any effort to lessen or mitigate the damages. The defendant seemed to be of the opinion that, if liable at all, the maximum of recovery was the amount of the Morrison judgment. The plaintiff's theory was correct, with this modification: she was entitled to all of the damages proximately resulting to her on account of the failure of defendant to note the existence of the Morrison judgment in the abstract, except damages as might, by reasonable diligence on her part, have been avoided. Such damages are not to be regarded as the natural and probable result of defendant's acts.

Under the admitted facts in this case, the plaintiff, after discovering the property was advertised for sale and about to be sold under the Morrison judgment, made no effort either to satisfy the judgment or notify the defendant. It is true, she was in Arlington, Ohio, but she had two days, or possibly three, in which to satisfy the judgment or notify the defendant, or have made L.R.A.1916D.

some effort with this end in view, or given some reasonable explanation for her neglect. This property, according to plaintiff's evidence, was worth \$5,000. It was within the range of possibilities for her to have borrowed sufficient money upon this property to have satisfied the judgment.

We believe plaintiff's right to recover included all the damages suffered by her proximately resulting from the failure of the defendant to include the Morrison judgment in the abstract; in other words, the general rule is that, when a wrong has been done and the law gives a remedy, the compensation shall be equal to the injury; the latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be in the situation which he would have occupied had the wrong not been committed. With this modification, that where a party is entitled to the benefit of a contract and can save himself from a loss arising from the breach of it at a trifling expense, or with reasonable exertion, it is his duty to do it, and he can charge the delinquent with such damages only as with reasonable diligence and expense he could not prevent. The burden of proving circumstances in mitigation of damages is upon the party guilty of the tortious act or breach of contract.

The evidence was before the jury as to what the plaintiff did to lessen the damages, and it was the duty of the court to instruct the jury as to her duty to exercise ordinary care and reasonable diligence to avert the loss, if the same could be done at trifling expense and reasonable exertion on her part. This evidence showing lack of diligence on the part of the plaintiff was admissible under the general issue, and it was the duty of the court to instruct the jury that, if they believed that the Morrison judgment was of record at the time this abstract was made and delivered, the plaintiff, in any event, would be entitled to the value of that judgment as heretofore suggested, and such other damages as proximately resulted to her by reason of the erroneous omission in the abstract, and which she could not have prevented by the exercise of reasonable diligence and care on her part. We therefore believe that instruction No. 10 should have been given, as plaintiff's right to recover the amount of the Morrison judgment was unquestioned, if the judgment was of record at the time the abstract in question was extended; but her further recovery should have been limited by the instructions of the court, as heretofore suggested.

We therefore recommend that the judgment be remanded, with instructions that if the plaintiff remit all that part of the

judgment over and above the amount of the Morrison judgment, with interest, the case be affirmed, and, should the plaintiff fail to agree to said remittitur, a new trial be granted.

Per Curiam:
Adopted in whole.

Petition for rehearing denied February 15, 1916.

Annotation—Liability of title abstractor.

This annotation supplements on the same question, notes to *Equitable Bldg. & L. Asso. v. Bank of Commerce & T. Co.* 12 L.R.A.(N.S.) 449; *Stephenson v. Cone*, 26 L.R.A.(N.S.) 1207; and *Anderson v. Spriestebach*, 42 L.R.A.(N.S.) 176.

Generally speaking, the duty of an abstractor to his client is to make a painstaking examination of the records, and to set forth in the abstract all the facts relating to the title under investigation. He is not called on for professional opinions as to any of the matters reported. He is therefore liable for any injury that may result from negligence in the performance of his duties; that is, from a failure to exercise ordinary care and skill in discovering in the record and noting in the abstract all the deeds, mortgages, etc., that affect the title in respect to which he is employed. 1 R. C. L. 92, § 4.

Thus, an abstract company is liable for mistakes made in the preparation of an abstract whereby the person for whom it is made is legally damaged. *Hillock v. Idaho Title & T. Co.* (1913) 24 *Idaho*, 242, 133 Pac. 119 (former appeal (1912) 22 *Idaho*, 440, 42 L.R.A.(N.S.) 178, 126 Pac. 612); *Walker v. Bowman* (1910) 27 *Okla.* 172, 30 L.R.A.(N.S.) 642, 111 Pac. 319, Ann. Cas. 1912B, 839.

So, an abstract company cannot escape liability by claiming that a tax deed is invalid which ought to have but did not appear on the abstract; for abstracts of title should show every instrument affecting the title which is a matter of record, and if an abstract fails to show certain instruments that cast a cloud upon the title, and the person who procures such abstract is damaged thereby, the abstract company is liable. *Hillock v. Idaho Title & T. Co.* (1913) 24 *Idaho*, 242, 133 Pac. 119.

So, under the amendment to the law regulating abstracting (Laws 1903, chap. 1) the abstractor and his sureties are liable upon the abstractor's bond for all negligent errors and omissions in an abstract, not only to a person who employs him, but also to all persons who purchase or invest in land relying on an abstract furnished for that purpose. *Arnold v. Barner* (1914) 91 *Kan.* 768, L.R.A.1916D.

139 Pac. 404, 6 N. C. C. A. 965, Ann. Cas. 1915D, 446. See also *SACKETT v. ROSE*, ante, 820.

And a bond conditioned that an abstractor "shall well and properly demean himself in the business of abstracting," and also "shall honestly and faithfully discharge and perform such other duties as abstractor as are prescribed by law," makes the abstractor and his sureties liable in the manner and to the extent provided for in the statute which is in effect read into the bond. *Arnold v. Barner (Kan.) supra*.

Under § 1, Snyder's Comp. Laws 1909, an abstractor who furnishes an abstract of title for a party, by and through an agent of such party, which abstract fails to show a deed on record at the time the abstract was made and delivered, whereby the party for whom the abstract was furnished, relying on it, purchase the land described therein, and the title thereto thereafter fails in the purchaser because of the deed omitted from the abstract, the purchaser may recover damages sustained by reason of the abstractor's negligent and careless act in failing to show the deed in the abstract, including the price paid for the land and reasonable attorney's fees, costs, and other necessary expenses expended by him in attempting to defeat the outstanding title under the deed, provided there was a reasonable probability of defeating the title. *Washington County Abstract Co. v. Harris* (1915) — *Okla.* —, 149 Pac. 1075.

And the proximate cause of the injury in such a case is the failure of the abstractor to show in the abstract the record of the outstanding deed; and the fact that the title in the purchaser might have failed for some other cause not shown in the record would not itself defeat the plaintiff's right to recover against the abstractor and his bondsmen. (*Okla.*) *Ibid*.

So, where it was contended that an abstract, incorrectly certifying that there were no taxes or liens against certain property, was not made for the person claiming to have been damaged by reason of this incorrect certification, and for such reason there was no privity of contract between complainant and ab-

stracter, and that without first showing this fact, complainant could not recover for a breach of obligation, the court in *Gregory v. Harper* (1915) — Okla. —, 152 Pac. 70, stated that the statute (Snyder's Comp. Laws 1909, chap. 1, § 1) was too broad to defeat recovery on that ground, the statute expressly providing that the bond of abstracters shall be conditioned "he will properly demean himself in the business of abstracting and will pay all damages that may accrue to any person by reason of any incompleteness, imperfections or error in any abstract furnished by him." The court observed that there were reasonable inferences and deductions showing that complainant relied on the abstract, and for that reason the court failed to sustain the contention "that the evidence does not show that the plaintiff in error relied on the abstract, but on the contrary shows that the same was not relied on by him, but that he had actual information as to the existence of the taxes on this property."

It seems that an abstracter is liable as for a breach of contract, and not in tort, for damages resulting from his negligence in preparing the abstract; and the rule is that, when an abstract is prepared to cover only a limited period, it need not include anything of record outside of such period. Consequently, an abstract company, assuming to abstract only such records and proceedings between certain dates as affect the title to the property, is not liable for failure to notice interlocutory proceedings in an action begun before, and judgment entered after, the time limit of the certificate, such proceedings not affecting the title. *Douglas v. Title Trust Co.* (1914) 80 Wash. 71, 141 Pac. 177. In this case the court distinguishes the *Bremerton Development Co. Case* (set out in note 42 L.R.A.(N.S.) 176) in that the liability of the abstract company was held to rest not upon one, but upon several, certificates.

Ordinarily an abstracter who is employed to extend an abstract previously made is only liable for negligent errors and omissions in the extended part of the abstract, yet if, when the extension is made, he reissues and recertifies the original with the extended part, his liability will be the same as if a complete abstract had been made at the time of the extension. *Arnold v. Barner* (1914) 91 Kan. 768, 139 Pac. 404, 6 N. C. C. A. 965, Ann. Cas. 1915D, 446.

An abstracter has been held not liable for failure to show a judgment against L.R.A.1916D.

William J. Rideout upon search for *William G. Rideout*. *Turk v. Benson* (1915) 30 N. D. 200, L.R.A. 1915D, 1211, 152 N. W. 354 (Goss, J. dissents).

Statute of limitations.

The earlier cases on the question of the running of the statute of limitations against an action to hold a title abstracter liable may be found in note to *Aachen & M. F. Ins. Co. v. Morton* (1907) 15 L.R.A.(N.S.) 156; and supplementary thereto are the following cases:

Thus, where a prospective purchaser of a tract of land purchased from an abstract company an abstract of title to such property, accompanied by certificate to the effect that such abstract contained a notation of all instruments of record affecting the title, including tax certificate and tax deeds, and relying upon the correctness of the abstract as the truth of the certificate annexed thereto, the purchaser of the abstract subsequently purchased the land therein described, and it thereafter developed that at the time of the making and delivery of such abstract there was an outstanding tax deed to such property which was not disclosed by the abstract, and the purchaser of the abstract and land therein described was obliged to expend money to procure a cancellation and release and satisfaction of the tax deed, and thereafter commenced an action against the abstract company to recover damages sustained on account of the mistake and false representation made by the abstract and certificate thereto,—it was held in *Hillock v. Idaho Title & T. Co.* (1912) 22 Idaho, 440, 42 L.R.A.(N.S.) 178, 126 Pac. 612, that the limitation of such action is governed by subdivision 4 of § 4054 of the Revised Codes, and that the cause of action in such case does not accrue until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

So, one who sustains damage by reason of the mistake and false and fraudulent representations contained in an abstract may, under the provisions of subdivision 4 of § 4054 of the Revised Codes, commence his action to recover damages within three years after discovering the fraud or mistake. *Hillock v. Idaho Title & T. Co.* (Idaho) supra. The above case was affirmed in (1913) 24 Idaho, 242, 133 Pac. 119, without reference to the statute of limitations.

But it is held in *Arnold v. Barner* (Kan.) supra, that the statute of limitations begins to run on a cause of action against an abstracter for negligent er-

rors and omissions in an abstract, from the time the abstract is furnished, rather than from the time the negligent errors and omissions are discovered, or when damages result therefrom.

So, a right of action against an abstracter for damages resulting from incompleteness, imperfection, or error in an abstract furnished by him accrues at the time the examination is made and reported, and not when the error is discovered and the damages resulting therefrom have been paid. *Walker v. Bowman* (1910) 27 Okla. 172, 30 L.R.A. (N.S.) 642, 111 Pac. 319, Ann. Cas. 1912B, 839.

So, as stated in *Bodine v. Wayne Title & T. Co.* (1907) 33 Pa. Super. Ct. 68, the cause of action against the conveyancer was the breach of duty, not the damages, which are only an incident; and it has been uniformly held that the right of action is complete so that the statute of

limitations begins to run from the breach, although the damage may not be known or may not in fact occur until afterwards.

The decision *Lilly v. Boyd* (1883) 72 Ga. 83, holds that the statute of limitations begins to run from the date of the breach of duty of an attorney retained to examine titles.

And in *Owen v. Western Sav. Fund* (1881) 97 Pa. 47, 39 Am. Rep. 794, it is held that a cause of action against a recorder of deeds for damages by reason of a false certificate of search accrued so soon as claimant parted with its money on the faith of it.

It may be observed, however, that neither of the last two cases is strictly within the scope of this note, which is limited to abstracters, and does not extend to officers and attorneys; other notes covering such cases. J. D. C.

WEST VIRGINIA SUPREME COURT OF APPEALS.

W. A. EGERTON

v.

B. T. FLESHER et al., Pliffs. in Err.

(— W. Va. —, 86 S. E. 34.)

Ferry — application — necessity.

1. Upon an application to a county court to establish a third ferry, where there are already two ferries serving the same public, the imperative public need for such additional ferry, and not the private ends of the promoters, or their selfish desires to absorb the business of one or both of the other ferries, should control the sound discretion of the court in refusing or granting such franchise.

For other cases, see Ferries, in Dig. 1-52 N. S.

Evidence — sufficiency.

2. Applying this rule, the facts established by the evidence in this case did not warrant the action of the county court in establishing such third ferry.

For other cases, see Ferries, in Dig. 1-52 N. S.

(June 16, 1915.)

ERROR to the Circuit Court for Cabell County to review a judgment affirming a judgment of the County Court in plain-

Headnotes by MILLER, J.

Note.—As to establishment, regulation, and protection of ferries, see annotation following this case, post, 831. L.R.A.1916D.

tiff's favor in a proceeding for the establishment of a steam ferry. Reversed.

The facts are stated in the opinion.

Messrs. Neal & Strickling and Campbell, Brown, & Davis, for plaintiffs in error:

It was the duty of the applicant to affirmatively show the conditions of all the ferries existing between Huntington and the state of Ohio, and that by reason of the want of ferry facilities, having taken all of the ferries into the estimate, that there was an imperative public demand for an additional ferry, and that the traffic would well support it.

Sistersville Ferry Co. v. Russell, 52 W. Va. 361, 59 L.R.A. 513, 43 S. E. 107; *Williamson v. Hays*, 25 W. Va. 609.

Messrs. Paul W. Scott and George S. Wallace, for defendant in error:

The testimony taken has shown an imperative public demand and need for an additional ferry, and the action of the court in granting the franchise was not an abuse of its discretion.

Williamson v. Hays, 25 W. Va. 609; *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356, 59 L.R.A. 513, 43 S. E. 107.

Miller, J., delivered the opinion of the court:

By its judgment of March 11, 1914, complained of, the circuit court of Cabell county, upon an appeal by defendants, affirmed the final judgment or order of the county court, pronounced on June 12, 1913, establishing on the application of plaintiff a ferry from a point on the Ohio river at

or near the foot of Sixteenth street, in the city of Huntington, West Virginia, to a point nearly opposite on the river bank in Lawrence county, Ohio.

The defendants, D. T. Fleisher and Mary A. Fleisher, husband and wife, who owned and had operated successfully, since the year 1901, another ferry, below the proposed ferry, and from a point on said river, at or near the foot of Tenth street, in said city, to a point opposite on the Ohio side and near the mouth of Symmes creek, were admitted as defendants and resistants to the granting of the proposed franchise; and deeming themselves aggrieved by the adverse judgments of the county court and of the circuit court upon their appeal have brought the case here for review, on writ of error awarded them on their petition assigning error.

The record, very voluminous, shows that at the time of plaintiff's application there were already established and in operation within the corporate limits of said city, besides appellants' ferry at the foot of Tenth street, a ferry at Central City, and about 2 miles below their ferry; another above it at the foot of Twenty-sixth street, and another some 3 miles still farther up the river and known as the Guyandotte or Proctorville ferry. It is claimed, also, that there are two or three other ferries at other intermediate points, some, if not all, of which are operated for carrying passengers only. The evidence also shows a turnpike road paralleling the Ohio river on the Ohio side, and connecting all these ferries.

The testimony also shows that at least 60 per cent of the patronage of appellants' ferry comes from the Symmes creek valley; that the people inhabiting that valley are principally engaged in truck farming and fruit raising, and that considerable tobacco is also raised there, and that a large part of these products find an outlet by way of the roads leading up this valley and over the ferries at Tenth and Twenty-sixth streets, and ready market in the city of Huntington, where there are also cold-storage houses. The principal road up the Symmes creek valley follows the creek, and is called the Eaton turnpike, the general trend thereof being north and south, but when at a point within about half a mile from the Ohio river the road forks, one fork going directly to the river, and to a point directly opposite the foot of said Sixteenth street, the location of the proposed ferry, the other following the course of the creek and with it paralleling the Ohio river in a south-westerly direction and then making a sharp bend in a southeasterly direction and coming to the Ohio river almost opposite appel-

lants' ferry, and a distance of about a mile and a half from the forks of the road. The point at which the first prong of this road reaches the river is about equidistant between appellants' ferry and the ferry at Twenty-sixth street, and the natural result would be to divide about equally between these two ferries the patronage from the Symmes creek valley, for the evidence is that the road by way of the creek valley on account of its condition is not much used. Moreover, the evidence shows that besides what patronage the Symmes creek valley furnishes the Twenty-sixth street ferry that ferry is patronized, or naturally should be, by the people living on the Greasy ridge road, running up from the Ohio river between Bear creek and Bent creek, and which naturally would not go to the appellants' ferry.

With these natural conditions obtaining on both sides of the river and about equally divided between these two ferries, the plaintiff and petitioner proposes to establish, and the county court by its judgment, so affirmed by the circuit court, has undertaken to establish, a ferry at the foot of Sixteenth street, and directly opposite the point where the first branch of the road up the Symmes creek valley intersects the turnpike along the river.

On the trial before the county court the applicant proposed and was permitted to show in evidence what purported to be a contract in writing between the Central Ferry Company, a corporation, owning and operating the Twenty-sixth street ferry, signed on behalf of this company by W. E. Neal, its president, and by three persons, represented as owning a majority of the stock of the company, as parties of the first part, and the plaintiff or applicant, as party of the second part, and whereby in effect the Central Ferry Company, and the three stockholders named, proposed, that Egerton should proceed to acquire the franchise for the ferry at Sixteenth street, transfer it and the land acquired therefor to this corporation, and that in consideration thereof the ferry company should issue additional stock and give Egerton or his assignee the right to subscribe for said issue, or any part thereof, and pay out of said subscription the cost of securing the license or franchise and all permits, leases, etc., incurred by him, and the cost and expense of removing the boat, equipment, and tackle, then owned by the Central Ferry Company, from Twenty-sixth street to said Sixteenth street, the same to be there operated under the franchise so to be obtained by the said company, and the ferry at Twenty-sixth

street to be thereafter abandoned. Other details of the contract are unimportant in the consideration of this case.

The record shows that the principal object of Egerton in seeking the establishment of the additional ferry at Sixteenth street was to exploit and develop a tract of land owned by him and associates in Ohio, immediately opposite the foot of Sixteenth street, and that to this end it was thought necessary, in order to establish a successful ferry, to consolidate with it the Twenty-sixth street ferry, which the evidence shows had been run at a loss, or at least unsuccessfully, and also as far as possible to absorb the business and patronage which would naturally go to appellants' ferry, and which for many years has been successfully operated and managed, and in the main, so far as the record shows, to the satisfaction of the public generally. There is a question made as to the validity of the alleged contract. The evidence tends to show that there was no meeting of the stockholders authorizing it; but that the three stockholders signing the contract owned a majority of the stock of the ferry company, and had obligated themselves thereby to vote their stock and vote in the directors' meeting so as to accomplish the objects of said contract. Whether said contract be valid or not, on grounds of public policy or otherwise, is a question not necessary to be decided for the purposes of this case.

In the case here, as in all cases of like character, the principal question for determination within the sound, but not arbitrary, discretion of the county court, is the imperative public need for the additional ferry, for if there be no such need our decisions hold such additional ferry should not be established. The public need therefore, and not the private ends of the promoters, or their selfish desires to absorb the successful and prosperous business of another ferry, should be the guiding star in all such cases. *Sistersville Ferry Co. v. Russell*, 52 W. Va. 356, 59 L.R.A. 513, 43 S. E. 107; *Williamson v. Hays*, 25 W. Va. 609.

To bring his case within these well-established and recognized rules, plaintiff undertook the burden of showing, notwithstanding the conditions already described and proven, that appellants were unable, or at least had failed, to take care of the public business offered them, and that because of this there was necessity for the proposed ferry. But in this we do not think he has succeeded. The sum of all the evidence of the numerous witnesses examined on this subject is this, that during certain months in the year, when the crops are be-

ing harvested and marketed, there has been in the early morning hours a congestion of business at appellants' ferry, delaying patrons in getting over the river at from half an hour to an hour and a half. Some of the witnesses say that they have seen as high as from fifteen to twenty-seven wagons, in the early morning before the ferry started, waiting to get across, but none of the evidence shows that any such condition ever occurred at any other time of the day. This congestion, the evidence shows, was due to the fact that these market people, some of them, would leave their homes as early as 11 o'clock the night before, and reach the ferry at very early hours of the morning, in order to gain some advantage of their competitors, in getting over the river. The evidence shows clearly that appellants' boat was well manned and well equipped; that the boat had a capacity of seven to eight wagons or vehicles, and that a round trip could be made in from ten to fifteen minutes, and that three quarters of an hour, or, at the outside, an hour would then be necessary to put all over the river. Besides, there was the ferry at Twenty-sixth street, as easily reached by the short branch of the Eaton turnpike as appellants' ferry, to relieve all such congestion. But, as noted, the evidence tends to show the ferry at Twenty-sixth street was poorly and unsuccessfully operated from a financial standpoint, that no dividends had ever been paid to the stockholders, and that at the time of the trial of this case the ferry boat seems to have been beached by the high water, and that the owners were then engaged in trying to get it back into the river.

Assuming that there may have been these slight congestions in the business, and that the public might to some extent be inconvenienced by another ferry at Sixteenth street, these are not the only elements to be considered in determining the question of the imperative public need. The public is concerned also in the financial success of the owners and operators of the ferries, for without this they could not long hold out in giving any public service. If one ferry can hold and serve better than two, the public interests would be better subserved by the one, than to divide the business with another, and neither be able because of want of sufficient financial support to serve the public well. We know from this record that the Twenty-sixth street ferry had been a financial failure, notwithstanding its ability to draw from the Symmes creek valley, and from the territory east of it not tributary to appellants' ferry.

On the trial appellants exhibited their books and vouchers, in connection with a comprehensive tabulated statement, show-

ing in accurate figures the results of their business, by periods of four years, and for the whole time, from 1901 to 1912, inclusive, and although they offered this testimony, and offered their books and vouchers, they were not questioned upon the subject by plaintiff or his counsel, or otherwise, and there can be no question about the verity of these statements and the books and papers back of them. These figures show in round numbers an original capital investment of \$15,000. For the first four years, the gross receipts were \$23,701.45; gross expenses, \$15,162.17; net proceeds, \$8,539.28, or an annual net income of \$2,134.82; for the following four years, the gross receipts were \$32,965.15; gross expenses \$18,695.20; net proceeds, \$14,269.95, or an annual income of \$3,567.48; and for the last quadrennial, the gross receipts were \$32,471.09; gross expenses \$24,040.89; net proceeds \$8,430.40, or an annual net income of \$2,107.60. It thus appears that during this last quadrennial the gross receipts fell off several hundred dollars, and the gross expenses increased several thousand dollars, and that the net annual income decreased \$1,459.88. These figures show great fluctuation in annual receipts and expenses, and also as compared by quadrennial periods. During some years the expenses were greatly increased by the necessity of docking and repairing the boat.

As already noted, the evidence tends to show, it does show to our satisfaction, that 60 per cent of appellants' business comes from the Symmes creek valley, and it is fair to assume, we think, from the evidence, that if the proposed ferry is located and operated successfully, it will at least divide the present patronage of the appellants' ferry. This would take away from it about one third of its entire patronage. Using the figures covering the last quadrennial for illustration, this would reduce the gross receipts to \$21,000, in round numbers, and assuming that the expenses would remain the same, and we can see no reason why they should be reduced, the result would be a net loss to appellants, in round numbers, of \$2,000 for that period. Appellants undertook but were not permitted to show in evidence, and plaintiff did not undertake to show, the result of the business of the ferry at Twenty-sixth street. According to our decisions this was a proper subject of inquiry, on the question of the imperative public need, but in the case at bar we think the error was harmless, because in

our view of the case the petitioner has wholly failed to show any imperative public need for the additional ferry. That it might serve well his private ends and needs may be granted; that the public might be to some extent inconvenienced by the proposed ferry may be assumed, but these are uncontrolling considerations. The imperative public need must furnish the foundation for action, and we find no such public need evidenced by the record. Appellants' ferry is well located with reference to the business center of the city of Huntington, and the evidence shows that they have made application to the county court for the establishment of night rates, and propose to operate the ferry in the nighttime so as to relieve the congestion of the early morning hours during the harvest months. Why they have applied for night rates, as they explained, was that the income would be small, and the expenses naturally as great as for operating the ferry in the daytime, and their evidence is that at best the night operation will be at a loss to them. Increased population on the Ohio side of the river was also relied on; but the last census showed an actual decrease of several hundred in the population in Lawrence county, as compared with the last preceding census, and an increase only of four hundred or five hundred in the township immediately opposite the city of Huntington. Alleged increase in agricultural products was also relied on; but neither increased population nor increased products seem to have increased the income at appellants' ferry during the last preceding quadrennial; on the contrary, as we have seen, there was a considerable falling off in the gross receipts as compared with the preceding four years.

Our conclusion from the whole evidence, which we will not undertake to detail, is that the plaintiff and petitioner has wholly failed to show any imperative public need for the proposed ferry; and we are of opinion, upon the principles enunciated in the two cases cited, to reverse the judgment of the Circuit Court, and to enter here such judgment as we think that court should have pronounced, reversing the judgment of the County Court, and dismissing the application of the plaintiff to establish such proposed ferry, and the judgment here will go accordingly.

Petition for rehearing denied September 7, 1915.

Annotation—Establishment, regulation, and protection of ferries.

This annotation is supplementary to a note on the same subject attached to L.R.A.1916D.

Sistersville Ferry Co. v. Russell, 59 L.R.A. 513.

As to ferryman as a common carrier, see note to *Rosen v. Boston*, 68 L.R.A. 153.

For other annotation considering questions relating to ferries, see Index to L.R.A. Notes, "Ferries."

Definition.

For other cases, see note in 59 L.R.A. 513.

A steam ferryboat is a steamer within the meaning of § 4472, Revised Statutes of the United States (Comp. Stat. 1913, § 8242), which provides that certain enumerated dangerous articles shall not be carried "as freight or used as stores on any steamer carrying passengers." *The Nassau* (1911) 110 C. C. A. 184, 188 Fed. 46, writ of certiorari denied in 223 U. S. 722, 56 L. ed. 630, 32 Sup. Ct. Rep. 524.

Necessity of license.

For other cases, see note in 59 L.R.A. 515.

The requirement of a franchise or permit for the conduct of a ferry upon navigable waters of a state, which by act of Congress have been declared to be common highways and forever free to the inhabitants of said state and to the citizens of the United States, is not an invasion of the right of free navigation nor a violation of such congressional act. *Vallejo Ferry Co. v. Lang* (1911) 161 Cal. 672, 120 Pac. 421.

How establishment proved.

The repeated issuance of an annual license to the operator of a ferry by the clerk of the county court is sufficient to make out a prima facie case of establishment by the county court of a ferry. *Finley v. Shemwell* (1910) 94 Ark. 190, 126 S. W. 717.

Authority to establish on boundary waters.

For other cases, see note in 59 L.R.A. 518; also note in 52 L.R.A.(N.S.) 574.

The St. John river being an international river and, under the terms of the Ashburton treaty, free alike to citizens of each country, it is not in the power of Canada or of the state of Maine to grant a license which would entitle the licensee to ferry from Canada to the United States and vice versa, to the exclusion of any person else who might choose to do so. *Ex Parte Dufour* (1893) 32 N. B. 357.

The fact that ferry rates over a boundary stream were fixed by the state of incorporation of the ferry company did not preclude the state on the other side of such stream from establishing, L.R.A.1916D.

subject to the paramount authority of Congress, the rates to be charged for ferriage from its own shore to the shore of the other state. *Port Richmond & B. P. Ferry Co. v. Hudson County* (1914) 234 U. S. 317, 58 L. ed. 1330, 34 Sup. Ct. Rep. 821.

State regulation of the rates to be charged for a ticket for a round trip over an interstate ferry from the shore of such state to the shore of another state and return is valid until Congress undertakes to regulate such rates, where the ferry company is not thereby required to issue round-trip tickets at its office within the state. (U. S.) *Ibid*.

The state of Mississippi may grant the right to operate a ferry across the Mississippi river to a point on the Louisiana shore, and such grant is not an interference with the power to regulate commerce among the states delegated to Congress by the Federal Constitution. *Marshall v. Grimes* (1866) 41 Miss. 27.

And in *State v. Hudson County* (1851) 23 N. J. L. 206, it was held that the power to regulate ferries between two states is vested in the states.

Power of municipality to establish and regulate.

For other cases, see note in 59 L.R.A. 521.

The power to establish and permit the operation of all ferries using any part of the water front of the city of greater New York is by the greater New York Charter, § 83, exclusively vested in the city, and it so far as concerns the territorial water rights of the city impliedly repeals § 270 of the Highway Law, which empowers county courts and city courts to grant licenses for keeping ferries in the respective counties and cities. *New York v. New Jersey & S. I. Ferry Co.* (1915) 92 Misc. 40, 155 N. Y. Supp. 937.

A charter of a city which conferred upon its board of trustees the power "to grant licenses and franchises in the manner provided by law for boards of supervisors of counties for constructing, keeping, and taking tolls on roads, bridges, ferries, wharves, chutes, and piers within the limits of" such city, empowered the city to grant ferry licenses although, by general statutes then in force, the power to grant ferry licenses was vested in the boards of supervisors, as under the Constitution in force when such charter was granted special legislation was not forbidden, nor was the conferring of special powers upon municipalities by their charters, even when a general law upon the same subject-matter

stood upon the statute books; and a provision in a subsequent Constitution forbidding local or special laws in the matter of "chartering or licensing ferries, bridges, or roads" was prospective, and did not operate to destroy the force of existing special laws. *Vallejo Ferry Co. v. Lang* (1911) 161 Cal. 672, 120 Pac. 421.

And *Vallejo Ferry Co. v. Lang* (Cal.) supra, was approved and followed in *Vallejo Ferry Co. v. Solano Aquatic Club* (1913) 165 Cal. 255, 131 Pac. 864, Ann. Cas. 1914C, 1197, as to the power of the city to grant a ferry franchise.

Nor does the fact that one terminus of a ferry is upon territory owned by and subject to the jurisdiction of the United States in the least militate against the validity or legality of a franchise to operate a ferry granted by a city. *Vallejo Ferry Co. v. Solano Aquatic Club* (Cal.) supra. It may be conceded or declared, the court stated, that the United States government would have power to forbid the ferryboats from landing upon the island, but this would in no way affect the legality of the franchise.

But the general powers of a city to lay out, establish, and maintain highways, and to improve rivers, to widen and straighten their channels when adjoining the town, does not empower a city to maintain a ferry outside the city limits. *Re Woolley* (1913) 75 Wash. 206, 134 Pac. 825.

Who may exercise authority.

For other cases, see note in 59 L.R.A. 523.

As part of a general plan to construct a system of highways throughout a county, and connect and extend them, the county has authority to establish free ferries, the court stating that a ferry is to be construed as a part of a highway and a necessary incident to the general plan. *Reid v. Lincoln County* (1912) 46 Mont. 31, 125 Pac. 429.

Under § 6 of chapter 448 of the statute of 1899, as read into § 14 of chapter 448 of the same statute, the Joint Board of Public Service Commissioners and Harbor and Land Commissioners has power to establish a suitable temporary ferry over the Cape Cod canal. *Bourne v. Joint Board* (1915) 221 Mass. 293, 108 N. E. 941.

A permit granted by the United States government to one to land his launches at the government floats at times and under circumstances which will not interfere with the government's L.R.A.1916D.

use of those floats, which permit, the government stated, it would revoke if it be declared to be inconsistent with its contracts with the owner of a ferry and an interference with the latter's franchise, is not a license paramount to a state license granted to operate a ferry. *Vallejo Ferry Co. v. Solano Aquatic Club* (Cal.) supra.

Restrictions on exercise of authority.

For other cases, see note in 59 L.R.A. 524.

An act granting a special franchise and providing that it "shall be unlawful for any person to establish any other ferry within 1½ miles" was held in *Re Spease Ferry* (1905) 138 N. O. 219, 50 S. E. 625, to be a restriction upon the general power conferred upon the county commissioners under the Code "to appoint and settle ferries," and so the county commissioners had no authority to grant a ferry privilege within said prohibited distance.

The limitation upon the power of a city to grant ferry franchises whose termini shall be within the limits of the city is not abused nor violated by reason of the fact that one terminus is upon land over which the United States admittedly exercises exclusive jurisdiction. *Vallejo Ferry Co. v. Lang*, and *Vallejo Ferry Co. v. Solano Aquatic Club* (Cal.) supra.

Riparian owner as entitled to ferry privileges.

For other cases, see note in 59 L.R.A. 528.

The right to keep a public ferry for toll is a franchise which cannot be exercised without legislative authority, and so, therefore, is not appurtenant to the land of the riparian owner. *Graham v. Caperton* (1912) 176 Ala. 116, 57 So. 741.

A ferry privilege may be granted to one of several tenants in common of land bordering on a river. *Guinn v. Eaves* (1906) 117 Tenn. 524, 101 S. W. 1154.

—priorities.

For other cases, see note in 59 L.R.A. 531.

The Code provision that preference for a ferry franchise be given to the owner of land on both sides of a river is not applicable where the possessor of such franchise has a landing on one side of the river at the foot of a public road which passes through his land, and the landing on the opposite shore is on the land of another, although he may be the owner of land on both sides of the

stream, so as to give him preference over the possessor of a ferry franchise who owns land on one side only but has his landing on his own land. *Guinn v. Eaves* (Tenn.) supra.

Right to landings.

For other cases, see note in 59 L.R.A. 535.

To form a foundation for a proceeding to obtain a license for a ferry, the petition should either show that the petitioner is the owner of the land at the point of embarkation of the proposed ferry, or, he must, if not such owner, bring himself within the exception of the statute that the landing place is at the end of a street in an incorporated city or town, or that the owner of the land has neglected to apply for a license; and the latter exception should be coupled with proof that the landowner has been served with notice in writing of the proposed application. *Dean v. Washington Nav. Co.* (1911) 59 Or. 91, 115 Pac. 284.

—on opposite shore.

For other cases, see note in 59 L.R.A. 536.

Under a statute providing that a landowner on one side of the river shall have the privilege of a public ferry from his own shore, with the privilege of landing his boat and passengers on the opposite shore, and making the landing and road up said opposite bank, and keeping the same at all times in good repair and condition for ascending and descending, one operating a ferry from his own land has the right to land on the opposite shore only where the public have a right to land, that is, at a public road or other highway, and has no right to tie the end of his ferry cable to the land of another. *Lake v. Combs* (1907) 84 Ark. 21, 104 S. W. 544, 1094.

Exclusive ferry franchises.

For other cases, see note in 59 L.R.A. 538-540.

In *Green v. Ivey* (1903) 45 Fla. 338, 33 So. 711, it was held that the county commissioners had no authority under statute to grant an exclusive ferry franchise, but that they had discretionary powers as to the necessity for more than one ferry at any point.

A statute which forbids the erection and operation of a second toll bridge or ferry within 1 mile above or below a regularly established ferry, unless public convenience renders necessary the franchise for a second ferry, is no in- L.R.A.1916D.

vasion of private rights, no bestowal of monopolistic special privileges, no interference with the free right of navigation *Vallejo Ferry Co. v. Solano Aquatic Club* (1913) 165 Cal. 255, 131 Pac. 864, Ann. Cas. 1914C, 1197. The court stated that ferries are established primarily for the convenience of the people. It is the duty of the government which has thus invited private capital to aid in the comforts and conveniences of its citizens, to safeguard the rights which it had bestowed, and to see that the enjoyment of those rights is coextensive with the grant of them.

Regulation and supervision.

For other cases, see note in 59 L.R.A. 542.

Congress under its maritime powers has authority to subject steam ferryboats to legislation enacted for the purpose of protecting passengers and crews, although such ferryboats are not engaged in interstate commerce, where they navigate waters of the United States which are common highways of commerce. *The Nassau* (1911) 110 C. C. A. 184, 188 Fed. 46.

A state may fix reasonable rates for ferriage from its shore to the shore of another state, over a boundary stream, until Congress undertakes to regulate such rates. *Port Richmond & B. P. Ferry Co. v. Hudson County* (1914) 234 U. S. 317, 58 L. ed. 1330, 34 Sup. Ct. Rep. 821.

Right to transfer of ferry franchise.

For other cases, see note in 59 L.R.A. 543.

A ferry franchise may be voluntarily transferred. *Evans v. Kroutinger* (1903) 9 Idaho, 153, 72 Pac. 882, 2 Ann. Cas. 691.

Interference with rights of ferryman.

For other cases, see note in 59 L.R.A. 546-548. Also see note in 30 L.R.A. (N.S.) 462, on "What amounts to interference with ferry franchise."

There is an infringement of a ferry franchise where employees combined ostensibly to form an aquatic club, but in reality to operate a ferry to carry them back and forth from their work. *Vallejo Ferry Co. v. Solano Aquatic Club* (Cal.) supra.

And the rights of a landowner who has obtained a license to establish a ferry after the abandonment of ferry privileges by another landowner, and has preserved his rights from year to year by procuring a renewal of such license, are

infringed by an attempt by such other landowner to re-exercise ferry rights. *Finley v. Shemwell* (1910) 94 Ark. 190, 126 S. W. 717.

Remedy for violation of right—who entitled to.

For other cases, see note in 59 L.R.A. 549.

A grantee of a ferry privilege who has not used or plied a ferry such as was stipulated for in the grant is not entitled to an injunction to restrain the operation of a ferry by another. *Gibson v. Garvie* (1912) — B. C. —, 7 D. L. R. 933.

And one who is operating a ferry without a license will not be permitted to attack the method adopted by a city granting a ferry license, where the city had power to grant such license. *Vallejo Ferry Co. v. Lang* (1911) 161 Cal. 672, 120 Pac. 421.

Also one who fails to give adequate accommodations, and whose ferryboat is so out of repair that it is dangerous to attempt to cross on it, is not in a position to obtain equitable relief restraining others from operating a ferry. *Crane v. Jackson* (1915) 116 Ark. 102, 172 S. W. 890.

But one legally licensed to operate a ferry, although the right is not exclusive, is entitled to an injunction to prevent an infringement upon his ferry rights by any person or persons not legally licensed to operate a ferry. *Green v. Ivey* (1903) 45 Fla. 338, 33 So. 711.

And one who has obtained a license to establish a ferry after the abandonment of ferry rights by another landowner is entitled to equitable relief upon an attempt by such other landowner to re-establish his ferry rights, and although he has obtained a license therefor from the county court. *Finley v. Shemwell* (Ark.) supra.

So, also, one who is entitled to an ancient ferry may have an injunction restraining the setting up of another ferry near by, where the evidence shows that no new traffic has arisen which could justify the setting up of another ferry, and this although the ancient ferry is a point to point, and not a vil to vil, ferry. *Dysart v. Hammerton* [1914] 1 Ch. (Eng.) 822, 83 L. J. Ch. N. S. 530, 110 L. T. N. S. 879, 78 J. P. 297, 30 Times L. R. 379, 58 Sol. Jo. 378, 12 L. G. R. 653; *General Estates Co. v. Beaver* [1914] 3 K. B. 918, 30 Times L. R. 634, 12 L. G. R. 1146.

One whose ferry privilege has been in-
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fringed is not bound by the order of the county court granting a license to another, but may invoke the aid of a court of chancery for redress. *Crane v. Jackson* (Ark.) supra.

—action at law.

For other cases, see note in 59 L.R.A. 551.

In Maine the proprietor of a ferry has no common-law remedy against those who, without right, interfere with his profits. *Peru v. Barrett* (1905) 100 Me. 213, 70 L. R. A. 567, 109 Am. St. Rep. 494, 60 Atl. 968.

—equitable remedy.

For other cases, see note in 59 L.R.A. 552.

One who has abandoned his ferry rights will be enjoined from infringing the rights of another who has obtained a license to establish a ferry, so long as such latter ferry is not abandoned by the owner or discontinued by order of the county court. *Finley v. Shemwell* (Ark.) supra.

And where it is necessary to have a city license to operate a ferry, one who is operating a ferry without such license will be enjoined from so operating it, although he has a license from the county court. *Cauble v. Craig* (1902) 94 Mo. App. 675, 69 S. W. 49.

Extinguishment of ferry rights.

For other cases, see note in 59 L.R.A. 554.

Ferry rights are not lost by a sale or lease without consent of the county as required by statute. They are revokable, but only by the county in direct proceedings brought for that purpose. *Willis v. Calhoun* (1911) 145 Ky. 95, 140 S. W. 199.

Nor are perpetual ferry rights granted by two counties on opposite sides of the river abandoned by the owner of such rights having them recognized by and recorded in a new county formed from portions of those two counties which contained the ferry. (Ky.) Ibid.

But a ferry franchise, while not actually abandoned, will be considered as temporarily abandoned so as to preclude the owner thereof from obtaining equitable relief against infringement of his rights, where, by failing to give adequate accommodations or because his ferryboat is so out of repair it is dangerous to attempt to cross on it, travelers must of necessity make some other provision for crossing. *Crane v. Jackson* (Ark.) supra.

J. H. B.

MONTANA SUPREME COURT.

RICHARD ELLINGHOUSE, Appt.,
v.

AJAX LIVE STOCK COMPANY, Respt.

(51 Mont. 275, 152 Pac. 481.)

Appeal — defective complaints — aider by evidence.

1. A complaint to recover damages from a property owner by one employed by a person contracting to do work for him, because of negligence of servants of the property owner who are assisting in the work, will not, when attacked for the first time on appeal, be held insufficient although it fails to show the relation of the contractor to defendant or the capacity in which the negligent servants are acting, if such facts appear in the evidence, since the complaint will be assumed to have been amended to comply with the evidence.

For other cases, see Appeal and Error, VII. j, 4, in Dig. 1-52 N. S.

Negligence — concurrent — liability.

2. A property owner is not absolved from liability for injury to the servant of an independent contractor to which the negligence of his own servants contributed, by the fact that negligence of the contractor's servants also contributed to the injury.

For other cases, see Negligence, I. a, in Dig. 1-52 N. S.

Master and servant — fellow servant — employee of owner and contractor.

3. The fellow servant doctrine will not prevent recovery by an employee of an independent contractor against the property owner for injuries caused by the negligence of his servants, although they are assisting in the performance of the work upon which he is engaged.

For other cases, see Master and Servant, II. e, 1, in Dig. 1-52 N. S.

Same — negligence of servant — scope of employment.

4. The owner of a ranch is liable for injury to the employee of one contracting to saw wood for him by the negligence of his foreman, who, in order to get the wood cut in proper lengths, displaces one of the contractor's servants and attempts to feed the wood to the saw himself, although he is not in so doing acting under the orders of the ranch owner.

For other cases, see Master and Servant, III. a, 2, in Dig. 1-52 N. S.

Trial — jury — liable for act of servants.

5. An action for personal injuries caused by defendant's servants must be submitted to the jury where the evidence justifies a prima facie conclusion that the servants were, at the time their negligence caused the

injuries, acting within the line of their employment.

For other cases, see Trial, II. b, in Dig. 1-52 N. S.

(October 13, 1915.)

A PPEAL by plaintiff from a judgment of the District Court for Beaverhead County granting defendant's motion for nonsuit in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. McCaffery & Tyler, Robison & Gilbert, and Maury, Templeman, & Davies, for appellant:

The relationship between the plaintiff and the person who injured him being that of servant of independent contractor and servant of proprietor, the two cannot be considered as, or held to be, fellow serv-

4 Thomp. Neg., § 4997; United States ants.

Board & Paper Co. v. Landers, — Ind. App. —, 92 N. E. 203.

If it could be said under the evidence that the operation of the wood saw at the time plaintiff was injured was a joint operation of the same by the plaintiff's master and the master of the negligent servant, Mr. Louk, the defendant would be liable for the latter's negligence.

4 Thomp. Neg. §§ 5002, 5003.

The relation of master and servant must exist between the plaintiff and the defendant before the defense of fellow servant can be available to the defendant.

4 Labatt, Mast. & S. §§ 1414, 1418: 26 Cyc. 1283.

Louk, at the time of the injury, was acting "within the scope of his employment."

6 Labatt, Mast. & S. § 2226; Shearm. & Redf. Neg. 6th ed. §§ 146, 147, 158, 159; Barmore v. Vicksburg, S. & P. R. Co. 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594; Conchin v. El Paso & S. W. R. Co. 13 Ariz. 259, 12 L.R.A.(N.S.) 88, 108 Pac. 260; Kelly v. Tyra, 103 Minn. 176, 17 L.R.A.(N.S.) 334, 114 N. W. 750, 115 N. W. 636; 1 Thomp. Neg. § 613; Coggin v. Central R. Co. 62 Ga. 685, 35 Am. Rep. 132; The Slingsby, 57 C. C. A. 52, 120 Fed. 748; The Gladestry, 63 C. C. A. 198, 128 Fed. 591.

Messrs. Rodgers & Gilbert, for respondent:

The true test in ascertaining who is responsible for a servant's negligence is to ascertain who directs the movements of the person committing the injury.

Higgins v. Western U. Teleg. Co. 156 N. Y.

Note. — For amendment of pleadings in appellate court to conform to proof, see annotation following this case, post, 841. L.R.A.1916D.

75, 66 Am. St. Rep. 537, 50 N. E. 500, 4 Am. Neg. Rep. 320.

Louk, as well as all others engaged in sawing the wood, was at the time of the accident complained of a servant of the contractors.

Pendelton v. The Martin Kalbfleisch, 5 C. C. A. 120, 14 U. S. App. 187, 55 Fed. 336; *Samuelian v. American Tool & Mach. Co.* 168 Mass. 12, 46 N. E. 98, 1 Am. Neg. Rep. 447; *Parkhurst v. Swift*, 31 Ind. App. 521, 68 N. E. 620; *Higgins v. Western U. Teleg. Co. supra*; *Wyllie v. Palmer*, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381.

It is incumbent upon plaintiff to prove his cause of action substantially as alleged, and if he has not done so he has no case to submit to the jury.

Thurman v. Pittsburg & M. Copper Co. 41 Mont. 141, 108 Pac. 588; *Knuckey v. Butte Electric R. Co.* 41 Mont. 314, 109 Pac. 979; *Bracey v. Northwestern Improv. Co.* 41 Mont. 338, 137 Am. St. Rep. 738, 109 Pac. 706; *Forsell v. Pittsburgh & M. Copper Co.* 38 Mont. 403, 100 Pac. 218; *Flaherty v. Butte Electric R. Co.* 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416.

If, from the evidence, it cannot be said that plaintiff has established the cause of his injury as alleged, or if it can be said that it is equally probable that the cause was some other than that alleged, the plaintiff has failed to sustain the burden of proof.

Winnicott v. Orman, 39 Mont. 339, 102 Pac. 570; *Andree v. Anaconda Copper Min. Co.* 47 Mont. 554, 133 Pac. 1090.

It is necessary that the complaint show a duty existing upon the part of defendant, and that duty cannot be shown by mere conclusions of law, but the facts must be stated.

Faris v. Hoberg, 134 Ind. 269, 39 Am. St. Rep. 261, 33 N. E. 1028; *Thiele v. McManus*, 3 Ind. App. 132, 28 N. E. 327; *Chicago & A. R. Co. v. Clausen*, 173 Ill. 100, 50 N. E. 680; *Angus v. Lee*, 40 Ill. App. 304; *West Chicago Street R. Co. v. James*, 69 Ill. App. 609, 2 Am. Neg. Rep. 700.

Brantly, Ch. J., delivered the opinion of the court:

Plaintiff brought this action for damages for the loss of his right hand through the alleged negligence of the defendant. At the trial the court sustained defendant's motion for nonsuit. Judgment was entered accordingly. Plaintiff has appealed.

At the time of the accident plaintiff, with four others, was employed by C. H. Strowbridge and Fred H. Holman in the operation of an ordinary circular wood saw which was propelled by steam. Strowbridge and Holman had contracted with the defendant, L.R.A.1916D.

through Jacob Louk, the foreman in charge of the ranch, to saw a quantity of logs into lengths rendering them suitable for use as stovewood on defendant's ranch. They were to furnish their own machine and servants, and to receive \$2.50 per hour. Strowbridge was not present. Holman was operating the machine. The logs were passed from left to right. To plaintiff was assigned the duty of operating the saw, which required him, as a log was passed, to force the carriage back with his left hand to bring the log in contact with the saw, and at the same time to hold the log steady by placing his right hand on it, a few inches to the left of the saw. To one of the other employees was assigned the task of carrying away the lengths or blocks as fast as they were cut off. To the remaining three was assigned the task of bringing the logs up and putting them upon the carriage or table of the machine. One of them (Worcester) was required also to act as guard by standing at the left of plaintiff, and, besides assisting to place the logs upon the carriage, to pass them along or feed them to the saw. It was also his duty, when a log was being placed upon the carriage, to see that it was not thrust against the log upon which plaintiff was engaged, and thus to prevent the obstruction of his part of the work, and to guard him against the danger of having his right hand forced into contact with the saw. After the work had proceeded for a short time Louk voluntarily took the place of Worcester, saying, as he did so, that he wanted to do the feeding; that theretofore the wood had been cut too long; and that he wanted to see that it was cut short. On prior occasions Strowbridge and Holman had cut wood for defendant. Two other subordinate employees of the defendant were engaged with Strowbridge and Holman's employees in bringing up and placing logs upon the carriage. Whether they were doing this at the instance of Louk or not does not appear, except inferentially from the fact that they were in the employ of the defendant and Louk was its foreman. Holman had not requested their services, nor was he to pay them any compensation. A few minutes after Louk took the place of Worcester a log was thrust against the end of a short piece of another in which plaintiff was about to make the last cut. This forced plaintiff's hand upon the saw, with the result that it was so badly lacerated that amputation of it at the wrist was necessary. Holman and Strowbridge were equipped with help sufficient to enable them to carry out the contract without assistance from Louk and his subordinates. They therefore did not need any assistance. Plaintiff did not see Louk or either of his subordinates

have hold of the log at the time he was hurt, because his attention was directed to the operation of the saw. Apart from displacing Worcester, Louk did not assume to control the conduct of the work, Holman continuing otherwise in control.

The complaint charges that while the plaintiff was engaged in the work of feeding the logs to the saw, under his employment aforesaid, the servants of the defendant negligently shoved against the log which plaintiff was feeding to the saw, another log which they were about to put upon the carriage, thus pushing the former and forcing plaintiff's hand upon the saw, whereby it was cut off at the wrist. The answer, besides denying all the allegations of the complaint alleges as special defenses that the plaintiff assumed the risk, and that the injury was caused by the negligence of his fellow servants. All the evidence tendered by plaintiff was admitted without objection.

At the outset we are met with the contention by counsel for the defendant that the complaint does not state a cause of action, and that, however meritorious the case disclosed by plaintiff's evidence, the judgment must be affirmed for this reason. The sufficiency of the complaint was not challenged in the trial court either by demurrer or by objection to the admission of evidence, and, though one of the grounds of the motion for nonsuit was that the pleadings are not sufficient to support a judgment, this ground was apparently not seriously urged upon the attention of the court. The order sustaining the motion is couched in general terms, but the court seems to have proceeded upon the theory that the evidence is insufficient to make a case for the jury.

It is well settled by the decisions of this court that the sufficiency of a complaint may be questioned for the first time on appeal, and that, if found fatally defective, a judgment rendered thereon for the plaintiff will be reversed. *Foster v. Wilson*, 5 Mont. 53, 2 Pac. 310; *Tracy v. Harmon*, 17 Mont. 465, 43 Pac. 500; *Shober v. Blackford*, 46 Mont. 194, 127 Pac. 329; *Cole v. Helena Light & R. Co.* 49 Mont. 443, 143 Pac. 974. These cases merely give force to the rule declared by the statute (Rev. Codes, § 6539) that a failure to question the sufficiency of a complaint by demurrer in the trial court does not amount to a waiver of the right to question it thereafter. When, however, the point is made in this court for the first time on appeal, the objection is regarded with disfavor, and every reasonable deduction will be drawn from the facts stated in order to uphold the pleading. So, also, will the pleading be held sufficient if the defect made the basis of the objection is not a matter going to the root of the cause of

action, but is such as might have been remedied by an amendment. Again, though it be deficient in its omission to state a particular fact necessary to make out a cause of action, it will be deemed amended by the answer when the latter contains allegations which supply the omission (*Wilson v. Harris*, 21 Mont. 374, 54 Pac. 46), or assumes that the complaint contains the allegation in question (*Lynch v. Bechtel*, 19 Mont. 548, 48 Pac. 1112; *Hefferlin v. Karlman*, 29 Mont. 139, 74 Pac. 201; *Stephens v. Conley*, 48 Mont. 352, 138 Pac. 189, Ann. Cas. 1915D, 958). And when a trial has been had upon the evidence which has been introduced without objection, a judgment for plaintiff will not be reversed for a defective complaint, but the complaint will be regarded as having been amended in the trial court, if this is necessary to sustain the judgment. *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071. When, under the same condition of the case, the judgment is for the defendant, whether on motion for nonsuit or on the merits, the point that the complaint is not sufficient will not be entertained, but the case will be considered on the merits and disposed of as if the proper amendment had been made upon request of plaintiff or by order of the trial court, unless the defect is of such a character that it cannot be removed by an amendment. *Post v. Liberty*, 45 Mont. 1, 121 Pac. 475; *Lackman v. Simpson*, 46 Mont. 518, 129 Pac. 325. The rule applies also to the answer of the defendant. *Lackman v. Simpson*, supra.

Of course, if the sufficiency of the pleading has been challenged in the trial court by appropriate method, the ruling thereon properly presents a question for consideration by this court, and it will review the action of the trial court thereon and determine the rights of the parties accordingly, subject to the injunction found in § 6593 of the Revised Codes: "The court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect."

It is elementary that, when a plaintiff seeks recovery for actionable negligence, his complaint must allege facts showing these three elements: (1) That the defendant was under a legal duty to protect him from the injury of which he complains; (2) that the defendant failed to perform this duty; and (3) that the injury was proximately caused by defendant's delinquency. All of these elements combined constitute the cause of action; and if the complaint fails to disclose, directly or by fair inference from the facts alleged, the presence of all of them, it

is insufficient, for it fails to state the facts constituting a cause of action. The rule, broadly stated, has application only to cases in which seasonable attack has been made upon the pleading in the trial court. If this is not done, and the defendant—as was the case here—allows the plaintiff to submit the case to a trial without objection, and permits him to establish by his evidence the presence of all the elements of his cause of action which the complaint shadows forth, but fails to state as definitely as it might have done, even the trial court should not nonsuit plaintiff because of the defective pleading, but direct it to be amended so as to remove the defect. As already said, when the case reaches this court, it will be presumed that the trial court has done its duty, and the defect will be disregarded. We have referred to the requirements to be observed in formulating a complaint in an action for wrong caused by negligence because the case at bar is one of that kind. The rule applies as well to any other kind of action.

We shall not quote the complaint in extenso. It is defective in that it does not state what was the relation of the defendant to Strowbridge and Holman. It does not allege that they were sawing wood for the defendant, or that they were upon its premises; nor does it allege, except by way of conclusion, that Louk and his two subordinates were defendant's servants, or were not servants of Strowbridge and Holman. In the absence of a statement of facts disclosing the relation existing between the defendant and Strowbridge and Holman, and the capacity in which Louk and his subordinates were acting, a liability on the part of the defendant is not made apparent, because it does not appear that defendant owed any duty to plaintiff.

Under the rule of the cases cited supra, however, the question before us is not one of pleading, but one arising upon the pleading and evidence; in other words, whether the direction of nonsuit was proper is to be determined upon the pleading as aided by the evidence.

It appears from the above summary of the evidence that Strowbridge and Holman had an independent contract to saw a quantity of wood for the defendant, and were upon its premises for that purpose. They were furnishing their own employees, and needed no assistance. Louk, with his two subordinates, who inferentially acted under his direction, volunteered to assist in the accomplishment of the work. It does not appear whether Louk had hold of the log which pushed plaintiff's hand upon the saw, but, inasmuch as he had assumed to perform Worcester's duty, and this duty required

him to assist in putting logs upon the carriage and to pass them to the saw, the fact that the injury occurred while he was engaged in doing this warrants the inference that he either alone or by the aid of his subordinates, in assisting the employees of Strowbridge and Holman in bringing up the log, negligently thrust it forward too rapidly, and thus caused the plaintiff's injury. That the employees of Strowbridge and Holman were negligent and their negligence concurred with that of defendant's servants would not exculpate the defendant. *Freeman v. Sand Coulee Coal Co.* 25 Mont. 194, 64 Pac. 347. The evidence is therefore sufficient to show prima facie that the injury was caused by Louk's negligence, and hence that he became personally liable. Whether this wrong is imputable to the defendant depends upon the further inquiry whether, by assuming the position he did, he became the fellow servant of the plaintiff for the time and, if not, he was acting within the scope of his employment by defendant.

We understand the accepted rule to be that the fellow servant doctrine has no application to a case in which the injury complained of was caused by the servant of a stranger to the common employment, even though such servant was at the time engaged in the same general operation as the injured servant. In such a case the injured servant will not be held to have assumed the risks incident to the negligence of the other, any more than he would the risks incident to the negligence of a stranger; and if the other at the time of the injury is acting within the general scope of his duty to his master, his master is liable under the rule of the maxim *respondet superior*. On this subject Mr. Labatt says: "In cases where a third person is sued for injuries caused by the negligence of his servants, it is considered that the fact of their having been at the time of the accident engaged in the same general operation as the injured servant is not a sufficient ground for putting him upon a footing different from that upon which any other stranger would stand in an action against the same defendant for injuries caused by the negligence of his servants. That is to say, as the mere general knowledge that the servants of a person with whom a stranger is brought into contact in the transaction of everyday life may act negligently has never been considered to involve the corollary that he accepted the risks of the situation, so the rule is now well settled, both in this country and in England, that 'unless the person sought to be rendered liable for the negligence of his servant can show that the person so seeking to make him liable was himself in his serv-

ice, the defense of common employment is not open to him.' In brief, the doctrine of common employment 'applies only where the action is brought for an injury to a servant or agent against the principal by whom such servant was himself employed.' The rationale of this rule is that a defense which . . . is based upon the hypothesis that, as accessory to the contract of hiring, there is implied on the servant's part an agreement to assume the risk of being injured by the negligence of his coemployees, cannot properly be invoked where he is suing a person with whom he has no contractual relations." 4 Labatt, Mast. & S. § 1414.

That Louk and his subordinates were not the servants of Strowbridge and Holman is apparent. Louk's declared purpose at the time he displaced Worcester indicates this; for he took the place not merely to assist the work, but to see that it was done to meet his approval, thus indicating that he was not submitting himself to the control of Holman, and that he was assuming, for this purpose, to control the conduct of the work. Under the rule recognized by the authorities generally, he did not become the plaintiff's fellow servant; nor did his subordinates become such, for they were acting under his direction.

"The real test by which to determine whether a person is acting as the servant of another is to ascertain whether at the time the injury was inflicted he was subject to such person's orders and control and was liable to be discharged by him for disobedience of orders or misconduct." Wood, Mast. & S. § 317.

See also 4 Thomp. Neg. 4996; 1 Shearm. & Redf. Neg. 5th ed. § 225; United States Board & Paper Co. v. Landers, — Ind. App. —, 92 N. E. 203; Union P. R. Co. v. Billeter, 28 Neb. 422, 44 N. W. 483.

"The rule quoted by the greatest number of adjudged cases is that all who serve a common master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow servants, who, under the rule under consideration, are deemed to take the risk of each other's negligence. It is said that subjection to control and direction by the same general master in the same common object, and not the fact that employees are paid by the same general master, is the test of fellow service." 4 Thomp. Neg. § 4917.

Under this test, Louk and his subordinates were acting upon his initiative, or else for the benefit of the defendant under their employment by it.

The servant of one master may tempor-

arily enter the service of another and for the time become the servant of the other; as when the servant is lent by his master to the other for the particular employment and becomes subject to the control of the other. For anything done in that employment he becomes, for the time being, the servant of the person to whom he is lent, provided he has consented to be lent. Johnson v. Lindsay [1891] A. C. 371, 16 L. J. Q. B. N. S. 90, 65 L. T. N. S. 97, 40 Week. Rep. 405, 55 J. P. 644; Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205, 46 L. J. C. P. N. S. 283, 36 L. T. N. S. 49, 25 Week. Rep. 263; Delaware, L. & W. R. Co. v. Hardy, 59 N. J. L. 35, 34 Atl. 986; Delory v. Blodgett, 185 Mass. 126, 64 L.R.A. 114, 102 Am. St. Rep. 328, 69 N. E. 1078, 15 Am. Neg. Rep. 581. The evidence in this case does not suggest that Louk and his subordinates were lent to Strowbridge and Holman by the defendant. So far as the evidence justifies any inference, it implies that for the time Louk was the alter ego of the defendant. Louk was therefore a stranger to the plaintiff. So, also, were his subordinates; and, since it appears that they were engaged with Louk in assisting in the bringing up and placing the logs in position to be sawed, they presumably contributed to his injury. But it would not affect the result if blame could not attach to them, but to Louk exclusively. All, however, were prima facie strangers to the plaintiff, and if it should be made to appear that any one of the three only caused his injury, this would be sufficient to fix liability upon him.

It remains, then, to inquire whether they were acting within the scope of their employment. In determining this question the inquiry is not, Was the servant at the particular time acting in obedience to the direction of the master? but, Was he acting in furtherance of his master's business? A servant may abandon his master's employment for the time to accomplish some purpose of his own. If in accomplishing this purpose he does an injury to another, his master is not liable; but a mere deviation from the master's directions with reference to the business in which he is employed is not an abandonment of his employment, and so long as he is doing some act in furtherance thereof he will be regarded as acting within its scope, and the master will not be excused on the ground that he did not authorize the particular act, or that he had no knowledge of it, or that in doing it the servant exceeded his authority, or, again, that he did it at a place to which his duty did not call him. Barmore v. Vicksburg, S. & P. R. Co. 85 Miss. 426, 70 L.R.A. 627, 38 So. 210, 3 Ann. Cas. 594; Geraty v. National Ice Co. 16 App. Div. 174, 44 N. Y.

Supp. 659, 2 Am. Neg. Rep. 624; Higgins v. Watervliet Turnp. & R. Co., 46 N. Y. 23, 7 Am. Rep. 293; Rounds v. Delaware, L. & W. R. Co. 64 N. Y. 129, 21 Am. Rep. 597, 8 Am. Neg. Cas. 536; Evansville & T. H. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102.

"The rationale of the master's liability for tortious acts which 'come within the scope of the servant's general duty, although in doing the particular act complained of he may have exceeded his authority,' is that, in most cases where a duty is to be performed or an act done by a servant, some discretion must be vested in him to whom the doing of it is committed; and, where this is so, the master cannot enjoy the benefit of his servant's acts which involve this discretion without being responsible for their result. The rule is held especially applicable 'where the master is absent, and the duty to be performed vicariously is general in character, as in the case of conductors of public vehicles, railway servants, and the like.'" 6 Labatt, Mast. & S. p. 6868.

Louk was in charge of the ranch. He had let the contract for the work, and it seems clear that it was his duty to see that it was properly done without loss of time.

As the solution of the question turns in each case upon the proper inference to be

drawn from the facts, if they present no conflict and furnish the basis for but a single inference, and that favorable to the master, his freedom from liability is to be determined by the court as a question of law. If there is a conflict in the evidence, or more than one inference may be drawn from it, the liability of the master is an issue to be determined by the jury. 6 Labatt, Mast. & S. § 2275.

We are of the opinion that the evidence here justifies a prima facie conclusion that Louk and his subordinates were within the line of their employment as servants of defendant, and thus a case was made for the jury.

The judgment is reversed, and the cause remanded for trial on the merits.

Sanner, J., concurs.

Holloway, J.: I concur in the result reached above. As I understand the general rule announced in Moss v. Goodhart and Lackman v. Simpson, to which reference is made, it is that, when a cause has been tried, and evidence has been admitted without objection which tends to prove a material fact which should have been pleaded, but was not, the deficient pleading will be deemed to have been amended to conform to such proof.

Annotation—Amendment of pleadings in appellate court to conform to proof.

I. Introduction, 841.

II. General rules and their limitations:

a. Power of appellate court as to amendments, 842.

b. Rule allowing amendments, 843.

c. Limitations of rule, in general, 849.

d. Objections erroneously overruled in lower court:

1. In general, 854.

2. Not affecting merits, 858.

e. Amendments to reverse judgment, 861.

III. Applications:

a. In general, 862.

b. Recovery exceeding amount claimed, 877.

I. Introduction.

Questions as to amendments of the pleadings in particular proceedings,¹ the

relation of new pleadings to statutes of limitations,² and the right to amend the pleadings after final decision on appeal,³ have been considered in other notes.

The present note includes, in general, only cases heard on the record, and not those tried de novo in the appellate court. It is confined to such cases as treat the matter from the standpoint of amendment of the pleadings, and does not include generally that large class of cases which apparently reach a substantially similar result on other grounds, as that of waiver, curing of defects by verdict and judgment, or immateriality of the variance. The question of presumption that an amendment has been in fact made below is beyond the scope of the note. The note also does not cover the

² As to relation of new pleadings to statutes of limitation, see Index to L.R.A. Notes, and Supplemental Index, Limitation of actions, § 64.

³ See note to Todd v. Bettingen, 18 L.R.A. (N.S.) 263.

¹ Generally, as to amendment of pleadings, see Index to L.R.A. Notes, and Supplemental Index, Pleadings, §§ 10, 11. L.R.A.1916D.

question of amendment of the pleadings as to jurisdiction;⁴ and does not treat exhaustively the question of amendment on appeal as to parties, this being a distinct class in which the requested amendments frequently cannot be regarded as merely for the purpose of conforming the pleadings to the proof. Some cases of this kind are, however, included for purposes of illustration.

The note does not include the question of review by the appellate court of the granting or refusing of amendments by the trial court, and it does not include generally cases in which the appellate court directed or authorized the allowance of an amendment by the lower court on proper terms, and remanded the case for further proceedings.

The term "proof" as used in the title of the note has been liberally construed, so that the note has a broader scope than the mere question of amendments of the pleadings to conform to evidence, strictly speaking, which is introduced on the trial, and includes cases generally which deal with the question of amendments of the pleadings on appeal to conform to the facts, whether they appear in the evidence, the pleadings of the adverse party, or are admitted by the parties.

In most of the cases cited in the note the appellate court has deemed the amendment made, and has not apparently required an actual amendment of the pleadings. It has been said⁵ that the general rule in respect to statutes of amendment and jeofails is that the amendment need not in point of fact be

made, but that the benefit of the statute is obtained by the court's overlooking the exception or considering the amendment as made. Whether the amendment is actually made seems to depend largely on the local practice, an actual amendment being apparently made in some jurisdictions. But generally the appellate court has apparently considered it as immaterial whether the amendment was actually made or was merely regarded as made, frequently stating the matter in the alternative that it would permit an amendment or regard it as made. In a New York case,⁶ however, it was considered that, although the variance between the pleadings and the proof might be immaterial, an amendment of the pleadings was proper for the purpose of securing certainty and harmony in the record.

II. General rules and their limitations.

a. Power of appellate court as to amendments.

"The power of amendment is incidental to the exercise of all judicial power. . . . So far as the mere power to amend is concerned, the statutes of amendment are only declaratory of the common law."⁷ The Federal Supreme Court⁸ has observed that there is nothing in the nature of an appellate jurisdiction proceeding, according to the common law, which forbids the granting of amendments. The subject of amendments of pleadings is controlled largely by statutes,^{9a} it being provided in most jurisdictions having the Code procedure that the

⁴ As to amendment of complaint in suit for divorce or separation, so as to show residence or domicile, see note to *Holton v. Holton*, 48 L.R.A.(N.S.) 779. See also note 51, *infra*.

⁵ *Eakin v. Burger* (1853) 1 Sneed (Tenn.) 417. The rule laid down in this case, that amendments which the court is authorized to make need not in fact be made, but will be considered as made, was approved in *McBee v. Petty* (1866) 3 Coldw. (Tenn.) 178, this being, however, a case involving amendments of the summons. The rule was also approved in *Beeler v. Huddleston* (1866) 3 Coldw. (Tenn.) 201, involving an amendment of a writ of attachment.

In *Canavan v. Canavan* (1913) 17 N. M. 503, 131 Pac. 493; Ann. Cas. 1915B, 1064, the court, in holding that a complaint in an action for divorce which failed to allege the residence of the plaintiff necessary to confer jurisdiction would be considered amended on appeal to conform to proof received without objection showing this fact, stated that it assumed the actual amendment need not be made, but the complaint would be treated as amended. L.R.A.1916D.

⁶ *Clark v. Dales* (1855) 20 Barb. (N. Y.) 42. The court said that "whether the amendment should be ordered at general term and without formal notice of motion for that purpose, or on notice as a special motion, is a question of practice, not entirely settled. . . . In a case like the present, where the amendment is only to conform the pleading to the facts specifically found by the court, and where the record furnishes the only grounds for and against the amendment, a motion is quite unnecessary."

⁷ 1 Enc. Pl. & Pr. pp. 508, 509.

⁸ *Kennedy v. Bank of Georgia* (1850) 8 How. (U. S.) 586, 12 L. ed. 1209. To a similar effect, see *Anonymous* (1812) 1 Gall. 22, Fed. Cas. No. 444. It was said also in the former case that the section of the judiciary act of 1789 allowing amendments was sufficiently comprehensive to embrace cases of appellate as well as original jurisdiction.

^{9a} 31 Cyc. 360.

court may, either before or after judgment, on such terms as may seem proper, permit the amendment of any pleading by adding or striking out the name of any party, by correcting a mistake in the name of any party, or a mistake in any other respect, or, when the amendment does not change substantially the claim or defense, by conforming the pleadings to the facts proved; also that the courts may, in every stage of the action, disregard any error or defect in the pleadings which does not affect the substantial rights of the parties; that no variance between the allegations in a pleading and the proof shall be deemed material unless it has actually misled the adverse party to his prejudice, and that whenever it shall appear that a party has been misled the court may order the pleading to be amended on such terms as may be just. These statutory provisions have been regarded as applying to amendments in the appellate court as well as in the trial court, no question generally being raised in this regard. It has been intimated, however, that while the statutes of amendments are liberally construed when relief under them is sought in the trial courts, they will be more strictly construed when their aid is sought in the appellate courts.⁹

As to the English practice, it is stated in *Laws of England* (Halsbury)¹⁰ regard-

ing amendments of the pleadings and other matters in the record, that an amendment may be allowed at any stage of the proceedings, not only before, but at and even after, trial, and after judgment, and on or after appeal.¹¹

b. Rule allowing amendments.

The appellate courts have been liberal in allowing an amendment of the pleadings or in regarding the amendment as made, to support the judgment, where the amendment is of such a nature that it should have been allowed by the lower court upon request, and substantial justice would be promoted by such procedure. Under these circumstances, it is held generally that the judgment will not be reversed because of defects or omissions in the pleadings which are supplied by the proof or the pleadings of the adverse party, or because of a variance between the pleadings and the proof, if the sufficiency of the pleadings was not properly challenged in the lower court, or the evidence was introduced without objection, or the defect or variance appears clearly not to have affected the substantial rights of the parties; but the pleadings may be amended in the appellate court to support the judgment, if necessary, or the amendment will be deemed made.¹² The rule has become

⁹ *Peterson v. Lincoln County* (1912) 92 Neb. 167, 138 N. W. 122, Ann. Cas. 1913E, 1309.

Attention is called in this connection to the rule laid down in *Todd v. Bettingen* (1907) 102 Minn. 260, 18 L.R.A.(N.S.) 263, 113 N. W. 906, on facts, however, not within the scope of the note, that "liberality in allowing amendments to pleadings is greatest in the early stages of a lawsuit, decreases as it progresses, and changes to a strictness ordinarily amounting to a prohibition after the matters litigated have received the normally final sanction of an adjudication by the trial court, affirmed on appeal by the court of last resort."

¹⁰ Vol. 23, p. 140.

¹¹ In *Montreal v. Hogan* (1900) 31 Can. S. C. 1, the court said: "The allegations and conclusions of the declaration, as it reads now, are undoubtedly deficient, but we order such amendments to be made thereto 'as are necessary' (to use the express words of § 63 of the supreme court act) 'for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence.'"

The English and Canadian cases, so far as they clearly appear in point, will be found in the appropriate subdivisions of the note.

¹² See also cases cited elsewhere in the L.R.A.1916D.

annotation under more specific rules and applications thereof.

Ala.—*Boddie v. Ely* (1830) 3 Stew. 182; *Thompson v. Pierce* (1831) 3 Stew. 427.

Ark.—*Dorris v. Grace* (1866) 24 Ark. 326; *Hanks v. Harris* (1874) 29 Ark. 323; *St. Louis, I. M. & S. R. Co. v. Harper* (1884) 44 Ark. 524; *Healy v. Conner* (1883) 40 Ark. 352; *Sorrels v. Self* (1884) 43 Ark. 451; *Caldwell v. Meshew* (1890) 53 Ark. 263, 13 S. W. 761; *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L.R.A. 773, 15 S. W. 831, 16 S. W. 266; *Texarkana Gas & E. L. Co. v. Orr* (1894) 59 Ark. 215, 43 Am. St. Rep. 30, 27 S. W. 66; *Davis v. Goodman* (1896) 62 Ark. 262, 35 S. W. 231; *Shattuck v. Byford* (1896) 62 Ark. 431, 35 S. W. 1107; *Young v. Stevenson* (1905) 75 Ark. 181, 86 S. W. 1000; *Waterman v. Irby* (1905) 76 Ark. 551, 89 S. W. 844; *Bynum v. Brady* (1907) 82 Ark. 603, 100 S. W. 66; *Roach v. Richardson* (1907) 84 Ark. 37, 104 S. W. 538; *Kahn v. Metz* (1908) 88 Ark. 363, 114 S. W. 911; *Griffin v. Anderson Tully Co.* (1909) 91 Ark. 292, 134 Am. St. Rep. 73, 121 S. W. 297; *Rucker v. Martin* (1910) 94 Ark. 365, 126 S. W. 1062; *Pulaski Gaslight Co. v. McGlintock* (1911) 97 Ark. 576, 32 L.R.A.(N.S.) 825, 134 S. W. 1189, 1199; *Citizens' F. Ins. Co. v. Lord* (1911) 100 Ark. 212, 139 S. W. 1114; *Chicago, R. I. & P. R. Co. v. King*

(1912) 104 Ark. 215, 148 S. W. 1035; *St. Louis, I. M. & S. R. Co. v. Bird* (1913) 106 Ark. 177, 153 S. W. 104; *Southern Cotton Oil Co. v. Campbell* (1913) 106 Ark. 379, 153 S. W. 256; *Simpson v. Blewitt* (1913) 110 Ark. 87, 160 S. W. 1087; *St. Louis & S. F. R. Co. v. Coy* (1914) 113 Ark. 265, 168 S. W. 1106. See also *Hurley v. Oliver* (1909) 91 Ark. 427, 121 S. W. 920, approving rule.

Fla.—*McKay v. Friebele* (1858) 8 Fla. 21. See also *Campbell v. Chaffee* (1856) 6 Fla. 724, where an omission in the summons in an action of assumpsit, to state the damages, was regarded as cured by amendment, on appeal.

Ill.—*Law v. Fletcher* (1876) 84 Ill. 45; *American Ins. Co. v. Walston* (1903) 111 Ill. App. 133.

Ind.—*Saxton v. State* (1846) 8 Blackf. 200; *Alden v. Barbour* (1852) 3 Ind. 414; *Lawrenceburgh Ferry Boat Co. v. Smith* (1856) 7 Ind. 520; *Langdon v. Bullock* (1858) 8 Ind. 341; *Warbritton v. Cameron* (1858) 10 Ind. 302; *Alvord v. Moffatt* (1858) 10 Ind. 366; *Harris v. Osenback* (1859) 13 Ind. 445; *Cleveland v. Roberts* (1860) 14 Ind. 511; *Case v. Wandel* (1861) 16 Ind. 459; *Fankboner v. Fankboner* (1863) 20 Ind. 62; *Torr v. Torr* (1863) 20 Ind. 118; *Hobbs v. Cowden* (1863) 20 Ind. 310; *McKinlay v. Shank* (1865) 24 Ind. 258; *Hull v. Green* (1866) 26 Ind. 388; *Lowry v. Dutton* (1867) 28 Ind. 473; *Barnes v. Bell* (1872) 39 Ind. 328; *Lucas v. Smith* (1873) 42 Ind. 103; *Hamilton v. Winterrowd* (1873) 43 Ind. 393; *Krewson v. Cloud* (1873) 45 Ind. 273; *Voris v. State* (1874) 47 Ind. 345; *Gimbel v. Stolte* (1877) 59 Ind. 446; *Randles v. Randles* (1878) 63 Ind. 93; *Fisher v. State* (1878) 65 Ind. 51; *Scheible v. Law* (1878) 65 Ind. 332; *Bristol Hydraulic Co. v. Boyer* (1879) 67 Ind. 236; *Davis v. Doherty* (1879) 69 Ind. 11; *Krutz v. Howard* (1880) 70 Ind. 174; *Phoenix Mut. L. Ins. Co. v. Hinesley* (1881) 75 Ind. 1; *Shryer v. Morgan* (1881) 77 Ind. 479; *Breedlove v. Bundy* (1884) 96 Ind. 319; *Hedrick v. D. M. Osborne & Co.* (1884) 99 Ind. 143; *Buchanan v. State* (1886) 106 Ind. 251, 6 N. E. 614; *Chaney v. State* (1889) 118 Ind. 494, 21 N. E. 45; *Watt v. Pittman* (1890) 125 Ind. 168, 25 N. E. 191; *Evansville & R. R. Co. v. Maddux* (1893) 134 Ind. 571, 33 N. E. 345, 34 N. E. 511; *Ades v. Levi* (1894) 137 Ind. 506, 37 N. E. 388; *Taylor v. Calvert* (1894) 138 Ind. 67, 37 N. E. 531; *Browning v. Smith* (1894) 139 Ind. 280, 37 N. E. 540 (obiter); *Kohli v. Hall* (1895) 141 Ind. 411, 40 N. E. 1060; *Praigg v. Western Paving & Supply Co.* (1895) 143 Ind. 358, 42 N. E. 750. See also *South Bend v. Turner* (1901) 156 Ind. 418, 54 L.R.A. 396, 83 Am. St. Rep. 200, 60 N. E. 271, where uncertainty or inadequacy of averment in complaint was deemed waived on appeal; *Consumers' Paper Co. v. Eyer* (1903) 160 Ind. 424, 66 N. E. 994; *Baltimore & O. S. W. R. Co. v. Slaughter* (1906) 167 Ind. 330, 7 L.R.A. (N.S.) 597, 119 Am. St. Rep. 503, 79 N. E. 186; *Noble v. Davison* (1911) 177 Ind. 19, 96 N. E. 325; L.R.A.1916D.

Crawfordsville Trust Co. v. Ramsey (1912) 178 Ind. 258, 98 N. E. 177; *First Nat. Bank v. Peck* (1913) 180 Ind. 649, 103 N. E. 643; *Shedd v. American Maize Products Co.* (1915) — Ind. App. —, 108 N. E. 610; *Goodbub v. Sheller* (1891) 3 Ind. App. 318, 29 N. E. 610; *Perry County v. Lomax* (1892) 5 Ind. App. 567, 32 N. E. 800; *Steinke v. Bentley* (1892) 6 Ind. App. 663, 34 N. E. 97; *Clark v. Trueblood* (1896) 16 Ind. App. 98, 44 N. E. 679; *Robison v. Wolf* (1901) 27 Ind. App. 683, 62 N. E. 74; *Whitern v. Krick* (1903) 31 Ind. App. 577, 68 N. E. 694; *Richardson v. Stephenson* (1906) 38 Ind. App. 339, 78 N. E. 256; *United States Fidelity & G. Co. v. State* (1907) 40 Ind. App. 136, 81 N. E. 226; *Radebaugh v. Scanlan* (1907) 41 Ind. App. 109, 82 N. E. 544; *Oil-Well Supply Co. v. Priddy* (1908) 41 Ind. App. 200, 83 N. E. 623; *Pittsburgh, C. C. & St. L. R. Co. v. Warrum* (1907) 42 Ind. App. 179, 82 N. E. 934, petition for rehearing denied in (1902) 42 Ind. App. 196, 84 N. E. 356; *Indianapolis v. City Bond Co.* (1908) 42 Ind. App. 470, 84 N. E. 20; *Axtell v. State* (1909) 43 Ind. App. 131, 86 N. E. 999; *Rooker v. Ludowici Celadon Co.* (1913) 53 Ind. App. 275, 100 N. E. 469; *Jann v. Standard Cement Co.* (1913) 54 Ind. App. 221, 102 N. E. 872; *Louisville & S. I. Traction Co. v. Lloyd* (1914) — Ind. App. —, 105 N. E. 519; *Chicago, I. & L. R. Co. v. Gorman* (1914) — Ind. App. —, 106 N. E. 897.

Kan.—*Missouri Valley R. Co. v. Caldwell* (1871) 8 Kan. 244; *Pape v. Capitol Bank* (1878) 20 Kan. 440, 27 Am. Rep. 183; *Grandstaff v. Brown* (1879) 23 Kan. 176; *Sanford v. Willetts* (1883) 29 Kan. 647; *Wilcox & W. Organ Co. v. Lasley* (1888) 40 Kan. 521, 20 Pac. 228; *Tipton v. Warner* (1892) 47 Kan. 606, 28 Pac. 712; *Capitol Ins. Co. v. Bank of Pleasanton* (1892) 48 Kan. 397, 29 Pac. 578; *Carnahan v. Lloyd* (1896) 4 Kan. App. 605, 46 Pac. 323. See also *Smith v. Burnes* (1871) 8 Kan. 197; *Mitchell v. Milhoan* (1873) 11 Kan. 617; and *Hummer v. Lamphear* (1884) 32 Kan. 439, 49 Am. Rep. 491, 4 Pac. 865, which reach a similar result, but do not treat the question particularly from the view point of amendments.

Ky.—*Bolinger v. Hanson* (1883) 5 Ky. L. Rep. 186; *Louisville Trust Co. v. Louisville Fire Proof Constr. Co.* (1900) 22 Ky. L. Rep. 433, 57 S. W. 506; *Ruffner v. Ridley* (1883) 81 Ky. 165.

Me.—*Conway F. Ins. Co. v. Sewall* (1867) 54 Me. 352; *Cowan v. Bucksport* (1903) 98 Me. 305, 56 Atl. 901; *Wyman v. American Shoe Finding Co.* (1909) 106 Me. 263, 76 Atl. 483; *Cyr v. Landry* (1915) — Me. —, 95 Atl. 883.

Mass.—*Cleaves v. Lord* (1854) 3 Gray, 66; *Stone v. White* (1857) 8 Gray, 589; *Nichols v. Prince* (1864) 8 Allen, 404; *Peck v. Waters* (1870) 104 Mass. 345; *Whitney v. Houghton* (1879) 127 Mass. 527; *Arlington v. Lyons* (1881) 131 Mass. 328; *Batchelder v. Hutchinson* (1894) 161 Mass. 462, 37 N. E. 452; *Beers v. McGinnis* (1906) 191 Mass. 279, 77 N. E. 768.

Mich.—Johnson v. Spear (1890) 82 Mich. 453, 46 N. W. 733; Wright v. Treat (1890) 83 Mich. 110, 47 N. W. 243; Warder, B. & G. Co. v. Gibbs (1892) 92 Mich. 29, 52 N. W. 73; Robinson v. Lake Shore & M. S. R. Co. (1895) 103 Mich. 607, 61 N. W. 1014; Lockwood v. Michigan Mut. L. Ins. Co. (1896) 108 Mich. 334, 66 N. W. 229; Thomas v. Ann Arbor R. Co. (1897) 114 Mich. 59, 72 N. W. 40; Smith v. Cowles (1900) 123 Mich. 4, 81 N. W. 916; Bean v. Bean (1910) 163 Mich. 379, 128 N. W. 413.

Minn.—Almich v. Downey (1891) 45 Minn. 460, 48 N. W. 197.

Mo.—Sawyer v. Wabash R. Co. (1900) 156 Mo. 468, 57 S. W. 108; Weissenfels v. Cable (1907) 208 Mo. 515, 106 S. W. 1028 (obiter); Shantz v. Shriner (1912) 167 Mo. App. 635, 150 S. W. 727 (amendment ordered by lower court, if not actually made, will be regarded as made).

Mont.—ELLINGHOUSE v. AJAX LIVE STOCK CO., ante, 836; Nyhart v. Pennington (1897) 20 Mont. 153, 50 Pac. 413; O'Brien v. Corra-Rock Island Min. Co. (1909) 40 Mont. 212, 105 Pac. 724; Post v. Liberty (1912) 45 Mont. 1, 121 Pac. 475; Lackman v. Simpson (1912) 46 Mont. 518, 129 Pac. 325; Moss v. Goodhart (1913) 47 Mont. 257, 131 Pac. 1071. See also other Montana cases cited in ELLINGHOUSE v. AJAX LIVE STOCK CO., which treat omissions in the complaint as supplied by the allegations in the answer.

Neb.—Ure v. Bunn (1902) 3 Neb. (Unof.) 61, 90 N. W. 904; Homan v. Steele (1886) 18 Neb. 652, 26 N. W. 472; Scott v. Spencer (1895) 44 Neb. 93, 62 N. W. 312.

N. J.—Price v. New Jersey R. & Transp. Co. (1865) 31 N. J. L. 229; Lomerson v. Hoffman (1855) 24 N. J. L. 674; Willis v. Fernald (1868) 33 N. J. L. 206; American Popular L. Ins. Co. v. Day (1876) 39 N. J. L. 89, 23 Am. Rep. 198; McAndrews v. Tipplett (1876) 39 N. J. L. 105, 14 Mor. Min. Rep. 616; Blackford v. Plainfield Gaslight Co. (1881) 43 N. J. L. 438; Redstrake v. Cumberland Mut. F. Ins. Co. (1882) 44 N. J. L. 204; Ware v. Millville Mut. M. & F. Ins. Co. (1883) 45 N. J. L. 177; Finegan v. Moore (1884) 46 N. J. L. 602; Hasbrouck v. Winkler (1886) 48 N. J. L. 431, 6 Atl. 22; Monmouth Park Asso. v. Warren (1893) 55 N. J. L. 598, 27 Atl. 932; Excelsior Electric Co. v. Sweet (1894) 57 N. J. L. 224, 30 Atl. 553; United States Pipe Line Co. v. Delaware, L. & W. R. Co. (1898) 62 N. J. L. 254, 42 L.R.A. 572, 41 Atl. 759; O'Neill v. Leeds (1899) — N. J. L. —, 43 Atl. 650; Hanrahan v. Metropolitan L. Ins. Co. (1906) 72 N. J. L. 504, 63 Atl. 280; Miller v. West Jersey & S. R. Co. (1908) 76 N. J. L. 282, 70 Atl. 175 (obiter); Holt v. United Security L. Ins. & T. Co. (1909) 76 N. J. L. 585, 21 L.R.A.(N.S.) 691, 72 Atl. 301.

N. M.—Brown & M. Co. v. Gise (1907) 14 N. M. 282, 91 Pac. 716; Canavan v. Canavan (1913) 17 N. M. 503, 131 Pac. 493, Ann. Cas. 1915B, 1064.

N. Y.—Bate v. Graham (1854) 11 N. Y. 237; Lounsbury v. Purdy (1859) 18 N. Y. L.R.A.1916D.

515; Bennett v. Judson (1860) 21 N. Y. 238; Pratt v. Hudson River R. Co. (1860) 21 N. Y. 305; Thompson v. Kessel (1864) 30 N. Y. 383; Sherman v. Parish (1873) 53 N. Y. 483; Tyng v. Commercial Warehouse Co. (1874) 58 N. Y. 308; Haddow v. Lundy (1874) 59 N. Y. 320; Reeder v. Sayre (1877) 70 N. Y. 180, 26 Am. Rep. 567; Harris v. Tumbbridge (1880) 83 N. Y. 92, 38 Am. Rep. 398; Fallon v. Lawler (1886) 102 N. Y. 228, 6 N. E. 392; Frear v. Sweet (1890) 118 N. Y. 454, 23 N. E. 910; Union India Rubber Co. v. Tomlinson (1852) 1 E. D. Smith, 364; Parsons v. Suydam (1854) 3 E. D. Smith, 276; Douai v. Lutjens (1897) 21 App. Div. 254, 47 N. Y. Supp. 659, affirmed without opinion in (1900) 165 N. Y. 622, 59 N. E. 1121; Rifenburgh v. Ham (1899) 44 App. Div. 620, 60 N. Y. Supp. 124; Grifhahn v. Kreiger (1901) 62 App. Div. 413, 70 N. Y. Supp. 973, affirmed without opinion in (1902) 171 N. Y. 661, 64 N. E. 1121; Liekens v. Staten Island Midland R. Co. (1901) 64 App. Div. 327, 72 N. Y. Supp. 162; Leiser v. McDowell (1902) 69 App. Div. 444, 74 N. Y. Supp. 1021; Nelson v. Hatch (1902) 70 App. Div. 206, 75 N. Y. Supp. 389, affirmed without opinion in (1903) 174 N. Y. 546, 67 N. E. 1085; Harris v. Harris (1903) 83 App. Div. 123, 82 N. Y. Supp. 568; Johnson v. Albany (1903) 86 App. Div. 567, 83 N. Y. Supp. 1002; Martin v. Flahive (1906) 112 App. Div. 347, 98 N. Y. Supp. 577 (obiter); Palmieri v. S. Pearson & Son (1908) 128 App. Div. 231, 112 N. Y. Supp. 684; Jacobs v. Beyer (1910) 141 App. Div. 40, 125 N. Y. Supp. 597; Montague v. Hotel Gotham Co. (1912) 149 App. Div. 687, 133 N. Y. Supp. 954; Tripp v. Pulver (1874) 2 Hun, 511; Clemons v. Davis (1875) 4 Hun, 260; Tisdale v. Morgan (1876) 7 Hun, 583; Argersinger v. Levor (1889) 54 Hun, 613, 7 N. Y. Supp. 923; Listman v. Hickey (1892) 65 Hun, 8, 19 N. Y. Supp. 880; Tannenbaum v. Armeny (1894) 81 Hun, 581, 31 N. Y. Supp. 55; Drexel v. St. Amant (1891) 37 N. Y. S. R. 166, 13 N. Y. Supp. 774; Gombert v. Schane (1915) 154 N. Y. Supp. 114 (obiter); Rowland v. Sprouls (1893) 66 Hun, 635, 50 N. Y. S. R. 921, 21 N. Y. Supp. 895; Hooper v. Beecher (1887) 7 N. Y. S. R. 405; Davis v. Grand Rapids F. Ins. Co. (1895) 15 Misc. 263, 36 N. Y. Supp. 791, affirmed without opinion in (1898) 157 N. Y. 685, 51 N. E. 1090; Van Orden v. Morris (1897) 19 Misc. 497, 43 N. Y. Supp. 1108; Rein v. Brooklyn Heights R. Co. (1905) 47 Misc. 675, 94 N. Y. Supp. 636; Alexander v. Harkin (1907) 53 Misc. 317, 103 N. Y. Supp. 56; Foote v. Roberts (1867) 7 Robt. 17; Hoffman v. New York, L. E. & W. R. Co. (1884) 18 Jones & S. 403; White v. Reed (1890) 26 Jones & S. 333, 11 N. Y. Supp. 575; Harrower v. Heath (1855) 19 Barb. 331; Clark v. Dales (1855) 20 Barb. 42; Hunter v. Hudson River Iron & Mach. Co. (1855) 20 Barb. 493; Cady v. Allen (1856) 22 Barb. 388; Coleman v. Palysted (1861) 36 Barb. 26, appeal dismissed in (1869) 40 N. Y. 341; Wright v. Whiting (1863) 40 Barb. 235; Hamilton v. Gridley

(1868) 54 Barb. 542; *Smith v. Holland* (1872) 61 Barb. 333, affirmed in (1874) 61 N. Y. 635; *Bartholomew v. Lyon* (1874) 67 Barb. 86; *Borst v. Griffin* (1832) 9 Wend. 307; *Hinman v. Booth* (1839) 21 Wend. 267; *Schmidt v. Gunther* (1874) 5 Daly, 452 (holding, however, amendment will not be allowed where attention is called to defects by objections below and party neglects to amend); *Flaherty v. Greenman* (1878) 7 Daly, 481; *Snyder v. Snyder* (1825) 4 Cow. 394; *Bowdoin v. Coleman* (1856) 3 Abb. Pr. 431; *Manice v. Brady* (1860) 15 Abb. Pr. 173; *Hudson v. Swan* (1879) 7 Abb. N. C. 324, reversed on other grounds in (1881) 83 N. Y. 552, as indicated in note 49, *infra*; *Kennedy v. Crandell* (1870) 3 Lans. 1.

N. C.—*Weed v. Richardson* (1837) 19 N. C. (2 Dev. & B. L.) 535; *Baxter v. Baxter* (1856) 48 N. C. (3 Jones, L.) 303; *Bibbs v. Fuller* (1872) 66 N. C. 116; *Allen v. Sallinger* (1891) 108 N. C. 159, 12 S. E. 896; *Franks v. Nolop* (1913) 164 N. C. 390, 80 S. E. 383; *Kenney v. Seaboard Air Line R. Co.* (1914) 165 N. C. 99, 80 S. E. 1078; *Deligny v. Tate Furniture Co.* (1915) — N. C. —, 86 S. E. 980.

Ohio.—*Benninger v. Hess* (1884) 41 Ohio St. 64. But see the earlier case of *Hosmer v. Williams* (1833) *Wright*, 355 (the court stating that the statute of amendments in that state "limits the right to amend to some time before writ of error brought, and does not extend beyond. . . . We have no power to amend, or to disregard even matters of form, after writ of error").

Okla.—*Mulhall v. Mulhall* (1895) 3 Okla. 252, 41 Pac. 577; *Mulhall v. Mulhall* (1895) 3 Okla. 304, 41 Pac. 109; *Carson v. Butt* (1896) 4 Okla. 133, 46 Pac. 596; *El Reno Electric Light & Teleph. Co. v. Jennison* (1897) 5 Okla. 759, 50 Pac. 144; *Ryndak v. Seawell* (1904) 13 Okla. 737, 76 Pac. 170; *St. Paul F. & M. Ins. Co. v. Mitten-dorf* (1909) 24 Okla. 651, 28 L.R.A.(N.S.) 651, 104 Pac. 354; *Kaufman v. Boismier* (1909) 25 Okla. 252, 105 Pac. 326; *First Nat. Bank v. Langston* (1912) 32 Okla. 795, 124 Pac. 308; *St. Paul F. & M. Ins. Co. v. Griffin* (1912) 33 Okla. 178, 124 Pac. 300; *Carson v. Vance* (1913) 35 Okla. 584, 130 Pac. 946; *Midland Valley R. Co. v. George* (1912) 36 Okla. 12, 127 Pac. 871; *Love v. Kirkbride Drilling & Oil Co.* (1913) 37 Okla. 804, 129 Pac. 858; *Homeland Realty Co. v. Robison* (1913) 39 Okla. 591, 136 Pac. 585; *Carson v. Butt* (1896) 4 Okla. 133, 46 Pac. 596.

Pa.—*Downing v. Lindsay* (1845) 2 Pa. St. 382; *Morris v. McNamee* (1851) 17 Pa. 173; *Robertson v. Reed* (1864) 47 Pa. 115; *Loew v. Stocker* (1869) 61 Pa. 347; *Waite v. Palmer* (1875) 78 Pa. 192; *Shryock v. Basehore* (1876) 82 Pa. 159, followed in *Shryock v. McClure* (1876) 82 Pa. 165; *Passenger Conductors' L. Ins. Co. v. Birnbaum* (1887) 116 Pa. 565, 11 Atl. 378; *Erie City Iron Works v. Barber* (1888) 118 Pa. 6, 12 Atl. 411; *Harley v. Lebanon M. Ins. Co.* (1888) 120 Pa. 182, 13 Atl. 833; *Trainor L.R.A.* 1916D.

v. Philadelphia & R. R. Co. (1890) 137 Pa. 148, 20 Atl. 632; *Chapin v. Cambria Iron Co.* (1891) 145 Pa. 478, 22 Atl. 1041; *Kroegher v. McConway & T. Co.* (1892) 149 Pa. 444, 23 Atl. 341; *Clifford v. Prudential Ins. Co.* (1894) 161 Pa. 257, 28 Atl. 1085; *Taylor v. Sattler* (1897) 179 Pa. 451, 36 Atl. 323; *C. & C. Electric Co. v. St. Clair* (1897) 182 Pa. 274, 37 Atl. 814; *Fisher v. Fidelity Mut. Life Asso.* (1898) 188 Pa. 1, 41 Atl. 467; *Hurst v. Bredden* (1913) 239 Pa. 216, 86 Atl. 778, Ann. Cas. 1914D, 428; *Stuart v. Line* (1899) 11 Pa. Super. Ct. 345; *Com. v. Patterson* (1900) 13 Pa. Super. Ct. 136; *Braker v. Deuser* (1912) 49 Pa. Super. Ct. 215; *Fonder v. Rosenstein* (1913) 53 Pa. Super. Ct. 161; *Palmer v. Waite* (1875) 1 W. N. C. 363; *Jones v. Freyer* (1877) 3 W. N. C. 365; *Wampler v. Shissler* (1841) 1 Watts & S. 365; *Cummings v. Lebo* (1829) 2 Rawle, 23, 19 Am. Dec. 615; *Prevost v. Nicholls* (1808) 4 Yeates, 479.

R. I.—*Cimini v. Zambarano* (1914) — R. I. —, 89 Atl. 711.

S. D.—*National Bank v. Feeney* (1897) 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874.

Vt.—*Chaffee v. Rutland R. Co.* (1899) 71 Vt. 384, 45 Atl. 750.

Wash.—*Tolmie v. Dean* (1858) 1 Wash. Terr. 47; *Ward v. Moorey* (1860) 1 Wash. Terr. 104; *Allend v. Spokane Falls & N. R. Co.* (1899) 21 Wash. 324, 58 Pac. 244; *Richardson v. Moore* (1902) 30 Wash. 406, 71 Pac. 18; *Gallamore v. Olympia* (1904) 34 Wash. 379, 75 Pac. 978; *Jones v. Herrick* (1904) 35 Wash. 434, 77 Pac. 798; *Bonne v. Security Sav. Soc.* (1904) 35 Wash. 696, 78 Pac. 38; *Iverson v. McDonnell* (1904) 36 Wash. 73, 78 Pac. 202; *Weber v. Snohomish Shingle Co.* (1905) 37 Wash. 576, 79 Pac. 1126; *Hodges v. Price* (1905) 38 Wash. 1, 80 Pac. 202; *Stern v. Sill* (1905) 39 Wash. 557, 81 Pac. 1007; *Irby v. Phillips* (1905) 40 Wash. 618, 82 Pac. 931; *Collins v. Denny Clay Co.* (1905) 41 Wash. 136, 82 Pac. 1012; *Lang v. Crescent Coal Co.* (1906) 44 Wash. 267, 87 Pac. 261; *Hester v. Stine* (1907) 46 Wash. 469, 90 Pac. 594; *Brummett v. Gleason* (1907) 47 Wash. 439, 92 Pac. 266; *Campbell v. Order of Washington* (1909) 53 Wash. 398, 102 Pac. 410; *Kluska v. Yeomans* (1909) 54 Wash. 465, 132 Am. St. Rep. 1121, 103 Pac. 819; *Staats v. Pioneer Ins. Asso.* (1909) 55 Wash. 51, 104 Pac. 185; *Alkire v. Myers Lumber Co.* (1910) 57 Wash. 300, 106 Pac. 915; *Spokane Merchant's Asso. v. Parry* (1910) 60 Wash. 204, 110 Pac. 991; *Holden v. Romano* (1911) 61 Wash. 458, 112 Pac. 489; *Carlisle Packing Co. v. Deming* (1911) 62 Wash. 455, 114 Pac. 172; *Domke v. Gunning* (1911) 62 Wash. 629, 114 Pac. 436; *Potter v. Spokane* (1911) 63 Wash. 267, 115 Pac. 176; *Overacker v. Northern P. R. Co.* (1911) 64 Wash. 491, 117 Pac. 403; *Powell v. Powell* (1912) 66 Wash. 561, 119 Pac. 1119; *Godfrey v. Olson* (1912) 68 Wash. 59, 122 Pac. 1014; *Perkins v. Lyons* (1912) 68 Wash. 498, 123 Pac. 793; *McCreery v. Carter* (1913) 73 Wash. 394, 131 Pac. 1125; *Lamoon v. Smith Cement Brick Co.* (1913) 74 Wash. 164, 132 Pac. 880;

elementary, it has been said,¹³ that "if a good cause of action is established upon a trial and all controversies in reference to the matter are fully tried without objection, and such cause is within the jurisdiction of the court and might have been, but was not, fully pleaded, or was not the particular cause of action the pleader had in mind at the outset, though the facts are fairly stated, the complaint may . . . on appeal

be deemed amended in accordance with the judgment;" and that almost any conceivable mistake that the parties, their attorneys, or the officers may make may be corrected by amendment under the very liberal and comprehensive provisions of the statute of jeofails, provided it is one by which neither party was prejudiced.¹⁴ "It is difficult to conceive of a case," said the New York court,¹⁵ "in which, after a trial and decision of

Kelly v. Lum (1913) 75 Wash. 135, 49 L.R.A.(N.S.) 1151, 134 Pac. 819; Klein v. Phelps Lumber Co. (1913) 75 Wash. 500, 135 Pac. 226; Sjong v. Occidental Fish Co. (1914) 78 Wash. 4, 138 Pac. 313; Yeisley v. Smith (1914) 82 Wash. 693, 144 Pac. 918; Mason County v. McReavy (1915) 84 Wash. 9, 145 Pac. 993; Cook v. Washington-Oregon Corp. (1915) 84 Wash. 68, 146 Pac. 156, 149 Pac. 325; Stewart v. Stewart (1915) 85 Wash. 202, 147 Pac. 1157. See also Brown v. Baldwin (1907) 46 Wash. 106, 89 Pac. 483.

Wis.—Paine v. Smith (1873) 32 Wis. 335; Flanders v. Cottrell (1875) 36 Wis. 564; Giffert v. West (1875) 37 Wis. 115; Miller v. Spaulding (1876) 41 Wis. 221; Weston v. McMillan (1877) 42 Wis. 567; Aschermann v. Philip Best Brewing Co. (1878) 45 Wis. 262; Vassau v. Thompson (1879) 46 Wis. 345, 1 N. W. 4; Forcy v. Leonard (1885) 63 Wis. 353, 24 N. W. 78; Murray v. Scribner (1889) 74 Wis. 602, 43 N. W. 549; Deuster v. Mittag (1900) 105 Wis. 459, 81 N. W. 643; Hocks v. Sprangers (1902) 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113; Rule v. J. L. Gates Land Co. (1904) 121 Wis. 544, 99 N. W. 333; Sherry v. Madler (1910) 123 Wis. 621, 101 N. W. 1095; Coe v. Rockman (1906) 128 Wis. 515, 106 N. W. 290; Nelson v. Campbell & C. Co. (1906) 128 Wis. 82, 107 N. W. 297; Donner v. Genz (1906) 129 Wis. 245, 107 N. W. 1039, 109 N. W. 71; Bieri v. Fonger (1909) 139 Wis. 150, 120 N. W. 862; Latton v. McCarty (1910) 142 Wis. 190, 125 N. W. 430; Swanby v. Northern State Bank (1912) 150 Wis. 572, 137 N. W. 763; Morehouse v. Voight (1913) 151 Wis. 580, 139 N. W. 423; Van Dinter v. Worden-Allen Co. (1912) 153 Wis. 533, 138 N. W. 1016, 142 N. W. 122; Kiefert v. Maple Valley Mut. Home F. Ins. Co. (1914) 158 Wis. 340, 148 N. W. 864; Callahan v. Chicago & N. W. R. Co. (1915) 161 Wis. 288, 154 N. W. 449.

U. S.—Grant Bros. Constr. Co. v. United States (1913) 232 U. S. 647, 58 L. ed. 776, 34 Sup. Ct. Rep. 452; National Waterworks Co. v. Kansas City (1894) 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 853; Keener v. Baker (1899) 35 C. C. A. 350, 93 Fed. 377; Columbus Constr. Co. v. Crane Co. (1900) 40 C. C. A. 35, 98 Fed. 946, rehearing on other points denied in (1900) 41 C. C. A. 189, 101 Fed. 55; Haley v. Kilpatrick (1900) 44 C. C. A. 102, 104 Fed. 647; Mine & S. Supply Co. v. Park & L.R.A.1916D.

L. Co. (1901) 47 C. C. A. 34, 107 Fed. 881; Chicago, M. & St. P. R. Co. v. Voelker (1904) 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; A. Coolot Co. v. Kahner (1905) 72 C. C. A. 248, 140 Fed. 836; Michigan Home Colony Co. v. Tabor (1905) 72 C. C. A. 480, 141 Fed. 332; Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co. (1906) 78 C. C. A. 293, 148 Fed. 159; United Kansas Portland Cement Co. v. Harvey (1914) 132 C. C. A. 460, 216 Fed. 316; Crescent Mill Co. v. H. N. Strait Mfg. Co. (1915) — C. C. A. —, 227 Fed. 804 (trial court, without ordering amendment, having treated complaint as amended after notice that plaintiff would apply for an amendment).

Can.—Jones v. Davenport (1900) 7 B. C. 452; Sonier v. Breaux (1912) 3 D. L. R. 184, 10 East. L. R. 391.

¹³ Bieri v. Fonger (1909) 139 Wis. 150, 120 N. W. 862. The court said: "The fact is that there is little room, if any, for mere technicalities in our system of jurisprudence. It deals with rights and remedies for the sole purpose of the attainment of justice, not for the purpose of dignifying into a controlling feature any of the numerous little inconsequential defects that may arise in the course of litigation, not seasonably mentioned by the adverse party, or, if mentioned, not affecting him substantially in any respect of the matter."

¹⁴ Witte Iron Works v. Holmes (1895) 62 Mo. App. 372, upholding the power of the appellate court to allow an amendment by inserting the real instead of the fictitious name of the plaintiff.

¹⁵ Tyng v. Commercial Warehouse Co. (1874) 58 N. Y. 308.

The New York courts in some cases have laid down the rule that, as against an objection made for the first time in the appellate court, the pleadings will be deemed amended to conform to the proof, to support the judgment, wherever such an amendment ought to have been allowed by the trial court, had it been requested, and it does not appear that the adverse party has been prejudiced or misled by failure to make the amendment in the trial court. See, for instance, Manice v. Brady (1860) 15 Abb. Pr. (N. Y.) 173; Wright v. Whiting (1863) 40 Barb. (N. Y.) 235; Kennedy v. Crandell (1870) 3 Lans. (N. Y.) 1; Bowdoin v. Coleman (1856) 3 Abb. Pr. (N. Y.) 431.

The supreme court of Oklahoma has said that if the case is one in which an amend-

the controversy as appearing on the proofs, when no question has been made during the trial in respect to their relevancy under the pleadings, it would be the duty of a court, or within its rightful authority, to deprive the party of his recovery on the ground of incompleteness or imperfection of the pleadings."

ment should upon an application have been allowed, and was tried without objection to the defects which appear in the pleadings, the appellate court will treat the amendment as having been made. *Mulhall v. Mulhall* (1895) 3 Okla. 304, 41 Pac. 109.

In *Carson v. Butt* (1896) 4 Okla. 133, 46 Pac. 596, the court stated generally that "averments which might have been amended below on motion, to correspond with the proof, will in the supreme court be deemed to have been made." The complaint in this instance, when attacked for the first time on appeal, was held sufficient to entitle the plaintiff to a judgment for possession, and such a judgment was rendered although the prayer of the complaint did not ask for possession, but asked only that the defendant be adjudged to hold the legal title of the land in question in trust for the plaintiff.

In *Ward v. Moorey* (1860) 1 Wash. Terr. 104, the court said: "We think it unnecessary to decide whether all the necessary allegations were contained in the complaint or not. The defendant, instead of allowing judgment to go against him, answered over, and under our statute a defect in the complaint could have been cured at any time, by amendment; and this court is required to consider all amendments that could have been made in the court below as made."

In *Cook v. Washington-Oregon Corp.* (1915) 84 Wash. 68, 146 Pac. 156, 149 Pac. 325, the court said it had repeatedly held that, where a case has proceeded to judgment, it would not consider any defects in the pleadings that might have been cured by amendment, but would, as admonished by statute, decide the case on the merits, disregarding all technicalities, and consider all amendments as made which could have been made.

And in *Weber v. Snohomish Shingle Co.* (1905) 37 Wash. 576, 79 Pac. 1126, it was said: "As to the first alleged cause of action in the complaint, we do not believe it states facts sufficient to constitute a cause of action; but this point is not raised in the brief, and does not appear to have been raised in the lower court. It would therefore be disregarded, and the complaint deemed amended to correspond with the proof, if the latter were sufficient to sustain a cause of action."

The conclusion was reached by the Pennsylvania supreme court that "generally, an amendment will be allowed whenever justice requires it;" and that when the merits of the case have been fully heard and tried, L.R.A.1916D.

In a Federal case,¹⁶ it was held that a petition may be considered upon appeal as having been amended to conform to the facts proved, where it is manifest that the defendant was not misled or surprised by the variance, so that the trial court would doubtless have permitted the amendment upon request.

These cases apparently proceed upon

and it appears that the matter assigned for error could have produced no possible injury to the party complaining of it, the court will, in general, allow the amendment to be made in furtherance of justice. *Wampler v. Shissler* (1841) 1 Watts & S. (Pa.) 365. Applying these principles to the facts in the case before it, the court held that an amendment might be made in the supreme court of a declaration in an action on a recognizance, to support the judgment, so as to make it conform to the record of the recognizance intended to be set out therein.

It was said in *Prevost v. Nicholls* (1808) 4 Yeates (Pa.) 479, regarding amendments by the supreme court, that where the objection is as to a matter merely of form, and the real merits of the controversy have been fairly tried, the court will be very liberal as to granting amendments.

The principle adopted in *Stuart v. Line* (1899) 11 Pa. Super. Ct. 345, was that, "after a trial on the merits of a case, a defect in the pleadings will not be considered as fatal, unless it is shown to have injuriously affected the trial, and a proper amendment will be considered to have been made."

An amendment of the pleadings may be allowed on appeal if justice appears to require it. *Jones v. Meehan* (1899) 175 U. S. 1, 44 L. ed. 49, 20 Sup. Ct. Rep. 1.

In *Holt v. United Security L. Ins. & T. Co.* (1909) 76 N. J. L. 585, 21 L.R.A.(N.S.) 691, 72 Atl. 301, it was held that under the practice act in that state amendments in matters of form that have not affected the fair trial and determination of the real question in controversy may be allowed in the court of review.

"The course of practice in the courts of this state, under the statutes permitting amendments, has been that wherever the real question in controversy has been fairly tried and correctly settled upon the merits, the court will not set aside the result for an objection that might have been avoided by amendment, but will, in such case, exercise the power of amendment." *Vunk v. Raritan River R. Co.* (1894) 56 N. J. L. 395, 28 Atl. 593.

It was said in *Palmer v. Waite* (1875) 1 W. N. C. (Pa.) 363, that "the rule is to allow the amendment to be made in this court [supreme court], or treat the record as amended, where it is in furtherance of justice and the case has been heard and decided on its merits, and no real injury will be done to the party complaining of it." And in this case, where there was a

the principle that "while parties have the right to try the issues made by the pleadings, yet they are not bound to, but may try any other issue by mutual consent," and that "the court, in reviewing such cases, is only called upon to determine whether the parties have consented to try the substituted issue and whether the decisions of the court upon the new issue are according to law."¹⁷

c. Limitations of rule, in general.

But, although the appellate courts are very liberal in permitting an amendment of the pleadings to conform to the proof, or in regarding the amendment as made, to support the judgment, where no proper objection has been made to the pleadings or the introduction of the evidence, or the defect or variance appears clearly not to have affected the substantial right of the parties, there are certain circumstances under which courts on appeal have considered such a course improper. It has been held that the doctrine of regarding the pleadings amended on appeal, to support the judgment, does not apply in the case of a judgment by default. On this point, the supreme court of Indiana¹⁸ has said: "It

will be presumed, to the extent that the plaintiff's cause of action was defectively or inaccurately stated, no fact essential to the cause of action being omitted, that the facts imperfectly stated which were necessary to support the action were proved at the trial, and the complaint will be considered as having been amended to correspond with the proof. This rule has, however, no application to a case where judgment has been taken by default. One who takes a judgment by default must, on an appeal seasonably taken, be content to stand upon his complaint as he makes it, for, in considering whether or not it is sufficient to support a judgment so taken, the court cannot assume that anything was proved beyond what was alleged in the complaint, nor can the complaint be considered as having been amended to meet the proof."

It has been held also that if a party declines to amend his pleading when offered the opportunity to do so, he cannot afterward be allowed to treat it as amended, when no amendment has in fact been made.¹⁹ And where the lower court refuses an amendment, but the party seeking it nevertheless recovers a judgment, it has been held that the

variance between the declaration and the proof as to the date of the bill sued on, an amendment of the declaration was allowed in the supreme court to correspond with the proof on payment by the plaintiff of the defendant's costs in error, the defendant having objected on the trial to the introduction of the bill in evidence and his objection having been overruled.

In *Erie City Iron Works v. Barber* (1888) 118 Pa. 6, 12 Atl. 411, it was said that "after a trial on the merits, no defect of pleading which could have been raised by a demurrer will be fatal to the judgment, unless it is shown to have injuriously affected the trial. The proper amendment will be considered to have been made. This is the outgrowth of the policy which has prevailed in practice in the allowance of amendments. The effect of our statutes has been to give more prominence to the trial of the cause had on its intrinsic merits, in the interest of a rational and speedy administration of justice, than to the exact and precise observance of the artificial forms originally devised for this purpose, but which are supposed in some instances, at least, to defeat rather than to promote the ends of justice."

Under the Washington statute providing that the supreme court shall hear and determine all cases upon the merits, disregarding all technicalities, and shall consider all amendments which could have been made as made, the court in *Allend v. Spokane Falls & N. R. Co.* (1899) 21 Wash. 324, 58 Pac. 244, laid down the rule that

the supreme court would treat the complaint as amended whenever it was necessary to do justice between the parties, and when to do so would not deprive either party of a substantial right.

¹⁸ *Chicago, M. & St. P. R. Co. v. Voelker* (1904) 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522.

¹⁷ *Frear v. Sweet* (1890) 118 N. Y. 454, 23 N. E. 910.

¹⁶ *Old v. Mohler* (1889) 122 Ind. 594, 23 N. E. 967, where a judgment by default was reversed because, in an action for breach of a covenant in a deed against encumbrances, the deed or a copy was not filed with and made a part of the complaint, as required by statute.

¹⁹ *Carpentier v. Brenham* (1875) 50 Cal. 549.

The rule was laid down in *Davidson v. Weems* (1877) 58 Ala. 187, that the appellate court cannot consider an amendment as made when counsel decline or omit to ask leave to make an amendment upon their attention being directed to the defect by an objection thereto.

Where the trial court correctly sustained a demurrer to the complaint, and the plaintiff having declined to amend, appealed from a judgment for the defendant, it was held that the appellate court would not grant leave to amend. *People ex rel. Hastings v. Jackson* (1864) 24 Cal. 630. To a similar effect is *Sutter v. San Francisco* (1868) 36 Cal. 112.

See also notes 30-38, *infra*.

appellate court will not, on a new motion to amend, permit an amendment, in order to sustain the judgment.²⁰ So, unless the evidence or findings properly presented for the consideration of the appellate court clearly establish the facts set out in the proposed amendment, it will not be permitted or deemed made on appeal.²¹

²⁰ Where the district court on error refused a motion to add to the petition in an action on a note, allegations which were necessary to a statement of a cause of action, the plaintiffs having in the county court obtained leave to amend, but the amendment not having been made, it was held on appeal to the supreme court that the plaintiffs could not, by a new motion to amend, be permitted to make an amendment of the petition to sustain the judgment in their favor. *Spellman v. Frank* (1885) 18 Neb. 110, 24 N. W. 442. The court said: "We are not asked to review the action of the district court, but a new motion is made in this court. As the jurisdiction of this court is appellate only, in such cases, there is no warrant for granting the motion, and it is therefore overruled."

²¹ In *Stephens v. Stephens* (1913) 108 Ark. 53, 156 S. W. 837, where a suit was brought to cancel a deed executed by the plaintiff to his wife and their infant children, it was held, on appeal from a decree for the plaintiff, that the court would not deem the complaint amended as to allege that the land conveyed was a homestead and therefore the conveyance void because the wife did not join in the deed, as the proof was insufficient that the land conveyed was a homestead.

An amendment of a petition by inserting therein an allegation necessary to the statement of a cause of action cannot be made in the appellate court to support the judgment, if proof of the facts alleged does not appear in the abstract of the record brought up on appeal. *Chandler v. Chicago & A. R. Co.* (1913) 251 Mo. 592, 158 S. W. 35; *Sheets v. Mississippi River & B. T. R. Co.* (1911) 152 Mo. App. 376, 133 S. W. 124. The action in each case was for the death of the plaintiff's husband. In the former action, brought nine months after the husband's death, the petition contained no allegations which would toll the six-months statute of limitations. On appeal from a judgment for the plaintiff it was held that an amendment could not be made in the supreme court, that the widow brought an action within six months of the husband's death, and, having suffered a nonsuit, brought the present action within the year allowed by statute. In the latter case the petition alleged that the plaintiff brought the action "within one year of the nonsuit which she suffered in her former action on this cause," but failed to allege that the first action was begun within six months of the husband's death. The appellate court held that evidence not preserved in the bill of L.R.A.1916D.

In several instances, a distinction has been made as regards the allowance of amendments by the appellate court to sustain the judgment, between cases where the cause of action is merely defectively stated, and where there is an entire omission in the petition to allege facts necessary to constitute a cause of action. Thus, in a Missouri case²² it was

exceptions could not be considered on appeal for the purpose of amending the petition so as to supply the omission.

So, in *Manhattan Co. v. White* (1913) 48 Mont. 565, 140 Pac. 90, it was held that a complaint could not be deemed amended in the appellate court where the bill of exceptions did not present any evidence establishing the facts to be incorporated in the amendment.

Where both the complaint and the findings in an action for divorce are deficient in failing to show residence of the plaintiff necessary to confer jurisdiction, and the evidence is not before the supreme court on appeal, a judgment for the plaintiff cannot be sustained by indulging in presumptions and deeming the complaint amended to conform to the presumed proof. *Ramsdell v. Ramsdell* (1907) 47 Wash. 444, 92 Pac. 278.

The rule was laid down in *Sutherland v. County Ct.* (1907) 62 W. Va. 1, 57 S. E. 274, that a motion in the supreme court on appeal for leave to amend a bill for an injunction, unsustained by anything in the record showing facts which, if incorporated in the bill, would sustain the injunction, will be refused.

Where there is nothing on the record from which it can be legally inferred in what way the declaration should be amended, an amendment will not be regarded as made. *Ballou v. Hill* (1870) 23 Mich. 60.

See also *Crandall v. Lee* (1916) — Wash. —, 154 Pac. 190, where, in a suit to quiet title, the trial court made no findings of fact, and, the facts being disputed, it was held on appeal that the plaintiff could not invoke the rule that where the trial had proceeded on the merits, the appellate court would deem the pleadings amended to conform to the proof.

²² *O'Toole v. Lowenstein* (1913) 177 Mo. App. 662, 160 S. W. 1016.

The rule was laid down in *Corson v. Waller* (1903) 104 Mo. App. 621, 78 S. W. 656, that a statement of a cause of action may be amended in the appellate court to supply any deficiency or omission therein when by such amendment substantial justice would be promoted, but that no new item or cause of action not embraced, or intended to be embraced, in the original statement, shall be added by such an amendment; and that when the statement of the cause of action is so entirely barren as to state nothing at all,—is a mere nullity,—it is not amendable in the appellate court. In this instance, however, the question was

held that, although a demurrer had not been filed to the petition, a judgment for the plaintiff could not be sustained in an action of trover where the petition alleged the plaintiff's ownership of the property, but contained no allegation that he had or was entitled to the possession of the property; and that an amendment could not be made in the supreme court to supply the omitted allegation. The statute of jeofails, providing that no judgment shall be reversed for omitting any allegations, without proving which the triers of the issue ought not to have given such a verdict, was regarded as declaratory of the common law that a verdict will aid a cause of action defectively stated, but not a defective cause of action.

An apparently sound rule has been laid down that an amendment of the declaration to conform to the proof as to a material issue omitted from the declaration should be allowed in the appellate court only when it is clear that the matter was an issue on the trial, and as fully litigated as though it had

been raised by the pleading; for otherwise great injustice might be done to a party by being compelled to try an issue that he had no notice of and did not come prepared to try.²³ In this instance the Vermont court held that a declaration could not be amended on appeal to support a judgment for the plaintiff by inserting a material allegation which was proved in connection with and as a part of the issues made by the pleadings, and was apparently not noticed by either side as a distinct issue, since it could not be said that the question raised by the amendment was fully litigated. Similarly in a New York case²⁴ it was said that while an appellate court in some instances may disregard the form of the pleadings and affirm or reverse the judgment in accordance with the proof presented on the question litigated, this should be done only in cases where the parties present their proof with a view to the litigation of that particular question, regardless of the pleadings; and that if, on the trial of the issues raised by the pleadings, evidence

whether the circuit court should have allowed an amendment of the statement of the cause of action on appeal from the probate court.

The same distinction has been noted by the supreme court of South Dakota. Thus, where the defendant alleged that the consideration of the notes sued on had failed, but did not claim special damages, and affirmative relief for damages was given the defendant by the verdict and judgment, it was held on appeal that, as there was an entire want of averments to support the verdict, the court would not presume an amendment of the pleadings in the trial court, or permit their amendment on appeal, to support the judgment, but that it must be reversed. *Seiberling v. Mortinson* (1898) 10 S. D. 644, 75 N. W. 202. The court said, however, that if in fact there was a counterclaim pleaded, but it was defective for want of some technical averment, and it was made to appear affirmatively that evidence was admitted to supply the defect in the pleadings, the court on appeal would permit an amendment of the pleadings to conform to the facts proved, or would presume that such an amendment was made in the lower court, and refuse to reverse the judgment for such apparent error; but that where there is an entire want of averments to support the verdict, the court could not presume that the pleadings were amended in the trial court in such manner as to support the verdict and judgment.

And the fact that the plaintiff replied to the answer when not required to do so was held in *Seiberling v. Mortinson* (S. D.) *supra*, not to justify the appellate court in L.R.A.1916D.

treating the answer as asking for affirmative relief.

²³ *Baker v. Sherman* (1901) 73 Vt. 26, 50 Atl. 633.

An amendment of the pleadings in the supreme court to sustain the judgment by the filing of an additional plea should be allowed only where it is certain that the case has been tried as it would have been if the plea had been properly filed. *Poole v. Massachusetts Mut. Acci. Asso.* (1902) 75 Vt. 85, 53 Atl. 331.

²⁴ *L. G. Catty Co. v. Cantor* (1911) 127 N. Y. Supp. 311. In this case the plaintiff brought an action under oral pleadings for fraud and conversion of money paid to the defendant by the plaintiff for the purpose of making a machine for the plaintiff's use. The evidence showed no cause of action for fraud or conversion, but the trial court rendered judgment for the plaintiff on the ground of breach of contract to deliver a completed machine within the required time.

The power of amendment of the pleadings should not be exercised by an appellate court to support a verdict and judgment that may have been based upon an issue which was not really in controversy between the parties and was not fairly litigated. *Excelsior Electric Co. v. Sweet* (1895) 59 N. J. L. 441, 31 Atl. 721.

So, if at the trial the parties have confined the controversy to the issues raised by the pleadings, the pleadings should not on appeal be amended so as to present a different issue, which was first suggested in the charge of the trial judge and submitted to the jury against the objection of the appellant. (N. J.) *Ibid*.

is introduced showing a state of facts which might entitle the plaintiff to recover on a different cause of action, a judgment rendered for him by the trial court based upon a finding of such a state of facts cannot be sustained on appeal by amending the pleadings to conform to the proof, since the defendant may not have attempted to meet an issue outside of the pleadings. And in a Canadian case²⁵ the court approved and followed the doctrine that if a party at a trial "deliberately elects to fight one question, on which he is beaten, he cannot afterwards on appeal raise another question, although that question was at the trial open to him on the pleadings and on the evidence."

It has been held also that the authority of the appellate court to direct an amendment of the pleadings obtains only in cases where the amendment could have been directed by the trial court; and that while issues other than those created by the pleadings may be litigated by consent of the parties, and, where this has been done, the trial court may direct an amendment of the pleadings to conform to the proof, and, if the amendment is not made on the trial, the appellate court may direct it or deem the pleadings amended, yet the pleadings cannot be amended in the trial or

appellate courts to state a new and entirely different cause of action from that alleged, merely because the evidence might justify recovery upon the new cause of action.²⁶ In this instance the New York court held that it should not, to support the judgment, allow an amendment of a complaint alleging a cause of action for money loaned, so as to state a cause of action for money paid under mistake or obtained by fraud, where the judgment for the plaintiff was erroneous on the cause of action alleged because barred by the statute of limitations, and all the evidence introduced was competent on this issue, although the evidence showed a state of facts which would have entitled the plaintiff to recover had the action been brought for money paid under mistake or obtained by fraud.

So, in a number of cases appellate courts have refused to permit amendments of the pleadings to conform to the proof, or to regard such amendments as made, where the proposed amendments changed substantially the nature of the claim or defense, and introduced new issues which it did not clearly appear had been fully litigated; or where the amendment was of a nature that it could not have been allowed by the trial court.²⁷

²⁵ *Sales v. Lake Erie & D. R. Co.* (1896) 17 Ont. Pr. Rep. 224, following the doctrine of *Browne v. Dunn* (1894) 6 Reports (Eng.) 67, 1 Mews, Eng. Case Law Dig. 452.

²⁶ *Riker v. Curtis* (1894) 10 Misc. 125, 30 N. Y. Supp. 940.

²⁷ In some cases amendments of the pleadings which would raise new issues or change the issues in the lower court were refused on appeal, it not appearing, however, that the proposed amendment was to conform the pleadings to the proof. Cases of this kind are not covered in the note. See, however, among other cases supporting the general rule that amendments will not be allowed on appeal which change the issues tried below, *Manatt v. Starr* (1887) 72 Iowa, 677, 34 N. W. 784; *Ottumwa Brick & Constr. Co. v. Ainley* (1899) 109 Iowa, 386, 80 N. W. 510; *Levandowski v. Althouse* (1904) 136 Mich. 631, 99 N. W. 786; *State v. Great Northern R. Co.* (1908) 106 Minn. 303, 119 N. W. 202; *Hill v. Stocking* (1844) 6 Hill (N. Y.) 277; *Holderness v. Welling* (1853) 7 N. B. 572; *Howard v. Mutual Reserve Fund Life Assn.* (1899) 125 N. C. 49, 45 L.R.A. 853, 34 S. E. 199; *Whitehead v. Spivey* (1889) 103 N. C. 66, 9 S. E. 319 (holding that on appeal by the plaintiff to the supreme court, he would not be allowed to make an amendment which would introduce substantially a new cause of action which had arisen after the appeal was taken).

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In *Brown v. Colie* (1851) 1 E. D. Smith (N. Y.) 265, it was held that an amendment of an answer changing the nature of the defense and rendering a new trial necessary would not be allowed on appeal, although the case was one in which the court was of the opinion that an amendment would have been allowed at special term, had the defendant applied therefor, even after the referee's report.

In an action on a joint contract against two defendants for goods sold, the trial court in *Dobbs v. Purington* (1901) 136 Cal. 70, 65 Pac. 1091, 68 Pac. 323, found that the goods were sold to one of the defendants, and rendered judgment against him. It was held on appeal by this defendant that the judgment could not be sustained, as the finding of separate liability was altogether outside the issues, and that, while the complaint might have been amended on the trial to make it conform to the evidence, and, on the case being remanded, such amendments might be allowed as the court might deem just, yet the issues could not be changed on appeal to support the judgment.

On appeal from a decree dismissing a bill in equity for a reconveyance of real estate, it was held that an amendment of the bill so as to include averments set out in the answer would not be allowed where it would raise an issue which should have been heard and determined in the lower

It has been held that a statute authorizing an appellate court, in furtherance of justice, and upon such terms as may be just, to permit an amendment in affirmance of a judgment of any record, pleading, or process, by adding or striking out the name of a party, or by cor-

recting a mistake in the name of a party, or a mistake in any other respect, or by rectifying defects or imperfections in matters of form, does not authorize an amendment in the appellate court by striking out an allegation relied upon as the basis of the cause of action, which

court, and the facts sought to be introduced by the amendment were known more than two years prior to the date of the motion and more than one year before the decree of the lower court dismissing the bill, the court, however, basing its decision partly, at least, on the ground of laches. *Jackson v. Thomson* (1902) 203 Pa. 622, 53 Atl. 506.

In an action by an assignee of an assessment collector against a city for fees on the ground of refusal by the city to permit him to perform the duties of his office, the collections having been made and the fees received by another, the court in *Smith v. New York* (1868) 37 N. Y. 518, in holding that a judgment for the plaintiff on the cause of action alleged could not be sustained, as there was no contract obligation for breach of which an action would lie, stated: "It is suggested that an amendment of the complaint should be permitted at this time, by which the same may be converted into an action for money had and received. . . . I have never known the exercise of such a power by this court, and am not aware of any authority for it. In no event could it be granted, except by a motion of which the defendants had notice, and in which the necessary terms could be imposed."

When, upon appeal from a judgment granting the petition of a city to extend its limits to embrace outlying territory, the petition as allowed is found to include lands not proper to be annexed, the petition cannot be amended so as to exclude such lands, and the judgment affirmed as to the remainder, but the whole case must be remanded for a new trial. *Vestal v. Little Rock* (1891) 54 Ark. 321, 11 L.R.A. 778, 15 S. W. 891, 16 S. W. 291.

An amendment of the pleadings changing the nature of the action from one for specific performance of a contract, or, in the alternative, damages, to an action simply for damages, was denied in the appellate court in *Hipgrave v. Case* (1885) L. R. 28 Ch. Div. (Eng.) 356, 54 L. J. Ch. N. S. 399, 52 L. T. N. S. 242, where the evidence showed that the plaintiff had rendered performance on his part impossible, and, there being no request to amend the pleading in the lower court, the action had been dismissed.

Under the Nebraska Code the power of the supreme court to amend the pleadings on appeal exists only where the amendment does not change substantially the claim or defense. *Peterson v. Lincoln County* (1912) 92 Neb. 167, 138 N. W. 122, Ann. Cas. 1913E, 1309.

So, in *Scott v. Spencer* (1895) 44 Neb. L.R.A.1916D.

93, 62 N. W. 312, it was held that while the supreme court on appeal might in some instances allow an amendment in order to conform the pleadings to the proof, an amendment would not be allowed which changed substantially the nature of the action or defense. Accordingly, in an action to foreclose a mechanics' lien, where the answer was, in effect, a disclaimer of title, and a decree was rendered for the plaintiff, it was held that the supreme court, on appeal, would not permit the defendant to amend his answer so as to show title. It was contended that the cause had been tried on its merits, and that the answer had been construed not as a disclaimer, but as putting in issue the validity of the lien, and that the amendment should be allowed, therefore, so that the answer would conform to the issues tried; but the supreme court held that, as there had been a failure to secure a bill of exceptions, it would not examine ex parte affidavits accompanying the application to amend for the purpose of ascertaining what issues had been tried.

In an action against a city for salary alleged to be due the plaintiff for services performed under an appointment as "record clerk of the board of police justices," where the defense was that the office had been abolished by statute, and the complaint was dismissed on this ground, it was held on appeal that the plaintiff should not be permitted to amend his complaint so as to be designated therein as "record clerk of the court of special sessions." *Fitch v. New York* (1882) 88 N. Y. 500. It was said that if the statute allowed amendments to be made in the court of appeals, the power should not be exercised unless no substantial right of the adverse party would be affected, and that here the case had been tried upon a different issue from that presented by the amendment.

An amendment of an answer to conform to the proof was denied on appeal in *Hondorf v. Atwater* (1894) 75 Hun, 369, 27 N. Y. Supp. 447, where it had not been asked for in the lower court, would have changed substantially the nature of the defense, and was sought by the appellant for the purpose of reversing the judgment.

An amendment of a complaint will not be allowed on appeal, which would present a case substantially different from the one which was tried below, and raise a question of law not involved in the appeal. *Bonner v. Stotesbury* (1905) 139 N. C. 3, 51 S. E. 781.

The rule that an appellate court will not permit an amendment of the pleadings to support the judgment on a different theory

was not inserted in the petition by mistake or inadvertence, and which is essential to the theory on which the case was tried.²⁸

d. Objections erroneously overruled in lower court.

1. In general.

Another class of cases in which appellate courts have usually refused an amendment of the pleadings, or declined to treat the pleadings as amended, in order to sustain the judgment, is that involving an erroneous ruling of the trial court when objection is properly made to the sufficiency of the pleadings or the admission of evidence under them. "There are cases," it has been said,²⁹ "which having proceeded in disregard of the pleadings, and wherein the whole case has been presented by both parties in their proofs without ob-

jection, in which an amendment has been allowed, after the evidence is closed, to conform the pleadings to the proofs; so also where the court can see that a trial has been had upon the real issue without objection, it will not disturb a recovery upon the ground that it was not embraced in the pleadings; but when the objection has been properly taken or an exception presents the question, it is fatal to a recovery that it does not conform in all material respects to the allegations of the pleadings." Thus, when a complaint is attacked by demurrer for want of facts sufficient to constitute a cause of action, but the demurrer is erroneously overruled, on appeal from the ruling the complaint will not be deemed amended, although the defect might have been cured by amendment in the lower court.³⁰ The same rule also applies to other pleadings,—for instance, where the answer does not state

from that on which the case was tried was applied in *State, Weigel, Prosecutor, v. Hartman Steel Co.* (1899) 51 N. J. L. 446, 20 Atl. 67, where the supreme court held that it would not permit an amendment of the state of demand in an action upon an account stated to one for goods sold and delivered, to support the judgment for the plaintiff, the case having been tried upon the theory of the pleadings, and counsel for the defendant having obviously shaped his client's cause in accordance with the demand as filed.

In *Jordan v. Reed* (1908) 77 N. J. L. 584, 71 Atl. 280, it was held that a declaration setting up a contract arising out of commercial paper, and entered into by the defendant alone, could not be amended on error to conform to proof of a contract of a different nature entered into by the defendant and others, so as to sustain the judgment for the plaintiff, because thereby the defendant would be bound by a verdict upon a matter which he had not expected or intended to try.

It was said in *Spokane Grain Co. v. Great Northern Exp. Co.* (1909) 55 Wash. 545, 104 Pac. 794, that the rule that if there is a substantial conflict in the evidence the appellate court will not disturb the findings of the jury, but will, if necessary, treat the pleadings as amended to conform to the facts proved, must not be held to permit a plaintiff to allege one cause of action and prove an entirely different cause, wholly foreign to the one alleged.

An amendment of an answer by pleading the defense of purchaser for valuable consideration without notice in an action for recovery of real estate was denied in *Robert v. Ellis* (1900) 59 S. C. 137, 37 S. E. 250, on appeal from a judgment for the plaintiff, where no motion to amend was made or considered in the lower court, and the amendment involved an entire and radical

change in the defense, and was not sustained by the proofs.

²⁸ *St. Louis v. G. H. Wright Contracting Co.* (1907) 210 Mo. 491, 109 S. W. 6, where a city brought an action against a contractor and his sureties on the bond for breach of contract to do public work, alleging that the plaintiff brought the suit as trustee for the lot owners to recover the excess paid in special tax bills by reason of the defendant's breach of contract, the amendment sought being the elimination of the allegation that recovery was sought as trustee.

²⁹ *Romeyn v. Sickles* (1888) 108 N. Y. 650, 15 N. E. 698. In this case the amendment had been erroneously deemed made by the trial court to permit a recovery on a different cause of action from that alleged or tried.

³⁰ *Rogers v. State* (1881) 78 Ind. 329 (where the complaint in an action on a bond failed to allege that a copy of the bond was filed therewith); *Utica Twp. v. Miller* (1878) 62 Ind. 230 (where the complaint alleged a cause of action against the school township, and the civil, and not the school, township was sued). In the latter case, the court said: "We do not think a complaint not stating facts sufficient to constitute a cause of action can be deemed so amended in this court as to make it good. . . . The amendment which we are asked to consider as made is one which involves an entire change of the party defendant. We are not aware of any authority for considering such an amendment as made."

Where the complaint in an action on a note was materially defective in that it did not allege that the note remained unpaid, but the court erroneously overruled a demurrer to the complaint, and rendered judgment for the plaintiff, it was held on appeal that the complaint could not be

facts sufficient to constitute a good defense, and a demurrer thereto is erroneously overruled, on appeal from the ruling the answer will not be deemed amended.³¹ And the provision of the Code that "no judgment shall be stayed or reversed . . . by the supreme court for any defect in form, variance, or imperfections in the record, pleadings," . . . "which by law might have been amended by the court below," does not aid the defect in the pleadings where the question on appeal

is the correctness of the ruling below on the demurrer.³²

So, also, if the evidence to which it is sought to conform the pleadings by amendment was introduced over objection that it was not within the pleadings, the appellate court will not permit the amendment, or regard it as made, in order to support the judgment, if the variance is not merely formal, but relates to a matter of substance, but it will reverse the judgment.³³ In a New York

deemed amended, but that the judgment should be reversed. *Friddle v. Crane* (1879) 68 Ind. 583.

So, in *Sinker v. Fletcher* (1878) 61 Ind. 276, where a demurrer was erroneously overruled to a complaint in an action against an indorser of a note, the complaint being insufficient in that it failed to allege a filing of a copy of the indorsement, it was held on appeal from a judgment for the plaintiff, that the appellate court would not consider the complaint amended. The court said: "It is also insisted by the appellees that the complaint ought to be deemed amended in this court, under the provisions of § 580 of the Code. But we can conceive of no case in which a complaint will be deemed amended in this court, which is so defective as that a demurrer filed to it for the want of a statement of sufficient facts to constitute a cause of action should be sustained, where the question here arises upon the correctness of the ruling below on the demurrer."

Where an action was brought by an executrix to recover the purchase price of goods alleged to have been sold by her as executrix to the defendant, and the defendant demurred on the ground that the plaintiff had no legal capacity to sue, and that the complaint failed to state facts sufficient to constitute a cause of action, and a motion by the plaintiff for judgment on the pleadings was granted, it was held on appeal that as the action should have been brought by the plaintiff in her individual capacity, the demurrer to the complaint should have been sustained, and the appellate court could not permit an amendment by striking out the allegations that the action was brought by the plaintiff as executrix and permit the recovery to stand as though the action had been brought by the plaintiff individually. *Ehrman v. Bassett* (1913) 159 App. Div. 752, 144 N. Y. Supp. 976. The court said that such an amendment should not be allowed especially when the defendant at the first opportunity had challenged the right of the plaintiff to maintain the action in its present form.

³¹ *Johnson v. Breedlove* (1880) 72 Ind. 368. The court said: "It can make no difference in principle whether the defective pleading, erroneously held to be good on demurrer for want of facts, was a complaint or an answer. In either case, when L.R.A.1916D

the question presented here involves the correctness of the ruling on the demurrer, we cannot regard the defective pleading as amended."

³² (Ind.) *Ibid*.

³³ *Western U. Teleg. Co. v. Webb* (1910) 94 Ark. 350, 126 S. W. 1072; *Loper v. State* (1892) 48 Kan. 540, 29 Pac. 687; *Northam v. Dutchess County Mut. Ins. Co.* (1903) 177 N. Y. 73, 69 N. E. 222; *Brown v. Haley* (1909) 56 Wash. 218, 105 Pac. 478; *Oldfield v. Angeles Brewing & Malting Co.* (1913) 72 Wash. 168, 129 Pac. 1098.

In *Barnes v. Seligman* (1890) 55 Hun, 339, 8 N. Y. Supp. 834, the court adopted as a familiar rule the proposition "that a complaint cannot be amended to conform to the facts proved where an objection has been taken in time to the proving of the facts because of the insufficiency of the pleadings."

In *Smith v. Wetmore* (1899) 41 App. Div. 290, 58 N. Y. Supp. 402, it was held that an omission in the complaint in an action to foreclose a mechanics' lien, to allege the procuring of, or a legal excuse for failure to procure, the engineer's certificate required by the building contract, might be cured by an amendment on appeal, to support the judgment, where there was evidence introduced, over objection, sufficient to support a finding that the certificate had been unreasonably withheld. Regarding this case, the court in *Bossert v. Poerschke* (1900) 51 App. Div. 381, 64 N. Y. Supp. 733, said that it was there held that the appellate division might presume that the complaint was amended upon the trial so as to conform to the proof, although the fact seemed to have been overlooked that the evidence when offered was objected to; but that it was probable the objection to the evidence was not put on the ground of failure to plead an excuse for not producing the certificate. In affirming the decision in the *Smith Case*, the court of appeals, however, in (1901) 167 N. Y. 234, 60 N. E. 419, held that an amendment of the complaint to conform to the proof had properly been allowed, because evidence introduced without objection as to the insufficiency of the complaint showed that the owner by his own acts had rendered production of the certificate unnecessary to the plaintiff's recovery.

The rule that an appellate court will not

case³⁴ the rule was laid down that while it is undoubtedly within the power of the court in a proper case to amend the pleadings to conform to the proof brought out on the trial, that power should never be exercised where the facts have been proved over the objection of the party against whom they are offered; that an amendment is allowable only where the proof has been admitted without objection, and the attention of

the party offering the evidence has not been called to the defect in the pleadings. Accordingly, it was held that a judgment for the plaintiff in an action to foreclose a mechanics' lien, where the complaint was defective because it failed to allege a performance or waiver of the provision in the contract requiring the architect's certificate, could not be sustained on the theory that the complaint would be deemed amended in the appel-

permit amendments of the pleadings to conform to the proof, in order to support the judgment, where the evidence has been erroneously admitted over a proper objection by the adverse party that it is not within the pleadings, was applied in *Page v. Delaware & H. Canal Co.* (1902) 76 App. Div. 160, 78 N. Y. Supp. 454, where evidence was erroneously admitted over the defendant's exception, in an action for personal injuries, to show injuries not alleged or necessarily and immediately resulting from those alleged.

It was held also in *Page v. Delaware & H. Canal Co.* (N. Y.) *supra*, that the appellate court in such a case would not permit an amendment of the complaint to conform to the proof because of the fact that the trial on which the evidence was erroneously admitted was a second trial of the case, and on a former trial similar evidence had been admitted without objection, the contention being overruled that because of this fact the defendant was not surprised upon the trial, and that therefore the appellate court should amend the pleadings to conform to the proof.

In *Smith v. Auburn* (1903) 88 App. Div. 396, 84 N. Y. Supp. 725, the complaint in an action against a city for the overflow of land predicated liability on an abuse of rights in a natural water course flowing across the plaintiff's premises, and the defendant was erroneously held liable on the theory that the water course had been abandoned and a sewer constructed, for the condition and operation of which it was responsible, evidence tending to sustain liability on the latter theory having been introduced over the defendant's objection. It was held that, as there was a substantial variance and the trial court had refused an amendment and erroneously rendered judgment for the plaintiff notwithstanding the variance, the pleadings could not be amended on appeal to conform to the proof, in order to support the judgment.

If evidence affecting the substantial rights of the parties is introduced over the objection of the adverse party that the issue raised is not within the pleadings, the appellate court will not permit an amendment of the pleadings to conform to the proof thus introduced over objection, since the defeated party is not obliged to introduce evidence to controvert evidence not properly within the issues. *Blydenburgh v. Ely* (1914) 161 App. Div. 91, 146 N. Y. Supp. 259.
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It was held in *Epstein v. Cohen* (1907) 56 Misc. 579, 107 N. Y. Supp. 148, that where the case was tried and submitted to the jury on a theory not sanctioned by the pleadings, and proper objections were made on the trial and no amendment of the pleadings requested, the judgment cannot be sustained on appeal, nor the pleadings amended to conform to the proof so as to support the judgment. In this case the complaint charged an ordinary bailment of a horse to the defendant and failure to return the same, and liability was denied on the ground of death of the horse without the fault of the bailee. On the trial evidence was admitted, over objections by the defendant, of a guaranty for the return of the horse, and the case was submitted to the jury on the theory of a breach of contract of guaranty.

A petition will not be treated as amended on appeal to conform to the plaintiff's evidence, where defendant objected to its introduction and the case was not submitted to the jury on the issue made thereby, and the evidence is controverted by evidence for the defendant. *Matthews-Linton Grain Co. v. Shannon* (1915) — Okla. —, 153 Pac. 631.

In *Oldfield v. Angeles Brewing & Malting Co.* (1913) 72 Wash. 168, 129 Pac. 1098, it was said that the rule that the complaint should be treated as amended to conform to the proof had no application where the evidence had been introduced over objection, and the issue tried was in no manner tendered in the complaint; that, leave to amend not having been requested, no rule of construction, however liberal, could permit the trial of an issue not tendered in the complaint over the objection of the defendant; and that to permit such a course would be to ignore the statute, dispense with formal pleadings, and invite endless confusion.

Where proper objection is taken to the insufficiency of a complaint which fails to state facts sufficient to constitute a cause of action, and objection is made and overruled to the introduction of evidence tending to establish the omitted facts, the complaint on appeal from a judgment for the plaintiff will not be deemed amended for the purpose of determining the correctness of the rulings of the lower court, although the complaint might have been amended on the trial, had an amendment been asked. *Tooker v. Arnoux* (1879) 76 N. Y. 397.

³⁴ *Bossert v. Poerschke* (1900) 51 App. Div. 381, 64 N. Y. Supp. 733.

late court, although it was found on the trial that the defendant had waived the certificate, this evidence being received over objection on the ground of the insufficiency of the complaint.

And so in the case of the erroneous overruling of other proper objections or motions taken on the trial, where the correctness of the lower court's decision is before the reviewing court, an amendment of the pleading in fact or in theory will not generally be permitted to cover

up the error so as to affirm the judgment.³⁵ Thus, the New York court has held that "the pleadings cannot be conformed to the proof where there is an objection taken in due time to the sufficiency of the pleading which sets forth the cause of action. It is only where no objection is taken, or where, if at the end of the case evidence has been admitted without objection, the objection is taken, the court makes an order amending the pleadings to conform to

³⁵ In *Schmidt v. Gunther* (1874) 5 Daly (N. Y.) 452, it was said: "We might, if the objection had not been taken below, have, upon appeal, amended the proceeding so as to conform it to the proof. . . . But as a general rule we have refused to do so where the objection was taken upon the trial, and the party, being then advised of the defect, had the opportunity, but neglected to apply to the court, to amend the proceeding."

The rule was laid down in *Askew v. Pollock* (1872) 66 N. C. 49, that where the ground of the appeal is an erroneous ruling of the lower court, an amendment cannot be allowed on an appeal which would defeat the appeal. In this case the lower court had erroneously refused to quash proceedings which were not brought against the board of county commissioners, but improperly brought against certain individuals who were styled commissioners in the petition.

It was held in *Gill v. Aetna Live Stock Ins. Co.* (1894) 82 Hun, 363, 31 N. Y. Supp. 485, that an amendment of a complaint which failed to state facts sufficient to constitute a cause of action would not be allowed on appeal from a judgment for the plaintiff, where the defendant, before the introduction of any evidence, moved that the complaint be dismissed for failure to state a cause of action and the motion was denied and judgment erroneously entered for the plaintiff on the pleadings, an amendment of the complaint not being requested in the trial court. To a similar effect, see *Pope v. Terre Haute Car & Mfg. Co.* (1887) 107 N. Y. 61, 13 N. E. 592.

Where, in an action against a physician for malpractice, the plaintiff failed to plead that he was not guilty of contributory negligence, and did not offer to cure the defect by amendment, it was held that he could not be relieved from the consequences of his neglect on appeal from an erroneous ruling of the lower court denying defendant's motion in arrest of judgment. *Decatur v. Simpson* (1902) 115 Iowa, 348, 88 N. W. 839.

It was held in *Baker v. Winter* (1859) 15 Md. 1, a proceeding to enforce a mechanics' lien, that failure of the lien claim to state the nature and character of the contract on which it was based, as required by statute, could not be cured by amendment on appeal from a judgment for the plaintiff after overruling of a motion

to quash. And it was held also that this conclusion was not affected by the fact that the statute provided that "amendments may at any time hereafter be made in the proceedings, . . . commencing with the claim or lien filed . . . and extending to all subsequent proceedings as may be necessary and proper to effect the objects" of the statute, except that the amount of the claim or lien should not be increased. The court said that notwithstanding the apparently comprehensive language of the statute it could not be supposed that the legislature designed to authorize such an amendment in a court having appellate jurisdiction only, that "where a scire facias issues upon a lien claim which the defendant's counsel believes to be essentially defective on its face, although he may have other valid grounds of defense he may think it is quite safe to rely only upon the apparent defect. Should the decision be against the defendant and he appeals, then, if, in the court above, an amendment of the defect is applied for and granted, and the decision below is affirmed, there can be no opportunity for the defendant ever to avail himself of his other grounds of defense. Whereas, if such amendments are required to be made in the court below, then the defendant will be in a position where he may present his defense by such pleas and issues as may be proper for the decision of the court or of a jury."

So, in *West v. Aberdeen & R. F. R. Co.* (1906) 140 N. C. 620, 53 S. E. 477, 6 Ann. Cas. 360, the supreme court held that it would not exercise its discretionary power of amendment on appeal to destroy an exception duly taken below, the case being one in which an action was brought by the husband alone for damages to land held by entireties, the plaintiff moving on appeal to make his wife a party, and the objection for defect of parties having been made below and overruled.

Where the complaint did not state a cause of action, and the defendant moved for dismissal of the suit at the beginning of the trial, which was denied, and objected to the introduction of evidence tending to supply the deficiencies in the complaint, it was held that the appellate court could not sustain the judgment for the plaintiff by allowing an amendment of the pleadings to conform to the proof. *Thrall v. Cuba* (1903) 88 App. Div. 410, 84 N. Y. Supp. 661.

the proof."³⁶ So, if there is a failure to prove the cause of action alleged, and proper objection on this ground is taken at the trial, and no amendment requested or granted, a recovery upon another cause of action distinct from that alleged cannot be sustained on the ground that the appellate court should allow an amendment of the pleadings to conform to the proof.³⁷ And that the defendant was probably not misled is not an answer on appeal to the objection of the variance.³⁸

Under a count for money had and received, a judgment for damages for breach of a bond cannot be sustained on appeal, where the point of the insufficiency of the pleadings was raised below, by granting leave to the plaintiff to apply to the trial court for an amendment of the bill of exceptions to show that there was no surprise and that the case was fully tried, so as to enable him to save his verdict by an amendment of the pleadings; but the judgment will be reversed. *Field v. Banks* (1900) 177 Mass. 36, 58 N. E. 155.

In an action by a shipper against a railroad company for the value of live stock alleged to have been converted by the defendant to its own use during transportation, where the case was tried and submitted to the jury on the theory of an unlawful conversion by the defendant, and the jury found for the plaintiff, it was held on appeal that, as the evidence conclusively showed that there was no conversion, and the court had erroneously denied a motion by the defendant for a directed verdict, the judgment could not be sustained on the theory that the evidence showed negligence on the part of the defendant, and that the complaint should therefore be amended to conform to the facts proved. *Spokane Grain Co. v. Great Northern Exp. Co.* (1909) 55 Wash. 545, 104 Pac. 794.

A complaint will not be amended on appeal to conform to the facts proved, so as to support a recovery on a ground of liability not suggested by the pleadings, where the defendant has taken proper objection in the lower court. *Springer v. Westcott* (1895) 87 Hun, 190, 33 N. Y. Supp. 805.

An amendment of a complaint will not be allowed on appeal, by changing the cause of action alleged to one resting on different grounds, so as to conform the complaint to the theory of the case erroneously submitted to the jury over the defendant's objection. Thus, in an action for injury sustained in falling upon the sidewalk in front of premises owned by the defendant, a complaint charging that the injuries were caused wholly by the carelessness and negligence of the defendant, and stating a cause of action based only on negligence, cannot be amended on appeal, to support the judgment, to show a cause of action based on nuisance, the case having been L.R.A.1916D.

2. Not affecting merits.

It has been held, however, that if the objection which is erroneously overruled by the trial court is one of form rather than of substance, the party objecting is not justified in relying thereon for a reversal in the appellate court, and under such circumstances, if judgment is rendered against him, the appellate court may deem the formal defect in the pleading cured by amendment and affirm the judgment.³⁹ The New York court in this instance stated in effect

erroneously submitted to the jury on the latter theory. *Fisher v. Rankin* (1889) 55 Hun, 606, 25 Abb. N. C. 191, 7 N. Y. Supp. 837.

In *Scheuer v. Rosenbaum* (1900) 33 Misc. 768, 67 N. Y. Supp. 936, where the complaint alleged a contract for delivery of goods ordered by the defendant from the plaintiff on a specified date, and a tender on that date, but the evidence was insufficient to warrant a finding of performance of the contract as alleged, it was held that an amendment of the pleading could not be made on appeal, to conform to the proof, to support a judgment for the plaintiff, so as to allege a waiver of performance of the contract as to time, in view of the fact that no waiver had been pleaded, and after a motion had been made to dismiss at the close of the evidence, the court had erroneously submitted the case to the jury on the theory of waiver.

Where the defendant has directed his evidence to the issues raised by the pleadings, and the proof establishes his defense, but the trial court erroneously rules against him on a requested direction for a verdict, the judgment for the plaintiff cannot be sustained by permitting an amendment of the complaint in the appellate court to conform to the proof, so as to permit a recovery on a different theory from that on which the action was brought and thereby eliminate this defense. *O'Connell v. George Morrison Co.* (1911) 132 N. Y. Supp. 358.

³⁶ *Rutty v. Consolidated Fruit Jar Co.* (1889) 52 Hun, 492, 6 N. Y. Supp. 23.

³⁷ *Southwick v. First Nat. Bank* (1881) 84 N. Y. 420.

³⁸ (N. Y.) *Ibid.*

So, if the plaintiff has been permitted to prove and recover upon a wholly different cause of action from that alleged, without an amendment being requested or allowed, and against a seasonable objection by the defendant, the pleadings cannot be amended on appeal to conform to the proof, even though the defendant was probably not misled. *Hill v. Weidinger* (1906) 110 App. Div. 683, 97 N. Y. Supp. 473.

³⁹ *Borat v. Griffin* (1832) 9 Wend. (N. Y.) 307, where, in an action of ejectment for dower, the plaintiff claimed in her declaration an undivided third of the premises, and on the trial proved an assign-

that the presumption that the defeated party, relying on his objection at the trial, which was sound, omitted to bring forward any other objection or defense that he might have had, must be confined to cases where the objection taken is one of substance, and that in all other cases the party omits the introduction of his defense on the merits at the peril of an amendment under the statute.

So, in a Pennsylvania case,⁴⁰ under the rule that an amendment may be made or deemed made on appeal where it is in furtherance of justice and the case has been heard and decided on its merits, and no real injury will be done to the party complaining of it, it was held that an amendment of a declaration on a note might be amended on appeal to the supreme court and the judgment for the plaintiff affirmed, where there was a variance between the declaration and the note introduced in evidence as to the date of the note; but that, as the defendant's objection to the introduction of the note in evidence because of the variance was good, an amendment would be allowed only on payment of costs in error.

The supreme court of Wisconsin has laid down the rule that where evidence has been admitted over a general objection, although it was in strictness inadmissible on technical grounds, as that the pleadings did not properly state the facts or contained no statement thereof,

yet if the evidence admitted establishes a good cause of action or defense on the merits, and it appears that justice has been done and that there was no surprise or improper advantage taken, the judgment on appeal will not be disturbed, but an amendment will be directed, or the court will consider the pleadings as having been amended in the lower court.⁴¹ And under the Indiana statute, the mere fact that objection has been made and overruled to the introduction of evidence on the ground of a variance between it and the pleadings does not entitle the party objecting to a reversal of the judgment against him because of the variance, if he makes no claim on the trial that he has been surprised or misled, since the variance under these circumstances, it is provided by the statute, is immaterial, and the trial court might have ordered an amendment of the pleadings, and the appellate court is required in such a case to treat the pleadings as amended.⁴²

Even where a demurrer to the complaint should have been sustained on the ground that it failed to state a cause of action, it has been held that the overruling of the demurrer is not reversible error if the proofs introduced by the defendant supplied the defect in the complaint, since the complaint may be amended after judgment to conform to the proof, or the defect disregarded.⁴³ It has been held also that even if a

ment to her by admeasurers of a certain part, for which a verdict was found in her favor over the objection of the defendant that the plaintiff should be nonsuited because by her own showing she was not entitled to recover the property demanded, it being held that to support the judgment the declaration might be amended in the supreme court so as to claim the land specifically assigned.

⁴⁰ Waite v. Palmer (1875) 78 Pa. 192.

⁴¹ Bowman v. Van Kuren (1871) 29 Wis. 209, 9 Am. Rep. 554.

This rule was in effect applied in Gill v. Rice (1861) 13 Wis. 549, where there was no claim of surprise and the case had been fairly tried on its merits, the supreme court affirming the judgment and directing the case to be remanded that the pleading might be amended to conform to the facts proved, although the defeated party had objected to the admission of the evidence because of the defective pleading.

⁴² N. S. Huey Co. v. Johnston (1905) 164 Ind. 489, 73 N. E. 996. To a similar effect is Louisville & S. I. Traction Co. v. Lloyd (1914) — Ind. App. —, 105 N. E. 519.

In Louisville & S. I. Traction Co. v. Lottich (1914) — Ind. App. —, 106 N. E. 903, an action for damages for personal injuries, where the defendant objected to

the introduction of evidence of certain injuries claimed to have been sustained by the plaintiff, on the ground that they were not alleged in the complaint, and the court overruled the objection and admitted the evidence, the appellate court, in affirming the judgment, said: "Where there is neither objection nor proof that the complaining party is unprepared to meet such evidence, and the objection rests on the ground of variance, or that the averments of the complaint are insufficient to warrant the admission of such evidence, the trial court may order the pleading to be so amended as to admit the proof, and where that has not been done, on appeal, this court will consider the pleading so amended as to conform to the proof, where, as here, such amendment and proof do not relate to a new or different cause of action, or give any new right to a recovery separate and distinct from that already stated in the pleading so amended, or where the amendment does not change the theory of the complaint or pleading amended, but simply permits proof of an additional phase of the injury resulting from the causes originally stated in the complaint."

⁴³ McKinney v. Jones (1882) 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.

complaint is subject to demurrer for failure to state a material fact essential to the recovery, and a demurrer is overruled, a judgment for the plaintiff will not be reversed on appeal where it appears to be right, and the omitted fact was the principal issue on the trial; but the court will treat the complaint as amended to conform to the proof, if necessary to support the judgment.⁴⁴

And in other cases amendments of the pleadings have in some instances been permitted on terms, or regarded as made, in the appellate court, to support the judgment, notwithstanding an erroneous ruling of the trial court against the defeated party, where such a course appeared to be in the interest of substantial justice.⁴⁵

⁴⁴ *Lung v. Crescent Coal Co.* (1906) 44 Wash. 267, 87 Pac. 261. In this case an action was brought on a contract which contained a provision that the work was to be done to the satisfaction of the defendant's superintendent, and the complaint failed to allege that the work was so performed. This, however, was the principal issue tried in the case after the overruling of the defendant's demurrer. The court on appeal held that, assuming that the complaint was deficient and that the court should have sustained the demurrer, under the liberal practice permitted by it, the error was not sufficient to require a reversal, since, had the demurrer been sustained, the plaintiff would have been allowed to amend.

Although the declaration in an action of ejectment failed to state the extent of the plaintiff's interest in the land, as required by a statute, and objection on this ground was taken by demurrer, which was overruled, it was held that after a verdict specifying such interest, the appellate court would not reverse because the objection had become one merely of form, and by the statute all defects in form after judgment might be amended by the court in which the judgment was rendered or by the court on appeal, if substantial justice required the amendment and it was in affirmance of the judgment. *Royston v. Wear* (1859) 3 Head (Tenn.) 7.

Where a special demurrer alleging a misjoinder of parties defendant should have been sustained, the court on appeal from a judgment for the plaintiff in *Charleston & W. C. R. Co. v. McElmurray* (1915) — Ga. App. —, 85 S. E. 804, allowed the plaintiff to amend his petition on payment of costs of the writ of error, by dismissing the suit as to one of the defendants who was not liable and had been improperly joined, and affirmed the judgment.

⁴⁵ Where the defendant in an action for damages for assault objected to evidence of the effect of the assault on the health of the party assaulted, but made no claim of surprise or unpreparedness to meet the proof when offered over his objection, and offered evidence in rebuttal, it was held that the admission of the evidence over objection, if erroneous because the complaint contained no allegation to support it, was not reversible error, and that the complaint might be deemed amended on appeal to support the judgment for the plaintiff. *Winston v. Terrace* (1914) 78 Wash. 146, 138 Pac. 673. L.R.A.1916D.

Where the case had been fully and fairly tried on the merits, and there was no claim of surprise, but the plaintiff's objection that certain evidence was not admissible under the defendants' answer was erroneously overruled and the evidence admitted, it was held on appeal that the defendants should be allowed to amend their answer on such terms as appeared just to the superior court, and that on the filing of this amendment the exceptions should be overruled. *Denham v. Bryant* (1885) 139 Mass. 110, 28 N. E. 691.

And where the defendant directed the trial court's attention to the fact that no action could be maintained upon the declaration, the form of the action being erroneous, but the case was fully and fairly tried on the merits without surprise to the defendant, it was held that the appellate court might overrule exceptions after judgment for the plaintiff, upon amendment of the declaration from trespass *quare clausum* to case, on such terms as might be ordered by the superior court. *Beers v. McGinnis* (1906) 191 Mass. 279, 77 N. E. 768.

Where the declaration in an action for breach of contract alleged an agreement by the plaintiff to sell to the defendant a certain quantity of lead, to be delivered in lots of 100 casks "at different times in the year 1877," and the defendant objected on the trial to the introduction of evidence showing a contract for delivery of 100 casks per month, on the ground of a variance between the proof and the declaration, but the objection was overruled and a verdict found for the plaintiff, it was held on appeal that while there was a variance as to the description of the contract between the declaration and the proof, as the merits of the case had been fully tried, the variance could be cured after verdict by an amendment of the declaration, the plaintiff taking no costs since the trial, and the exceptions being overruled on such an amendment. *Keller v. Webb* (1879) 126 Mass. 393.

In *Bennett v. Baum* (1911) 90 Neb. 320, 133 N. W. 439, where the defendants had objected to the introduction of the evidence, the court, while stating that ordinarily such amendments would not be permitted, held that, as the action was of an equitable nature and it was clear that all the evidence to sustain or defeat the issue had been produced by the respective litigants in the district court, it was competent for the supreme court on appeal, in the interests of justice, to permit amended pleadings to be filed so as to conform to the proof.

e. Amendments to reverse judgment.

While, as appears from the above discussion, the practice is common of allowing amendments of the pleadings on appeal to conform to the proof, in order to support a judgment, the appellate courts have refused to regard such an amendment as made, or permit an amendment to conform to the proof, for the purpose of reversing a judgment otherwise correct.⁴⁶ Thus, in a New

York case⁴⁷ in which a motion was made at general term for an order conforming the complaint to the facts as proved, the court said: "The only effect of the amendment would be to make the judgment erroneous and reversible solely by reason of such amendment, notwithstanding the decisions at the trial and subsequently at the general term were correct and according to law, as the pleadings stood when those decisions

An amendment of the answer nunc pro tunc, so as to make it a general denial, was allowed on terms in the appellate court in *Hoffman v. New York, L. E. & W. R. Co.* (1884) 18 Jones & S. (N. Y.) 403, to support a judgment dismissing the complaint, where the plaintiff failed to establish a cause of action, although the trial court had erroneously denied a motion by the plaintiff at the beginning of the trial for judgment on the pleadings.

Under the Washington statute requiring the supreme court on appeal to hear the case on its merits, disregard all technicalities, and consider amendments as made which could have been made, it was held not prejudicial error for the court to permit the plaintiff in an action for personal injuries, to prove, over the defendant's objection, acts of negligence not specifically set forth in the complaint, where it did not appear that the defendant had been surprised or misled, or had been prevented from fully presenting his case to the jury. *Sjong v. Occidental Fish Co.* (1914) 78 Wash. 4, 138 Pac. 313.

See also *Landers v. Quincy, O. & K. C. R. Co.* (1905) 114 Mo. App. 655, 90 S. W. 117, where the plaintiff voluntarily dismissed a count of his petition under the mistaken impression that the allegations therein were also in the remaining count, and the instructions erroneously related to the allegations of both counts, and it was held that the plaintiff could not on appeal amend his petition so as to restore the dismissed count; but that the case would not be reversed unless the error materially affected the merits.

⁴⁶ *Peterson v. Lincoln County* (1912) 92 Neb. 167, 138 N. W. 122, Ann. Cas. 1913E, 1309; *Star S. S. Co. v. Mitchell* (1865) 1 Abb. Pr. N. S. (N. Y.) 396; *Williams v. Birch* (1860) 6 Bosw. (N. Y.) 674; *McGinniss v. New York* (1876) 6 Daly (N. Y.) 416; *Weems v. Shaughnessy* (1893) 70 Hun, 175, 24 N. Y. Supp. 271; *Howell v. Grand Trunk R. Co.* (1895) 92 Hun, 423, 36 N. Y. Supp. 544; *Volkening v. De Graaf* (1860) 81 N. Y. 268; *Amherst College v. Ritch* (1897) 151 N. Y. 282, 37 L.R.A. 305, 45 N. E. 876; *Justices of Tyrrel v. Simmons* (1855) 48 N. C. (3 Jones, L.) 187, see also *Englis v. Furniss* (1856) 3 Abb. Pr. (N. Y.) 82 (the court stating that there is nothing in the Code warranting any amendment of the pleadings except for the purpose of sustaining the judgment).

In *Howell v. Grand Trunk R. Co.* (1895) L.R.A.1916D.

92 Hun, 423, 36 N. Y. Supp. 544, the court said that "in support of a judgment the court may on review treat pleadings as though they had been amended so as to conform to the facts found, when it can be done without overruling an exception well taken upon the question of variance between the pleadings and proofs. . . .

But that rule does not apply with the same force to create error and for the purpose of reversal of a judgment." In this case it was held that the appellate court would not amend the complaint or regard it as amended, to reverse the judgment, where the evidence did not entitle the plaintiff to recover on the cause of action alleged in the complaint, and the defendant on the trial properly raised the question that the plaintiff must rely upon the cause of action alleged, and no motion for leave to amend the complaint was made.

The rule that an amendment of the pleadings will not be allowed by an appellate court to reverse the judgment was applied in *Justices of Tyrrel v. Simmons* (1855) 48 N. C. (3 Jones, L.) 187, where the action for a breach of contract should have been by a county instead of by justices of the peace in their individual names, and the lower court had rightly ordered a nonsuit.

It was held in *Abbott v. Reedy* (1904) 9 Idaho, 577, 75 Pac. 764, that where the issue as to the existence of a separate and distinct water right and appropriation is not made by the pleadings, and the proofs tend to establish such a right, but no amendment of the pleadings is offered in the trial court, the appellate court will not go beyond the issue so made to modify the judgment.

The North Carolina statute authorizing the supreme court to make amendments in the same manner as they should have been made in the superior or county courts, "at any time, in any thing," was said (dictum) in *Grist v. Hodges* (1831) 14 N. C. (3 Dev. L.) 198, to contemplate such amendments only as were necessary to support the judgment below, and not to contemplate an amendment which would require a new plea or replication, and render the reversal of a judgment on a new trial necessary.

⁴⁷ *Williams v. Birch* (1860) 6 Bosw. (N. Y.) 674.

Attention is called to a class of cases represented by *Balcom v. Woodruff* (1849) 7 Barb. (N. Y.) 13, and *Harrison v. Magoon* (1905) 16 Haw. 485, which this annotation does not purport to cover, dealing

were made. We are not aware of any decisions which hold it a proper exercise of discretion, or that the court has the power to so amend the pleadings, after a trial and a review at the general term of exceptions there taken, as to convert, merely by force of such amendment, a correct decision into an erroneous one, and an irreversible into a reversible judgment."

Although the facts were such as to call only for the application of the rule that an appellate court will in a proper case permit an amendment of the pleadings to conform to the proof for the purpose of sustaining a judgment, but will not grant such permission to defeat a judgment, the majority of the court in a Nebraska case⁴⁸ indicated that there might be circumstances under which a different rule would obtain. Part of the

court were of the opinion that an amendment not for the purpose of sustaining a judgment, but for the purpose of reversing it, not to cure error, but to create it, should never be allowed on appeal; but the rule laid down by the majority was that "the power of the supreme court to permit an amendment of a pleading to conform to the proofs is, as a rule, only exercised to sustain a judgment, and not to reverse it, except where it clearly appears that a refusal to permit the amendment would cause a miscarriage of justice."

III. Applications.

a. In general.

The principles above considered have been applied under various circumstances.⁴⁹ Sometimes, it will be ob-

with the question whether the appellate court may under some circumstances, in order, for instance, to avoid the bar of the statute of limitations, permit an amendment of the pleadings and a new trial, the judgment being otherwise correct. In the latter case on appeal from a judgment for the defendant, the court held that, although a new action would be barred by the statute of limitations, it could not permit the plaintiff to amend the complaint, and have a new trial rendered necessary by the amendment, in the absence of error in the judgment rendered. But in the former case the general rule that a party who has not applied for an amendment until he has been nonsuited cannot at general term obtain an amendment, and a new trial rendered necessary by the amendment, was held to yield to an exception under the peculiar circumstances existing, the statute of limitations having run against the demand, and the objection being technical, and not having been made on a previous trial.

⁴⁸ *Peterson v. Lincoln County* (1912) 92 Neb. 167, 138 N. W. 122, Ann. Cas. 1913E, 1309 (suit to quiet title).

⁴⁹ In an action against a railroad company for damages for delay in the transportation and delivery of goods, a judgment for special damages will not be reversed on the ground that the complaint did not contain sufficient allegations to warrant a recovery for such damages, if the facts proved without objection sustain the judgment, but the complaint on appeal will be considered as amended to conform to the proof. *Chicago, R. I. & P. R. Co. v. King* (1912) 104 Ark. 215, 148 S. W. 1035.

After a general verdict for the plaintiff in an action to recover the amount of a note where the complaint erroneously contained two counts, the two together stating but one cause of action, it was held that on appeal the court would regard as done what ought to have been done and L.R.A.1916D.

treat the two counts as one. *Oley v. Miller* (1901) 74 Conn. 304, 50 Atl. 744.

Where an amendment in matter of form is allowable, the appellate court will give the party entitled to the amendment the benefit of it as though it had been actually made. *McKay v. Friebele* (1858) 8 Fla. 21.

On exception to a judgment refusing a petition for certiorari after a verdict in a justice's court adverse to the plaintiff in a lien foreclosure proceeding, where the case was argued on appeal by both sides upon the theory that one of the contested issues was whether or not demand for payment was made before the institution of the proceeding, it was held that the case would be dealt with as though a counter affidavit was duly filed, denying that such demand was made. *Hutson v. Sutton* (1912) 10 Ga. App. 844, 74 S. E. 447.

In an action on an insurance policy where evidence of forfeiture was introduced without objection, and this question was treated by both parties as an issue on the trial, it was held that the plaintiff on an appeal could not insist that this was not an issue, although forfeiture was not especially pleaded. *American Ins. Co. v. Walston* (1903) 111 Ill. App. 133.

In *Missouri Valley R. Co. v. Caldwell* (1871) 8 Kan. 244, it was held in an action against a carrier to recover the value of property damaged in transportation, that a judgment for the plaintiff would not be reversed on the ground of variance in that the petition alleged that the defendant as a common carrier received the property for transportation and so negligently handled it that it was damaged, and the proof showed an agreement for transportation relieving the carrier from its liability as an insurer, but not relieving it from liability for ordinary negligence. The court stated that, assuming this to be a case of variance, it was such a case as would manifestly have required the court to give leave to amend the petition to conform to

served, the defects or variances are of a formal or technical nature, which it seems might simply have been regarded as of too immaterial or unsubstantial a

the facts proved, since the defendant could not claim to be prejudiced by such an amendment, and the judgment ought therefore not to be disturbed because no formal amendment was made.

Without indicating the particular defects, the court in *Grandstaff v. Brown* (1879) 23 Kan. 176, stated: "If some of the allegations of the petition might be considered as slightly defective, still the petition may now be considered as amended, so as to make its allegations correspond to the facts proved. . . . There can be no question but that the evidence was sufficient as to all facts concerning which it is claimed that the petition was defective. Besides, after all the evidence was introduced, . . . the defendant . . . filed an amended answer, which helped to supply the supposed defective allegations of the petition."

"A defect in the pleadings or proceedings, which ought to have been corrected below by amendment, will be disregarded in the supreme court on appeal, or considered as amended. *Wilkins v. Tourtellott* (1883) 29 Kan. 513 (obiter).

In *Wilcox & W. Organ Co. v. Lasley* (1899) 40 Kan. 521, 20 Pac. 228, the court said: "Conceding the variance between some of the allegations of the answer and the facts established, still, as the case is such a one as would manifestly require the trial court to give leave to amend the answer to conform to the facts proven, and as the plaintiff could not justly claim to be prejudiced by such an amendment, we do not think the judgment ought to be disturbed because no formal amendment has actually been made. We will consider the amendment as having been made."

In *Carnahan v. Lloyd* (1896) 4 Kan. App. 605, 46 Pac. 323, where the trial court sustained a demurrer to the plaintiff's evidence, it was held that the ruling could not be sustained on the ground of a technical variance between the petition and the proof, in that the petition alleged that the note evidencing the debt sued for had been transferred by the original payee to the plaintiff, and the proof showed that there had been several intermediate transfers. It was said: "If an amendment in this respect was necessary, this court, in furtherance of justice, will consider such an amendment made, for it is evident that no one has been misled to his prejudice."

Where an allegation in the reply was treated as an amendment to the petition, and the rights of the parties fairly and fully considered under it, it was held that the appellate court would treat the petition as amended. *Ruffner v. Ridley* (1883) 81 Ky. 165.

In an action involving a settlement of partnership accounts, it was held in *Bolinger v. Hanson* (1883) 5 Ky. L. Rep. 186 (abstract), that, as the pleadings did not state facts showing that a partnership ex-

isted, the parties on appeal should be permitted to reform the pleadings and to present issues which it seemed were supposed to have been made.

Under the Massachusetts statute authorizing the court to allow amendments upon just and reasonable terms at any time before judgment, it has been held on the hearing of exceptions taken by the defendant after a verdict for the plaintiff, that the supreme court may allow amendments of the complaint so as to cure a variance between the complaint and the proof which has not affected the merits of the case or misled or surprised the defendant; but that where objection on the ground of variance is made at the trial, the plaintiff, if he amends, is not entitled to cost accrued after the trial. *Cleaves v. Lord* (1854) 3 Gray (Mass.) 66; *Peck v. Waters* (1870) 104 Mass. 345; *Nichols v. Prince* (1864) 8 Allen (Mass.) 404.

It was held in *Stone v. White* (1857) 8 Gray (Mass.) 589, that the supreme court had power under statute to allow an amendment of a declaration in an action on a contract, by striking out an alleged consideration of which there was no proof, the declaration alleging two good and distinct considerations; but as the trial court had erroneously refused to instruct the jury that the plaintiff was bound to prove the whole consideration as alleged, the plaintiff would be allowed no costs incurred since the trial.

An objection that there was a variance between the declaration and the theory upon which the case was submitted to the jury, made for the first time on appeal, is not available to reverse the judgment, if the variance is one which might have been cured by amendment, since the appellate court will regard the amendment as made to conform to the proof. *Scendar v. Winona Copper Co.* (1912) 169 Mich. 665, 135 N. W. 951.

In *Humphries v. Spafford* (1883) 14 Neb. 488, 16 N. W. 911, the court said: "We have no doubt whatever that an amendment at this stage of the case is in harmony with § 144 of the Code, where the ends of justice seem to demand it." The court was of the opinion that the plaintiff should be permitted in the supreme court to have the petition amended and the case remanded to the district court for further proceedings, where the petition apparently failed to set forth her claim, although she had recovered the amount claimed in the petition.

Where substantial justice has been done and evidence has been introduced without objection showing that the plaintiff is entitled to recover, an objection on appeal that the action should have been to recover on a quantum meruit, and not on contract, is not available to reverse the judgment for the plaintiff, but the appellate court will, if necessary, permit an amendment of the petition to conform to the proof, or remand

nature to require a reversal of the judgment or an amendment of the pleadings.

the cause to the district court for that purpose. *Homan v. Steele* (1886) 18 Neb. 652, 26 N. W. 472.

On error from a judgment for the plaintiff in an action to recover the amount due on a note, the court held that, although it had no power to grant leave to amend the declaration, it could disregard what was clearly a clerical mistake in the name of the party alleged to have made the promise to pay. *Rowell v. Bruce* (1831) 5 N. H. 381.

The power of amendment conferred by the New Jersey practice act of 1874 extends to the court of errors and appeals; and that court may allow an amendment to sustain a judgment where the defect is merely a matter of form, and has not prejudiced in any way the adverse party. *American Popular L. Ins. Co. v. Day* (1876) 39 N. J. L. 89, 23 Am. Rep. 198. The rule was applied in this case to uphold a judgment for the plaintiff in an action on an insurance policy which was under seal, where the form of the action should have been covenant instead of assumpsit.

An amendment of an action from assumpsit to one of covenant, the instrument sued upon being found to be under seal, may be permitted in the appellate court to support the verdict, where the real controversy has been tried and it is not claimed that the defense was in any respect limited or abridged by the error. *Redstrake v. Cumberland Mut. F. Ins. Co.* (1882) 44 N. J. L. 294.

Where, upon the incontrovertible facts, a verdict must necessarily pass in favor of the plaintiff for false representation, although the recovery by him cannot be sustained on the ground of a breach of contract, on which the action is based, a new trial will not be granted, but the pleadings may be amended on appeal to support the recovery. *Westervelt v. Demarest* (1884) 46 N. J. L. 37, 50 Am. Rep. 400.

An objection made for the first time on appeal, that the form of the action should have been trespass instead of trespass on the case, which might have been obviated by amendment in the lower court, may be cured by amendment on appeal, to support the judgment. *Hasbrouck v. Winkler* (1886) 48 N. J. L. 431, 6 Atl. 22.

In *O'Neill v. Leeds* (1899) — N. J. L. —, 43 Atl. 650, where it appears that the real issue between the parties had been tried, and that the trial court had properly directed a verdict for the plaintiff, it was held that an amendment of the declaration might be made in the supreme court on a rule to show cause why a new trial should not be granted, by inserting in the declaration a count which the plaintiff had failed to insert after having obtained permission so to do from the trial court.

Where the complaint alleged a contract for railroad grading to be done by the plaintiff for the defendant, and a refusal by the defendant to permit the plaintiff to L.R.A.1916D.

And in cases of this kind some courts have held simply that the defect or vari-

perform the work, while the proof showed a refusal by the defendant to execute the contemplated written contract embodying the terms agreed upon, it was held that, as the variance did not affect the merits of the case and the defect was merely formal, the complaint could be amended on appeal so as to support a judgment for the plaintiff. *Pratt v. Hudson River R. Co.* (1860) 21 N. Y. 305. The case was decided under § 173 of the Code, providing that the court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading by correcting a mistake in any respect or inserting other allegations material to the case, or, where the amendment does not change substantially the claim or defense, by conforming the pleading to the facts proved. And it was said that before the enactment of the statute a new trial would have been necessary.

Under the above provision of the New York Code, in an action against partners, an amendment of a supplemental answer setting up a claim by one member of a firm was held properly allowed at general term after a judgment for the defendant, so as to assert a claim by all the members of the firm, in accordance with the proof. *Thompson v. Kessel* (1864) 30 N. Y. 383.

In *Fallon v. Lawler* (1886) 102 N. Y. 228, 6 N. E. 392, it was held that a complaint in an action to enforce a mechanics' lien might be considered on appeal as amended to conform to the proof, so as to support the judgment, by alleging a new contract between the parties for the completion of the work, which was shown by evidence introduced without objection.

An objection that the complaint in an action on a contract does not state facts sufficient to constitute a cause of action is not available on appeal to reverse a judgment for the plaintiff, if the evidence introduced without objection as not within the pleadings warranted the judgment, although at the opening of the case the defendant moved to dismiss the complaint as not stating facts sufficient to constitute a cause of action, and the motion was denied with leave to renew, where subsequent motions during the trial to dismiss the complaint did not include its insufficiency as a ground therefor; but the complaint on appeal may be amended to conform to the proof, if necessary to sustain the judgment. *Johnson v. Albany* (1903) 86 App. Div. 567, 83 N. Y. Supp. 1002.

In *Reit v. Meyer* (1914) 160 App. Div. 752, 146 N. Y. Supp. 75, it was held that, for the purpose of determining on appeal the correctness of a judgment dismissing the complaint in an action for malicious prosecution, the allegations of the complaint would be deemed supplemented by the opening statement of counsel for the plaintiff as to the manner in which the prosecution had terminated, it not being

ance should be disregarded on appeal as immaterial. As before stated, cases of this kind are not generally included in the note. But even where the variance

claimed that in so far as the opening statement was broader than the allegations of the complaint in this respect the evidence would not have been admissible.

Where the complaint in an action to recover payments and expenses under a contract for conveyance of property to the plaintiff alleged a refusal by the defendant to convey and an election by the plaintiff to rescind the contract, and evidence was introduced without objection as to its admissibility under the pleadings, showing a partial destruction of the property by fire before the time agreed upon for the conveyance, which would justify the plaintiff in rescinding the contract, it was held that the pleadings on appeal might be amended to conform to the proof, to support a judgment for the plaintiff. *Listman v. Hickey* (1892) 65 Hun, 8, 19 N. Y. Supp. 880.

In an action for an accounting between partners, in affirming a judgment for the plaintiff the court, in *Tannenbaum v. Armeny* (1894) 81 Hun, 581, 31 N. Y. Supp. 55, said: "It is urged that there is a material variance between the agreement alleged in the complaint and the proof adduced by the plaintiff, the plaintiff alleging no time for the copartnership, and the court having found that it was to exist for one year, and that there were some discrepancies in the proof and allegations in regard to localities. These objections are of no avail upon this appeal, because if there is any discrepancy between the allegations of the complaint and the findings and judgment of the court, the pleadings will be amended in order to support the judgment."

A complaint in an action on an insurance policy, showing ownership of the property in the plaintiff when the insurance was effected, may be amended on appeal, if necessary to support the judgment, to conform to the proof showing that the plaintiff continued to be the owner to the time of the trial. *Davis v. Grand Rapids F. Ins. Co.* (1895) 15 Misc. 263, 36 N. Y. Supp. 792, affirmed without opinion in (1898) 157 N. Y. 685, 51 N. E. 1090.

Under § 723 of the New York Code, providing that the court may, upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any pleading or other proceeding by adding or striking out the name of a party, or by correcting a mistake in any respect, or by inserting an allegation material to the case, or, where the amendment does not change substantially the claim or the sense, by conforming the pleading or other proceedings to the facts proved, and that in every stage of the action the court must disregard an error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, it was held in *Van Orden v. Morris* (1897) 19 Misc. 497, 43 N. Y. Supp. 1108, an action for a broker's commission for procuring a loan, that a variance between the allegations of the

complaint and the proof, in that the complaint alleged the procuring by the plaintiff of the proposed lender and the making of the loan, and the proof showed that the loan was never actually made, although the lender was ready to make the loan, would be disregarded on appeal, or the complaint amended to conform to the facts proved, the evidence having been introduced without objection.

In an action against a railroad company for assault of a passenger by a conductor, where the action was brought in the municipal court, which was without jurisdiction because the complaint alleged a cause of action for assault, but the case was tried on the merits without objection and a judgment rendered for the plaintiff, it was held on appeal that, since the complaint could have been framed according to the evidence for damages for breach of contract, and such an action would have been within the jurisdiction of the municipal court, the complaint could be amended accordingly on the appeal and the judgment affirmed. *Rein v. Brooklyn Heights R. Co.* (1905) 47 Misc. 675, 94 N. Y. Supp. 636. The court cited § 166 of the municipal court act, which it stated required the court to allow a pleading to be amended at any time if substantial justice would be promoted thereby, and § 326, extending, it was said, that requirement by implication to the appellate court.

In an action for injury to mortgage security, an omission in the complaint to allege insolvency of the mortgagor may be cured by amendment in the appellate court to sustain a verdict for the plaintiff, where evidence introduced without objection establishes such insolvency, and the course of the trial is the same as if the allegation had been in the complaint. *Rowland v. Sprauls* (1893) 66 Hun, 635, 50 N. Y. S. R. 921, 21 N. Y. Supp. 895.

Where the judgment contained an item of recovery not embraced in the pleadings, but sustained by the proof, and the question had been fairly litigated, it was held that the appellate court might treat the pleadings as amended, or allow an amendment, in such respect as the court at special term would have allowed. *Foote v. Roberts* (1867) 7 Robt. (N. Y.) 17.

It was held in *White v. Reed* (1890) 26 Jones & S. 333, 11 N. Y. Supp. 575, that the appellate court in an action to set aside a sale of partnership property and for an accounting might, if necessary to sustain a judgment for the defendants for the sum found due them from the plaintiff, order the answers to be amended by inserting a prayer for affirmative relief. The judgment was on appeal modified on other points in (1891) 124 N. Y. 468, 26 N. E. 1037.

Where evidence was admitted without objection to disprove the due execution of an assignment by a firm, it was held on appeal from a judgment declaring the assignment void, that, although the plead-

appeared to be of an unsubstantial nature the courts in some cases have

treated the matter from the standpoint of amendment of the pleadings, and

ings were insufficient to warrant the introduction of the evidence over objection, the case would be treated as if the pleadings had been properly amended. *Hooper v. Beecher* (1887) 7 N. Y. S. R. 405.

It was held in *Hudson v. Swan* (1879) 7 Abb. N. C. (N. Y.) 324, that a complaint in an action to recover possession of personal property which alleged ownership in the plaintiff could be amended, on appeal from a judgment for the plaintiff, to conform to the proof, which showed that the plaintiff and the defendant were tenants in common of the chattel, and that the plaintiff had a lien thereon by agreement and was entitled to possession until satisfaction of the lien, the case having been tried without objection that under the pleadings the plaintiff could not recover by proving a right to possession as lienor. The decision, upholding the judgment for the plaintiff, was, however, reversed in (1881) 83 N. Y. 552, on the ground that the question was not simply one of amendment of the pleadings to conform to the proof, but that there had been error in permitting the plaintiff, who throughout the trial claimed as sole owner of the property, and had submitted this issue to the jury, to be allowed, over the defendant's objection, at the same time to submit to the jury, without abandoning the former claim, the inconsistent theory that he was entitled to possession as lienor.

It was held in *Flaherty v. Greenman* (1878) 7 Daly (N. Y.) 481, that, if necessary to support the judgment, the general term would allow an amendment of a complaint in an action against a carrier for loss of a trunk, alleging the loss while in charge of defendants "as common carriers of passengers and baggage," to conform to the proof, showing that the defendants were carriers of freight as well as of passengers, and that the trunk might have been lost while being carried as freight.

It was held in *Hinman v. Booth* (1839) 21 Wend. (N. Y.) 267, that a declaration in an action of ejectment in which the plaintiffs claimed one half of the premises might be amended in the supreme court to support a verdict for the plaintiffs for one fourth of the premises, to which it was found they were entitled. It was said that there was no objection of a variance made at the trial, but if it were otherwise, the court would now allow the plaintiffs to amend on easy terms rather than grant a new trial.

An amendment of the declaration which would have been allowed as of course in the lower court after verdict was held allowable in the supreme court on appeal in *Weed v. Richardson* (1837) 19 N. C. (2 Dev. & B. L.) 535, to support the judgment for the plaintiffs, on payment by them of the costs in both courts.

In *Baxter v. Baxter* (1856) 48 N. C. (3 Jones, L.) 303, the supreme court allowed an amendment of the declaration by extend-

ing the term of the demise in an action of ejectment, so as to support the judgment for the plaintiff, the term stated having expired before the judgment in the lower court was rendered, but the point not having been called to the attention of the court.

Where a petition in an action to foreclose a mechanics' lien was defective in failing to allege that the material was actually used in the building, but no proper objection was taken to the petition to reach this defect, and evidence introduced without objection showed that the material was actually used in the construction of the building, it was held that, to support the judgment, the petition would be considered on appeal as if the proper amendment had been made. *Ryndak v. Seawell* (1904) 13 Okla. 737, 76 Pac. 170.

Where the petition in an action on an insurance policy alleged performance of all conditions precedent to a recovery, which the defendant specifically denied, and on the trial, in the cross-examination of the plaintiff, the defendant brought out evidence without objection sufficient to prove a waiver. It was held that, to support the judgment, the petition would be considered amended to conform to the facts proved, so as to put in issue a waiver of one of the conditions of the policy. *St. Paul F. & M. Ins. Co. v. Griffin* (1912) 33 Okla. 178, 124 Pac. 300.

Where, in an action for commission for a sale of land, the plaintiff declared upon an express contract for payment of 5 per cent commission, and the proof failed as to this allegation, but evidence was introduced without objection proving that 5 per cent was the usual and customary commission, it was held that the pleadings might be regarded as amended to conform to the proof, to justify an instruction submitting to the jury the question of a reasonable commission. *Carson v. Vance* (1913) 35 Okla. 584, 130 Pac. 946.

In *Morris v. McNamee* (1851) 17 Pa. 173, it was held on appeal from a judgment for the plaintiff, that a declaration might be amended in the supreme court by striking out an improper allegation which had not affected the trial of the case, but might, it was feared, prejudice the rights of the defendant in another action. The court said: "Our statute of amendments declares a valuable principle, when it requires that no suit 'shall be set aside for an informality,' and this improper averment is a mere informality, if it has not entered into the merits of the cause before the jury."

In *Chapin v. Cambria Iron Co.* (1891) 145 Pa. 478, 22 Atl. 1041, where the plaintiff's statement of claim in an action of assumpsit was, the court said, perhaps open to criticism for want of clearness, it was held that as there was no demurrer, after a trial on the merits, verdict, and judgment for the plaintiff, no defect would be fatal

held that the pleadings might be amended on appeal to conform to the proof, or

the amendment would be regarded as made. This treatment of the question

unless it was shown to have injuriously affected the trial; but the proper amendment would be considered to have been made.

Where an action was begun by scire facias on the bond of a committee of a lunatic, but was amended before trial by changing the form of the action to assumpsit, and on the trial the affidavit filed with the precipe for scire facias was treated as a statement, it was held on appeal that it would be so regarded for the purpose of sustaining the judgment for the plaintiff. *Com. v. Patterson* (1900) 13 Pa. Super. Ct. 136.

In an action of debt on a bond, where the plaintiff filed a copy of the bond, but no declaration, and the defendant pleaded nil debet, it was held on error, after the overruling of a motion for arrest of judgment for the plaintiff, that the judgment would not be reversed because of failure to file a declaration, the court saying: "The act of 14th March, 1872, § 1, . . . cures the alleged error in this case. It was in the power of the court under that act to order a declaration to be filed. After verdict, and in this court, the practice is to consider an amendment as made." *Jones v. Freyer* (1877) 3 W. N. C. (Pa.) 365.

The Washington statute providing that the supreme court shall consider all amendments as made which could have been made below was applied in *Richardson v. Moore* (1902) 30 Wash. 406, 71 Pac. 18, where the petition in a will contest case did not show upon its face any interest of the petitioner to entitle her to maintain the action, but evidence was introduced of the petitioner's interest under an earlier will of the decedent without objection as to the insufficiency of the pleadings.

The statute was also applied in *Gallamore v. Olympia* (1904) 34 Wash. 379, 75 Pac. 978, where, in an action for personal injuries, evidence was admitted without objection of pain and suffering, and the jury were instructed that they might take these elements into consideration in determining the amount of the verdict, the complaint making no special demand for such damages.

In *Paine v. Smith* (1873) 32 Wis. 335, where, over objection, proof of items not contained in the copy of the bill of particulars served was admitted, and the defendant made no affidavit of surprise, and no facts appeared which would have made an amendment of the bill improper, it was held that, on appeal from a judgment for the plaintiff, the admission of the proof would be regarded as equivalent to a direction by the lower court that the bill be amended.

In *Giffert v. West* (1875) 37 Wis. 115, it was held where the plaintiff, whose proof showed an implied warranty, under a complaint on an express warranty, offered to amend his complaint, the evidence having been introduced without objection, and the L.R.A.1916D.

lower court held the amendment unnecessary, that on appeal from a judgment in his favor the amendment would be considered as having been made, the court stating, however, that it might have been better practice to have amended the complaint.

The Wisconsin statute provides that the court may, in furtherance of justice before or after judgment, amend any pleading when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. It was held in *Murray v. Scribner* (1889) 74 Wis. 602, 43 N. W. 549, that under this statute, in an action for damages for the flowage of the plaintiff's land by means of a dam, while an answer alleging that neither the dam nor the water therein had been changed in height within the preceding ten years did not state a good defense under the ten years' statute of limitations, as it did not allege the length of time the defendant had flowed the land of the plaintiff by means of the dam, yet where evidence on the latter issue was admitted without objection, the answer would be regarded on appeal as amended to conform to the proof.

Where a defense was not pleaded, but was established by evidence admitted without objection, the court in *Deuster v. Mittag* (1900) 105 Wis. 459, 81 N. W. 643, stated that the pleadings might have been amended on the trial or after judgment, or the court of its own motion might have amended the pleadings, so as to have made the same conform to the facts proved; and that the rule on appeal, in such a case, where there was no doubt but that the judgment was supported by the evidence, is to consider what ought or might have been done as done, or to make the proper amendment in the appellate court. The practice, it was said, was general in the appellate courts, but in this instance was enjoined on the court by statutes to the effect that the court should disregard every error or defect in the pleadings or proceedings which did not affect the substantial rights of the adverse party, and that no judgment should be reversed by reason of such error or defect.

Where, in an action for damages, it was not objected that the question of estoppel by former recovery could not properly be shown under the general issue raised by the pleadings, and the court and counsel treated the question as properly within the issues, and tried the case upon that theory, it was held on appeal that the court would, for the purpose of determining the correctness of the ruling of the lower court, deem the answer amended to include that issue. *Nelson v. Campbell* (1906) 128 Wis. 82, 107 N. W. 297.

Where the county court held that the answer sufficiently alleged a denial of the plaintiff's claim, and the circuit court apparently so treated it, or deemed the plead-

from the standpoint of amendments, even where the variance or defects were

of a technical nature, appears to be due, in part at least, to statutory provisions

ing amended to conform to the evidence, it was held, on appeal from a judgment for the plaintiff, that, for the purpose of determining the sufficiency of the evidence, the answer would be deemed amended, if necessary, to conform to the proof. *Donner v. Genz* (1906) 129 Wis. 245, 107 N. W. 1039, 109 N. W. 71.

In *Latton v. McCarty* (1910) 142 Wis. 190, 125 N. W. 430, the complaint in an action to foreclose a mortgage, which alleged all the facts necessary to the right of a vendor's lien and a foreclosure thereof, was deemed amended on appeal to conform to proof showing a right on the part of the plaintiff to enforce the lien for a part of the debt remaining unpaid, the mortgage having been discharged.

It was held in *State ex rel. Conway v. District Board* (Wis.) ante, 399, that if such power did not exist independently of statute, the supreme court on appeal had at least statutory power to permit an amendment of the pleadings, if the plaintiffs had a cause of action, but had mistaken their remedy, counsel on both sides requesting the decision of the case on the merits.

In *Columbus Constr. Co. v. Crane Co.* (1900) 40 C. C. A. 35, 98 Fed. 946, the rule was laid down that there should be a liberal practice in allowing amendments of notices of a counterclaim accompanying a plea of the general issue, and on appeal any amendment should be regarded as having been made, which if allowed would have caused no injustice to the adverse party.

The appellate court, in furtherance of justice, also, permitted an amendment of the pleadings to conform to the proof, or regarded the amendment as made, to support the judgment,

—where, in an action against a railroad company for injury to an employee by the explosion of a locomotive boiler, the complaint, critically considered, charged only an injury to a servant by a coservant, but the defendant made no objection to the sufficiency of the complaint, and permitted the plaintiff to introduce evidence showing that the boiler was defective, and that the company was chargeable with notice thereof. *St. Louis, I. M. & S. R. Co. v. Harper* (1884) 44 Ark. 524;

—where, in an action against a railroad company for death of an employee, the complaint alleged the killing by the negligent operation of the defendant's cars, and evidence was introduced without objection that the company had failed to provide a safe place for the decedent to work, and failed to exercise proper care to protect him against the carelessness of his fellow servants. *St. Louis, A. & T. R. Co. v. Triplett* (1891) 54 Ark. 289, 11 L.R.A. 773, 15 S. W. 831, 16 S. W. 266;

—where evidence was admitted without objection to support a ground of negligence not charged in the complaint, in an action L.R.A.1918D.

to recover for wrongful death, and the cause was tried on that issue. *Pulaski Gas-light Co. v. McClintock* (1911) 97 Ark. 576, 32 L.R.A.(N.S.) 825, 134 S. W. 1189, 1199;

—where the petition in a suit to enforce a mechanics' lien failed to allege that the architect's certificate, upon the granting of which final payment was due, had been demanded or wrongfully refused; that the case was tried on the theory that there had been a refusal to grant the certificate, one of the principal issues being whether the refusal was justifiable. *Louisville Trust Co. v. Louisville Fire Proof Constr. Co.* (1900) 22 Ky. L. Rep. 433, 57 S. W. 506;

—where the complaint raised the issue of an express contract, but the case was submitted to the jury on the theory of an implied contract, which evidence introduced without objection tended to show. *Nyhart v. Pennington* (1897) 20 Mont. 158, 50 Pac. 413;

—where the cross petition for foreclosure of a mortgage lacked the required averment that no proceedings had been had at law. *Ure v. Bunn* (1902) 3 Neb. (Unof.) 61, 90 N. W. 904;

—where, in an action for trespass, the only plea on the record was the general issue, but the defense of justification was fully considered by counsel. *United States Pipe Line Co. v. Delaware, L. & W. R. Co.* (1898) 62 N. J. L. 254, 42 L.R.A. 572, 41 Atl. 759;

—where, on appeal from a judgment for the defendant in an action on a note, it appeared that the defense that the note was without consideration was inartificially pleaded, but the intent was clear, and the trial court could have permitted an amendment if the pleading was defective. *Douai v. Lutjens* (1897) 21 App. Div. 254, 47 N. Y. Supp. 659, affirmed without opinion in (1900) 165 N. Y. 622, 59 N. E. 1121;

—where the complaint in an action for services for a sale of defendant's land alleged a contract to pay a certain sum per acre, which amounted to much more than the sum found due on the trial as the value of the plaintiff's services. *Rifenburgh v. Ham* (1899) 44 App. Div. 620, 60 N. Y. Supp. 124;

—where the point was not raised at the trial in an action for death through the fall of a freight elevator, that proof of defective construction of the elevator was not within the pleading. *Grifhahn v. Kreizer* (1901) 62 App. Div. 413, 70 N. Y. Supp. 973, affirmed without opinion in (1902) 171 N. Y. 661, 64 N. E. 1121;

—where the complaint in an action for an injury by a railroad company alleged that the plaintiff, when the injury occurred, was rightly driving upon a public highway on which the defendant's tracks were laid, and the evidence showed that defendant owned the fee of the premises where the injury occurred, but that they constituted practically a part of the system of public

on the question of immaterial variances. For example, the Indiana statute provides that no variance between the allegations in a pleading and the proof is to be deemed material unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits; that whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled, and thereupon the court may order the pleading to be amended on such terms as may be just; that where the variance is not material, as above provided, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs; and that no judgment shall be stayed or reversed by the supreme court for any defect in form, variance, or imperfections in the record, pleadings, etc., which by law might be amended by the court below, but such defect shall be deemed to be amended in the supreme court.

The specific instances which are given

highways which the public were tacitly invited to use, *Liekens v. Staten Island Midland R. Co.* (1901) 64 App. Div. 327, 72 N. Y. Supp. 162;

—where evidence was introduced without objection in an action for breach of contract, tending to show a breach not alleged in the complaint, *Nelson v. Hatch* (1902) 70 App. Div. 206, 75 N. Y. Supp. 389, affirmed without opinion in (1903) 174 N. Y. 546, 67 N. E. 1085;

—where, in an action on an insurance policy, the petition alleged certain specific acts of waiver of proof of loss, and uncontradicted evidence was introduced, without objection, sufficient to prove a waiver on other grounds, *St. Paul F. & M. Ins. Co. v. Mittendorf* (1909) 24 Okla. 651, 28 L.R.A. (N.S.) 651, 104 Pac. 354;

—where a proposed amendment to make the pleadings conform to the proof was erroneously denied by the lower court on the ground that it was unnecessary, and the rights of the parties were determined on the facts as established by the evidence, *National Bank v. Feeney* (1897) 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874;

—where the question tried without objection in an action for commission for a sale of property was whether the plaintiff was instrumental in enabling the defendants to sell the property, and not whether the plaintiff had sold the property for the defendants at their request, as alleged, the latter allegation being entirely unproved, *Flanders v. Cottrell* (1875) 36 Wis. 564;

—where a small item incidental to the plaintiff's claim not covered by the complaint was included in the verdict, *Weston v. McMillan* (1877) 42 Wis. 567; L.R.A.1916D.

are intended merely as illustrative of the practice in the different jurisdictions. Other illustrations will be found in connection with the statement of the general rules in other parts of the annotation. While in some cases the defects in the pleadings, or the variances between the pleadings and the proof, are of a formal or technical nature, the rule permitting amendments on appeal in furtherance of justice, or regarding them as made, to support the judgment, has been applied to cure defects and omissions of the most substantial character. The cases cited, which have been grouped according to jurisdictions because of the diversity of circumstances under which the amendments were allowed or deemed made, include instances of amendment of the pleadings to conform to the proof, so as to allege special damages or items of damages not originally alleged, but proved without objection, defects in the form of the action, omissions in the complaint of allegations necessary to the maintenance of the action or to the support of the judgment rendered. Thus, where the complaint

—where the answer and evidence introduced without objection tended to remove the ambiguity in the translation of certain defamatory words alleged in the complaint in an action for slander, *Hocks v. Sprangers* (1901) 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113. It was held that the lower court had properly overruled an objection to further evidence on the alleged cause of action where the evidence introduced without objection tended to remove the ambiguity;

—where the issues presented by the pleadings in an action for commission for a sale of land were whether the defendant's agents made an agreement with the plaintiff as alleged in the complaint, and whether they had authority to bind the defendant by such an agreement, and the court found that the agents made the agreement, but were induced to do so by false representations on the part of the plaintiff, and rendered judgment for the defendant without passing on the question of the agent's authority, *Rule v. J. L. Gates Land Co.* (1904) 121 Wis. 544, 99 N. W. 333;

—where neither the complaint nor the claim for liens in an action to foreclose a mechanics' lien set forth the contract as required by statute, but the contract on which the plaintiff recovered was proved by evidence introduced on the trial without objection, *Sherry v. Madler* (1910) 123 Wis. 621, 101 N. W. 1095;

—where, in an action to cancel a tax deed as a cloud on title, evidence was introduced without objection of irregularities in the tax sale which were not alleged in the complaint, *Coe v. Rockman* (1906) 126 Wis. 515, 106 N. W. 290.

was subject to demurrer for failure to state a cause of action, but no demurrer was taken, and the proof or pleadings of the adverse party supplied the omission, the appellate courts, to sustain the judgment, have allowed an amendment of the pleadings to conform to the proof, or deemed the amendment made.⁵⁰ In holding that an objection made for the first time on appeal, that the complaint in an action for divorce was defective in failing to allege residence of the plaintiff necessary to confer jurisdiction, was not available to reverse the decree for the plaintiff, the supreme court of New Mexico⁵¹ laid down the rule that "where a material, even jurisdictional, fact omitted from the complaint is as fully litigated, without objection, as if said fact had been put in issue by the pleadings, it is the duty of the trial court, and of this court on appeal, to amend the complaint in aid of the judgment so as to allege the omitted fact." And in Arkansas, in an action against a railroad company for injuries caused by a train at a crossing, it was held that, although there was no charge of negligence in the complaint, the judgment for the plaintiff would not be reversed, but the complaint would be deemed amended

on appeal to conform to the proof, where the defendant did not demur, but answered, denying negligence, and evidence to show negligence was introduced without objection.⁵² It has been held also, for example, in an action for damages for negligence, that where no questions are raised as to the admissibility of the evidence, the appellate court, to support a judgment for the plaintiff, will treat the complaint as being as broad as the evidence, and hold any act of negligence proved to be within the issues.⁵³ And that on appeal from a judgment in a case submitted to the court on an agreed statement of facts, the complaint will be deemed amended to conform to the facts stipulated.⁵⁴ So, a variance between a copy of an instrument filed with a pleading as an exhibit, forming the basis of the action, and the averments of the pleading, which can be avoided by an amendment in the lower court, will be disregarded or deemed cured by an amendment on appeal, to support the judgment.⁵⁵ And a complaint in an action by an employee against a railroad company for damages has been regarded as amended to conform to the proof, so as to allege the interstate character of the business in

⁵⁰ See *ELLINGHOUSE v. AJAX LIVE STOCK Co.* ante, 836.

Where no objection was taken to the complaint until the trial, although it was subject to demurrer on the ground of failure to state facts sufficient to constitute a cause of action, but the answer contained the necessary averments omitted in the complaint, it was held that, as the lower court should have permitted or ordered an amendment of the complaint, the omissions would be regarded on appeal as supplied, in order to support the judgment. *Bate v. Graham* (1854) 11 N. Y. 237.

Where the appellate court was bound by a statute to consider all amendments as made which could have been made below, a complaint in an action on a contract, although subject to demurrer because failing to show the relation of the defendant to the company with whom the contract was alleged to have been made, was held sufficient when questioned for the first time on appeal from a judgment for the plaintiff, in *Tolmie v. Dean* (1858) 1 Wash. Terr. 46.

In an action for personal injuries sustained by an employee, it was held in the *Southern Cotton Oil Co. v. Campbell* (1913) 106 Ark. 379, 153 S. W. 256, that, it being assumed that the complaint failed to state a cause of action, the judgment for the plaintiff would not be reversed where there was no demurrer to the complaint, and testimony introduced without objection was sufficient to warrant the finding of the jury and the judgment, the complaint on appeal L.R.A.1916D.

being deemed amended to conform to the proof.

That a judgment will not be reversed because of a defect in the complaint rendering it subject to a demurrer, where the defendant does not demur, but answers, and on the trial objects to the introduction of evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action, if evidence admitted over the objection supplies the omitted allegations in the complaint, see *Johnson v. Burnside* (1892) 3 S. D. 230, 52 N. W. 1057, and *Sherwood v. Sioux Falls* (1898) 10 S. D. 405, 73 N. W. 913. The defects were regarded, however, as cured, the court not directing attention especially to the question of amendments on the appeal.

In *Excelsior Electric Co. v. Sweet* (1894) 57 N. J. L. 224, 30 Atl. 553, the court said that the power of amendment by the court on error extended to matters of substance as well as form, citing *Price v. New Jersey R. & Transp. Co.* (1865) 31 N. J. L. 229.

⁵¹ *Canavan v. Canavan* (1913) 17 N. M. 503, 131 Pac. 493, Ann. Cas. 1915B, 1064. See note 4, supra.

⁵² *St. Louis, I. M. & S. R. Co. v. Bird* (1913) 106 Ark. 177, 153 S. W. 104.

⁵³ *Domke v. Gunning* (1911) 62 Wash. 629, 114 Pac. 436.

⁵⁴ *O'Connor v. Enos* (1909) 56 Wash. 448, 105 Pac. 1039.

⁵⁵ *Ind.—Ebersole v. Redding* (1864) 22 Ind. 232; *Estep v. Estep* (1864) 23 Ind. 114; *Carver v. Carver* (1876) 53 Ind. 241; *Single-*

which the defendant was engaged, and thereby sustain the recovery as under the Federal statute.⁵⁶

Under the Indiana statute above set out, the rule that if the defect in the pleadings is of a nature that it might have been cured by amendment in the lower court, and no substantial prejudice has resulted to the defeated party

by the failure to amend, the appellate court, after a trial and determination of the case on the merits, will deem the amendment made, to support the judgment, has been applied in various instances.⁵⁷

The New Mexico statute expressly requires that all omissions, imperfections, defects, and variances not against the

ton v. O'Brien (1890) 125 Ind. 151, 25 N. E. 154; Stockwell v. Whitehead (1911) 47 Ind. App. 423, 94 N. E. 736. See also McDonald v. Yeager (1873) 42 Ind. 388; Brownlee v. Kenneipp (1872) 41 Ind. 216, among possibly other cases in this state which reach a similar result, but do not treat the question especially from the standpoint of amendments of the pleadings.

A defective allegation in an action on a note may be amended on appeal, if necessary to support the judgment, to conform to the particulars of demand annexed to the declaration. Finney v. Pennsylvania Iron Works Co. (1903) 22 App. D. C. 476.

⁵⁶ In an action by an employee against a railroad company for personal injury, where there was no allegation in the complaint that the plaintiff was engaged in interstate commerce at the time of the injury, or that his cause of action was controlled by the Federal statute, but the answer alleged the interstate character of the commerce in which the plaintiff was engaged, and the court submitted the case to the jury on the theory that the action was governed by the Federal statute, which the undisputed evidence showed, it was held on appeal from a judgment for the plaintiff that the complaint would be deemed amended to conform to the proof. Callahan v. Chicago & N. W. R. Co. (1915) 161 Wis. 288, 144 N. W. 449.

And where, in an action by an employee against a railroad company for injury sustained in a train collision, the evidence for the defendant showed that it was liable, if at all, under the Federal employers' liability act rather than under the state statute, it was held that since the declaration otherwise set out facts which would impose a liability under the Federal act, the court on error from a judgment for the plaintiff would deem the declaration amended so as to allege that the defendant was engaged in interstate commerce, and affirm the judgment. Fernette v. Pere Marquette R. Co. (1913) 175 Mich. 653, 141 N. W. 1084, 144 N. W. 834.

⁵⁷ See, for example, the following:

Where, in an action for injuries by a train at a railroad crossing, both parties introduced evidence without objection respecting the failure of the defendant to give the statutory signals, and the case was tried on the theory that the question whether or not the whistle was sounded as required by statute was in issue, it was held that on appeal the complaint, although not containing a sufficient averment that the statute was violated in this regard, L.R.A.1916D.

would be deemed amended so as to raise the issue, and that therefore the giving of an instruction on this point was not reversible error. Chicago, I. & L. R. Co. v. Gorman (1914) — Ind. App. —, 106 N. E. 897.

An amendment of a paragraph of a complaint which the lower court allowed as to another paragraph, and might have allowed as to both, will be deemed on appeal to extend to both if necessary to support the judgment. Laramore v. Blumenthal (1915) — Ind. App. —, 108 N. E. 602.

In Case v. Wandel (1861) 16 Ind. 459, a suit to foreclose a mortgage given to secure the payment of certain notes, the court dismissed the point that the notes should not have been admitted in evidence with a statement that if there was any variance between the notes as described in the complaint and as offered in evidence, the complaint might have been amended on the trial, and would be deemed amended on the appeal.

In Harris v. Osenback (1869) 13 Ind. 445, it was held that failure to subscribe the complaint was such a merely formal or clerical error as the plaintiff should have been permitted to amend, and would be considered as amended on appeal, to support the judgment for plaintiff.

And where an amended complaint was not signed by the plaintiff or his attorney, but no motion was made to strike it from the files, it was held that, the original complaint having been signed, the defect would be regarded on appeal as cured by amendment, to support the judgment. Lowry v. Dutton (1867) 28 Ind. 473.

See also Fankboner v. Fankboner (1863) 20 Ind. 62, where it was held that the defendant had waived a defect in that the replication was not signed by the plaintiff or his attorney, by failure to make an objection thereto until after the trial.

Where a complaint might have been amended in the lower court so as to state the amount demanded, it was held on appeal from a judgment for the plaintiff that it would be deemed amended. Gimbel v. Stolte (1877) 59 Ind. 446.

An immaterial variance between the complaint and the proof which might have been amended in the lower court after the evidence had all been produced will be deemed cured by an amendment on appeal, to support the judgment. Taylor v. Calvert (1893) 138 Ind. 67, 37 N. E. 531.

Amendments of the pleadings were also deemed made on appeal under the Indiana statute, to support the judgment,

right and justice of the matter, and not altering the issues between the parties on the trial, shall be supplied and amended by the court where the judgment is given, or by the court into which the cause is removed by writ of error or appeal;⁵⁸ and in Maine a statute provided that no declaration or other proceeding in a court of justice shall be reversed "for any kind of circumstantial errors or mistakes, when the person and case may be rightly understood by the court, nor for want of form only, and which by law might have been amended."⁵⁹ In Massachusetts it has been held that if issues not presented by the

pleadings were fully tried, the appellate court may remand the cause with permission to amend the pleadings to meet the issues without awarding a new trial.⁶⁰

While this note does not purport to cover the question generally whether and under what circumstances an actual amendment is necessary to entitle a party who applies for and obtains permission to amend a pleading, to the benefit of the proposed amendment, attention is called to a class of cases which, although in reality involving this question, from another view point, may be regarded as coming within the scope of

—where, in an action for damages for personal injuries, the jury were permitted to take into consideration loss of time as an element of damages, it being assumed on appeal that the complaint failed to allege special damages on this account, *Pittsburgh, C. C. & St. L. R. Co. v. Warrum* (1907) 42 Ind. App. 179, 82 N. E. 934, petition for rehearing denied in (1907) 42 Ind. App. 196, 84 N. E. 356;

—where there was a variance between the allegations of the complaint in an action on a life insurance policy, and the date of payment of the premium notes, not affecting the substance of the matters in issue, *Phoenix Mut. L. Ins. Co. v. Hinealey* (1881) 75 Ind. 1;

—where, in an action on a note containing a provision for payment of all necessary expenses of collection, the judgment by default included a sum as expenses of collection, although the complaint did not allege the amount of such expenses, *Barnes v. Bell* (1872) 39 Ind. 328;

—where the form of the complaint in a civil action was defective in that it omitted the venue, *Fisher v. State* (1878) 65 Ind. 51;

—where it was alleged in an action on a lost note, that the note was transferred and delivered to the plaintiff without indorsement in writing, the evidence showing that the note had been assigned in writing to the plaintiff, *Cleveland v. Roberts* (1860) 14 Ind. 511;

—where the complaint in an action by husband and wife failed to show in what respect the wife was the meritorious cause of action, *Langdon v. Bullock* (1756) 8 Ind. 341;

—where, in an action by a guardian against the administrator and surety of a deceased guardian, to recover money belonging to the wards, for which the former guardian had failed to account, on appeal from a judgment for the plaintiff an amendment was regarded as having been made in the lower court by adding to the complaint an allegation that the money had not been paid by the defendants after the death of the former guardian, *Buchanan v. State* (1886) 106 Ind. 251, 6 N. E. 614;

—where the complaint in an action for

failure to carry out a trust of real estate devised to the defendant for the support of the plaintiff did not aver with certainty the death of the testatrix, but alleged that the will was admitted to probate, and that the defendant took possession and accepted the devise, *Watt v. Pittman* (1890) 125 Ind. 168, 25 N. E. 191;

—where the complaint in an action by an employee for damages for being thrown from a train by reason of the negligent construction of the roadbed did not allege at what point the defect existed, *Evansville & R. R. Co. v. Maddux* (1893) 134 Ind. 571, 33 N. E. 345, 34 N. E. 511;

—where, in an action to foreclose a mortgage, the indebtedness was treated in the complaint as evidenced by notes, and the proof showed that prior to the beginning of the action it had been reduced to judgment, *Kohli v. Hall* (1895) 141 Ind. 411, 40 N. E. 1060;

—where, in an action for medical services rendered a pauper, the complaint alleged that the township physician refused to perform the operation on the ground of inexperience, lack of proper instruments, etc., and the evidence showed that he was not qualified to perform the operation by reason of want of skill and experience, but did not show that he had been requested so to do by the trustee before the plaintiff was employed, *Perry County v. Lomax* (1892) 5 Ind. App. 567, 32 N. E. 800;

—where the complaint in an action on a lost note varied from the evidence in the description of the note, *Clark v. Trueblood* (1896) 16 Ind. App. 98, 44 N. E. 679;

—where the complaint in an action to recover an insurance premium alleged a written promise by the defendant to pay the premium, and the evidence showed facts from which an implied promise would arise, *Robinson v. Wolf* (1901) 27 Ind. App. 683, 62 N. E. 74.

⁵⁸ *Canavan v. Canavan* (1913) 17 N. M. 503, 131 Pac. 493, Ann. Cas. 1915B, 1064.

⁵⁹ *Page v. Danforth* (1865) 53 Me. 174; *Lord v. Pierce* (1861) 33 Me. 350.

⁶⁰ *Lemay v. Springfield Street R. Co.* (1911) 210 Mass. 63, 37 L.R.A. (N.S.) 43, 96 N. E. 79, and other cases in the state cited in note 12, supra.

the present annotation. No attempt has been made to treat the general question indicated, and the cases in this connection are merely illustrative. Thus, there are a number of cases holding that where an amendment of the pleadings has been requested and properly allowed by the trial court, and the trial thereafter has proceeded as though the pleadings were amended, the court on appeal

will deem the amendment made, or permit an amendment to support the judgment, although it does not appear that an actual amendment was made,⁶¹ or, as held in some cases, where the trial court upon request properly orders an amendment of the pleadings, the amendment will be regarded on appeal as having been made, whether the verbal changes have actually been made or not.⁶² In an

⁶¹ *Aylesworth v. Brown* (1869) 31 Ind. 270 (amendment as to parties); *Bank of Lindsborg v. Ober* (1884) 31 Kan. 599, 3 Pac. 324; *Merrill v. St. Louis* (1884) 83 Mo. 244, 53 Am. Rep. 576; *Oberg v. St. Joseph Town Mut. F. Ins. Co.* (1899) 82 Mo. App. 64; *Maders v. Whallon* (1893) 74 Hun, 372, 26 N. Y. Supp. 614; *Ufford v. Lucas* (1822) 9 N. C. (2 Hawks) 214; *Holland v. Crow* (1851) 34 N. C. (12 Ired. L.) 275; *Bullen v. Arkansas Valley & W. R. Co.* (1908) 20 Okla. 819, 95 Pac. 476. See also *Johnston v. Farmers' F. Ins. Co.* (1895) 106 Mich. 96, 64 N. W. 5 (regarding as immaterial the failure actually to make an amendment which the trial court had permitted and treated as made).

Although there was no formal order of the trial court granting the defendant's request to amend his answer to conform to the proof, if the case was decided below as if the amendment had been made, it will be regarded as made on appeal for the purpose of determining the correctness of the decision. *Lazelle v. Miller* (1902) 40 Or. 549, 67 Pac. 307.

Where an order is made in the lower court for an amendment of the petition, but the amendment is not actually made, and all the subsequent proceedings are based on the assumption that it has been made, the appellate court will consider the order as standing for the amendment. *Holland v. Crow* (1851) 34 N. C. (12 Ired. L.) 275.

Where permission was granted in the trial court to a minor plaintiff to amend his bill of particulars to show that he prosecuted the action by his adult brother as next friend, and both parties to the action and the court in the subsequent proceedings on the trial treated such amendment as made, and no objection was made in the trial court by the defendant that the amendment had not actually been made, it was held that the amendment would be treated by the supreme court on appeal as having been made, in order to support the judgment. *Hill v. Reed* (1909) 23 Okla. 616, 103 Pac. 855.

And in *Excelsior Mfg. Co. v. Boyle* (1891) 46 Kan. 202, 26 Pac. 408, it was held that the lower court had properly granted permission for the answer of a judgment creditor to be amended to correspond with the facts, to show a levy of execution, and that on appeal, where it appeared that the trial had proceeded in the lower court as if the answer had been amended, the amendment would be deemed made, although in L.R.A.1916D.

fact there had been no actual amendment. The rule was quoted that "a defect in the pleadings or proceedings which ought to have been corrected below by amendment will be disregarded here or considered as amended."

Where the parties agreed that the case might be amended so as to change the form of action from trespass to assumpsit, but no formal amendment was made of the statement of claim, it was held that, although the defendant objected on the trial to the introduction of evidence on the ground that the statement was for damages for a tort and the evidence offered was on a contract, the appellate court, after a trial on the merits, would permit an amendment of the statement to conform to the facts proved. *Grim v. Rohn* (1913) 53 Pa. Super. Ct. 59.

And in *Hines v. Wilmington & W. R. Co.* (1886) 95 N. C. 434, 59 Am. Rep. 250, where it was agreed by the parties that the court should make an order allowing the plaintiffs to amend their complaint so as to conform to the facts agreed upon, but the amendment was not in fact made, it was held that the amendment might be made in the supreme court on appeal "for the sake of uniformity and order," and the judgment affirmed.

In *Hoffman v. Keeton* (1901) 132 Cal. 195, 64 Pac. 264, the court regarded it as immaterial on appeal from a judgment for the plaintiff foreclosing a mortgage, that the real name of one of the defendants had not been substituted in the complaint for a fictitious name, the lower court having directed the substitution. The court stated, in affirming the judgment, that it would have been more regular to have made the amendment in the complaint, but that the error, if any, was merely clerical, and might be corrected by the lower court at any time.

⁶² *Underwood v. Bishop* (1878) 67 Mo. 374; *Young v. Glascock* (1883) 79 Mo. 574; *Shantz v. Shriner* (1912) 167 Mo. App. 635, 150 S. W. 727; *Locke v. Bowman* (1912) 168 Mo. App. 121, 151 S. W. 468.

In *Ballou v. Hill* (1871) 23 Mich. 60, it was said that where an amendment is ordered or permitted, and is of such a nature that the record furnishes upon its face all the data for applying it, the amendment may be considered as made, though no verbal changes are made in the pleadings, which are then to be read as if they had been actually amended.

Oregon case,⁶³ it was said on this point: "The principle obtains that permission to amend a pleading does not usually amount to an alteration of a party's formal allegations of his cause of action or the averments of his defense, but where an order has been made granting leave to amend, and the subsequent proceedings in the cause are predicated on the supposition that the change has actually been made, it is proper to treat the order as equivalent to amendment itself. . . . The exception to the general rule is particularly applicable to a party who has been permitted to amend his pleadings so as to allow the introduction of important evidence, although he has not in fact made any alteration or additional averments to his original formal allegations."

Some courts have, however, refused on appeal to regard the amendment as made where it was merely authorized and treated as made in the lower court.⁶⁴ As before stated, the general question whether an authorized amendment must be actually made in order to be effective is beyond the scope of the note.

⁶³ *Casner v. Hoskins* (1912) 64 Or. 254, 128 Pac. 841. The rule was applied in this instance by treating an amendment of the reply as made in order to support the judgment. Petition for rehearing was denied in (1913) 64 Or. 282, 130 Pac. 55.

⁶⁴ In an action for damages for the construction and operation of a railroad, where the declaration alleged that the track was laid on a street adjacent to and within 10 feet of the plaintiff's property, and the evidence showed that it was not laid on the street, but on land on the opposite side thereof 50 feet or more from the property of the plaintiff, and the plaintiff did not amend the declaration after obtaining leave of court to do so, it was held that on appeal, although the words of the amendment and the place where it should be placed in the pleadings were shown by the bill of exceptions, the amendment could not be regarded as actually made. *Wisconsin C. R. Co. v. Wiczorek* (1894) 151 Ill. 579, 38 N. E. 678. It was said: "While the appellate court saw fit to treat the leave given as amounting in effect to an amendment actually made, we do not feel at liberty to so regard it. If a party, for any reason, disregards the leave given by the trial court to amend his pleading so as to make it correspond with the proofs, and omits, without justifiable cause, the due incorporation into the record of the amendment pursuant to the leave, this court, *sua sponte*, has no authority to carry out the leave, make his amendment for him, interpolate it into the record, and thereby save him harmless of error assigned. After obtaining such leave, the plaintiff was in no wise obliged to exercise the privilege given and L.R.A.1916D.

The question of amendment of the pleadings in the appellate court as to parties does not in many instances appear simply as one of amendment of the pleadings to conform to the proof. In some cases, however, an amendment as to the parties does appear to be of this nature. Without attempting to exhaust the cases on the question of amendment as to parties in the appellate courts, attention is called to a number of such cases as illustrative of the application in this regard of the general rules above indicated. The appellate courts have liberally allowed amendments of the pleadings as to parties to conform to the facts in the case, or deemed such amendments made, to support the judgment, where no substantial rights of the adverse party would be prejudiced thereby. Thus, in many instances, formal defects in the pleadings in the names of the parties, or the capacity in which they sue or are sued, not affecting the merits of the case, have been cured by amendment on appeal, to support the judgment, or the amendment has been deemed made.⁶⁵ And in other cases, it

make the amendment, and until the amendment was in fact made, the declaration in all respects remained the same, as though no leave to amend it had been given."

III.—*Wisconsin C. R. Co. v. Wiczorek*, supra, was followed, among possibly other cases, in *Ogden v. Lake View* (1887) 121 Ill. 422, 13 N. E. 159; *Sinsheimer v. Skinner Mfg. Co.* (1896) 165 Ill. 116, 46 N. E. 262; *West Chicago Street R. Co. v. McCallum* (1897) 169 Ill. 240, 48 N. E. 424; *Landt v. McCullough* (1903) 206 Ill. 214, 69 N. E. 107; *Condon v. Schoenfeld* (1905) 214 Ill. 226, 73 N. E. 333, and *Christensen v. Oscar Daniels Co.* (1908) 142 Ill. App. 129.

See also *Lohrfrink v. Still* (1857) 10 Md. 530, holding it error for the lower court to treat leave to amend the declaration by inserting an essential allegation as an actual amendment.

⁶⁵ *Drummond v. Wright* (1840) 1 Ala. 205 (names of parties plaintiff and defendant having been transposed in declaration); *Alabama Conference v. Price* (1868) 42 Ala. 39; *Alameda County v. Crocker* (1899) 125 Cal. 101, 57 Pac. 766 (amendment of complaint in condemnation proceedings by substituting real for fictitious names of defendants); *Sinton v. The R. R. Roberts* (1874) 46 Ind. 476 (clerical mistake in name of defendant); *Waltz v. Waltz* (1882) 84 Ind. 403 (where an action by certain heirs was brought in their maiden names, although in the evidence each was mentioned by a different surname); *Bullard v. Nantucket Bank* (1809) 5 Mass. 99; *Berrien County v. Bunbury* (1881) 45 Mich. 79, 7 N. W. 704; *Smith v. Pinney* (1891) 86 Mich. 484, 49 N. W. 305; *Stanton v. Estey*

has been held that where the cause has been tried on the merits between the real parties in interest, the appellate court, to support the judgment, may

Mfg. Co. (1892) 90 Mich. 12, 51 N. W. 101; *Enright v. Standard Life & Acci. Ins. Co.* (1892) 91 Mich. 238, 51 N. W. 928; *Stofflet v. Strome* (1894) 101 Mich. 197, 59 N. W. 411; *Newton v. Detroit United R. Co.* (1910) 163 Mich. 373, 128 N. W. 184; *Witte Iron Works v. Holmes* (1895) 62 Mo. App. 372 (amendment allowed by inserting real instead of fictitious name of plaintiff); *Holt v. United Security L. Ins. & T. Co.* (1909) 78 N. J. L. 585, 21 L.R.A. (N.S.) 691, 72 Atl. 301; *Daly v. Haight* (1914) 163 App. Div. 234, 148 N. Y. Supp. 42; *Risley v. Wightman* (1878) 13 Hun (N. Y.) 163; *Bartholomew v. Lyon* (1874) 67 Barb. (N. Y.) 86; *Howard v. United States* (1900) 42 C. C. A. 169, 102 Fed. 77, affirmed in (1901) 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543; *Chicago G. W. R. Co. v. First M. E. Church* (1900) 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85.

In *Reeder v. Sayre* (1877) 70 N. Y. 180, 26 Am. Rep. 567, it was held that to support a judgment an amendment might be allowed on appeal to conform the pleadings to the proof, so that the complaint would allege the character of the plaintiffs as surviving partners instead of tenants in common.

In *Clifford v. Prudential Ins. Co.* (1894) 161 Pa. 257, 28 Atl. 1085, where an action was begun by an administrator on a life insurance policy of the intestate, and the evidence showed that the insured had transferred the policy to the plaintiff as collateral security for a debt, and it was contended that the action should have been by the plaintiff as assignee, and not as administrator, it was held that the supreme court might allow an amendment, if necessary to support the judgment for the plaintiff, by permitting the plaintiff to describe himself as the assignee of the decedent.

In *Shaffer v. Eichert* (1890) 132 Pa. 285, 19 Atl. 81, where an action of ejectment was brought by the plaintiffs in right of their wives, it was held that an amendment might be made on appeal by adding the names of the wives as coplaintiffs, to support the judgment for the plaintiffs, the court stating that this was a mistake amendable below; that it was a technical matter, and that the allowance of the amendment in the supreme court could do the defendant no injury.

In an action for mesne profits brought by husband and wife in right of the wife, where the case had been tried on the merits as brought by the husband for the use of the wife, it was held that the error, being formal, might be cured by amendment in the supreme court, to support the judgment for the plaintiff. *Thornton v. Britton* (1891) 144 Pa. 126, 22 Atl. 1048.

In an action on the bond of a county treasurer, where the action was brought in the name of the board of supervisors instead of in the name of the county, but L.R.A.1916D.

a trial on the merits resulted in a judgment for the plaintiff, it was held on appeal that the error, if any, in the name of the party plaintiff, might be corrected by amendment in the appellate court. *Johr v. St. Clair County* (1878) 38 Mich. 532.

And in *Shryock v. Basehore* (1876) 82 Pa. 159, followed in *Shryock v. McClure* (1876) 82 Pa. 165, it was held that a declaration in assumpsit by the assignees of a bank against its debtor on a note, which should have been brought by the assignees in the name of the bank, could be amended, or would be regarded as amended, in the supreme court.

Where a county attorney as such sued for the benefit of the territory of Oklahoma to prevent the misapplication of county funds by its officers, without naming the territory as the plaintiff, and the cause of action, the issues made by the pleadings, the scope of the evidence, and the issue and relief given were clearly what they would have been if the suit had been in name, as it was in fact, by the territory on the relation of the county attorney, and no substantial right of the adverse party was affected to his prejudice, it was held that the petition would be treated on appeal as if amended as to the name of the proper party plaintiff. *Dolezal v. Bostick* (1914) 41 Okla. 743, 139 Pac. 964.

An amendment of parties plaintiff was allowed on appeal in *Com. v. Mahon* (1900) 12 Pa. Super. Ct. 616, to support the judgment for the plaintiff in an action against a property owner for taxes which the sureties on the tax collector's bonds had been compelled to pay, the action having been irregularly brought in the name of the commonwealth for the use of the sureties, instead of by the sureties in their own names, and the case having been tried on the merits between the real parties. The court said that the irregularity, though formal, would have been fatal at common law, but it was amendable under the legislation in that state.

And in *Robertson v. Reed* (1864) 47 Pa. 115, where, on a settlement between the defendant and a third party, the latter directed a balance due him to be placed to the credit of the plaintiff, which was done, it was held on appeal from a judgment for the plaintiff that, although the plaintiff could not maintain the action in his own name to recover the amount so placed to his credit, a judgment in his favor would not be reversed for this reason alone, the court saying that, as the defect would undoubtedly be amendable under the statute authorizing a change or alteration in the names of parties, it would treat the amendment as made, or permit the amendment to be made on the appeal.

In *Bailey v. Lankford* (1916) — Okla. —, 154 Pac. 672, it was held that while a suit to collect a note which the bank commissioner had taken over as part of the

allow an amendment by adding or striking out the names of parties or regard the amendment as made.⁶⁶

In Indiana it has been held that a judgment in the name of a wrong relator cannot be affirmed on the ground that the complaint might have been amended

by inserting the name of a new relator, as this would be in effect a total change of one of the parties to the action,⁶⁷ and an amendment making such a change of parties, it was held, should not be deemed made on appeal to support the judgment.⁶⁸

assets of an insolvent bank should be brought in the name of the state on the relation of the bank commissioner, yet where a suit was brought in the name of the bank commissioner, and no one could be prejudiced thereby, the petition would be treated on appeal as amended, to support the judgment.

A complaint for damages in a firm name which fails to state the individual names of the partners is sufficient on appeal, after a judgment by default, where the names of the individual partners are set out in the summons, the complaint being considered as amended. *Galliard v. Dubose* (1859) 34 Ala. 207.

⁶⁶ As observed above, these cases are merely illustrative.

First Presby. Church v. Lafayette (1873) 42 Ind. 115; *Elmore v. McCrary* (1881) 80 Ind. 544 (where an administrator brought an action and then resigned, and his successor prosecuted the suit to judgment without having the complaint amended by the insertion of his own name); *Fay v. Welch* (1906) 190 Mass. 374, 77 N. E. 44; *Cruchon v. Brown* (1874) 57 Mo. 38 (action by husband to use of wife amended in appellate court by striking out name of wife); *State, Wills, Prosecutor, v. Shinn* (1880) 42 N. J. L. 138 (recognizing power of amendment on appeal in a proper case); *State, Jones, Prosecutor, v. Cook* (1892) 54 N. J. L. 513, 24 Atl. 758; *Vunk v. Raritan River R. Co.* (1894) 56 N. J. L. 395, 28 Atl. 593; *Neher v. Armijo* (1898) 9 N. M. 325, 54 Pac. 236; *Ackley v. Tarbox* (1864) 31 N. Y. 564; *Benyak v. Lehigh Coal & Nav. Co.* (1915) 166 App. Div. 829, 152 N. Y. Supp. 329; *Barnhill v. Haigh* (1866) 53 Pa. 165; *Weaver v. Iselin* (1894) 161 Pa. 386, 29 Atl. 49; *Natalie Anthracite Coal Co. v. Ryon* (1898) 188 Pa. 138, 41 Atl. 462; *Thomas v. Dickerson* (1913) 52 Pa. Super. Ct. 507; *Fritz v. Heyl* (1880) 93 Pa. 77; *Quison v. Salud* (1908) 12 Philippine, 109; *Alonso v. Villamor* (1910) 16 Philippine, 315.

In *Baldwin v. Bornheimer* (1874) 48 Cal. 433, the court, on appeal by the defendants, affirmed the judgment and directed the lower court to amend the complaint by the insertion therein of the name of one for whom counsel had entered an appearance and for whom an answer on file had been considered, by stipulation, as an answer.

The substitution in the complaint of the name of the successors of an administrator against whom an action is pending being a mere formal amendment which might have been made at any time in the lower court on the motion of either party, on appeal from a judgment for the plaintiff, the L.R.A.1916D.

complaint will be regarded as having been amended, where the case has been tried on its merits without objection on this ground. *Niblack v. Goodman* (1879) 67 Ind. 174.

In *Fenton v. Lord* (1880) 128 Mass. 466, where an action on a contract brought by the wife alone should have been brought by the husband and wife, and the defendant's objection in the lower court that the plaintiff should not have sued alone was overruled and judgment rendered for the plaintiff, it was held on appeal that, as the merits of the case had been fully tried, the plaintiff should be allowed to amend by joining her husband in the suit, but was not entitled to costs incurred after the trial.

In *Heidelberg School Dist. v. Horst* (1869) 62 Pa. 301, it was held that an amendment might be made on appeal, if necessary to support the judgment, by substituting the name of the township for that of the school district as the party defendant in an action of debt, where the evidence showed that the township was liable and the lower court had treated the case as amended.

In an action against a landlord and a constable for unlawful distraint, where the evidence showed that the plaintiff's claim was exclusively against the constable, and the case had been submitted to the jury as against him alone, it was held that the appellate court, to sustain a judgment for the plaintiff, might allow an amendment by striking out the name of the landlord. *Oliver v. Wheeler* (1904) 26 Pa. Super. Ct. 5.

In *Grant v. Rogers* (1886) 94 N. C. 755, it was held that a complaint in an action on an administrator's bond brought by the administrator *de bonis non* might be amended in the supreme court so as to make the action in the name of the state, to support a judgment for the plaintiff, the objection having been first made on appeal. And to a similar effect is *Wilson v. Pearson* (1889) 102 N. C. 290, 9 S. E. 707.

In *Vunk v. Raritan River R. Co.* (1894) 56 N. J. L. 395, 28 Atl. 593, it was held that the appellate court would not refuse to exercise its power of amendment in the interest of justice, by adding the name of the plaintiff's wife as a coplaintiff, because of the fact that the suit of the wife had become barred by the statute of limitations.

⁶⁷ See, for instance, *Snyder v. State* (1863) 21 Ind. 77, and *Taggart v. State* (1874) 49 Ind. 42, followed on similar facts in 49 Ind. 45; 49 Ind. 46; 49 Ind. 47; 49 Ind. 49; 49 Ind. 50.

⁶⁸ In an action by an alleged firm for

b. Recovery exceeding amount claimed.

The doctrine that an amendment of the pleadings to conform to the proof introduced without objection may be allowed or deemed made on appeal to support the judgment, where this course appears clearly to be in furtherance of justice, has been applied in a number of cases in which the amount found due on

the trial exceeded the amount claimed, and verdict and judgment were rendered for the larger sum, the pleading on appeal being amended or regarded as amended to conform to the proof in respect to the amount claimed, in order to sustain the judgment.⁶⁸ In Maryland it was expressly declared by statute that "no judgment shall be reversed in the court of appeals because the verdict was

the price of goods sold to the defendants, where the evidence showed that the plaintiffs were the sole stockholders in the corporation which had sold the goods, it was held that a judgment for the plaintiffs could not be sustained on the theory that the complaint would be deemed amended by substituting the corporation as the party plaintiff. *Cutshaw v. Fargo* (1893) 8 Ind. App. 691, 34 N. E. 376, 36 N. E. 650. The court quoted with approval the rule laid down in *Snyder v. State* (1863) 21 Ind. 77, that such a radical amendment as a total change of one of the parties to the action could not on appeal be deemed made.

See also *Utica Twp. v. Miller* (Ind.) under note 30, supra.

⁶⁸ *Carpenter v. Sheldon* (1864) 22 Ind. 259 (excess being interest which had accrued owing to a delay in the trial); *Webb v. Thompson* (1864) 23 Ind. 428 (the court declining to follow *Roberts v. Muir* (1856) 7 Ind. 544, where a judgment was reversed because for a sum exceeding that claimed in the complaint, it being said that in the latter case the provisions of the Code had apparently been overlooked); *Raymond v. Williams* (1865) 24 Ind. 416 (excess being interest); *Numbers v. Bowser* (1868) 29 Ind. 491 (same); *Robinson v. Jamison* (1870) 33 Ind. 122 (same); *White v. Stellwagon* (1876) 54 Ind. 186; *Singer Mfg. Co. v. Doney* (1878) 65 Ind. 65; *McKinney v. State* (1888) 117 Ind. 26, 19 N. E. 613; *Kettuc-e-mun-guah v. McClure* (1890) 122 Ind. 541, 7 L.R.A. 782, 23 N. E. 1080; *Decatur v. Grand Rapids & I. R. Co.* (1897) 146 Ind. 577, 45 N. E. 793; *Louisville, N. A. & C. R. Co. v. Steele* (1892) 6 Ind. App. 183, 33 N. E. 236; *Bozarth v. McGillicuddy* (1897) 19 Ind. App. 36, 47 N. E. 397, 48 N. E. 1042 (complaint as to amount claimed for attorneys' fees being deemed amended); *Helms v. Appleton* (1908) 43 Ind. App. 483, 85 N. E. 733, petition for rehearing denied in (1908) 43 Ind. App. 490, 86 N. E. 1023 (same); *Noyes Carriage Co. v. Robbins* (1903) 31 Ind. App. 300, 67 N. E. 959 (excess being interest); *Southern R. Co. v. Bulleit* (1907) 40 Ind. App. 457, 82 N. E. 474; *Wyandotte & K. C. Gas Co. v. Schliefer* (1879) 22 Kan. 468 (excess being interest); *Earle v. Gorham Mfg. Co.* (1896) 2 App. Div. 460, 37 N. Y. Supp. 1037; *Schultz v. 3d Ave. R. Co.* (1882) 89 N. Y. 242; *Coates v. Donnell* (1881) 16 Jones & S. (N. Y.) 48; *Withers v. New Jersey S. B. Co.* (1867) 48 Barb. (N. Y.) 455; *Grist v. Hodges* (1831) 14 N. C. (3 Dev. L.) 198 (decided under statute of 1824, authorizing amendment L.R.A.1916D.

ments on appeal in the same manner as they could have been made in the superior or county courts); *Clayton v. Liverman* (1846) 29 N. C. (7 Ired. L.) 92; *Miller v. Weeks* (1853) 22 Pa. 89 (excess being interest); *Trego v. Lewis* (1868) 58 Pa. 463 (same).

As sustaining the above rule, see also *Kettry v. Thumma* (1893) 9 Ind. App. 498, 36 N. E. 919, where, although the verdict was for less than the total amount claimed, it was contended that on a particular item of the claim the plaintiff could not recover more than he had alleged as due on that item.

If the verdict and judgment are for a larger sum than that claimed in the complaint, application should be made to the court below for their correction; and in the absence of such an application, as presumably the complaint would have been amended in the lower court if objection to the amount of recovery had been made, the amendment will be treated as made, on appeal. *McKinney v. State* (1888) 117 Ind. 26, 19 N. E. 613.

In *Boddie v. Ely* (1830) 3 Stew. (Ala.) 182, the court said that whatever was amendable in the lower court would be considered in the supreme court as amended, and affirmed a judgment for the plaintiff in an action of debt, for damages in addition to the amount of the debt, where in the writ damages were claimed in a sum exceeding those allowed, but in the declaration the amount of damages claimed was left blank.

In an action for damages for personal injuries where the amount claimed in the complaint for medical services was \$50, and a verdict was found on this item for \$300, it was held on appeal that, as an answer had been filed and the complaint might have been amended in the lower court in respect to the amount claimed, and the evidence warranted the amount recovered, the complaint would be deemed amended on appeal. *Southern R. Co. v. Bulleit* (1907) 40 Ind. App. 457, 82 N. E. 474.

In *Schultz v. 3d Ave. R. Co.* (1882) 89 N. Y. 242, it was held that a judgment for damages for personal injuries would not be reversed because for a larger amount than that claimed in the complaint, but since the defect in the complaint did not affect the trial in any way, or mislead or prejudice the defendant, the complaint might be amended on appeal or the defect disregarded. The action was for damages for personal injury.

Where the note sued on provided for at-

rendered for a larger sum than the amount laid in the declaration."⁷⁰

In a Pennsylvania case⁷¹ involving this question, it was said: "The legislature has led the way to the making of amendments of the most vital character, altering names Christian and surname, changing and adding names of parties, and even striking out parties where too many have been included. It becomes us to keep pace with legislative reform instead of lagging in its rear. Nothing is a matter of more form than the sum inserted at the conclusion of a narr. as the damages suffered. We therefore will allow the amendment which would have been of course in the court below."

A distinction not apparently generally recognized in other jurisdictions has been made on this point in a New Jersey case.⁷² Thus, it was held that a declaration in an action for personal injuries should not be considered amended on appeal so as to claim an increased sum found due by the verdict, the court distinguishing between cases where the action was for unliquidated damages and the only indication of the amount claimed was in the *ad damnum* clause, and cases where the declaration alleged a cause of action on proof of which a

larger sum must be due than was alleged. It was said: "If a declaration should allege a cause of action on proof of which a larger sum must be due than is stated in the *ad damnum* clause, then that clause might be deemed formal, and, after verdict, might be amended to conform with the real claim set forth in the pleadings. But where, as in this case, the declaration is for unliquidated damages, and contains no indication of the extent of the plaintiff's claim outside of the *ad damnum* clause, we must presume that the defendant regulated his conduct at the trial with reference to a claim for the damages there stated, and might have modified his course of defense had a claim for a larger sum been in controversy."

Another distinction has been observed in a few cases, namely, that while the declaration may be amended by the writ, if the former fails to allege any damages or an insufficient amount, the amendment cannot be allowed or deemed made on appeal, to support the judgment, if both the writ and declaration are defective in this regard. Thus, in an early Virginia case⁷³ it was held that while a declaration in an action for slander which failed to allege any sum

torneys' fees, while the note set out in the findings provided for 5 per cent attorneys' fees, it was held that the complaint might be deemed amended on appeal to conform to the proof, and the judgment for the plaintiff affirmed, on the excess over 5 per cent allowed in the judgment as attorneys' fees being remitted. *Cummings v. Girton* (1897) 19 Ind. App. 248, 49 N. E. 360.

⁷⁰ *Marburg v. Marburg* (1866) 26 Md. 8, 90 Am. Dec. 84.

⁷¹ *Trego v. Lewis* (1868) 58 Pa. 463.

In *Miller v. Weeks* (1853) 22 Pa. 89, in holding that a declaration in an action on a note might be amended in the supreme court by increasing the damages asked to an amount to comprehend the verdict, the excess being interest which had accrued pending the action, the court said: "In *Spackman v. Byers* (1820) 6 Serg. & R. (Pa.) 385, where the damages found by the verdict exceeded the amount laid in the declaration, this court held that the record might be taken back for amendment, and that the judgment, so amended, should be affirmed. But when there is matter on the record to amend by, and there is no possibility of surprise or injustice to the defendant, why send the record down for purpose of amendment, instead of allowing it to be done here? A copy of the note on which the action was brought has been on the record ever since the institution of the suit, and nothing but the persevering resistance of the defendant has caused the interest to swell beyond the sum originally L.R.A.1916D.

demanded. It is taking no undue advantage of him, therefore; it is indeed only administering the justice of the cause, to permit the plaintiff to amend here where we have the full record. This has been often allowed in regard to other amendments of equal or more materiality."

⁷² *Excelsior Electric Co. v. Sweet* (1895) 59 N. J. L. 441, 31 Atl. 721.

⁷³ *Hook v. Turnbull* (1806) 6 Call (Va.) 85.

On the authority of *Hook v. Turnbull* (Va.) supra, it was held in *Palmer v. Mill* (1809) 3 Hen. & M. (Va.) 502, that where the damages were laid in the writ at a sum exceeding the amount of the verdict and judgment, but in the declaration at a sum less than that in the verdict and judgment, the writ might be referred to for the purpose of amending the declaration, and the judgment affirmed.

And, on the same authority, it was held in *Craghill v. Page* (1808) 2 Hen. & M. (Va.) 446, that if no amount of damages is alleged in the declaration, the omission is not fatal on appeal, but the declaration may be amended by the writ and the omission cured to support the judgment.

An omission in the declaration to state the damages sustained was held cured by the statute of jeofails in *Stephens v. White* (1796) 2 Wash. (Va.) 203, and not to be a ground for arresting the judgment for the plaintiff.

In *Robinett v. Morris* (1807) *Hardin* (Ky.) 93, it was held that the writ might

as damages would be considered amended on appeal from a judgment for the plaintiff to correspond with the amount of damages claimed in the writ, yet, if the judgment was for a larger sum than that claimed in the writ, a new trial would be necessary.

It has also been held, it appears, that if a judgment in an intermediate court on appeal is for a sum exceeding the jurisdiction of the court in which the action was begun, it may not be sustained by an amendment of the pleadings increasing the amount claimed to conform to the proof.⁷⁴

The Indiana Code provides that the

be looked to for amendment of the declaration where the amount of the damages was omitted in the latter, but that the judgment must be reversed if for a larger amount than stated in the writ. This case was followed in *Walker v. Kendall* (1808) *Hardin* (Ky.) 404, holding in effect that the defect in the declaration in that it failed to state the damages was cured after verdict by the statement of damages in the writ.

Where, in an action for assault, the damages were laid in the writ at \$1,000 and in the declaration at \$100, and the verdict and judgment were for \$120, it was held on appeal that the defect in the declaration was cured by the statute of jeofails. *Kennedy v. Woods* (1814) 3 *Bibb* (Ky.) 322.

⁷⁴ Where the plaintiff in an action commenced before a justice of the peace could recover only \$100 damages, and the circuit court on appeal rendered judgment for a sum exceeding \$100, it was held that the judgment of the circuit court could not be upheld by disregarding the error or permitting an amendment of the pleadings on the appeal by increasing the ad damnum. *Dunbar v. Bittle* (1859) 7 *Wis.* 143.

⁷⁵ *Webb v. Thompson* (1864) 23 *Ind.* 428.

⁷⁶ *May v. State Bank* (1857) 9 *Ind.* 233. Regarding this decision it was said in *Webb v. Thompson* (*Ind.*) *supra*, that the reasoning, while broad enough to cover a case where the judgment was not by default, apparently proceeded upon the ground that the Code made no change in the subject, and overlooked the provision which plainly required reversal where the judgment for a larger sum than was claimed was by default.

As to default judgment in other cases, see note 18, *supra*.

⁷⁷ It was said in *Corning v. Corning* (1851) 6 *N. Y.* 97, that before the adoption of the Code it was well settled that the supreme court had no power to allow an amendment of the declaration after verdict by increasing the amount of damages claimed to correspond with the amount of the verdict, except on the condition that the plaintiff relinquished the verdict, paid the defendant's costs of the trial, and consented to a new trial, and that the Code L.R.A.1916D.

relief granted to the plaintiff, if there is no answer, cannot exceed the relief demanded in his complaint.⁷⁵ Accordingly, if a judgment by default is for a sum exceeding that claimed in the complaint, the complaint cannot be deemed amended on appeal, in order to support the judgment.⁷⁶

Although the appellate courts have generally permitted an amendment of the pleadings as to the amount claimed, or regarded the amendment as made, in order to support a recovery of a larger amount shown to be justly due, a few decisions appear to be to the contrary,⁷⁷ and in other cases, without apparently

had not changed its rule. As sustaining the rule the court cited *Dox v. Dey* (1829) 3 *Wend.* (N. Y.) 356, and *Curtiss v. Lawrence* (1819) 17 *Johns.* (N. Y.) 112.

In *Hawk v. Anderson* (1827) 9 *N. J. L.* 319, and *Lake v. Merrill* (1829) 10 *N. J. L.* 288, judgments were reversed because for a larger amount than that claimed in the demand filed in the justice's court; but these decisions, it was said in *Excelsior Electric Co. v. Sweet* (1894) 57 *N. J. L.* 224, 30 *Atl.* 553, were before the amendment act in that state.

In *Hooper v. Wells, F. & Co.* (1864) 27 *Cal.* 11, 85 *Am. Dec.* 211, the supreme court of California stated that there was no provision in the practice act in that state authorizing it to allow an amendment to the complaint to make it correspond with the verdict, and held that where the verdict and judgment exceeded the amount of damages claimed in the complaint, while the lower court before a judgment might have permitted an amendment so as to make the complaint correspond with the verdict, on appeal the judgment must be reversed unless the respondent consent to remit the excess.

So, in *Perkins v. West Coast Lumber Co.* (1893) 4 *Cal. Unrep.* 155, 33 *Pac.* 1118, the court denied the contention of the plaintiff that he should be permitted to amend his complaint so that it would sustain a judgment for a larger amount than that claimed.

In *Morgan v. Hall & L. Co.* (1912) — *R. L.* —, 83 *Atl.* 401, an application was made in the supreme court on the hearing of a rule on the defendant to show cause why judgment should not be entered for the plaintiffs after their exceptions were sustained, for leave to increase the ad damnum, since the aggregate amount of the interest and judgment would exceed the sum for which the action had originally been brought. But the court denied the motion, stating that it did not think it should be entertained at this late stage of the proceeding when the case was before it upon exceptions, and remitted the case to the superior court with direction to enter judgment for the sum due the plaintiffs and so much of the interest as, added to the

considering the matter of a possible amendment of the pleadings on appeal, the courts have reversed judgments on

the ground that the recovery was for a substantially larger amount than was claimed in the pleading.⁷⁸

principal sum, should not exceed the amount of the ad damnum.

In *Tomlinson v. Blacksmith* (1797) 7 T. R. (Eng.) 132, the court was of the opinion that it would be going too far, without sending the cause down for a new trial, to allow an amendment of the declaration as to the amount of damages claimed from £100 to £1,000, the amount alleged being

evidently a mistake not discovered until after the jury had found a verdict for more than £600, it being said that the defendant might have gone to trial relying that no more than £100 damages could be recovered against him.

⁷⁸ See, for example, *Lester v. Barnett* (1857) 33 Miss. 584. R. E. H.

ARIZONA SUPREME COURT.

IKE DIAMOND, Doing Business as N. Diamond & Brother, Appt.,

v.

WILLIAM JACQUITH.

(14 Ariz. 119, 125 Pac. 712.)

Statute of frauds — contract for services — extension beyond year.

1. A contract made in June to render personal services for a year from the following October is within the statute making voidable all contracts not to be performed within one year from the making thereof.

For other cases, see Contracts, I. c, 3, in Dig. 1-52 N. S.

Same — performance — rendition of services.

2. Complete performance of a contract to render services during a period extending beyond a year from the making of the contract, for a monthly salary and a percentage on gross sales, and the payment of the stipulated salary, take the case out of the statute of frauds, so as to warrant recovery of the commission.

For other cases, see Contracts, I. c, 6, in Dig. 1-52 N. S.

(June 29, 1912.)

APPEAL by defendant from a judgment of the District Court for Maricopa County in plaintiff's favor, and from an order overruling a motion for new trial, in an action brought to recover an amount alleged to be due under a contract for services. Affirmed.

Statement by Ross, J.

The appellee brought his action in the lower court against the appellant, alleging that, in the month of June, 1909, he entered into a verbal contract with the defendant to act as manager of defendant's mercan-

tile business and general merchandising store in the city of Phoenix for the period between the 15th day of October, 1909, and the 15th of October, 1910; the appellant (defendant below) agreeing to pay as compensation \$150 per month and 2 per cent on all gross sales made in said store under appellee's management over the sum of \$144,000. Appellee further alleged that the gross sales of said business amounted to \$273,107.79, and that his percentage at 2 per cent on the gross sales, over the sum of \$144,000, was the sum of \$2,582.14. Appellee alleged the payment of the salary of \$150 a month, or \$1,800, on account, and alleged that there was still due, under his contract, \$2,582.14. He alleged that he performed each and every service required by him to be performed under the provisions of the contract. The appellant, in his answer, denied that he ever agreed to pay any percentage, and alleged that, prior to October 18, 1909, in the city of New York, he hired appellee under a verbal contract to work from month to month as manager of the dry goods and notions department of his store, at the agreed price of \$150 a month, and for no other compensation whatsoever. Appellant alleged payment in full of the stipulated salary. The defendant, by way of demurrer and answer, set up the provisions of the statute of frauds, requiring contracts and agreements not to be performed within one year to be in writing. It was stipulated in the trial of the case that the gross sales of appellant's business, from October 15, 1909, to October 15, 1910, amounted to \$273,107.79. Appellee testified: "There were no percentages to be paid until the expiration of the year. If I didn't stay my year out, I didn't get any percentage." The evidence shows that at the time the contract was entered into between the parties appellee was in

Note. — For part performance to take contracts to render services not to be performed within a year out of the statute of frauds, see annotation following this case, post, 884.
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For right to quantum meruit for services rendered under parol contract, unenforceable because not to be performed within a year, see annotation following *Fabian v. Wasatch Orchard Co.* post, 895.

Phoenix; that he was making arrangements to move himself and family to Connecticut, with a view of entering business there; that he did in fact go to Connecticut, after the contract was concluded, on a visit, and remained there a couple of months; that he met appellant in New York and had several conversations with him concerning his employment, the details of which were discussed between them; that with his family he returned to Phoenix and entered upon the discharge of his labors for the appellant, continuing to work for him the entire year. The appellee also testified that he had received from the appellant \$450 in cash and \$107.10 in goods, amounting in all in cash and goods to \$557.10. The cause was tried to a jury, and the jury returned a verdict in favor of appellee for the sum of \$2,582.14, less the amount of the counterclaim for cash and goods paid and advanced to appellee by appellant, amounting to \$557.10. The judgment followed the verdict and was for \$2,025 and legal interest, and costs in the sum of \$105.30. From this judgment and the order overruling motion for a new trial an appeal is taken.

Messrs. Kibbey, Bennett, & Bennett, and Barnett E. Marks, for appellant:

No action will lie upon a contract for services not to be performed within a year from the making of the contract. For services rendered under such contract, the plaintiff can only recover upon a quantum meruit to recover the value of the services rendered.

McElroy v. Ludlum, 32 N. J. Eq. 828; Riiff v. Riibe, 68 Neb. 543, 94 N. W. 517, 4 Ann. Cas. 462; Hillhouse v. Jennings, 60 S. C. 373, 38 S. E. 599; Patten v. Hicks, 43 Cal. 511; Pierce v. Paine, 28 Vt. 34; Emery v. Smith, 46 N. H. 151; Dunphy v. Ryan, 116 U. S. 497, 29 L. ed. 705, 6 Sup. Ct. Rep. 486; Scheuer v. Monash, 35 Misc. 276, 71 N. Y. Supp. 818; Hertzog v. Hertzog, 34 Pa. 418; Ewing v. Thompson, 66 Pa. 382; Fuller v. Reed, 38 Cal. 100.

In a contract of employment not to be performed within one year from the making, the rendering of the services does not take the case out of the statute so as to make an action on the contract sustainable.

Patten v. Hicks, 43 Cal. 511; Wood, Mast. & S. 2d ed. § 193; McElroy v. Ludlum, 32 N. J. Eq. 828; Quinn v. Stark County Teleph. Co. 122 Ill. App. 133.

Full performance by plaintiff alone does not take the case out of the statute of frauds.

Cooley v. Miller & Lux, 156 Cal. 510, 105 Pac. 981; Baxter v. Baxter, 46 Ind. App. 514, 92 N. E. 881, 1039; Lipscomb v. Lipscomb, 66 W. Va. 55, 66 S. E. 8; Graham v. L.R.A.1916D.

Graham, 134 App. Div. 777, 119 N. Y. Supp. 1013; McKinley v. Hessen, 135 App. Div. 832, 120 N. Y. Supp. 257; King v. Brown, 2 Hill, 485; Whipple v. Parker, 29 Mich. 369.

Messrs. G. P. Bullard and Alexander & Christy for appellee.

Ross, J., delivered the opinion of the court:

The appellant relies upon paragraph 2696, Revised Statutes of Arizona (Civil Code) 1901, for a reversal of the judgment of the lower court. That paragraph is as follows: "(§ 1) No action shall be brought in any of the courts in any of the following cases, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the parties to be charged therewith, or by some person by him thereunto lawfully authorized: . . . (5) Upon any agreement which is not to be performed within the space of one year from the making thereof."

Under similar statutes, it has been held that verbal contracts not to be performed within a year are not void, but voidable. The language forbids the bringing of an action, but does not declare the contract void. 20 Cyc. 279 A. 2.

Clearly the contract here sued on falls within the statute of frauds (20 Cyc. 198 B) and is not enforceable, unless the acts of the parties to it take it out of the statute. The plaintiff (appellee) alleges that he was to receive, under his agreement, "as compensation, . . . the sum of \$150 per month and 2 per cent on all gross sales made in said store and business under the management of said plaintiff over and above the sum of \$144,000." This was the contract sued on. The percentage was as much a part of his salary as was the \$150 per month. It was not ascertainable at the date of the contract, nor at any time before the end of the year; but at the end of the year, by a simple process of arithmetical computation on the excess over \$144,000, the plaintiff's salary could be known. The fixed part of the plaintiff's salary, \$150 per month, and the percentage, \$2,582.14 added, determined the year's compensation to be \$4,382.14.

The question as to whether the contract alleged by the appellee was, in fact, the contract of the parties or not, and as to whether appellee had performed all of its terms and conditions, was submitted to a jury, and that jury, by its verdict, found in favor of the appellee.

The item of \$150 per month was no more a part of the contract for salary, nor any

less a part thereof, than the item of percentage.

The question is, then, the appellant having partly performed the contract, by monthly payments, and the appellee having fully performed on his part, does this part performance by one of the parties and full performance by the other take the case out of the statute of frauds?

This is a case of first impression in this jurisdiction, and we are therefore not bound by any decision of this court; but we are at liberty to adopt that view of the law that appeals to us as most consonant with reason and justice. If it were an executory contract, we would not hesitate in holding it unenforceable; but the fact is that it has been executed by appellee and largely by appellant.

MacDonald v. Crosby, 192 Ill. 283, 289, 61 N. E. 505, 507, announced this rule: "It is insisted that the court erred in sustaining the demurrer to the pleas setting up the statute of frauds. The first plea is that the promise declared upon was not to be performed within one year; and, the second, that whatever promise was made by the defendants was a promise to answer for the debt of Mr. Crosby. As to the first, the demurrer was properly sustained, on the ground that the contract declared upon was fully and completely performed upon the part of the plaintiff, and nothing remained to be done by the defendants but to pay the money. *Curtis v. Sage*, 35 Ill. 22. We do not understand, under the rule in this state, that the statute of frauds can be interposed as a defense where the contract is fully performed on the part of the plaintiff; in other words, the statute of frauds cannot be availed of for the purpose of perpetrating a fraud."

In *Lowman v. Sheets*, 124 Ind. 416-422, 7 L.R.A. 784, 24 N. E. 351, 353, the court said: "The sale and delivery of a one-half interest in the mares in controversy is not within the statute of frauds, because it was fully executed by Templeton. The statute prohibiting the making of contracts not to be performed within one year has no application to contracts which have been fully performed by one of the parties."

The Iowa court, in *Murphy v. De Haan*, 116 Iowa, 61, 62, 89 N. W. 100, in passing upon the right of an employee to recover on an oral contract, said: "It is contended that, while the petition states a valid cause of action, plaintiff proved a contract within the statute of frauds, in that, according to his evidence, he was not to commence work

on the day the contract was entered into, but at some future time, and that the contract was made three or four days before he actually began the service. Defendant moved to strike out this evidence, because within the statute, but the motion was overruled. He also challenges the instructions of the court, for the reason that they ignore the statute of frauds. Remembering that this is an action for work and labor performed at an agreed price per month, it is difficult to see how the statute of frauds affects the case. Contracts within the statute are not void, and, if performed or partly performed, they are, to the extent of such performance, taken out of the statute. When executed, or so far as executed, such contracts are valid, and as binding as if they had been in writing. This statute was not enacted for the purpose of aiding one in the perpetration of a fraud, but to secure him from the consequences thereof. It was intended as a shield, and not as a sword. According to the evidence, defendant had the benefit of plaintiff's services, and he cannot be heard to say that they were performed under a contract which would have been invalid had it remained executory in character."

In *Marks v. Davis*, 72 Mo. App. 557-563, the court, after reviewing the Missouri cases bearing on oral contracts for labor and services not to be performed within a year, said: "In view of this line of decisions, we think we can safely say that the rule is firmly established in this state that a full and complete performance of a contract by one of the contracting parties takes the contract out of the statute of frauds, and that the party so performing his contract may sue upon it in a court of law, and that he is not compelled to abandon the contract and sue in equity or upon a quantum meruit, as seems to be the law in some of the states."

In *Wehner v. Bauer* (C. C.) 160 Fed. 240, 244, it is said: "Nor do I think the objection well taken that the contract is void within the statute of frauds because not in writing, and one which, by its terms, was not to be performed within a year. The statute of frauds has no application to a contract which has been fully performed or executed by one of the parties thereto; and here the evidence shows that complainant had immediately, and before the parties left the mine, fully performed the contract on his part by turning over and delivering to the defendant all the machinery, stock, material, and tools, in accordance with its terms."

There is a line of cases that turns on the question of the election of remedies, holding that, when the contract is within the statute of frauds, the suit should be on quantum meruit, in which case the contract may be used as evidence of the value of the services.

The distinction drawn by this line of cases is technical rather than substantial. To say that a contract fully performed by one of the parties to it cannot be sued upon because the statute is evidentiary, and the contract, being within the statute of frauds, cannot avail as evidence in a suit on the contract, but in a suit on quantum meruit the contract, if fully performed by one of the parties, can be used as evidence of the value of the services, is a technical distinction, it seems to us, in the matter of remedy, and is not a distinction on principle. It goes rather to the form than to the substance of the matter. If, on full performance by one of the parties, the contract is taken out of the statute, to the effect that it may be introduced as evidence in aid of a common count, we can perceive no reason why such performance will not take it out of the statute so that suit may be maintained on the contract.

That, in a suit on the contract, its terms determine the value of the services, while in a suit on one of the common counts the terms of the contract may only be evidence of the value of the services, does not militate against the reasoning that, if it can be held to be taken out of the statute in the one case, it should be so held in the other case.

Another aspect of the case is that appellee was closing out his business connections in Arizona, with a view of locating in Connecticut; but, having concluded his contract with appellant, he returned from the East, where he went on a visit, bringing his family. Relying upon his engagement with appellant, he made the trip to Arizona, and necessarily at considerable expense for himself and family. He made no effort, as was his intention until employed by appellant, to secure a business or employment in the East.

Having induced appellee by means of his oral contract to return to Arizona, to abandon his search for other business connections, we think it does not lie in the mouth of the appellant to deny the contract, especially after its full and complete performance by appellee.

In *Seymour v. Oslrichs*, 156 Cal. 782, 794, 134 Am. St. Rep. 154, 106 Pac. 88-94, it L.R.A.1916D.

is said by the California court: "The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practising a fraud, cannot be disputed. It is based upon the principle, 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud, or in the consummation of a fraudulent scheme.' 2 Pom. Eq. Jur. § 921. It was said in *Glass v. Hulbert*, 102 Mass. 24, 35, 3 Am. Rep. 418: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation, in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscionable injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' This statement has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. . . . We can see no good reason for limiting the operation of this equitable doctrine to any particular class of contracts included within the statute of frauds, provided always the essential elements of an estoppel are present, or for saying otherwise than as is intimated by Mr. Pomeroy in the words already quoted, viz., that it applies 'in every transaction where the statute is invoked.'"

For the reasons given above, we think the judgment of the lower court was in accordance with law, and that no errors were committed in the trial.

The judgment of that court is therefore affirmed.

Franklin, Ch. J., and Cunningham, J., concur.

Annotation—Part performance to take contracts to render services not to be performed within a year out of the statute of frauds.

I. Scope, 884.

II. Part performance on one or both sides.

a. In actions to recover for services rendered, 884.

b. In actions for breach of the contract, 886.

c. In equity, 888.

d. Sufficiency of acts to constitute part performance, 889.

III. Complete performance of services.

a. In actions to recover for services rendered, 890.

b. In actions for breach of the contract, 891.

c. In equity, 892.

I. Scope.

This note is confined to a consideration of those cases in which the contracts to render services were looked upon as coming within the operation of the portion of the statute of frauds dealing with contracts not to be performed within a year. The scope, therefore, does not include cases in which the contracts, although apparently not to be performed within a year, are objected to, not upon that ground, but because they fall within some other clause of the statute, e. g., the clause requiring all contracts relating to realty to be in writing.

Part performance, as used in the title of this note, refers to any performance by one or both parties falling short of complete performance on both sides. All cases are therefore included in which the performance has fallen short of absolute execution.

Upon the right to quantum meruit for services rendered under contract unenforceable because not to be performed within a year, see note to *Fabian v. Wasatch Orchard Co.*¹

For a discussion of the validity of an oral contract for a year's services, to commence in futuro, see note to *Chase v. Hinkley*.²

As to the effect of the statute of frauds upon a parol contract for services which may, but are not intended to, be performed within a year, see note to *White v. Fitts*.³

And see, upon the matter of the specific performance of oral contract to devise or convey land in consideration of performing services or furnishing support, where no possession is taken or improvements made, the note to *Grindling v. Reyhl*.⁴

II. Part performance on one or both sides.

a. In actions to recover for services rendered.

Only one state has committed itself to the unqualified rule that part performance of a parol contract for services, unenforceable because not to be performed within a year, will remove the contract from the operation of the statute of frauds.⁵ On the other hand, however, several courts have laid down the rule that part performance of such a contract will remove it from the operation of the statute so far as it has been performed.⁶ Such a rule is the result of

¹ Post, 892.

² 2 L.R.A.(N.S.) 738.

³ 15 L.R.A.(N.S.) 313.

⁴ 15 L.R.A.(N.S.) 466.

⁵ In *Heery v. Reed* (1909) 80 Kan. 380, 102 Pac. 846, an action to recover from the estate of a deceased person for services performed under a contract that she should live with and work for deceased during his lifetime, and have all his property at his death, it is held that the part performance by plaintiff of her contract up till the time its performance was prevented by deceased was sufficient to remove the bar of the statute of frauds, assuming such contract to be one not to be performed within a year.

And this case is referred to in *Longhofer v. Herbel* (1910) 83 Kan. 278, 111 Pac. 483, an action by a minor against his stepfather on a parol contract to pay for his services after he was thirteen years old, where it is said that "under somewhat similar circumstances this court has held that an oral L.R.A.1916D.

contract may be taken out of the statute by the rendition and acceptance of services under it."

⁶ Where a salesman is suing for the contract price of work and labor performed under a parol contract for a year, to commence at a future date, the court, in *Murphy v. De Haan* (1902) 116 Iowa, 61, 89 N. W. 100, says: "Contracts within the statute are not void, and, if performed or partly performed, they are, to the extent of such performance, taken out of the statute. When executed, or so far as executed, such contracts are valid, and as binding as if they had been in writing."

The preceding case was cited and followed in *Hahnel v. Highland Park College* (1915) — Iowa, —, 152 N. W. 571, an action by a teacher to recover the contract price of services rendered under a parol contract of employment for three years, in which it is said: "We have held that contracts for services partly performed are, to

a very proper endeavor on the part of the courts to remove the rigor of the statute without destroying its entire effect. Its purpose is the same as that which is the basis of the principle upon which, in a number of states, an employee who has performed services under a parol contract not to be performed within a year is permitted to recover the value of the services rendered.⁷ The employer having permitted the services to be performed, and having received their benefit, it is considered proper that he should pay for them. It should be noted, however, that these two rules, while accomplishing a similar purpose, are based upon antagonistic theories. In the one case, the recovery is upon the express contract, which is held to be removed from the operation of the statute by the part performance; in the other, the part performance is looked upon as inefficacious to remove the operation of the statute,

and the recovery is upon an implied contract. The practical result of this difference of opinion becomes evident when the question of the amount of the recovery comes up for consideration.

The doctrine of part performance, however, is not always invoked on behalf of the employee; where the contract provides for payment at the completion of the term of employment, the employee can base no claim for services thereon until he has completed such term, and the performance of the services for a portion of the term, although serving to remove the operation of the statute therefrom, leaves him in no better position than if the statute still obtained.⁸ It may even be said that he is in a less favorable position, inasmuch as, being bound by the terms of the express agreement, he cannot sue in quantum meruit on an implied contract.

In other instances part performance

the extent of the performance, taken out of the statute."

In *Fuller v. Rice* (1884) 52 Mich. 435, 18 N. W. 204, an action for services performed under a parol contract to cut and haul logs for defendant at a certain rate for three years, defendant's objection to evidence of the agreement, as being within the statute of frauds, was held not to be valid, on the ground that "so far as the parties had acted in performance of the agreement, they had consented to be governed by its terms." The court says further that "if the plaintiff had performed valuable services for the defendant under the contract, of which the latter had reaped the advantage, he was entitled to recover therefor at the rate fixed by the contract, less any damages the defendant may have suffered by reason of failure in complete performance."

And the preceding case is cited and followed in *Smith v. Chase & B. Piano Mfg. Co.* (1913) 175 Mich. 371, 141 N. W. 563, an action to recover certain instalments of salary under a parol contract of employment in the capacity of superintendent and manager, for a period of three years, where it is held that parties to the contract "were bound thereby so far as it was performed." In this case the instalments sued for had not been earned when plaintiff was discharged. In a later appeal (1915) 185 Mich. 313, 151 N. W. 1025, where plaintiff was suing for the recovery of the same instalments upon an implied contract, the recovery was denied, and the court said: "If one makes a contract for services which is void under the statute, he can recover at the contract price for the services actually rendered."

See also *Swanzy v. Moore* (1859) 22 Ill. 63, 74 Am. Dec. 134; *Philbrook v. Belknap* (1834) 6 Vt. 383; *Mack v. Bragg* (1858) 30 Vt. 571, *infra*, footnote 8.

⁷See the note to *Fabian v. Wasatch Orchard Co.* post, 895.
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⁸In *Swanzy v. Moore* (1859) 22 Ill. 63, 74 Am. Dec. 134, an action for work and labor rendered in part performance of a contract for a year, to begin at a future date, it is said that "a parol contract which that statute requires to be in writing is as good as any when performed, or while being performed, or when partly performed, so far as the performance goes." Where, therefore, as in this case, plaintiff breached a contract by the terms of which he engaged to work for a year before receiving compensation, his part performance up till the time of the breach takes the contract, so far as it deals with the work so performed, out of the statute, and puts it in operation, thereby shutting plaintiff off, under its terms, from any compensation for his labor.

And in *Philbrook v. Belknap* (1834) 6 Vt. 383, an action on a book account for the value of services rendered by plaintiff up to the time of his breach of a parol contract of employment for a period of three years, by the terms of which plaintiff was to receive no compensation if he left the service before the expiration of the three years, it was held that the plaintiff's part performance of the contract rendered the statute inoperative as to the part performed, and that, consequently, there could be no recovery.

And, although seeming to enunciate a different principle, the decision is based upon the same grounds in *Mack v. Bragg* (1858) 30 Vt. 571, an action by the father of an infant to recover the value of his son's services rendered up till the time of his breach of a parol contract, by the terms of which he was to receive a certain sum of money at the expiration of his period of employment, some four years later, where the part performance was held to remove from the operation of the statute the portion of the contract performed, and recovery was accordingly denied.

by one or both of the parties has been held to have no effect on the operation of the statute.⁹ This view seems to be the one taken by the greater number of courts. Additional weight is given to this rule by the number of cases involving part performance in which the matter has been disregarded.¹⁰

⁹ The doctrine of part performance was, in *Union Sav. & T. Co. v. Krumm* (1915) — Wash. —, 152 Pac. 681, held to have no application to the clause of the statute dealing with contracts not to be performed within a year. In that case defendant set up as an affirmative defense, in an action by the trust company, a claim for saw logs furnished under a parol contract which, by its nature, could not be performed within a year. Recovery on the contract was denied.

So, it is said in *Draheim v. Evison* (1901) 112 Wis. 27, 87 N. W. 795, an action by a father to recover the value of services rendered by his son in part performance of his oral contract of employment for a year, to begin in the future, that the part performance did not remove the contract from the operation of the statute, either in favor of plaintiff, so that he might maintain an action thereon or in favor of defendant, so that he might found a defense thereupon.

"Partial performance of a contract void under the statute of frauds does not save it," is the way it is put in *Chase v. Hinkley* (1905) 126 Wis. 75, 2 L.R.A.(N.S.) 738, 110 Am. St. Rep. 896, 105 N. W. 230, 5 Ann. Cas. 328, an action by an employee to recover for services rendered in part performance of a parol contract of employment for a year, to begin in the future.

The partial performance of a parol contract of employment to begin in the future, consisting of plaintiff's coming to the United States and entering upon the employment, is held, in *Turnow v. Hochstadter* (1876) 7 Hun (N. Y.) 80, not to remove the contract from the operation of the statute.

While of the opinion that full performance by an employee of a parol contract for the term of a year, to begin in the future, will remove it from the operation of the statute, it is held in *Scheuer v. Monash* (1901) 35 Misc. 276, 71 N. Y. Supp. 818, that where the employee has left the employment without the consent of his employer, before the expiration of the term, he cannot recover on the contract.

Where a laborer who entered into an oral contract to work for defendant for a year, to begin at a future date, leaves the employment before his term has expired, and sues for the value of the services rendered, the employer cannot set up the part performance by plaintiff, in order to take the contract out of the statute, so that he may rely upon it for a defense. *Comes v. Lamson* (1844) 16 Conn. 246.

And it was held in *Patten v. Hicks* (1872) 43 Cal. 509, that plaintiff could not recover L.R.A.1916D.

b. In actions for breach of the contract.

The rule that part performance will prevent the operation of the statute so far as performance has gone, can, by the nature of things, have no application to actions for the breach of contract. In such actions recovery is based not upon

the contract rate for logs which he had furnished defendant under a parol contract to cut and deliver to him at his mill saw logs sufficient to keep the mill running for two years.

¹⁰ In *McGarland v. Steward* (1871) 2 Houst. (Del.) 277, an action for the partial services rendered by plaintiff's son before defendant's breach of a parol contract with plaintiff for an employment for three years, the court held that the recovery, if at all, would have to be on the count on quantum meruit, and not on the one upon special agreement. In this case no mention is made of the matter of part performance.

So, in *Barrett v. Riley* (1891) 42 Ill. App. 258, an action by a mother on the contract of employment under which her son was engaged by defendant for a period of three years, where defendant successfully set up the statute of frauds, the matter of the part performance during the time the boy had worked for defendant is not discussed.

And in *Tague v. Hayward* (1865) 25 Ind. 427, an action by an apprentice for the value of the work and labor performed during the five years prior to his breach of the parol contract of apprenticeship, no question was made of the effect of the part performance.

And the matter of part performance is given no consideration in *William Butcher Steel Works v. Atkinson* (1873) 68 Ill. 421, an action by an employee upon a parol contract of employment for three years, which he had performed in part before his discharge by his employer, although the statute of frauds is held to be a good defense to the action.

In *Hill v. Hooper* (1854) 1 Gray (Mass.) 131, an action by a father to recover one of the instalments due under his parol contract with defendant for the employment of his infant son for a period of five years, recovery is denied, no force being given to the part performance on the part of the son.

Where, in *Giles v. McEwan* (1896) 11 Manitoba, L. R. 150, an action for services rendered under a parol contract of employment for a year, to begin in the future, plaintiffs had completed the year all but two days, the contract was held to be within the operation of the statute, no weight being given to the part performance.

And where, in *Thacher v. New York, W. & B. R. Co.* (1912) 153 App. Div. 186, 138 N. Y. Supp. 463, plaintiffs sued on a count in quantum meruit for work done, and on a count on a parol contract of employment, not to be performed within a year, it is held that the recovery should be in quantum

what has been done under the contract, but upon the loss accruing from what has not been done. Therefore, even in jurisdictions which have adopted that rule, there can be found no ground upon which to base a right of recovery for the breach of a contract not to be performed within a year.¹¹ It may consequently be stat-

ed as a rule without exception that the part performance of services under a parol contract not to be performed within a year does not remove the contract from the operation of the statute of frauds, so that an action may be maintained for its breach, either by the master¹² or servant.¹³ Additional indirect

meruit, no attention apparently being given to the part performance, as operating to prevent the operation of the statute.

In *Salb v. Campbell* (1886) 65 Wis. 405, 27 N. W. 45, in which the father of an apprentice who had left his master before the expiration of the four years of apprenticeship provided for in the parol contract sought to recover the contract price of the services performed, and in which the defendant also claimed damages for breach of the contract, it was held that no action on the contract could be maintained, no mention being made, however, of the effect of part performance on that question.

¹¹ In *Murphy v. De Haan* (1902) 116 Iowa, 61, 89 N. W. 100, an action by a salesman for the contract price of work and labor performed under a parol contract not to be performed within a year, where, after holding part performance sufficient to take the contract out of the statute of frauds for the purpose of that action, it is said that, "if the action were to recover damages for breach of the contract, a different rule would apply."

¹² In *Seymour v. Warren* (1903) 86 App. Div. 403, 83 N. Y. Supp. 871, former appeal in (1901) 59 App. Div. 120, 69 N. Y. Supp. 236, an action by the owner of premises for the breach of a parol contract not to be performed within a year, under which defendants undertook to take charge of the premises, and keep them in good repair, and pay all the expenses connected therewith, for a certain consideration, it was held that partial performance of such agreement did not remove it from the operation of the statute, so as to afford any right to an action for its breach.

Where defendants have entered into an oral subcontract with plaintiffs, who have a contract with the United States for carrying mail, and defendants have carried the mail, and plaintiffs have paid them the stipulated rate, for several months, such part performance is not sufficient to take the contract out of the statute of frauds, so that plaintiffs may maintain an action for breach thereof. *Long v. Long* (1912) 162 Cal. 427, 122 Pac. 1077.

And in *Squire v. Whipple* (1827) 1 Vt. 69, an action on a parol contract of apprenticeship, to last for four years, by the master against the father of the apprentice, who, without plaintiff's consent, had left his employ, it was held that the part performance during the six months in which the boy had remained in plaintiff's employ would not remove the contract from the operation of the statute. The court said: "There has been no more execution of this L.R.A.1916D.

agreement by one party than the other, and hence they stand on equal ground in respect to fraud or hardship."

¹³ In *Britain v. Rossiter* (1883) L. R. 11 Q. B. Div. (Eng.) 123, an action by a clerk for the breach of a contract of employment for a year, to begin in the future, the court denies the doctrine of part performance as extending to contracts for services. The distinction between the part performance of such contracts and those relating to land is explained as follows: "It is well known that where a contract for the sale of land had been partly performed, courts of equity did in certain cases recognize and enforce it; but this doctrine was exercised only as to cases concerning land, and was never extended to contracts like that before us, because they could not be brought within the jurisdiction of courts of equity. Those courts could not entertain suits for specific performance of contracts of service, and therefore a case like the present could not come before them. As to the application of the doctrine of part performance to suits concerning land, I will merely say that the cases in the court of chancery were bold decisions on the words of the statute."

And it is held, obiter, in *Bracegirdle v. Heald* (1818) 1 Barn. & Ald. (Eng.) 722, 19 Revised Rep. 442, 17 Eng. Rul. Cas. 177, an action by a groom for the breach of a parol contract of employment for a year, to begin in the future, caused by defendant's refusal, upon the agreed date, to take plaintiff into his service, that part performance will not remove such a contract from the operation of the statute. "Will an inchoate performance, or a part execution, satisfy the terms of the statute?" Lord Ellenborough, Ch. J., asks. "I am of opinion that it will not, and that there must be a full, effective, and complete performance."

An oral contract of employment for a year, to begin in the future, is held not to be removed from the operation of the statute of frauds by the part performance of the employee, in *San Antonio Light Pub. Co. v. Moore* (1907) 46 Tex. Civ. App. 259, 101 S. W. 867, an action for breach of the contract.

Where, in *Hillhouse v. Jennings* (1900) 60 S. C. 373, 38 S. E. 599, plaintiff sought to recover for the breach of a parol contract of employment for a year, to begin in the future, evidence of such contract was excluded under the statute, and it was held that plaintiff's part performance would not serve to relax the rule.

In *Smith v. Bowler* (1857) 1 Disney (Ohio) 520, 12 Ohio Dec. Reprint. 770, affirmed in (1858) 2 Disney (Ohio) 153, an

authority for this rule is furnished by several cases in which recovery for the breach of such contracts has been refused on the ground that they come within the operation of the statute, no reference being made to the part performance of the services contracted for.¹⁴

action by an employee under a parol contract of employment for three years, it is held that part performance for two years will not take the contract out of the operation of the statute, so that plaintiff may maintain an action for its breach.

Part performance on the part of the employee was held not to avail him, in *Baker v. Coddington* (1892) 44 N. Y. S. R. 787, 18 N. Y. Supp. 159, affirmed in (1893) 21 N. Y. Supp. 1131, an action for damages for the breach of a parol contract of employment for a year, to begin in the future.

And in *Spinney v. Hill* (1900) 81 Minn. 316, 84 N. W. 116, an action for the breach of a parol contract of employment for three years, it is likewise held that, while plaintiff is entitled to recover the value of the services rendered, he cannot maintain an action on the contract for the breach thereof.

While stating, in *Lally v. Crookston Lumber Co.* (1902) 85 Minn. 257, 88 N. W. 846, that an employee under a parol contract of employment for a year, to begin at a future date, might recover in quantum meruit for the value of services rendered, it is held that he cannot maintain an action for the breach of the contract.

Where an employee who has been engaged under a parol contract for a year, to begin at a future date, is discharged without cause at the end of four months, and paid for his work during that time, he cannot maintain an action on the contract for damages sustained by the breach; "nor does a partial performance authorize an action to be maintained on the contract." *Kleeman v. Collins* (1872) 9 Bush (Ky.) 460.

It is said in *Clark County v. Howell* (1890) 21 Ind. App. 495, 52 N. E. 769, an action by a person engaged under a parol contract as janitor for the courthouse for a year, to commence at a future date, to recover damages for the breach of his contract, caused by his discharge before the expiration of his term of employment, that "the doctrine of part performance has no application in the case of a contract that cannot be performed by either party within a year."

In *Oak Leaf Mill Co. v. Cooper* (1912) 103 Ark. 79, 146 S. W. 130, an action by an employee, discharged a short time after entering upon his employment, and paid one month's wages, to recover the remainder of his year's wages under a contract of employment for one year, to begin at a future date, it is held that "a part performance of such a verbal contract does not take the case out of the provisions of the statute."

So, in *Scoggin v. Blackwell* (1860) 36 Ala. 351, an action by an employee dis-

c. In equity.

Parol contracts for services not to be performed within a year have rarely come before courts of equity, but, in the few instances in which they have, part performance has been held ineffectual

charged a few days after entering upon his employment, to recover his year's salary, under a contract of employment for one year, made in the month preceding the one in which the employment was to begin, it was held that "so long as the contract remained executory, no action could be predicated upon it for its breach or non-performance."

One who has entered into an oral contract to cultivate certain land for a period of more than fourteen months cannot recover for the breach of the defendant, who refused to perform his duties under the contract, although he himself has entered upon the performance of his labors. *Treadway v. Smith* (1876) 56 Ala. 345.

And where, under an oral contract to serve as a bartender for a period exceeding a year, plaintiff has entered upon the employment and worked for several months, he cannot, upon discharge without cause, recover his wages for the remaining months. *Henry v. Wells* (1886) 48 Ark. 485, 3 S. W. 637. "Partial execution has no effect at law to take any case out of the provisions of the statute," says the court.

In *Seymour v. Oelrichs* (1909) 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88, an action to recover for the breach of an oral contract of employment for ten years, the court says: "The claim of plaintiff is not that mere part performance of a contract for personal services which, by its terms, is not to be performed within a year, 'invalid' under our statute because not evidenced by writing, renders the same valid and enforceable. Such a claim would, of course, find no support in the authorities."

But see *Shumate v. Farlow* (1890) 125 Ind. 359, 25 N. E. 432, *infra*, footnote 19; *Johnson v. Upper* (1905) 38 Wash. 693, 80 Pac. 801, *infra*, footnote 19; and *Chenoweth v. Pacific Exp. Co.* (1902) 93 Mo. App. 185, *infra*, footnote 27.

¹⁴ In *Meyer v. Roberts* (1885) 46 Ark. 80, 55 Am. Rep. 567, the plaintiff, who had been engaged as manager of defendant's plantations for a year, to begin at a future date, and who had been paid and discharged after a few months, was suing to recover the salary due for the remainder of the term. The attention of the court was not called to the question of part performance, and the recovery was denied.

So, in *Frazer v. Howe* (1883) 106 Ill. 563, where an employer successfully set up the statute of frauds as a defense to a set-off set up by the employee for the breach of the oral contract of employment, which was to last five years, and which he had partly performed, the matter of part performance was not raised.

to prevent the operation of the statute, both in actions for accounting¹⁵ and for specific performance.¹⁶

d. Sufficiency of acts to constitute part performance.

Where, as in Georgia, the statute itself provides for an exception in the case of part performance, the only question which remains for the court is the meaning of the term "part performance," as used in the statute. In the jurisdiction mentioned, the court is not liberal in its construction, and while it is held that the

surrender of one position to accept another is a sufficient part performance,¹⁷ the removal of the employee from one city to another, and his entering upon the employment, has been held to be insufficient.¹⁸

And it has been held in other jurisdictions making no exception to the statute of frauds for the part performance of contracts not to be performed within a year, that entry upon and occupancy of the premises upon which the services are to be performed do not constitute a sufficient part performance.¹⁹

And in *Wonsettler v. Lee* (1888) 40 Kan. 367, an action for the breach of a parol contract under which plaintiff had performed the services agreed upon for two years, he was permitted to recover in quantum meruit, and the question of part performance was disregarded.

And where, in *Hambell v. Hamilton* (1835) 3 Dana (Ky.) 501, the validity of a parol contract of apprenticeship for three years, breached by the apprentice after performance for a year, came into question, neither court nor counsel raised the point as to the effect of the part performance.

In *Bethel v. A. Booth & Co.* (1903) 115 Ky. 145, 72 S. W. 803, an action for breach of a parol contract whereby defendant engaged to employ plaintiff for ten years, no mention is made of the year during which plaintiff remained in defendant's employ, as taking the contract out of the statute.

And in *Drummond v. Burrell* (1835) 13 Wend. (N. Y.) 307, an action by an employer against his employee, who had left his service at the end of six months for breach of a parol contract of employment for two years, recovery was denied, no reference being made to the part performance.

¹⁵ Where, in *McElroy v. Ludlum* (1880) 32 N. J. Eq. 828, an employee brought suit against employers for an accounting and share of profits due under a parol contract of hiring for five years, the court makes the following reference to the matter of plaintiff's performance of the contract: "Performance of a contract invalid by the statute will not validate the contract so as to enable a party to enforce it by an action upon the contract. Unless in cases specially provided for in the statute, part performance will not validate the contract at law. The dictum that part performance will make valid a contract invalid by the statute of frauds is exclusively the creature of equity, and applies only to contracts relating to lands, and does not extend to contracts relating to other matters."

And in *Van Horn v. Van Horn* (1890) — N. J. Eq. —, 20 Atl. 826, a suit for a partnership accounting, involving a claim by an employee for her wages for the remainder of the term of her employment, the claim is held to be within the statute of frauds as one not to be performed within a year, L.R.A.1916D.

and her recovery is measured by the value of her services, nothing being said with respect to the part performance for ten months taking the contract out of the statute.

¹⁶ Part performance of a parol contract for the clearing of land, to extend over a period of years, while sufficient to remove the portion performed from the operation of the statute, will not entitle the employee to compel the owner of the land to complete the performance of the contract. *Sheldon v. Preva* (1884) 57 Vt. 263. *

But see *Johnson v. Upper* (1905) 38 Wash. 693, 80 Pac. 801, *infra*, footnote 19.

¹⁷ It is held in *Bagwell v. Milam* (1911) 9 Ga. App. 315, 71 S. E. 684, an action by a discharged teacher of telegraphy to recover the salary due him under his contract for the remainder of his term of employment, that, conceding the contract to be one not to be performed within a year, the surrender by plaintiff of his former position, in order to take employment with defendant, constitutes such part performance as will take the contract out of the statute of frauds. The court lays down the following general rule: "The contract will be taken out of the operation of the statute of frauds whenever one party to the contract performs some act essential to the contract that results in loss or injury to him and in benefit to the other party."

¹⁸ In an action on a contract of employment for more than a year, brought by a discharged employee for an unpaid balance, it is held that neither the removal of plaintiff with his family to the city in which the defendant's store was located, nor the fact that he entered upon the employment, was such part performance as is referred to in a statute making an exception on that ground. *Bentley v. Smith* (1907) 3 Ga. App. 242, 59 S. E. 720.

¹⁹ In *Shumate v. Farlow* (1890) 125 Ind. 359, 25 N. E. 432, an action for damages sustained by reason of defendant's refusal to permit plaintiff to perform services on his farm after he had moved in, in accordance with the terms of a parol contract which was not to be performed within a year, it is said: "The taking possession and occupancy of the house were not the performance of a substantive part of, but a mere incident to, the contract for per-

*III. Complete performance of services.**a. In actions to recover for services rendered.*

It seems to be the better rule that complete performance of the services specified in a parol contract not to be performed within a year prevents the operation of the statute of frauds, so that the servant may recover his salary.²⁰ And where the contract provides for the payment of a sum in addition to salary, conditioned upon the profits of the business,²¹ or for the payment of a commission upon the sales made,²² recov-

ery of such sum may be had. But the complete performance on one side having removed the contract from the operation of the statute, the employee, as well as the employer, is bound thereby, and he cannot repudiate it and sue in quantum meruit.²³ The unfairness of any other rule is evident. A part performance that removes the contract from the operation of the statute in favor of one of the parties should have the same effect in favor of the other.

In a few instances complete performance of the services specified in the contract has been held inefficacious to pre-

sonal service, and did not have the effect to rescue the agreement from the prohibition of the statute."

After holding, in *Johnson v. Upper* (1905) 38 Wash. 693, 80 Pac. 801, an action for the breach of a parol contract by the terms of which plaintiff was to care for defendant's farm for a period of five years, for a share of the profits, that, inasmuch as the damages claimed were not for labor expended, but for the loss of profits, "the action is substantially one in specific performance of the contract," the court, in discussing the case from the view point of a court of equity, finds that plaintiff's allegation that he entered upon the premises and continued to reside thereon for several months, and that defendant furnished a portion of the stock, "falls far short of showing any changed relation, 'or unconscientious injury and loss,' which are essential to authorize a court exercising both law and equity jurisdiction to declare that the defendant is bound as upon an executed contract."

²⁰ *Re Chamberlain* (1911) 146 App. Div. 583, 131 N. Y. Supp. 245, affirmed in (1912) 204 N. Y. 665, 97 N. E. 1103, was an action on an unsigned contract of employment for five years, which had been executed by the plaintiff. While plaintiff's right of recovery is not based wholly upon such performance, the court gives it as one of the grounds for its decision. It is said: "This agreement was not signed, but it was a part of the contents of a communication signed by the decedent, and was a part of a series of communications passing between the parties, and there is no dispute that Miss Smith has performed the agreement in good faith on her part, and it is conceded that Miss Maurice made payments upon the account during her lifetime, so that we are of the opinion that the suggestion that the contract was void because of the statute of frauds is without force."

And where, in *Durfee v. O'Brien* (1888) 16 R. I. 213, 14 Atl. 857, plaintiff had performed within a year his parol contract to build a house for the defendant, it was held that such performance was sufficient to warrant his action upon the contract for the contract price of the labor and materials furnished.
L.R.A.1916D.

And a ruling that one who had fully performed his portion of a parol contract to act as defendant's overseer for a year, to begin in the future, could not recover the compensation specified in the contract, but that he could recover only so much as his services were worth, was held in *Carter v. Brown* (1871) 3 S. C. 298, to be erroneous.

And in *Gee v. Hicks* (1830) Rich. Eq. Cas. (S. C.) 5, it is said obiter: "If a contract, not to be performed within a year, is, after the expiration of the year, entirely executed by one party, at the request, or by the consent, of the other party, then the promise to pay for this performance cannot be within the statute."

²¹ In *Marks v. Davis* (1897) 72 Mo. App. 557, an action on a parol contract of employment for a year, to begin at a future date, to recover a sum of money which defendants had agreed to pay to plaintiff if the profits on his sales should exceed a certain amount, it was held that, plaintiff having completely performed his part of the contract, he might recover. The court said: "The rule is firmly established in this state that a full and complete performance of a contract by one of the contracting parties takes the contract out of the statute of frauds, and that the party so performing his contract may sue upon it in a court of law, and that he is not compelled to abandon the contract and sue in equity or upon a quantum meruit, as seems to be the law in some of the states."

²² *DIAMOND v. JACQUITH*, ante, 880, in which it is held that complete performance of a contract to render services during a period extending beyond a year from the making of the contract, for a monthly salary and a percentage on gross sales, and the payment of the stipulated salary, take the case out of the statute, so as to warrant a recovery of the commission.

²³ In *Van Valkenburg v. Crofut* (1878) 15 Hun (N. Y.) 147, an action for the recovery of the value of services rendered by plaintiff under a parol contract between his father and defendant, by the terms of which plaintiff was to work for defendant for a number of years, it is held that, plaintiff having fully performed his part of the contract, he cannot repudiate it and sue in quantum meruit for the value of the services

vent the operation of the statute.²⁴ And in one jurisdiction the view is taken that where complete performance of the services is said to remove the contract from the operation of the statute, "it is only an artificial method" of stating that the servant may recover upon the contract implied from the master's acceptance of such services.²⁵ The position taken in this last case, however, is wholly unwarranted by a review of the decisions in other states.

There seems to be a close analogy between the rule stated above, to the effect that complete performance of services removes a parol contract not to be performed within a year from the operation of the statute, and the rule which permits a recovery of the purchase price named in a parol contract for the sale of land, where the deed has been de-

livered. For cases sustaining the latter rule, reference is made to the note discussing that question.²⁶

b. In actions for breach of the contract.

If complete performance of the services under a parol contract not to be performed within a year is sufficient to remove the contract from the operation of the statute of frauds for purposes of actions to recover compensation for the services rendered, it should, with equal propriety, be sufficient to accomplish the same result in actions for breach of the contract. Cases of this latter kind are rare, but those which have been discovered agree that the complete performance of the services is sufficient to take the contract out of the statute.²⁷

rendered; but that his action must be on the contract.

²⁴ *Price v. Press Pub. Co.* (1907) 117 App. Div. 854, 103 N. Y. Supp. 206, was an action by an employee, who had served the term of his employment, to recover a bonus promised him by parol more than a year before his contract of service expired, to be paid at the conclusion of such term of employment, in consideration of his remaining. With reference to the complete performance of the contract on the plaintiff's part, the court said: "If it could be said that the employee performed under it, it could be void just the same."

And in *Emery v. Smith* (1865) 46 N. H. 151, an action by a clerk, who had completed his two years of service provided for in the parol contract of employment, to recover the balance due him for his second year's work, it was held that "the execution of the agreement upon one side, whether partial or complete, does not take it out of the statute."

In *Aiken v. Nogle* (1891) 47 Kan. 96, 27 Pac. 825, an action by a servant for wages due under a parol contract by which defendant agreed to pay her at a specified rate for each year she worked as a servant, the court mentions the fact that the contract has been fully performed on plaintiff's part, but does not speak of such performance having any effect upon the application of the statute.

²⁵ *Towsley v. Moore* (1876) 30 Ohio St. 184, 27 Am. Rep. 431, was an action on a parol contract by the terms of which plaintiff had agreed to work for defendant for a period of more than six years, which promise she had fully performed. This performance was set up in the reply after defendant had answered, setting up the statute. The court said: "When courts say that performance takes a case out of the statute, or that where the contract has been fully completed on both sides, or where it has been completed on one side and payment alone remains, the statute has no applica-

tion, it is only an artificial method of stating a very simple proposition. That is this: When one has received money, goods, or benefits from another, justice and equity demand that he should pay therefor, and the law will, if necessary, imply a promise to that effect. And although such benefits may have been rendered under a void contract, or one that cannot be enforced, it cannot be allowed that a defendant can retain his advantage without compensation. This would be unconscionable. In the case before us plaintiff agreed to labor for defendant for board and clothing, and such sum as her services were reasonably worth. If this contract cannot be enforced, by reason of the statute, the law can imply a promise precisely like it. The defendant has received the benefit of the services, whatever they were, and it would be a reproach to the law if he were permitted to retain these benefits without just payment."

²⁶ Appended to *Malzer v. Schisler*, 51 L.R.A.(N.S.) 77.

²⁷ It was held in *Westfall v. Perry* (1893) — Tex. Civ. App. —, 23 S. W. 740, where three persons had erected a windmill on the land of a fourth, under an unsigned contract whereby the three were to have the use of the water for three years in payment, that after the completion of the windmill one of the three might maintain an action for breach of the contract against another of the three, who fenced in the well and cut off his use of the water, on the ground that the full performance on one side had removed the contract from the operation of the statute.

And full performance on one side is held, in *Chenoweth v. Pacific Exp. Co.* (1902) 93 Mo. App. 185, to be sufficient to take a parol contract of employment, not to be performed within a year, out of the statute. In that case the contract had been one for life employment, entered into in consideration of plaintiff's agreement not to sue for personal injuries sustained in defendant's employ. The defendant, after

c. In equity.

The doctrine of part performance being of equitable origin, courts of equity would naturally be expected at least not to be less favorably disposed than courts of law towards the doctrine which removes from the operation of the stat-

ute parol contracts for services not to be rendered within a year, when the services have been fully performed. No direct authority has been discovered upon this point, however, but the inference deducible from one case²⁸ is harmonious therewith.

fifteen years' employment, had discharged plaintiff, and he brought an action for breach of contract. While no criticism is made with respect to the rule of law applied, it should be noted that what the court here calls a complete performance on the part of the plaintiff is nothing more than a performance until the breach by defendant.

²⁸In *Vose v. Strong* (1891) 45 Ill. App. 98, affirmed in (1893) 144 Ill. 108, 33 N. E. 189, a bill in equity in which plaintiff claimed money due from the estate of a deceased person under a parol contract

whereby plaintiff agreed to transact deceased's business during his lifetime for a certain compensation, the court, in refusing the relief sought on the ground that the evidence was not clear and convincing, refers to the matter of part performance in the following language: "The law is well established that a court of equity will not enforce a parol agreement, when it is obnoxious to the statute of frauds, even if performed, unless the evidence . . . is clear and convincing." E. L. D.

UTAH SUPREME COURT.

FERD J. FABIAN, Respt.,
v.

WASATCH ORCHARD COMPANY, Appt.

(41 Utah, 404, 125 Pac. 860.)

Statute of frauds — oral contract for services — compensation.

A broker may recover the reasonable value of services rendered under a contract void under the statute of frauds because not in writing, in selling goods for another, if the services are accepted, without showing that they result in a profit to the employer. For other cases, see *Contracts*, I. e, in *Dig.* 1-52 N. S.

(July 31, 1912.)

APPEAL by defendant from a judgment of the District Court for Salt Lake County in plaintiff's favor in an action brought to recover the value of services rendered by plaintiff for defendant. Affirmed.

The facts are stated in the opinion.

Messrs. Dickson, Ellis, Ellis, & Schuller, for appellant:

Where a person performs services under a contract which is void because the same is within the statute of frauds, he can recover only the value of the benefits received

Note.—For right to quantum meruit for services rendered under parol contract unenforceable because not to be performed within a year, see annotation following this case, post, 895.

As to part performance to take contracts to render services not to be performed within a year out of the statute of frauds, see annotation following *Diamond v. Jacquith*, ante, 884.

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by the person for whom the services are performed.

Browne, Stat. Fr. 5th ed. 118a; Keener, Quasi Contr. p. 279; Gazzam v. Simpson, 52 C. C. A. 19, 114 Fed. 71; Reed v. McConnell, 133 N. Y. 425, 31 N. E. 22; Dowling v. McKeeney, 124 Mass. 478; 29 Am. & Eng. Enc. Law, 836; Henrikson v. Henrikson, 143 Wis. 314, 33 L.R.A.(N.S.) 534, 127 N. W. 963; Bristol v. Sutton, 115 Wis. 365, 73 N. W. 424; Clark v. Terry, 25 Conn. 395; Davenport v. Gentry, 9 B. Mon. 427; 20 Cyc. 299; Banker v. Henderson, 58 N. J. L. 26, 32 Atl. 700.

Messrs. Stephens, Smith, & Porter and Dey, Hoppaugh, & Fabian, for respondent:

Plaintiff was entitled to recover the reasonable value of the services rendered by him and accepted by defendant.

Vickery v. Ritchie, 202 Mass. 247, 26 L.R.A.(N.S.) 810, 88 N. E. 835; 3 Sutherland, Damages, 3d ed. 684; 9 Enc. Pl. & Pr. 717, 718; Werre v. Northwest Thresher Co. 27 S. D. 486, 131 S. W. 721; King v. Brown, 2 Hill, 485; Graham v. Graham, 134 App. Div. 777, 119 N. Y. Supp. 1013; Cozad v. Elam, 115 Mo. App. 136, 91 S. W. 434; Jackson v. Stearns, 58 Or. 57, 37 L.R.A.(N.S.) 639, 113 Pac. 30, Ann. Cas. 1913A, 284; Stout v. Royston, 32 Ky. L. Rep. 1055, 107 S. W. 784; Grant v. Grant, 63 Conn. 530, 38 Am. St. Rep. 379, 29 Atl. 15; Snyder v. Neal, 129 Mich. 692, 89 N. W. 588; Hull v. Thoms, 82 Conn. 647, 74 Atl. 925; Patten v. Hicks, 43 Cal. 509; Hindmarch v. Hoffman, 127 Pa. 284, 4 L.R.A. 368, 14 Am. St. Rep. 842, 18 Atl. 14; Salmon v. United States, 19 Wall. 17, 22 L. ed. 46; Wojahn v. National Union Bank, 144 Wis. 646, 129 N. W. 1068.

Straup, J., delivered the opinion of the court:

The complaint is in two counts. One that the plaintiff, a merchandise broker, rendered services for the defendant, a Utah corporation engaged in canning and selling fruits and vegetables, in advertising, introducing, and selling its products in eastern markets, in consideration of which it, by a written agreement, agreed to give the plaintiff the exclusive right for three years to sell, as a broker, all its manufactured products in the state of Utah and in southern Idaho, for which the plaintiff was to have a brokerage of 2½ per cent of the amount of all sales made by him or by others in such territory during such time. In the second count, it is alleged that the plaintiff, at the instance and request of defendant, rendered services for it in advertising, introducing, and selling its products in eastern markets, and there creating a market for its products, which services were reasonably worth the sum of \$6,000.

The case was tried to the court, without a jury. The court found that the defendant had invested a considerable sum of money in growing asparagus for canning purposes, and that the asparagus plants had reached a stage where they would be producing in considerable quantities. That the defendant was heavily in debt, and in straitened financial circumstances. That it had a large quantity of such product on hand, but had no market or outlet for it. That it desired to convert the products into cash, regardless of the profit from the sales thereof, and to create a market therefor in eastern cities, especially in Kansas City, St. Louis, Cincinnati, Chicago, Pittsburgh, Boston, New York, and Philadelphia, and to advertise and introduce its products in such markets. That thereupon the plaintiff, a merchant broker at Salt Lake City, at the solicitation and request of the general manager of the defendant, and for and on its behalf, visited such cities and there advertised the defendant's products, and devoted time and services in introducing them and in creating a market for them, and solicited and obtained orders amounting, at the prices fixed for the products, to the aggregate sum of between \$30,000 and \$35,000. That the defendant accepted the benefit of such services, and, to the extent of its capacity, filled such orders to the amount of at least \$16,000, and that the reasonable value of plaintiff's services was \$2,300.

The court further found that, in consideration of the services to be rendered, the defendant's general manager orally agreed to give plaintiff for three years the exclusive right to sell the defendant's products in Utah and southern Idaho, and to give him

2½ per cent commission of all sales made in such territory during such time, either by himself or others. The oral contract was made about the 18th day of April, 1909. The services rendered by plaintiff, and for which compensation is sought, were rendered by him between that day and the 23d day of May of that year. The contract was reduced to writing in December, 1909, and was signed and delivered in the name of the defendant and by the person purporting to act as its general manager, the same person who made the oral contract with the plaintiff. The court found that the person so acting was the defendant's general manager when the oral contract was made, and that he then had authority to make such a contract, but that when the written contract was made he then was not its general manager, and was not in its employ, he having theretofore left it, and hence found that the written contract was unauthorized, and was not the defendant's contract. The defendant, after the rendition of the services, repudiated the contract, notified the plaintiff to that effect, and refused to ratify, confirm, or approve it, or to be bound by it. The court also found that the oral contract, though made by an authorized agent of the defendant, nevertheless was unenforceable, because by its terms it was not to be performed within one year, and was therefore within the statute of frauds. The court further found that in January, 1910, the defendant discontinued the business of canning fruits and vegetables, and in the spring of that year sold and disposed of its business.

Upon the findings, and in response to the second count of the complaint, the court rendered judgment in favor of the plaintiff for the sum of \$2,300, the reasonable value of the services rendered by the plaintiff and received and accepted by the defendant. From the judgment, the defendant appeals.

In its brief it states the proposition for consideration to be: "There is but one question in this case, and that is: Was the defendant enriched in any manner by the part performance of the oral contract, which was within the statute of frauds, and what was the value of that enrichment? In other words, what was the value of the benefits received by the defendant from the part performance of the oral contract by the plaintiff?"

Both parties agree that the law on the subject is as stated in Browne on Statute of Frauds, 5th ed. § 118a, that "the rule that, where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid, or recover for the services upon a quantum

meruit, applies only to cases where the defendant has received and holds the money paid or the benefit of the services rendered;" and, as stated in 29 Am. & Eng. Enc. Law, 2d ed. p. 836, that, "although part performance by one of the parties to a contract within the statute of frauds will not, at law, entitle such party to recover upon the contract itself, he may nevertheless recover for money paid by him, or property delivered, or services rendered, in accordance with and upon the faith of the contract. The law will raise an implied promise on the part of the other party to pay for what has been done in the way of part performance. But this right of recovery is not absolute. The plaintiff is entitled to compensation only under such circumstances as would warrant a recovery in case there was no express contract; and hence it must appear that the defendant has actually received, or will receive, some benefit from the acts of part performance. It is immaterial that the plaintiff may have suffered a loss because he is unable to enforce his contract."

But the defendant asserts that under the facts found by the court the "benefits" received by the defendant cannot be measured by ascertaining and determining the reasonable value of the services rendered by plaintiff, and accepted and received by the defendant, but by ascertaining and determining whether the services resulted to the defendant's profit or gain, whether it "was enriched" thereby, and, if so, "what was the value of that enrichment?" Hence it urges that the court erred in permitting the plaintiff to prove the reasonable value of the services, and in giving the plaintiff a judgment for the sum of \$2,300, the found reasonable value thereof, and further assails the judgment for the reason, as contended by it, that the products sold by it in the eastern markets on the orders solicited and procured by the plaintiff were sold for less than cost of manufacturing them, and were therefore sold, not to the defendant's profit or gain, but to its loss; and hence the defendant received no "benefit" from the services rendered by the plaintiff and accepted and received by it.

It is not contended that the services rendered by the plaintiff, or the orders obtained by him, were not rendered or obtained in accordance with the contract. No such claim is made. The claim made is that the defendant did not profit, "was not enriched," by the transaction. The defendant's contention leads to this: If A should orally employ B for a period of three years to do the labor in the manufacture of 100,000 brick (assuming such a contract to be within the statute of frauds), and if B, on the faith of

and in accordance with the contract, should, within the first nine months, make and produce 20,000, which were received and accepted by A, and A should then repudiate the contract and refuse to longer engage B's services, B could not recover the reasonable value of the services on a quantum meruit, but to entitle him to recover it would be essential for him to show that the market value of the brick so made by him and received by A was more than the cost of manufacture; otherwise A received no "benefit" from B's services. Or, if A should orally employ B to work on his farm for a term of three years, and agree to give him 10 acres of land at the end of that period, and if B, on the faith of the contract, should work nine months on the farm for A in tilling the soil, sowing grain, and reaping crops, and A should then repudiate the contract and refuse to longer engage B's services, again B could not recover the reasonable value of his services; and if it were made to appear that because of drought or a falling market, or other causes not due to his negligence or wilfulness, the market price of the products was less than the cost of production, then A received no benefit from B's services, and the latter could not recover from the former.

We think appellant's notion of what is meant by "benefit," as the term is used by textwriters and courts, and applied in cases of the nature under consideration, is not borne out by the authorities. The texts and cases cited by it do not support its contention. *Dowling v. McKenney*, 124 Mass. 478, is cited. There A orally agreed to convey land to B, and to take in exchange or payment a monument to be made by B. B finished the monument and tendered it with the money; but A refused to receive the monument, and refused to convey. There A did not receive or accept the monument. He did not receive or accept the fruits of B's services, and hence received no benefit. Had he received and accepted the monument and then repudiated the contract and refused to convey, then, clearly, B would have been entitled to recover the reasonable value of the monument so delivered to and accepted by A. The case in no wise makes against that doctrine, and falls within the rule stated in 20 Cyc. 299, that, "where services are rendered on an agreement which is void by the statute, an action will lie on the implied promise to pay for such services; but the promise is implied, not from the services alone, but from the benefit to defendant as well, and if defendant has received no benefit, as, for instance, where work has been performed on a chattel which is never delivered, there can be no recovery." To that effect is also cited the

case of *Banker v. Henderson*, 58 N. J. L. 26, 32 Atl. 700.

We are also referred to *Henrikson v. Henrikson*, 143 Wis. 314, 33 L.R.A.(N.S.) 534, 127 N. W. 963. That was an action to enforce specific performance of an oral contract to convey real estate upon performance by the purchaser and the making of valuable permanent improvements on the land by him. The lower court denied, and the appellate court granted, specific performance of the contract. The case is not in point, and does not decide anything in support of the appellant here.

Bristol v. Sutton, 115 Mich. 365, 73 N. W. 424, is also cited. There a minor was emancipated and left home. Shortly afterwards his uncle agreed to give him \$1,000 if he would return home and remain with and assist his father on the father's farm until he should attain his majority. The minor carried out the agreement. It was held that, the contract being within the statute of frauds, the approval by the uncle of the minor's conduct was not such a subsequent act as to create an obligation to pay; and that, since the uncle had derived no benefit from the plaintiff's labor, the contract was void. This case also falls within the rule stated in *Downing v. McKenney*, *supra*, and in no way supports the defendant's contention.

It is unnecessary to review in detail all the cases cited by appellant. An examination of them will show that they do not support any such doctrine as is contended for by it. We think the well-established rule is that, where one, not in default, on

faith of and in accordance with a contract unenforceable because within the statute of frauds, but not *malum prohibitum* nor *malum in se*, has, in pursuance of the contract, rendered services for the adversary party, who, with knowledge or acquiescence, accepted them and received the benefit of them and repudiated the contract, he may recover on a quantum meruit the reasonable value thereof,—not the profit or gain resulting to the adversary party by reason of the transaction, nor the loss suffered or sustained by the other, but compensation for the reasonable value of the services rendered by the one and accepted and received by the other. Page, *Contr.* chap. 74; *Vickery v. Ritchie*, 202 Mass. 247, 26 L.R.A.(N.S.) 810, 88 N. E. 835; *Stout v. Royston*, 32 Ky. L. Rep. 1055, 107 S. W. 785; *Cozad v. Elam*, 115 Mo. App. 136, 91 S. W. 434; *Hull v. Thoms*, 82 Conn. 647, 74 Atl. 925; *Wojahn v. National Union Bank*, 144 Wis. 646, 129 N. W. 1068; *Jackson v. Stearns*, 58 Or. 57, 37 L.R.A.(N.S.) 639, 113 Pac. 30, Ann. Cas. 1913A, 284; *Patten v. Hicks*, 43 Cal. 509; *Lapham v. Osborne*, 20 Nev. 168, 18 Pac. 881; *Snyder v. Neal*, 129 Mich. 692, 89 N. W. 588; *Werre v. Northwest Thresher Co.* 27 S. D. 486, 131 N. W. 721.

We see nothing in appellant's cases which makes against this. On this theory the case was tried and the judgment rendered. We think it should be affirmed, with costs.

Frick, Ch. J., and McCarty, J., concur.

Petition for rehearing denied August 16, 1912.

Annotation—Right to quantum meruit for services rendered under parol contract unenforceable because not to be performed within a year.

I. Scope, 895.

II. Right to quantum meruit in general, 895.

III. Reference to contract, 900.

I. Scope.

This note is confined to a consideration of those cases in which the contracts to render services were looked upon as coming within the operation of the portion of the statute of frauds dealing with contracts not to be performed within a year. The scope, therefore, does not include cases in which the contracts, although apparently not to be performed within a year, are objected to, not upon that ground, but because they fall within some other clause of the statute; e. g., the clause requiring all contracts relating to realty to be in writing.

Upon the question of part perform-

ance to take contracts to render services not to be performed within a year out of the statute of frauds, see note to *Diamond v. Jacquith*.¹

For a discussion of the general question of quantum meruit as remedy of wrongfully discharged servant with respect to services actually rendered, see note to *Davidson v. Laughlin*.²

And as to the right to recover value of services rendered in consideration of contract to convey or devise property, which is void by the statute of frauds, see note to *Jackson v. Stearns*.³

II. Right to quantum meruit in general.

Where either goods or services are

¹ Ante, 884.

² 5 L.R.A.(N.S.) 582.

³ 37 L.R.A.(N.S.) 639.

furnished by one person to another who accepts them and derives the benefit therefrom, the courts hold, as a general rule, that the latter is liable as upon an implied contract to pay the value of that which he receives. Where services are performed under a parol contract unenforceable because not to be performed within a year, the situation is the same and the same principle is applicable.

In such a case the contract is either void and considered as nonexistent ab initio, or voidable and considered as nonexistent as soon as it is repudiated by either party. Repudiation may be effected by a breach on either side, or, in absence of a breach, by an action by the servant in quantum meruit, or by the setting up by the master of the statute in an action brought by the servant on the contract. Thus, it is only in cases where neither party has breached the contract and, in addition thereto, where the servant bases his action upon contract, and the master makes no defense on the ground of the statute, that even a contract considered voidable may, aside from the matter of part performance, be given any effect in an action to recover for services rendered thereunder. And in cases of that kind the matter of quantum meruit would not be raised. Therefore, for the purposes of this discussion it may be said that the rights and obligations of the parties depend in no way upon the express contract, but arise wholly out of the contract implied by law from the acceptance of the services rendered. For that reason the question as to who breached the express contract is, even in jurisdictions where the statute is held to render parol contracts merely voidable, not a proper one for consideration. The breach by either party will avoid it, and, having been avoid-

ed, no liability or obligation can be imposed upon the party guilty of the breach. And, moreover, the rights and liabilities existing between the parties under the implied contract can scarcely be said to be in any way dependent upon the identity of person who breached a wholly independent and void express contract. The servant has performed certain services and the master, having had the benefit of them, must make compensation. Therefore, for a court to inquire, before rendering judgment in an action of quantum meruit, into the question as to who breached the contract, is both unnecessary and improper, and a decision based upon any such consideration must be deemed incorrect.

If it is objected that under this rule a servant may by his own default avoid a contract and recover greater compensation than that agreed upon, it may be answered that a master may by his default avoid a contract and, in a suitable case, compel his servant to be satisfied with a lesser compensation than that specified in the contract. But, aside from this, both the master and the servant enter into the parol contract knowing that it may be avoided by either, and if they are satisfied to take that risk they should not be heard to complain when called upon to abide by the consequences.

While, in many instances, the courts are so hazy and indefinite in their reasoning that a perusal of the cases without independent consideration is liable to prove both unsatisfactory and misleading, practically all the decisions are in harmony with these principles. There are numerous authorities for the proposition that where the master has breached the contract,⁴ or has refused to pay the contract price for the services rendered

⁴ In *Emery v. Smith* (1865) 46 N. H. 151, an action by a clerk who had completed his two years of service provided for in the parol contract of employment, to recover the balance due him for his second year's work, it was said that "where the defendant has received a benefit from the part execution by the plaintiff of such a contract, and then refuses to complete his part of it, he may be compelled to answer for what he has so received, either by a quantum meruit or other appropriate remedy."

And where, in *Smith v. Chase & B. Piano Mfg. Co.* (1915) 185 Mich. 313, 151 N. W. 1025, the administrator of a person engaged under a parol contract of employment for three years was suing as on implied contract to recover instalments of salary not earned at the time of the employee's discharge, it is said, in holding recovery improper, that if the employee "has rendered

services in reliance upon a void contract, he may recover the value of the services actually rendered, under the common counts."

Where defendant removed from the state and thus prevented plaintiff from continuing to render his services in assisting her with her business and her children, and defendant further refused to convey to plaintiff the ranch which, under the parol contract, he was to receive for his services, it was held in *Stout v. Royston* (1908) 32 Ky. L. Rep. 1055, 107 S. W. 784, an action for the value of the services rendered, which defendant sought to defeat on the ground that the contract was void, that plaintiff might recover upon quantum meruit.

In *Wonsettler v. Lee* (1888) 40 Kan. 367, 19 Pac. 862, an action for the breach of a parol contract under which plaintiff had performed the services agreed upon for two years, in which defendant "successfully

thereunder,⁵ the servant may recover the value of such services as upon quan-

tum meruit. And where the servant has breached the contract, the courts are

pleaded the statute of frauds, it was held that, the allegations of the petition being sufficiently broad, a recovery might be had upon quantum meruit.

And in *Frazer v. Howe* (1883) 106 Ill. 563, where the employer successfully set up the statute of frauds as a defense to a set-off set up by the employee for the breach of the oral contract of employment which was to last five years, it was held that the employee might recover in quantum meruit the value of the services rendered and the money expended in executing his portion of such contract.

So, in *William Butcher Steel Works v. Atkinson* (1873) 68 Ill. 421, 18 Am. Rep. 560, where an employer successfully set up the statute of frauds as a defense to an action by an employee on a contract of employment for three years which he had partly performed before his discharge, it is held that plaintiff may recover in quantum meruit.

In *Cohen v. Stein* (1884) 61 Wis. 508, 21 N. W. 514, an action by discharged employees to recover the value of the services rendered under a parol contract of employment not to be performed within a year, the right to such recovery is admitted with respect to services not compensated.

Where plaintiff agreed under a parol contract to cultivate defendant's land for two years for a share of the crop, both parties understanding that a large part of the labor performed the first year was a preparation for the increased productiveness in the second year, and defendant at the end of the first year paid plaintiff his share of that year's crop, and refused to let him cultivate the second year, plaintiff may maintain an action to recover the value of the labor performed and not paid for in his share of the first year's profits. *Williams v. Bemis* (1871) 108 Mass. 91, 11 Am. Rep. 318.

In *Cadman v. Markle* (1889) 76 Mich. 448, 5 L.R.A. 707, 43 N. W. 316, an action to recover the value of services rendered prior to plaintiff's discharge, in the promotion of corporations under a parol contract of employment not to be performed within a year, plaintiff is held to be entitled to a recovery.

So, in *Kleeman v. Collins* (1872) 9 Bush (Ky.) 460, where an employee who had been engaged under a parol contract for a year to begin at a future date had been discharged without cause at the end of four months, and was suing for breach of the contract, and the employer set up the statute of frauds, the court said: "The only remedy the party has is by quantum meruit, or some appropriate action other than on the contract itself." In this case, however, the plaintiff had been paid in full for the four months he had worked, and was seeking damages for the failure to furnish work during the remainder of the year. L.R.A.1916D.

In *McGartland v. Steward* (1860) 2 Houst. (Del.) 277, an action on quantum meruit by a mother for the partial services of her son rendered before defendant's breach of a contract of quasi apprenticeship for a term of three years, to which defendant attempts to set up the contract, it is held that the plaintiff may recover. The court said: "Where either party has partially performed the special agreement pursuant to the terms of it, but has been prevented from completing or perfecting it by the default or misconduct of the other party, the party so interrupted and prevented from completing it may recover on the common counts and in quantum meruit for his partial services up to the time when he was stopped, whatever they were reasonably worth."

Where defendant set up the statute of frauds in an action for the breach of an oral contract whereby plaintiff was to be given the timber cleared from land and the use of the land for two years in consideration of his services in clearing it, a judgment, not on the contract, but for his services in clearing the land, was held proper. *Gates v. Davis* (1905) 28 Ky. L. Rep. 490, 89 S. W. 490.

And in *Giles v. McEwan* (1896) 11 Manitoba L. R. 150, an action on a parol contract of employment for a year to begin at a future time, where defendant had dismissed plaintiffs two days before the end of the year, it was held that they could recover the value of the services performed as upon a quantum meruit.

⁵ In *McElroy v. Ludlum* (1880) 32 N. J. Eq. 828, an action by an employee on a parol contract of hiring for a term of five years, to recover the share of the profits due him as compensation, where defendant relied upon the statute of frauds, the court says that "the only remedy in such cases is by an action on a quantum meruit to recover the value of the services."

And in a subsequent action, *Buckingham v. Ludlum* (1883) 37 N. J. Eq. 137, brought to enforce a judgment obtained upon quantum meruit, it is again said that "it is a well-established legal principle that where one person renders valuable services to another, under a contract invalid by the statute of frauds, and the person to whom the services are rendered, after getting them, refuses to perform his part of the contract, the person rendering the services may, in such event, treat the contract as a nullity, and recover the value of his services in an action on the quantum meruit."

In *Price v. Press Pub. Co.* (1907) 117 App. Div. 854, 103 N. Y. Supp. 296, an action by an employee who had served the term of his employment, to recover a bonus promised him by parol more than a year before his contract of service expired, to be paid at the conclusion of such term of employment in consideration of his re-

practically unanimous in holding that he may recover the value of the services

maining, it is said that plaintiff's action was not on the void agreement, but in quantum meruit.

Van Horn v. Van Horn (1890) — *N. J. Eq.* —, 20 Atl. 826, was suit for an accounting between partners, involving, among other things, a claim by an employee for wages. Employee sought at first to enforce the contract and demanded compensation for the full term of her employment, but, upon learning that such contract of employment was within the statute as one not to be performed within a year, she sought to recover a larger sum by showing that her services were worth more than the amount agreed upon. "That she had a right to make such an effort is not questioned," says the court. "The real question is, What were her services fairly worth?"

Where, in *Union Sav. & Trust Co. v. Krumm* (1915) — *Wash.* —, 152 Pac. 681, defendant set up as an affirmative defense in an action by the trust company, a claim for saw logs furnished under a parol contract which, by its nature, could not be performed within a year, to which defense the trust company successfully set up the statute of frauds, defendant was permitted to recover in quantum meruit.

So, in *Patten v. Hicks* (1872) 43 Cal. 509, an action to recover the contract price of logs under an oral agreement by plaintiff to cut and deliver to defendant saw logs sufficient to keep the mill running for two years, to which defendant set up the statute of frauds, it is held that plaintiff's remedy is on quantum meruit, but recovery is denied because such count is not found in the complaint.

And in *Hill v. Hooper* (1854) 1 Gray (Mass.) 131, an action by a father to recover one of the instalments due under his parol contract with defendant for the employment of his infant son for a period of five years, which defendant successfully defended on the ground that the contract was within the statute of frauds, it is said that plaintiff may have any action "on an implied contract, as for work and labor done."

In *Barrett v. Riley* (1891) 42 Ill. App. 258, an action by a mother on the contract of employment under which her son was engaged by the defendant for a period of three years, to recover a sum of money retained from his wages as a guaranty of his faithful execution of the contract, it was held that, the statute of frauds being presumed to have been pleaded thereto, plaintiff could not recover, there being no recovery possible except "upon a quantum meruit as to services actually rendered."

It is said in *Jones v. Hay* (1868) 52 Barb. (N. Y.) 501, where plaintiff was suing both upon the parol contract of hiring for more than two years which he had made with defendant for his son, and also upon quantum meruit for the value of the services rendered until the employment was terminated by mutual consent, that, "in the *L.R.A.* 1916D.

absence of any new, binding agreement between the parties relative to the services of the plaintiff's son, he could recover upon a quantum meruit for the services performed."

And where in *Shute v. Dorr* (1830) 5 Wend. (N. Y.) 204, plaintiff had contracted orally with defendant to employ his son for a period of several years, it was held that, the contract having been abandoned by the assent of the parties, plaintiff might recover on quantum meruit for the services performed.

It is held in *La Du-King Mfg. Co. v. La Du* (1887) 36 Minn. 473, 31 N. W. 938, in which defendant set up a counterclaim for services rendered under a parol contract of employment for five years, that where an employee leaves the service of his employer for good cause, he is entitled to recover the value of his services "not exceeding the compensation fixed by the agreement under which the service was rendered."

After holding, in *Myers v. Korb* (1899) 21 Ky. L. Rep. 163, 50 S. W. 1108, an action under a parol contract for a balance of wages earned, that a contract for services until plaintiff should learn his trade may be performed within a year, and is not within the statute of frauds, the court adds: "But, if no action could be maintained upon the contract, appellee [employer] would not be allowed to shelter himself behind the statute of frauds, and so obtain an infant's services for less than they were worth."

Where, in *Miller v. Wisener* (1898) 45 W. Va. 59, 30 S. E. 237, an attorney set up a counterclaim for services rendered under a parol contract of employment for four years, to which plaintiff objected as being within the statute, it was held that defendant might recover as on quantum meruit the value of the services rendered.

And an action of quantum meruit to recover the value of the services rendered was held proper in *Nones v. Homer* (1858) 2 Hilt. (N. Y.) 116, where plaintiff was suing to recover for such services under a parol contract for a year to begin in the future, which he had partly performed.

Where, in *Towsley v. Moore* (1876) 30 Ohio St. 184, 27 Am. Rep. 434, an action on a parol contract of employment for a term of more than six years, which plaintiff had fully performed, defendant set up the statute, plaintiff was permitted to recover in quantum meruit for the value of the services rendered.

And where a servant sues for wages due under an oral contract by which defendant agreed to pay her at a specified rate for each year she worked as a servant, it is held that, assuming the contract to come within the statute of frauds as not to be performed within a year, as contended by defendant, plaintiff still has an action for the value of services actually performed. *Aiken v. Nogle* (1891) 47 Kan. 96, 27 Pac. 825.

rendered.⁶ In only two jurisdictions have the courts held otherwise,⁷ and in one of these the rule has been questioned in a later case.

While this position seems at first inharmonious with the rule sustained by the great weight of authority, that money

paid upon a parol contract for the sale of land cannot be recovered back if the vendor is willing to perform his part,^{7a} the two rules are found to be distinguishable. In a decision by a court which adheres to both rules⁸ the distinction is clearly made between them.

⁶ Where, in *Chase v. Hinkley* (1905) 126 Wis. 75, 2 L.R.A.(N.S.) 738, 110 Am. St. Rep. 896, 105 N. W. 230, 5 Ann. Cas. 328, an action on a parol contract of employment for a year to begin in the future, to recover for services rendered, defendant set up plaintiff's breach, recovery was held proper in quantum meruit. "Either party," says the court, "can terminate the services at any time and the employee recover the reasonable value of the work done."

And the father of an apprentice who leaves the employ of his master long before the four-year period of apprenticeship, as provided in the parol contract, has expired, may, it is held in *Salb v. Campbell* (1886) 65 Wis. 405, 27 N. W. 45, recover the reasonable value of the services performed.

In *Comes v. Lamson* (1844) 16 Conn. 246, an action for the value of services rendered by a laborer who entered into a parol contract to work for defendant for a year to begin at a future date, and who left the employment before the term had expired, the plaintiff was held to have the right to the relief sought, although defendant set up the contract.

Where, in *Draheim v. Evison* (1901) 112 Wis. 27, 87 N. W. 795, an action by a father to recover the value of services rendered by his son under a parol contract of employment for a year to begin in the future, defendant set up the son's breach, it was held that the plaintiff might recover upon a quantum meruit.

And where plaintiff was suing for services rendered as morocco dresser under a parol contract of employment for two years, it was held that he was "under no obligation to continue in his employer's service for that length, and could recover for the value of the service he had rendered." *McGlucky v. Bitter* (1852) 1 E. D. Smith (N. Y.) 618.

In *Hartwell v. Young* (1893) 67 Hun, 472, 22 N. Y. Supp. 486, an action by an employee under a parol contract for a year to begin in the future, to recover the value of the services rendered prior to the time she left defendant's employ, it is held that a verbal contract for services, void under the statute, which does not involve the investment of capital further than the mere compensation for services, can be treated by the employee as void, so that he may abandon performance and recover upon quantum meruit for the services rendered prior to his breach.

In *King v. Welcome* (1855) 5 Gray (Mass.) 41, an action by an employee who wrongfully left defendant's employ and sought to recover upon quantum meruit for L.R.A.1916D.

the work performed, it is held that defendant could not defend on the ground that the contract under which the work was performed, which was oral, was entire and for the term of a year to begin at a future date.

And it is held in *Tague v. Hayward* (1865) 25 Ind. 427, an action by an apprentice for the value of the work and labor performed during the five years prior to his breach of the contract, that the master cannot set up the parol contract of apprenticeship as a bar thereto.

In *Clark v. Terry* (1856) 25 Conn. 395, an action by an employee under a parol contract of employment for a year and a day, for the value of services rendered before his breach of the contract, where defendant attempted to set up the contract in defense, on the theory that by its terms performance was a condition precedent to plaintiff's right of recovery, quantum meruit is said to be the proper action, the recovery being denied, however, on the ground that, while the contract fell within the statute, its terms should still control with respect to the date of payment.

⁷ *Abbott v. Inskip* (1875) 29 Ohio St. 59, was an action by an infant who had rendered services under a parol contract not to be performed within a year, to recover the value thereof. Such recovery was denied because plaintiff had left defendant's service without cause. "The default of a defendant," says the court, "or his refusal to go on with a contract which falls within the statute of frauds, is an essential condition of the right to recover for services rendered under it. It is only in cases where the defendant, by reason of his own breach of such contract, is estopped from setting it up as a defense, that an action for the value of the work done under it can be maintained."

Where, in *Galvin v. Prentice* (1871) 45 N. Y. 162, 6 Am. Rep. 58, an action upon quantum meruit for services performed upon a parol contract of employment for three years, the court below had charged the jury that it was immaterial whether plaintiff had been discharged or had voluntarily left the employment, it was held that before plaintiff can maintain his action, he must show the defendant, and not himself, to be in default. This part of the opinion, however, is designated in *Hartwell v. Young* (1893) 67 Hun, 472, 22 N. Y. Supp. 486, supra, footnote 6, to be obiter.

^{7a} *Cook v. Griffith* (W. Va.) ante, 466.

⁸ *King v. Welcome* (1855) 5 Gray (Mass.) 41, supra, footnote 6.

See, however, *Swanzy v. Moore* (1859) 22 Ill. 63, 74 Am. Dec. 134; *Philbrook v.*

In the case of the action to recover money paid upon a parol contract for the sale of land, the "action rests upon an implied assumpsit. The implied promise arises only upon the failure of the consideration upon which the money was paid. The plaintiff fails to show any failure of consideration. He shows the money was paid upon a contract not void, and which the defendant is ready to perform. The consideration upon which it was paid exists unimpaired. . . . In the case of the money paid upon a contract for the sale of land, the action fails because no failure is shown of the consideration from which the implied promise springs. In the case at bar, the defense fails because the contract upon which the defendant relies is not evidenced as the statute requires."

The implied contract which is the foundation of the action of quantum meruit is, as stated above, based upon the fact that the master has received the benefit of such services. Such services having been performed and the benefit duly accepted, nothing further is

necessary to the servant's right of action; and it is not incumbent upon him to show that the services resulted in profit to his master.⁹

It should be noted, in connection with the cases here discussed, that the position is taken by several courts that the part performance by a servant of his contract will remove the contract from the operation of the statute of frauds.¹⁰ And in still a larger number of jurisdictions it is held that complete performance by the servant will remove the operation of the statute.^{10a} Where this is the case there is, of course, no necessity for a right of action upon quantum meruit, and it has been held that no such right exists.¹¹

III. Reference to contract.

In a few jurisdictions parol contracts for services not to be performed within a year are held admissible in actions of quantum meruit as evidence upon the point as to the value of the service rendered.¹² In other states, however, an opposite opinion is held.¹³ While it may be a close question as to which of these

Belknap (1834) 6 Vt. 383; and Mack v. Bragg (1858) 30 Vt. 571, in footnote 8 of the note to *Diamond v. Jacquith*, ante, 880, which, it seems, are really opposed to the doctrine of *King v. Welcome*, although the language employed suggests that the decisions are based upon the theory that part performance removes the contracts involved from the operation of the statute of frauds.

⁹ *FABIAN v. WASATCH ORCHARD CO.* ante, 892, in which it is held that a broker may recover the reasonable value of services rendered under a parol contract not to be performed within a year, if the services are accepted, without showing that they result in profit to his employer.

¹⁰ See note to *Diamond v. Jacquith*, supra, upon the question of part performance to take contracts out of the statute of frauds.

^{10a} *Ibid.*

¹¹ See *Van Valkenburg v. Croffut* (1878) 15 Hun (N. Y.) 147, footnote 23 of the note to *Diamond v. Jacquith*, supra.

¹² In an action for work and labor performed by plaintiff prior to his discharge, under a parol contract of employment for a year to begin in the future, evidence of the terms of the contract is admissible on behalf of the plaintiff to show the value of his services as agreed upon by the parties. *Moore v. Capewell Horse Nail Co.* (1889) 76 Mich. 606, 43 N. W. 644.

And in *Clark v. Terry* (1856) 25 Conn. 395, an action by an employee under a parol contract of employment for a year and a day, for the value of services performed in the period before he left defendant's service, it is held that the contract is not to be entirely disregarded. The court says: "It is true that if the plaintiff

can recover at all, it must be for a quantum meruit, or so much as he deserves to have for the service performed. But this is not to be measured by the value of such services alone, as if no contract had been made between the parties." And further on in the opinion it is said again: "Now, in respect to the question whether wages have been earned which ought to be paid for, . . . it appears to us that all the circumstances under which they are claimed to have been earned, including the contract under which the service was performed, although it may be one that cannot be enforced by an action directly upon it, may and ought to be considered."

In *Giles v. McEwan* (1896) 11 Manitoba L. R. 160, an action involving a parol contract for a year's employment to begin in the future, breached by defendant two days before the expiration of the year, evidence of the contract is held proper "for a collateral purpose, such as to ascertain the terms of the engagement and the value of the services."

And the agreement is held in *Nones v. Homer* (1858) 2 Hilt. (N. Y.) 116, to be the measure of damages for the value of services rendered under a parol contract of employment for a year to begin in the future, "in the absence of proof as to the value" of such services. While seeming to be authority for the proposition that the contract is the measure of damages in actions in quantum meruit, all that is in fact held in this case is that, when there is no other evidence as to the value of the services, the contract may be considered upon that point.

¹³ In *Thacher v. New York, W. & B. R. Co.* (1912) 153 App. Div. 186, 138 N. Y.

views is right, there seems to be little doubt as to the impropriety of making use of such a contract, not for the mere purpose of furnishing evidence of value, but for the purpose of measuring the compensation. While such a practice has been held improper in several states,¹⁴ it has been upheld in a number of others.¹⁵ But how it can be held that the

adoption of the rate of compensation fixed in the contract as the measure of the servant's recovery does not amount to the giving of effect to a contract within the statute of frauds is not easy to comprehend. And the distinction sometimes attempted to be made between jurisdictions in which the statute is held to render offensive contracts void,

Supp. 463, an action involving a count in quantum meruit for the value of work done under a parol contract not to be performed within a year, the court says: "The whole theory of allowing a recovery upon quantum meruit where the contract is found to be void under the statute proceeds upon an elimination of the contract. There is no contract in existence to be availed of by either the plaintiff or the defendant to fix their several rights, duties, or obligations. The action is based upon the equitable doctrine that the defendant, having received the benefit, should pay therefor what it was reasonably worth; that the implied promise to pay became enforceable when the services were rendered. . . . It is true the later cases hold that the amount of remuneration provided by the alleged contract may be looked at as some evidence of the value of the services, but the jury are not bound thereby. It is admitted in evidence as in the nature of an admission as to value. If, although the statute declared the contract to be void and incapable of enforcement, it could still be made use of to fix the respective liabilities of the parties, the statute would become a nullity."

Where, in *McElroy v. Ludlum* (1880) 32 N. J. Eq. 828, an action by an employee on a parol contract of hiring for a term of five years, to recover the share of profits due him as compensation, plaintiff's remedy is held to be quantum meruit, it is said: "The policy of the statute is to prevent frauds which may be accomplished by setting up contracts of the interdicted class, by parol testimony. That policy is infringed upon equally whether the contract be used for the purpose of influencing the amount of the recovery or be made the foundation of the action."

In *McGartland v. Steward* (1860) 2 Houst. (Del.) 277, an action on quantum meruit by a mother for the partial services of her son rendered before defendants' breach of a contract of quasi apprenticeship for a term of three years, it is held that plaintiff may recover such compensation as the jury may "consider reasonable for such services, to be determined, however, without reference to any rate of wages stipulated to be paid for them in the special agreement."

¹⁴ Where, in *William Butcher Steel Works v. Atkinson* (1873) 68 Ill. 421, 18 Am. Rep. 560, an action of assumpsit by an employee to recover the value of services performed up to the time of his discharge, under a parol contract of employment for three years, the defendant urged that the rate

fixed by the contract should control upon the measure of the value of plaintiff's services, the court says that "this position is neither equitable nor is it well founded in law."

And this case is followed in *Schanzenbach v. Brough* (1895) 58 Ill. App. 526, an action by an employee discharged without cause, to recover for services rendered under a parol contract of employment not to be performed within a year, where it is said that plaintiff "is not limited to the price fixed by his contract, . . . but may recover what his services were really worth."

Referring to actions in quantum meruit to recover the value of services rendered under parol contracts not to be performed within a year, the court in *Cohen v. Stein* (1884) 61 Wis. 508, 21 N. W. 514, says: "The logic of the rule is, inasmuch as the contract has no legal validity, it is not admissible in evidence to determine the value of the services, but the servant recovers what he can show his services were reasonably worth."

¹⁵ Where, in *Union Sav. & T. Co. v. Krumm* (1915) — Wash. —, 152 Pac. 681, defendant set up as an affirmative defense in an action by the trust company, a claim for saw logs furnished under a parol contract which, by its nature, could not be performed within a year, the court held that it was the rule "that a party performing services under a contract void as in contravention of the one-year statute of frauds may recover for the work actually performed on a quantum meruit, and the value of the services is measured by that fixed in the contract."

In *La Du-King Mfg. Co. v. La Du* (1887) 36 Minn. 473, 31 N. W. 938, involving a counterclaim in quantum meruit for services rendered under a parol contract of employment for five years, the court fixes the amount of the recovery at the value of the services, "not exceeding the compensation fixed by the agreement under which the service was rendered." The court then quotes from *Clark v. Terry* (1856) 25 Conn. 395, *infra*, footnote 18, and adds: "This rule we think applicable in the case at bar."

In *Kruger v. Leppel* (1889) 42 Minn. 6, 43 N. W. 484, an action of quantum meruit to recover for services as a farm laborer rendered under an oral contract to work for a year from a future date at a fixed gross price to be paid at the end of the year, the court said: "So far, however, as the parties have voluntarily acted under and performed them [parol contracts not to be performed within a year], they are to be taken

and those in which it is held merely to render them voidable,¹⁶ is of no avail. The very act of bringing an action in quantum meruit is a repudiation of the contract which will avoid it and render it as null as if the statute were held to have the effect of rendering it void in the first instance. In passing, it should be noticed that the practical result of the rule establishing the contract as the measure of compensation in quantum meruit is the same as that of the rule which holds that part performance removes the contract from the operation of the statute so far as performance goes.¹⁷ In each instance a way is found to avoid the harsh effect of the statute

and compel the parties to abide by the terms of the contract so far as it has been executed, the only difference being in the form of action in which the remedies are obtainable.

The question of the propriety of referring to the contract arises also with respect to contracts in which the payment of the compensation is postponed until the expiration of the term of service. It has been held in cases where the servant was chargeable with the breach of the contract, first, that he ought not to be permitted to recover before the expiration of the term of service,¹⁸ and, second, that he ought not to recover at all, so long as he did not complete the

as defining and measuring the rights of the parties." And assuming plaintiff to be at fault for breaching the contract, it is said that "if, by the terms of the agreement, he would be entitled to pay for the part performance, the rate fixed by it must be the measure he is to receive."

And these two cases are followed in the later cases of *Spinney v. Hill* (1900) 81 Minn. 316, 84 N. W. 116, and *Lally v. Crookston Lumber Co.* (1902) 85 Minn. 257, 88 N. W. 846, actions for breach of parol contracts of employment not to be performed within a year, in which it is held that plaintiff's remedy is for the value of the services rendered, to be measured by the terms of the contract.

In *Shumate v. Farlow* (1890) 125 Ind. 359, 25 N. E. 432, an action for damages sustained by reason of defendant's refusal to permit plaintiff to perform services on his farm after he had moved in, in accordance with the terms of a parol contract which was not to be performed within a year, the court says: "No action can be maintained upon such an agreement, either for the purpose of enforcing it or to recover damages for its breach. . . . If such a contract can be looked to or respected for any purpose whatever, it is only to define and measure the rights of the parties so far as it has been voluntarily executed. It may well be that to the extent that either party has derived any advantage under the contract on account of the voluntary part performance of the other, the contract may be referred to in determining and considering the amount of compensation which may be recovered."

And in *Ryan v. Dayton* (1856) 25 Conn. 188, 65 Am. Dec. 560, an action of assumpsit for work and labor, without specifically deciding that the contract between the parties under which the services were performed came within the statute, the court holds that reference may be had thereto for the purpose of determining the amount of the recovery.

In *Cohen v. Stein* (1884) 61 Wis. 508, 21 N. W. 514, an action by discharged employees to recover the value of the services

rendered under a parol contract of employment not to be performed within a year, the court, while admitting the propriety of quantum meruit for services not compensated, denies recovery, inasmuch as plaintiffs have received in full the contract price for the services rendered.

¹⁶ It is held in *Miller v. Wisener* (1898) 45 W. Va. 59, 30 S. E. 237, where defendant set up a counterclaim for services rendered under a parol contract of employment for four years, that "as our statute does not declare the contract void, it would furnish the measure of recovery" in quantum meruit.

¹⁷ See the note on the question of part performance to take contracts to render services not to be performed within a year out of the statute of frauds, appended to *Diamond v. Jacquith*, ante, 880.

¹⁸ In *Clark v. Terry* (1856) 25 Conn. 395, an action by an employee under a parol contract of employment for a year and a day, brought before the expiration of the term of service, for the value of services performed in the period before he left defendant's service, it is held that the contract is not to be disregarded with respect to the date of payment. The court says: "Nor can the time of payment for the service, as it was agreed to in the contract, be disregarded. It would obviously be unjust for a party to contract to labor for a year and a day at a stipulated rate of wages to be paid at the end of the term, and after he had labored half the time, refuse to go on and demand immediate payment for the wages earned, before the expiration of the time." And it is said later on: "Now, in respect to the question whether wages have been earned which ought to be paid for, and if so, to what extent or amount, and when the payment ought to be made, it appears to us that all the circumstances under which they are claimed to have been earned, including the contract under which the service was performed, although it may be one that cannot be enforced by any action directly upon it, may and ought to be considered."

execution of his contract.¹⁹ These cases proceed upon the theory that the servant ought not to profit by his own default, and are answerable by the observation that the master entered into the parol

contract with the knowledge of such a possibility in mind. Further than that, such rules give effect to the terms of the contract in direct contravention of the terms of the statute.

¹⁹ And in *Kruger v. Leppel* (1889) 42 Minn. 6, 43 N. W. 484, an action of quantum meruit to recover for services as a farm laborer rendered under an oral contract to work for a year from a future date at a fixed gross price to be paid at the end of the year, it is held that so far

as such parol contracts have been performed "they are to be taken as defining and measuring the rights of the parties," and, assuming plaintiff to be chargeable with the breach, that he cannot recover unless he performs the whole of the contract. E. L. D.

CALIFORNIA SUPREME COURT.
(In Banc.)

FIDELITY & DEPOSIT COMPANY OF MARYLAND

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA et al.

(— Cal. —, 154 Pac. 834.)

Master and servant — workmen's compensation — driving automobile at excessive speed.

Driving an automobile on a public highway at a speed prohibited by statute under penalty is wilful misconduct, which will prevent the recovery of compensation for the death of an employee so doing, under a workmen's compensation act providing compensation for injuries arising in the course of employment except in case of wilful misconduct on the part of the employee.

For other cases, see *Master and Servant*, II. a, 1, in *Dig. 1-52 N. S.*

(January 18, 1916.)

APPPLICATION for a writ of review to determine the lawfulness of an award of the Industrial Accident Commission given under the workmen's compensation act for the death of an employee. Award annulled.

The facts are stated in the opinion.

Messrs. Alfred C. Skaffe, Guy Le Roy Stevick, and Redman & Alexander, for petitioner:

At the time of the accident the deceased was engaged in acts constituting a crime, which caused his death; this is wilful misconduct as a matter of law.

Great Western Power Co. v. Pillsbury,

Note.—As to the construction and effect of the workmen's compensation acts generally, see annotation in L.R.A.1916A, 23.

As to what constitutes serious and wilful misconduct within the meaning of the compensation acts, see annotation following *Clem v. Chalmers Motor Co.* L.R.A.1916A, 355. L.R.A.1916D.

170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 460; *Bist v. London & S. W. R. Co.* [1907] A. C. 209, 76 L. J. K. B. N. S. 703, 96 L. T. N. S. 750, 23 Times L. R. 471, 9 W. C. C. 19, 8 Ann. Cas. 1; *Bradbury, Workmen's Compensation*, pp. 480 et seq.; *Waddell v. Coltness Iron Co.* 50 Scot. L. R. 29, 2 Scot. L. T. 301, 6 B. W. C. C. 306; *Willis, Workmen's Compensation*, 15th ed. p. 58.

At the time of the accident, Head was not performing service growing out of his employment.

Neumann v. Milwaukee Electric R. & Light Co. 3 N. C. C. A. 703, note; *Greene v. Shaw* [1912] 2 I. R. 430, 46 Ir. L. T. 18, 5 B. W. C. C. 573; *Kitchenham v. The Johannesburg* [1911] A. C. 417, 80 L. J. K. B. N. S. 1102, 105 L. T. N. S. 118, 27 Times L. R. 504, 55 Sol. Jo. 599, 4 B. W. C. C. 311; *Rodger v. School Board*, 49 Scot. L. R. 413, 5 B. W. C. C. 547; *Barnes v. Nunnery Colliery Co.* [1912] A. C. 44, 81 L. J. K. B. N. S. 213, 105 L. T. N. S. 961, 28 Times L. R. 135, 56 Sol. Jo. 159, 49 Scot. L. R. 688, 5 B. W. C. C. 195; *Milliken's Case*, 216 Mass. 293, L.R.A.1916A, 337, 103 N. E. 898, 4 N. C. C. A. 512; *Lowe v. Pearson* [1899] 1 Q. B. 261, 68 L. J. Q. B. N. S. 122, 47 Week. Rep. 193, 79 L. T. N. S. 654, 15 Times L. R. 124; *Siemientkowski v. Berwind White Coal Min. Co.* — N. J. L. —, 92 Atl. 909; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 458, 3 N. C. C. A. 585.

Mr. Christopher M. Bradley, for respondents:

The deceased was not guilty of wilful misconduct as a matter of law or fact.

Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 460; *Rumboll v. Nunnery Colliery Co.* 80 L. T. N. S. 42, 63 J. P. 132, 1 W. C. C. 28; *Casey v. Humphries* [1913] W. N. 221, 29 Times L. R. 647, 57 Sol. Jo. 716, 6 B. W. C. C. 520.

Deceased suffered accidental death while he was performing a service growing out of and incidental to his employment, and while he was acting within the course of his employment, and the accident arose out

of his employment, as provided in § 12 (a) of the workmen's compensation act.

Fielder v. Davison, 139 Ga. 509, 77 S. E. 618; *Linville v. Nissen*, 162 N. C. 95, 77 S. E. 1096; *Re Employers' Liability Assur. Corp.* 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697.

Henshaw, J., delivered the opinion of the court:

By this review petitioner seeks to have an award given under § 84 of the workmen's compensation act of 1913, as that act was amended in 1915, declared invalid. *W. D. Head*, president and superintendent of the *Head Drilling Company*, a corporation, was killed. The award was made to his widow. There is thus within this case the question of the power of the Commission to make any award in case of death. But, as that question is not necessary to the decision of this case, and as it is now under the consideration of this court in another case, it is here passed over without determination.

The question presented is whether or not *Head* was guilty of wilful misconduct when he met his death. Workmen's compensation act, § 12a, subdiv. 3. This question is a jurisdictional one, and therefore subject to review by this court. *Great Western Power Co. v. Pillsbury*, 170 Cal. 180, 149 Pac. 35, 9 N. C. C. A. 460. Over the facts there is no dispute. In the course of his employment *Head*, who was at *Taft*, was directed to go to *Los Angeles* on the work of his company. He hired an automobile, with a driver, to take him from *Taft* to *Bakersfield*, at which point he proposed to embark on a train for *Los Angeles*. The distance between *Taft* and *Bakersfield* is about 40 miles, and he had four hours of time to make the run and catch his train. Leaving *Taft*, he displaced the driver, and took the wheel himself. It was in the nighttime. The Commission finds the following: "That at said time he was driving the automobile at a rate of speed from 35 to 45 miles per hour. That said rate of speed was not entirely safe in view of the condition of the road at the place of the accident, but that the evidence is insufficient to establish that such speed was unusual, according to the usual custom of drivers of automobiles in that vicinity, or that it was so in excess of customary rates of speed as to amount to speed mania, or that said excessive speed amounted to more than ordinary negligence or amounted to foolhardiness or dare-deviltry; that the act of the deceased in driving at said rate of speed was not in violation of any instructions, rules, or orders made by the said employer, the *W. D. Head Drilling Company*, L.R.A.1916D.

for the safety of its employees or any of them."

While so driving the car it ran into a sandy piece of road and overturned. *Head* was killed, and the driver injured.

The law of this state in the motor vehicle act (Stat. 1913, p. 649) declares: "Every person operating . . . a motor . . . vehicle on the public highways of this state shall operate . . . the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive" an automobile "or other vehicle on a public highway . . . as to endanger the life or limb of any person or the safety of any property: Provided, that it shall be unlawful to drive at a rate of speed in excess of 30 miles an hour." § 22.

A violation of this provision is declared a misdemeanor, punishable by fine or imprisonment or both. Admittedly, therefore, under the very findings of the Commission, *Head* was violating the express mandate of the law designed for his own protection, for the protection of the other occupants of the car, and for the protection of the general public. His act in so doing was criminal. Much of the finding of the Commission which we have quoted at length is quite beside the question and without the slightest persuasive force. It matters not, for example, that the evidence is insufficient to establish that such speed was "unusual according to the usual custom of drivers of automobiles in that vicinity." That forty men violate the law and commit crimes is neither justification nor excuse for the forty-first man, who does the same thing. Nor yet does it matter that *Head* was not afflicted with "speed mania," nor that his excessive speed did not "amount to foolhardiness or dare-deviltry." Nor is it of the slightest consequence that *Head* was not violating any rule or order made by his company. Indeed, it would be as remarkable as it would be unnecessary for an employer to give a specific instruction upon a matter completely covered by a penal statute. The plain and unescapable fact is that *Head* was criminally violating a law designed for his own protection and for that of the general public. The statute itself forbade him from endangering "the life or limb of any person," himself as well as others, and fixed the danger point of speed at 30 miles an hour. The finding is that his rate of speed "was not entirely safe." But even without such a finding, or if the finding declared it to be a safe rate of speed, the fact still remains that the deceased wilfully and deliberately miscon-

ducted himself and violated the plain mandate of the law. Says Willis, *Workmen's Compensation*, p. 58: "Where there is a deliberate and unmistakable act of disobedience to an express order, or where there is a deliberate breach of a law or rule, which is framed in the interests of the workingman, it will be held that such a breach or such disobedience amounts to serious misconduct."

There is no finding and indeed nothing in the record extenuating or excusing the conduct of the deceased. He was not even im-

pelled by the desire to make the train connection. He had four hours in which to travel 40 miles. The conclusion is unavoidable that he was guilty of the wilful misconduct contemplated by the law.

For this reason, without consideration paid to any of the other propositions urged upon our attention, the award of the Commission must be and hereby is annulled.

We concur: Angellotti, Ch. J.; Melvin, J.; Sloss, J.; Shaw, J.; Lawlor, J.

CALIFORNIA SUPREME COURT. (In Banc.)

RE APPLICATION OF WILLIAM J. DART.

(— Cal. —, 155 Pac. 63.)

Constitutional law — power to prohibit charitable work.

1. A municipal corporation cannot, in view of the constitutional recognition of the right to pursue happiness, arbitrarily say, through its Charity Commission, what person or institution may or may not engage in charitable work dependent wholly or in part upon voluntary contributions from the public.

For other cases, see Constitutional Law, II, c, in Dig. 1-52 N. S.

Same — religious liberty.

2. Under the constitutional guaranty of religious liberty, a municipal corporation cannot, through its Charity Commission, arbitrarily say who may or may not engage in charitable work dependent wholly or in part on voluntary contributions from the public.

For other cases, see Constitutional Law, II, d, in Dig. 1-52 N. S.

(February 3, 1916.)

APPPLICATION for a writ of habeas corpus to secure petitioner's release from custody to which he had been committed for alleged violation of an ordinance creating a Municipal Charities Commission and an ordinance prohibiting begging in the public streets. Petitioner discharged.

The facts are stated in the opinion.

Messrs. Gibson, Dunn, & Crutcher, Edward E. Bacon, and William A. Barnhill, for petitioner:

The ordinance of the city of Los Angeles here in question violates the constitutional guaranties of liberty and property.

Stimson Mill Co. v. Braun, 136 Cal. 122,

Note. — For state or municipal power to control private charity, see annotation following this case, post, 912.
L.R.A.1916D.

57 L.R.A. 726, 89 Am. St. Rep. 116 68 Pac. 481; *Ex parte Dickey*, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; *Re Kelso*, 147 Cal. 609, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241; *Ex parte Drexel*, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; *Allgeyer v. Louisiana*, 165 U. S. 579, 589, 590, 41 L. ed. 832, 835, 836, 17 Sup. Ct. Rep. 427; *Hughes v. Los Angeles*, 168 Cal. 764, 145 Pac. 94.

The ordinance, by its necessary operation and effect, is an unwarranted interference with religious liberty.

San Antonio v. Salvation Army, — Tex. Civ. App. —, 127 S. W. 860.

The ordinance cannot be sustained as a reasonable or valid exercise of the police power.

Re McCapes, 157 Cal. 26, 106 Pac. 229; *Ex parte Whitwell*, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *Ex parte Jentzsch*, 112 Cal. 468, 32 L.R.A. 664, 44 Pac. 803; *Ex parte Dickey*, 144 Cal. 234, 66 L.R.A. 928, 103 Am. St. Rep. 82, 77 Pac. 924, 1 Ann. Cas. 428; *Ex parte Hayden*, 147 Cal. 649, 1 L.R.A.(N.S.) 184, 109 Am. St. Rep. 183, 82 Pac. 315; *Ex parte Drexel*, 147 Cal. 763, 2 L.R.A.(N.S.) 588, 82 Pac. 429, 3 Ann. Cas. 878; *Ex parte Dietrich*, 149 Cal. 104, 5 L.R.A.(N.S.) 873, 84 Pac. 770; *Re Kelso*, 147 Cal. 609, 2 L.R.A.(N.S.) 796, 109 Am. St. Rep. 178, 82 Pac. 241; *Lawton v. Steel*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Re Smith*, 143 Cal. 368, 77 Pac. 180.

The ordinance, in conferring upon a Municipal Commission uncontrolled discretion to grant or refuse licenses, is unconstitutional and void.

Yick Wo v. Hopkins, 118 U. S. 356, 366, 368, 369, 30 L. ed. 220, 225, 226, 6 Sup. Ct. Rep. 1064; *Ex parte Sing Lee*, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; *Los Angeles County v. Hollywood Cemetery Assn.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *Re Johnston*, 137 Cal. 115, 69 Pac. 973; *Sonora v. Curtin*,

137 Cal. 583, 70 Pac. 674; *Re McCapes*, 157 Cal. 26, 106 Pac. 229; *Hewitt v. State Medical Examiners*, 148 Cal. 590, 3 L.R.A. (N.S.) 896, 113 Am. St. Rep. 315, 84 Pac. 39, 7 Ann. Cas. 750; *Schaezlein v. Cabaniss*, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; *Richmond v. Model Steam Laundry*, 111 Va. 758, 69 S. E. 932; *Montgomery v. West*, 149 Ala. 311, 9 L.R.A. (N.S.) 659, 123 Am. St. Rep. 33, 42 So. 1000, 13 Ann. Cas. 651; *Walsh v. Denver*, 11 Colo. App. 523, 53 Pac. 458; *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 42 L.R.A. 696, 68 Am. St. Rep. 155, 51 N. E. 758; *Richmond v. Dudley*, 129 Ind. 112, 13 L.R.A. 587, 28 Am. St. Rep. 180, 28 N. E. 312; *Boyd v. Frankfort*, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669; *State v. Dubarry*, 44 La. Ann. 1117, 11 So. 718; *Newton v. Belger*, 143 Mass. 598, 10 N. E. 464; *St. Louis v. Atlantic Quarry & Constr. Co.* 244 Mo. 479, 148 S. W. 948; *State v. Tenant*, 110 N. C. 609, 15 L.R.A. 423, 28 Am. St. Rep. 715, 14 S. E. 387; *Sioux Falls v. Kirby*, 6 S. D. 62, 25 L.R.A. 621, 60 N. W. 156; *Goodale v. Sowell*, 62 S. C. 516, 40 S. E. 970; *Newbern v. McCann*, 105 Tenn. 159, 50 L.R.A. 476, 58 S. W. 114; *State v. Smith*, 67 Conn. 541, 52 Am. St. Rep. 301, 35 Atl. 506; *Ex parte Theisen*, 30 Fla. 529, 32 Am. St. Rep. 36, 11 So. 903; *Bear v. Cedar Rapids*, 147 Iowa, 341, 27 L.R.A. (N.S.) 1150, 126 N. W. 324; *Anderson v. Wellington*, 40 Kan. 173, 2 L.R.A. 110, 10 Am. St. Rep. 175, 19 Pac. 719; *Hagerstown v. Baltimore & O. R. Co.* 107 Md. 178, 126 Am. St. Rep. 382, 68 Atl. 490; *Re Frazee*, 63 Mich. 396, 6 Am. St. Rep. 310, 30 N. W. 72; *State ex rel. Collinge v. Crepeau*, 29 R. I. 340, 71 Atl. 449; *State ex rel. Garabad v. Dering*, 84 Wis. 585, 19 L.R.A. 858, 36 Am. St. Rep. 948, 54 N. W. 1105; *Lynch v. North View*, 73 W. Va. 609, 52 L.R.A. (N.S.) 1038, 81 S. E. 833.

The ordinance is void for the further reason that it is an attempt to delegate legislative powers of the city council to an administrative board.

Cooley, Const. Lim. 6th ed. p. 137; *People v. Parks*, 58 Cal. 624; *Ex parte Cox*, 63 Cal. 21; *Harbor Comrs. v. Excelsior Redwood Co.* 88 Cal. 491, 22 Am. St. Rep. 321, 26 Pac. 375; *San Francisco Gaslight Co. v. Dunn*, 62 Cal. 580; *Scollay v. Butte County*, 67 Cal. 249, 7 Pac. 661; *Holley v. Orange County*, 106 Cal. 420, 39 Pac. 790; *House v. Los Angeles County*, 104 Cal. 73, 37 Pac. 796; *Knight v. Eureka*, 123 Cal. 192, 55 Pac. 768; *Schaezlein v. Cabaniss*, 135 Cal. 466, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; *Los Angeles Gas & E. Corp. v. Los Angeles*, 163 Cal. 621, 126 Pac. 594; *Egan v. San Francisco*, 165 Cal. 576, 133 Pac. 294, Ann. Cas. 1915A, 754. L.R.A.1916D.

Messrs. Albert Lee Stephens, Charles S. Burnell, Warren L. Williams, and Samuel Barnes Smith for respondent.

Mr. Andrew J. Copp, Jr., for Municipal Charities Commission:

The regulation of charity is a public, and not a private, function.

Re Coleman, 167 Cal. 212, 138 Pac. 992, Ann. Cas. 1915C, 682; *Re Sutro*, 155 Cal. 727, 102 Pac. 920; 2 *Perry*, Tr. § 697; *Sacramento Orphanage v. Chambers*, 25 Cal. App. 536, 144 Pac. 317; *Tyssen, Charitable Bequests*, p. 170; *University of London v. Yarrow*, 1 *Dé G. & J.* 72, 26 *L. J. Ch. N. S.* 430, 3 *Jur. N. S.* 421; *Re Douglas*, *L. R.* 35 *Ch. Div.* 472, 56 *L. J. Ch. N. S.* 913, 56 *L. T. N. S.* 786, 35 *Week. Rep.* 740; *Armstrong v. Reeves*, *Ir. L. R.* 25 *Eq.* 325; *Re Foveaux* [1895] 2 *Ch.* 501, 64 *L. J. Ch. N. S.* 856, 13 *Reports*, 730, 73 *L. T. N. S.* 202, 42 *Week. Rep.* 661.

Charity is a proper subject of police regulation.

Tiedeman, *Pol. Power*, § 48; *People ex rel. State Bd. of Charities v. New York Soc.* 25 *Misc.* 53, 53 *N. Y. Supp.* 1017; 42 *App. Div.* 82, 58 *N. Y. Supp.* 953, 161 *N. Y.* 233, 55 *N. E.* 1063; *People ex rel. New York Inst. v. Fitch*, 154 *N. Y.* 14, 38 *L.R.A.* 591, 47 *N. E.* 983; *Ex parte Cheney*, 90 Cal. 617, 27 *Pac.* 436; *Ex parte Delaney*, 43 Cal. 478; *Ex parte Smith*, 38 Cal. 702; *Re Newell*, 2 Cal. App. 767, 84 *Pac.* 226; *Re O'Meara*, 11 *Ont. Rep.* 603; 3 *McQuillin*, *Mun. Corp.* 1886.

Each individual case as it presents itself must be investigated, considering the character of work, the degree of efficiency, and its responsibility, and upon such investigation the discretion of the investigator must be exercised in granting or withholding permission to do any of the things enumerated in the begging ordinance, and such discretion is not unreasonable.

Ex parte Fiske, 72 Cal. 127, 13 *Pac.* 310; *Barbier v. Connolly*, 113 U. S. 27, 28 *L. ed.* 923, 5 *Sup. Ct. Rep.* 357; *Soon Hing v. Crowley*, 113 U. S. 703, 28 *L. ed.* 1145, 5 *Sup. Ct. Rep.* 730; *Re Flaherty*, 105 Cal. 558, 27 *L.R.A.* 529, 38 *Pac.* 981; *Pedrick v. Dailey*, 12 *Gray*, 161; *Com. v. Abrahams*, 156 *Mass.* 57, 30 *N. E.* 79; *Los Angeles County v. Spencer*, 126 Cal. 670, 77 *Am. St. Rep.* 217, 59 *Pac.* 202, 385; *Pacific States Supply Co. v. San Francisco*, 171 *Fed.* 727; *Lassen v. Dental Examiners*, 24 *Cal. App.* 767, 142 *Pac.* 505; *Roberts v. Duffy*, 167 Cal. 629, 140 *Pac.* 260.

Henshaw, J., delivered the opinion of the court:

The authorities of the city of Los Angeles adopted two ordinances. By one was created a Municipal Charities Commission,

whose powers and duties were defined. Amongst those powers and duties are: "(1) To investigate all charities dependent upon public appeal or general solicitation for support, and to indorse such of them as meet actual needs of the community, attain a reasonable standard of efficiency, and are so conducted as to insure the public of the wise use of the funds."

The second of these ordinances prohibits begging in the public streets or places in the city, and regulates the soliciting of alms and contributions for charitable purposes. It provides as follows:

"Section 2. It shall be unlawful for any person, firm, corporation, or association to solicit alms, food, clothing, money, or contributions within the city of Los Angeles, without first securing a permit so to do from the Municipal Charities Commission of said city. Provided, however, that the provisions of this section shall not apply to properly accredited solicitors of established churches of said city soliciting for purely religious purposes, but it shall apply to the various institutional works carried on by said churches in like manner as other persons, firms, corporations, and associations. The permit from the Charities Commission above referred to shall consist of a written certificate issued by the said Commission certifying that the object of said solicitation is worthy and meritorious, and authorizing the soliciting of gifts and donations therefor; said permits may be revoked by said Commission at any time.

"Section 3. It shall be unlawful for any person to solicit or collect for any charitable or philanthropic organization, without first obtaining a written permit so to do from the Municipal Charities Commission; said permit shall be revocable at any time in the discretion of said Commission, which may adopt such regulations regarding the soliciting and collecting of funds as its judgment may dictate; and it shall be obligatory upon the holders of such permits to abide by such rules and regulations.

"Section 4. It shall be unlawful for any person, firm, corporation, or association to give or promote any entertainment, fair, bazaar, or benefit in the name of charity or philanthropy, without first obtaining a written permit so to do from the Municipal Charities Commission, said permit to be revocable at any time at the discretion of said Commission.

"Section 5. It shall be unlawful for any person, firm, corporation, or association to solicit funds within the city of Los Angeles for any ethical, evangelistic, religious, missionary, or charitable purposes, without having first obtained an indorsement certificate from the Municipal Charities Com-
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mission. Provided, however, that the provisions of this section shall not apply to established and recognized churches or other religious organizations in the city of Los Angeles.

"Section 6. It shall be unlawful for any person, firm, corporation, or association to sell, or offer for sale, any clothing, household goods, or other goods, wares, or merchandise which have been solicited or donated for charity or philanthropy, without first obtaining a written permit so to do from the Municipal Charities Commission, said permit to be revocable at any time at the discretion of said Commission."

Petitioner was arrested under two criminal complaints charging violations of these ordinances. By the first of these complaints he was accused of soliciting "alms, food, clothing, money, and contributions . . . without first securing or having a permit or written certificate so to do from the Municipal Charities Commission." By the second of these complaints his crime was in "selling and offering for sale clothing, household goods, and other goods, wares, and merchandise which had been solicited and donated for charity and philanthropy, without first obtaining or having a written permit so to do from the Municipal Charities Commission."

The following facts appear without controversy: The Salvation Army is a religious organization founded on and believing in the teachings of Christ. It has been established for fifty years. It has its churches and charitable organizations throughout the United States and other countries. Profoundly impressed with the Founder's sympathy for the poor and afflicted and with His teachings that "Now abideth faith, hope and charity, these three, but the greatest of these is charity," and, "Now the end of the commandment is charity out of a pure heart," it has made its special field of religious work the relief of the destitute and the rescue of society's outcasts. It has found that it cannot lead the spirit of the weary and heavy burdened without first ministering to his physical necessities. While "man does not live by bread only," he cannot live at all without bread. Therefore the charitable organizations of the Salvation Army are vital, integral parts of its religious life and work. For twenty-five years it has prosecuted its religious and charitable work in the city of Los Angeles. It there maintains an "Industrial Home," where men out of employment are given food and lodging without charge, but are required, for their own self-respect and to the end that mere professional beggary be not fostered, to perform such labor as is within their power,

being paid the value thereof. It maintains a "Rescue Home and Maternity Hospital," in which, without charge, food, lodgings, and hospital service are afforded needy married women and unfortunate girls. It maintains a "Young Woman's Boarding House," giving for an extremely low price to homeless girls and women clean, wholesome food and lodging and helpful moral influences. It maintains four other hotels and lodging houses where the destitute are housed and homed free of charge, and where but a small charge is exacted from those able to pay. An average of twenty-seven persons per night are given shelter in these hotels free of all charge. It also maintains nine stores where secondhand clothing, furniture, rags, paper, and junk of various kinds, contributed by the charitable, are sold at low prices. In these stores and in the renovatory work necessary to make many contributed articles salable, employment is given to the needy, who thus become self-sustaining and self-respecting. In the years of its labors the Salvation Army has acquired properties of much value in Los Angeles, all of which are used for one or another of the described purposes. It has alleviated suffering, and given relief and employment in thousands of cases. Its books of financial account are and always have been open to the inspection and examination of its contributors, and no one of those contributors has ever voiced any complaint touching the honesty and efficiency of the Army's administrative work.

After its creation, the Charities Commission, claiming the power so to do under the aforesaid ordinances, on or about the 6th day of October, 1913, demanded, in writing, of the Salvation Army, that it should, as a condition precedent to obtaining the indorsement or permit of the Commission for carrying on or soliciting contributions for any of its above described charitable work in said city, be governed by a local board of managers, or trustees, all of whom should be residents of the city of Los Angeles, and representative Los Angeles citizens, and that all the property of the Salvation Army in the city should be conveyed to and held by such local board, and that the financial work of the Salvation Army in the city should be conducted by such local board; that no budgets for funds should be prepared and enforced on the Los Angeles workers for any purpose other than Los Angeles work; and that no funds should be sent out of Los Angeles for the use of the Salvation Army elsewhere, except by the direction of such local board, or of the Municipal Charities Commission; and that Christmas offerings, self-denial, harvest festival, and like accustomed contribu-

tions of the Salvation Army should not be used except for local purposes; and that all proceeds derived by the Salvation Army from the conduct of its aforesaid institutions in Los Angeles (whether self-sustaining or not) should be used exclusively for the extension of its work in the city, and not be subject to assessment by territorial (i. e., national) officers of the Salvation Army. Next, the Charities Commission exacted that title to all property of the Salvation Army in Los Angeles should be vested in a corporation, and this was done. Thereafter the Salvation Army and its corporation petitioned the Charities Commission for a permit allowing it to continue its charities, and its petition was denied. Always desirous of yielding obedience to the law, and of "rendering to Cæsar the things that are Cæsar's," the Salvation Army endeavored to comply with the exactions of the Charities Commission, but was unable to comply with some of them without impairing its efficiency and integrity as an organized society for religio-charitable work. Failing to secure the permit, the Salvation Army continued this work. The petitioner is one of its officers. In the performance of his duties as such officer, and not otherwise, he has been subjected to these arrests and charged with these crimes.

In setting forth the foregoing facts we are not unmindful of the limitations put on our inquiry under this writ. The validity of these ordinances is to be determined from their provisions, and the question of their validity or invalidity is all that concerns us here. Nevertheless, and assuming for the moment the validity of the ordinances, these facts are highly instructive as illustrating the extent of the power conferred and the manner of its exercise. Here is a great and living charity doing good to thousands of the needy and heavy-laden of Los Angeles, struck dead because it does not make over the management of its affairs to a local board of "representative citizens," and cannot agree that it will dispense the bounty which it receives exclusively for local purposes. Charity is not only to begin at home, but to end at home, saving as under "permit" it may be suffered to go abroad. The quality of mercy (and so necessarily of charity), we are told,

—"is not strained;

It droppeth as the gentle rain from Heaven
Upon the place beneath."

But in Los Angeles it is to be strained and drop as from a sprinkling pot in the guiding hand of the Charities Commission. But this exemplification of the use of the

power is not, of course, an argument against the existence of the power itself. Conceding the existence of the power, if in any instance an illegal exercise of it has been made, that fact will constitute a defense to a prosecution, but will not be effective to destroy the validity of the grant of power itself. The basic question still remains: May a private charitable association, order, or organization be denied the right to fulfil the purposes of its existence saving under a "permit" from the authorities? We here use the term "private charity" as meaning one not supported in whole or in part by state or municipal funds. Over the latter class manifestly the power of regulation and control is great, if not plenary.

Certain features of these ordinances at once strike the reader. Money may be freely sent abroad by any "established church" for the uplift of the soul of the Senegambian, and this is very well; but no penny can be sent to Belgium, to Poland, to Serbia to still the wailing of the children or allay the anguish of the women except under a "permit" from the Charities Commission. Nay, more, in the city of Los Angeles itself its needy childhood goes unfed and unclothed, its dependent womanhood unprotected and uncared for by organized charities, except they have a "permit." Surely here, if anywhere, is

"The organized charity, scrimped and iced
In the name of a cautious, statistical
Christ."

Respondent argues that charitable institutions soliciting contributions from the general public thus secure public trust funds, and that it is quite within governmental powers for the state or its municipal agencies to regulate the collection and disposition of such trust funds. It is freely conceded, indeed it is proclaimed, that reasonable regulations may be adopted touching, and to a limited extent controlling, the operation of charitable institutions dependent in whole or in part on public beneficence. But respondent fails to perceive or at least to discuss the distinction, as broad as the temperate zone, between a law imposing reasonable regulations to effectuate these ends on all such charitable institutions, and a law which makes the right to solicit at all, and thus the right of a given charity to exist, dependent on the arbitrary will of a Charities Commission. Again, let us illustrate. Respondent in its brief thus defines the power of the Charities Commission:

"The Municipal Charities Commission is delegated power to indorse (which means L.R.A.1916D.

grant permits to charitable institutions under which alone they are entitled to live) such charitable institutions as meet the actual needs of the community, attain a reasonable standard of efficiency, and are so conducted as to insure the public in the wise use of funds."

This language taken from the first of the ordinances above quoted sounds reasonable. But as interpreted by the Municipal Charities Commission, what does it mean? In their own language it is this: Such a charity is "one that will execute every trust for charity with the least possibly delay, with the greatest possible efficiency, and with the least possible deduction for expense." Here is a mark set, and that mark is the absolute perfection of human endeavor. No tolerance, no charity is shown by this Commission of Charities, for any human effort, however self-sacrificing and efficient, that does not attain perfection. Charities in Los Angeles must reach a pitch of perfection unattained by any other human institution, or in the view of the Municipal Charities Commission they are unfit to live.

But let us eliminate from consideration these constructions put by the Municipal Charities Commission on their own powers, which are but delegated powers, and meet the question of the existence of this power at its source. Can the municipal authorities of a city arbitrarily say what person or what institution may or may not engage in charitable work dependent wholly or in part upon voluntary contributions from the public? Unhesitatingly we answer that this cannot be done; that it constitutes an attempt to use the police power in an arbitrary, unreasonable, and oppressive manner. It necessarily contains an assertion of the power to prohibit and suppress vocations and occupations which, entirely aside from their religious character, are from a worldly point of view in and of themselves not only harmless, but positively beneficial to humanity. The power to pass reasonable regulations in such a case bears no relationship to the power to prohibit or suppress. *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153; *Re Johnston*, 137 Cal. 115, 69 Pac. 973; *Sonora v. Curtin*, 137 Cal. 583, 70 Pac. 674.

Such charitable work is not to be confounded with beggary, which imports personal gain. Most often those who devote themselves to such charities live lives of self-denial and self-abnegation for the sake of others. And the utmost limit of reasonable regulation in the matter is reached by

acts protecting the public from charlatans and impostors, insuring knowledge on the part of the donors of the purposes to which their contributions may be put, coupled with adequate safeguards against malversation as to the funds received. But this falls far short of the law here under review, which permits such charitable work to be carried on only by (again to quote respondent) "trustees satisfactory to the Municipal Charities Commission."

But in further support of the argument that the Charities Commission or the municipal council may thus forbid a man from devoting his life to this form of self-denial and good works, it is said that neither the Constitution of the United States nor the Constitution of this state guarantees him the right so to do as they guarantee him the free exercise of his religion. They do not. Neither do they guarantee to a man the right to love, to show mercy, to forgive his enemies, or to walk in the path of rectitude. The existence of some human rights is taken for granted in both of those august instruments. We have heard one Chief Executive of this nation declare that he construed the Constitution as conferring on his department all powers not expressly withheld. The construction has not as yet met with favor from the juriconsults. As little accord can be given to a construction which denies to the individual any right not expressly reserved and preserved to him. But if driven to authority to support this declaration, we can at least point out that the Declaration of Independence recognizes the right of all mankind to pursue happiness. When that pursuit takes the innocent and admirable form of effort to better the lot of the poor and oppressed, whether happiness be found solely in the consciousness of the doing of kindly deeds, or whether it be found in the conviction that one is thereby following the precepts of a Divine Teacher, in either case it lies not within the ordained powers of our government, national, state, or municipal, to say that such a vocation shall not be followed, such a life shall not be led.

So far we have dealt with the question in what, for lack of a better word, we may term its secular aspect only. From this point of view our remarks and conclusion apply equally to all charities, whether temporal or religious.

But there is another aspect of the question clearly presented and as clearly demanding consideration. This is the religious aspect. The petition shows that the charities of the Salvation Army are a vital part of its religious life work. One need L.R.A.1916D.

not write as a theologian in expressing as we do the most profound veneration for religion as embodying the highest ethical concepts of a people and as satisfying their spiritual yearning for a life finer than this earthly one. The two religions exercising the most potent influence in shaping the material and spiritual destinies of the white-skinned races are the Jewish and the Christian. To these, as to all others, perfect freedom of exercise is constitutionally guaranteed. In both of these religions charity is the central word. It is enjoined, not as a good thing or a wise thing, or as a kindly thing only, but as a fundamental part of the religion itself. Says the Jewish faith: "On three things the world is stayed; on the Torah (the law) and on worship and on the bestowal of kindness."

"Now the end of the commandment is charity out of a pure heart," says Paul to Timothy.

"Charity is the scope of all God's commands," preaches Chrysostom.

"All perfection of the Christian life is to be attained according to charity," declares Thomas Aquinas.

Does it need more, does it need so much, to show that in these religions the bestowal of charity, the devotion of life to charity, are a part of the religion itself? And does it demand discussion to establish so plain a truth as that touching religion there is a doubtful zone which legislation should be most reluctant to enter? The founders of the nation recognized it when they placed the great guaranty of religious liberty in the Constitution of a free people, and it is for every court to see that that liberty is not encroached upon, and that freedom gnawed and impaired, by any experimental legislation however well meant. So, when legislation does enter that uncertain domain, the fact that it is there must bring to it condemnation. In accordance with the dictate of the Constitution itself, the doubt will be resolved in favor of religious liberty. And it will be found better in the long run that the free exercise of religion be preserved in its integrity, better for the nation, better for charity itself, which owes so much to religion,—even if the efficiency of religious charities be not up to the standard of perfection set by the Municipal Charities Commission. If under that standard 75 cents of every dollar would go to the objects of charity, while under the less efficient methods in vogue but 50 cents of each dollar actually reaches the beneficiaries, it is not to be forgotten that there will be many millions fewer of these dollars to be distributed in charity if the activities

of the religious are hampered, thwarted, and stayed.

Wherefore the prisoner is discharged from custody.

We concur: **Melvin, J.; Lorigan, J.**

Shaw, J., (concurring):

The occupation of soliciting contributions to charitable purposes is clearly so far subject to the police power that it may be regulated by laws or ordinances providing for a reasonable supervision over the persons engaged therein, and for the application and use of the contributions received to the purposes intended, in order to prevent unscrupulous persons from obtaining money or other things under the pretense that they were to be applied to charity, and to prevent the wrongful diversion of such funds to other uses, or to secure them against waste. Measures reasonably tending to secure these ends are unquestionably valid.

If the ordinances in question here were reasonably appropriate for the attainment of these objects, there could be no valid objection to them based on the ground that they deprived persons of liberty or unduly restricted them in the pursuit of happiness. But they do not merely empower the Municipal Charities Commission to inquire or examine into the character of persons soliciting for charity and withhold permits from all who do not come within fixed standards of character and fitness. They give the Commission absolute and arbitrary power to forbid any person from soliciting for charity, regardless of his personal character, worth, or fitness. No standard of character or fitness is set by which the Commission is to be guided in giving or withholding permits. The only thing required is that the Commission shall find that the "object of said solicitation is worthy and meritorious." Persons of the highest character desiring to solicit for a worthy cause might be refused a permit for no reason except the arbitrary will of the Commission. Every person has the right, under our Constitution, and perhaps without its guaranty, to solicit contributions for a worthy charitable purpose, provided he acts in good faith and honestly applies them to that purpose. The ordinances give the Commission power to deprive persons of that right without cause or reason. To the extent that they give this arbitrary power they are contrary to the Constitution and void. They come within the principles stated by the Supreme Court of the United States in *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, and by this court in *Ex parte Sing Lee*, L.R.A.1916D.

96 Cal. 359, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 349, 71 Am. St. Rep. 75, 57 Pac. 153; *Schaezlein v. Cabaniss*, 135 Cal. 469, 56 L.R.A. 733, 87 Am. St. Rep. 122, 67 Pac. 755; and *Hewitt v. State Medical Examiners*, 148 Cal. 593, 3 L.R.A.(N.S.) 896, 113 Am. St. Rep. 315, 84 Pac. 39, 7 Ann. Cas. 750.

In the *Yick Wo* Case, referring to ordinances prohibiting laundries in wooden buildings except by permission from the board of supervisors, the court said: "They seem intended to confer, and actually do confer, not a discretion to be exercised upon a consideration of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus, to require the supervisors to consider and act upon his case, it would be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. . . . It does not prescribe a rule and conditions for the regulation of the use of property for laundry purposes, to which all similarly situated may conform." 118 U. S. 366, 368.

And in *Los Angeles County v. Hollywood Cemetery Asso.* 124 Cal. 344, 71 Am. St. Rep. 75, 57 Pac. 153, the court said: "There is a wide difference between regulation and prohibition,—between regulatory provisions as a condition imposed for the exercise of a lawful occupation, and making the right itself to depend upon the unrestrained will of the municipality. . . . If the business be lawful, and having no injurious tendency, they cannot say who shall and who shall not exercise the right itself. Under the guise of regulating a business, the municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business."

The proper method of regulating a lawful business is indicated in *Hewitt v. State Medical Examiners*, supra, as follows: "The right of the physician to be secure in his privilege of practising his profession is thus made to depend, not upon any definition which the law furnishes him as to what shall constitute 'grossly improbable statements,' but upon the determination of the board after the statement is made and

simply upon its opinion of its improbability. No definite standard is furnished by the law under this provision whereby a physician with any safety can advertise his medical business, nor is there any definite rule declared whereby after such advertisement is had the board of medical examiners shall be controlled in determining its probability or improbability. The physician is not advised what statements he may make which will not be deemed 'grossly improbable' by the board. No rule is provided whereby he can tell whether the publication he makes will bring him within the ban of the provision or not. . . . If a physician's license is to be revoked for 'grossly improbable statements,' if he is to be thereby deprived of his means of livelihood, of his right to practise a profession which it has taken him years of study and a large expenditure of money to qualify himself for, on the ground that he has made 'grossly improbable statements' in advertising his medical business,—it is requisite that the statute authorizing such revocation define what shall constitute such statements, so that the physician may know in advance the penalty he incurs in making them." 148 Cal. 593.

Other methods of regulation may also be allowable; but a law or ordinance by or under which a lawful occupation, in itself, when properly conducted, in no wise injurious to persons, property, or the public interest, may be absolutely prohibited at the dictation of any official body without other cause than its own will or desire, is beyond the legislative power, and to that extent void.

There is a class of cases upon which the respondent relies as contravening the above-stated principles, such, for example, as *Ex parte Fiske*, 72 Cal. 127, 13 Pac. 310, *Re Flaherty*, 105 Cal. 558, 27 L.R.A. 529, 38 Pac. 981; and *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357. It will be found, however, that these cases relate to things which in their nature are or may be injurious to public health, safety, comfort, or welfare, and that they do not infringe upon the principles above stated with regard to the regulation of occupations which are both lawful and innocuous. In the *Flaherty* Case the distinction is stated. After holding that an ordinance forbidding the beating of drums upon the streets without a permit from the president of the board of trustees was valid, the

court, referring to other cases which seemed to conflict with the decision, and which are similar to the case at bar, said: "But upon closer examination they will be found to go upon a distinction or principle, whether sound or not, that is not applicable to the case at bar. They are based upon the theory that the lawful inherent rights of men cannot be entirely suppressed or destroyed by statute or ordinance, but can only be regulated, and that all regulations of such rights must be uniform." 105 Cal. 565.

And again: "At all events, the cases referred to deal with a right. But the proposition that a man has a natural, ingrained, inviolate, common-law, or constitutional right to beat a drum on the traveled streets of a city, has no foundation in reason or authority. As therefore it is not a right that may not be entirely suppressed, it may be regulated as the lawmaking power may determine," and that, "as it could be suppressed, no one could be heard to complain of an ordinance regulating it because thereby special privileges accrued to particular persons." 105 Cal. 566.

The distinction between cases like *Ex parte Fiske* and the present case is that in this case the right which the Commission has power absolutely to take away is a lawful and innocent occupation which the legislature cannot entirely suppress, and as to which its functions are merely to regulate its conduct and prevent abuses. There are other cases relating to ordinances which, after prohibiting certain things, delegate to some officer or board the power to decide whether or not a given person or subject comes within the terms of the prohibition. These are not in conflict with the principles above stated, nor are they applicable to this case. For these reasons, I am of the opinion that the portion of the ordinance in question imposing a penalty upon anyone who solicits contributions for charitable purposes without a permit from the Commission is void. The section of the ordinance prohibiting the sale of any goods donated to charity without first obtaining a similar permit is invalid for like reasons.

I concur in the judgment discharging the prisoner.

We concur: *Angellotti*, Ch. J.; *Sloss*, J.; *Lawlor*, J.

Annotation—State or municipal power to control private charity.

RE DART, ante, 905, appears to be the only case discussing the power of a L.R.A.1916D.

state or municipality to control the solicitation of funds for charitable purposes.

An interesting case in connection with *RE DART* is *People ex rel. State Bd. of Charities v. New York Soc.* (1900) 161 N. Y. 233, 55 N. E. 1063, reversing (1899) 42 App. Div. 83, 58 N. Y. Supp. 953, in which it is held that the constitutional and statutory provisions of the state giving the state board of charities power to enact rules and regulations for the government and management of charitable institutions do not apply to a society for the prevention of cruelty to children, as such society is not a charitable institution or corporation within the meaning of the Constitution and statutes, although its purposes are in the broadest sense charitable, and it has legal capacity to take and administer gifts and bequests that would be called charitable under general rules of law applicable to trusts, as the scheme of state supervision was not intended to apply to every institution engaged in some good or commendable work for the relief of humanity from some of the ills with which it is afflicted, but only to those maintained in whole or in part by the state or some of its political divisions through which charity, as such, is

dispensed by public authority to those having claim upon the generosity or bounty of the state, and having the distribution of relief or public aid, the fruit of taxation levied alike upon the willing and unwilling. And the fact that the society received from the city \$30,000 per annum did not affect its status as a charitable organization, as, in receiving and disbursing that sum of money, it neither received nor administered any charity, but was simply allowed something by the city for doing work that otherwise would devolve upon the police department, which the society could do better and with much less expense than the police. It should be noted that this case does not discuss the power of the state to exercise supervision over private charitable institutions, but only the question whether defendant came within the constitutional and statutory provisions which purport to be applicable to institutions, societies, and associations, whether state, county, municipal, incorporated or not incorporated, private or otherwise, which are of a charitable, eleemosynary, reformatory, or correctional character or design. R. L. S.

FLORIDA SUPREME COURT.

CITY OF JACKSONVILLE et al., Appts.,
v.

J. E. T. BOWDEN.

(67 Fla. 181, 64 So. 769.)

Statute — constitutionality.

1. The lawmaking power of the legislature of a state is subject only to the limitations provided in the state and Federal Constitutions; and no duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt that, under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law. *For other cases, see Statutes, I. c, 1, in Dig. 1-52 N. S.*

Same — giving effect.

2. A statute should be so construed and applied as to make it valid and effective, if

its language does not exclude such an interpretation.

For other cases, see Statutes, II. a, in Dig. 1-52 N. S.

Same — power of court.

3. Where a statute does not violate the Federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy, but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law.

For other cases, see Constitutional Law, I. c, 2, in Dig. 1-52 N. S.

Same — interpretation.

4. The Constitution is the controlling law, and, while, in appropriate proceedings properly taken, it may be the duty of the court to declare a legislative enactment to be inoperative in whole or in part, if it plainly violates the Constitution, yet, as under our system of government the lawmaking power of the legislature is subject only to the limitations contained in the state and Federal Constitutions, the court should, in deference to the legislature, take care to so interpret an enactment as to make it consistent with the Constitution, if it can be done upon any reasonable consideration of the legislative intent, as shown by a fair application of all the language used to the

Headnotes by WHITFIELD, J.

Note. — For statutes conferring powers upon municipalities or counties in respect to their officers as a delegation of legislative power, see annotation following this case, post, 921.
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purpose designed to be accomplished by the enactment.

For other cases, see Statutes, II. a, in Dig. 1-52 N. S.

Municipal corporation — delegated power — validity.

5. In conferring upon municipalities appropriate quasi legislative powers for local governmental purposes, the legislature does not violate the implied principle of organic law that the legislature shall not delegate its general lawmaking power.

For other cases, see Constitutional Law, I. d, 4, in Dig. 1-52 N. S.

Same — constitutional power.

6. The express authority given to the legislature by the Constitution to "prescribe" the "powers" of municipalities, and "to provide for their government," is not subject to implied limitations that would curtail the real intent and purpose of the authority expressly conferred as disclosed by a consideration of the language used and the subject-matter upon which it operates.

For other cases, see Constitutional Law, I. d, in Dig. 1-52 N. S.

Same — form of government.

7. While, under the express authority "to provide for the government" of municipalities, and to "prescribe their jurisdiction and powers and to alter or amend the same at any time," the legislature cannot delegate to a municipality its general law-making power for the state, nor confer a power that violates any other express provision of organic law, nor confer "powers" other than for municipal purposes, yet the legislature has a wide discretion in the government it may provide and in the powers it may prescribe for a municipality, and also in the means and instrumentalities it may use in providing the government and prescribing the powers, when organic law is not plainly violated.

For other cases, see Constitutional Law, I. d, 4, in Dig. 1-52 N. S.

Statute — implied repeal.

8. A statute may be, in whole or in part, repealed or superseded or abrogated by implication of law as a result of the due enactment of a subsequent statute covering the same subject, or by the operation of a later statute upon the occurrence of a definitely specified contingent event.

For other cases, see Statutes, III, in Dig. 1-52 N. S.

Same — intent to supersede.

9. If it is clear from its terms and purpose that the intent of a statute is that it shall supersede another statute upon a stated contingent event, the courts will give effect to such intent, when organic law is not thereby plainly violated, since the intent of the law is its vital force, and the province of the courts is to ascertain and effectuate the valid legislative purpose.

For other cases, see Statutes, III, in Dig. 1-52 N. S.

Legislature — what powers may be delegated.

10. Neither the Constitution nor the com-L.R.A.1916D.

mon law defines the line of separation between the powers that shall be exercised directly by the legislature and those that may be indirectly exercised through delegated authority conferred upon municipal governmental agencies.

For other cases, see Constitutional Law, I. d, 4, in Dig. 1-52 N. S.

Same — governmental regulation.

11. Where the legislature has authority to provide a governmental regulation, and the organic law does not prescribe the manner of adopting or providing it, and the nature of the regulation does not require that it be afforded by direct legislative act, such regulation may be provided either directly by the legislature, or indirectly by the legislative use of any appropriate instrumentality, where no provision or principle of organic law is thereby violated.

For other cases, see Constitutional Law, I. d, in Dig. 1-52 N. S.

Municipal corporation — creation of offices.

12. Uniformity is not required in the character and number or in the powers and duties of municipal officers, and it is entirely clear that the legislature may authorize a municipality to create and abolish its own municipal offices, and to define and change their powers and duties.

For other cases, see Constitutional Law, I. d, 4, in Dig. 1-52 N. S.

Statute — implied repeal.

13. Chapter 6705, Acts 1913, confers a limited power upon the city of Jacksonville to regulate the character and number and the powers and duties of its administrative officers and boards for municipal purposes; and when that power is duly exercised within the limitations of the law, conflicting statutes are superseded by the force and operation of this statute in conferring the power upon the municipality, and in expressly repealing all inconsistent statutory provisions.

For other cases, see Statutes, III, in Dig. 1-52 N. S.

Municipal corporation — regulation of offices.

14. Chapter 6705, Acts 1913, is limited in its operation, is confined to municipal governmental regulations, and is not, beyond all reasonable doubt, in conflict with the principle of organic law which forbids a delegation of the general lawmaking power of the state. Nor does the statute, in effect, authorize a municipality to repeal a state law.

For other cases, see Constitutional Law, I. d, in Dig. 1-52 N. S.

(March 10, 1914.)

A PPEAL by defendants from an order of the Circuit Court for Duval County restraining them from submitting certain ordinances to the voters of the city for adoption or rejection. Reversed.

The facts are stated in the opinion.

Messrs. P. H. Odom, James M. Carson, and Ion L. Farris, for appellants:

The powers which belong to a municipal corporation are determined by its charter, which consists of the creative act and all laws in force relating to the corporation, whether defining its powers or regulating their mode of exercise.

St. Petersburg v. English, 54 Fla. 585, 45 So. 483; Cooley, Const. Lim. 7th ed. 264-266.

The power given to a city or town to change its corporate limits is a delegation of power, but not such a delegation as to render the act conferring such power unconstitutional.

Saunders v. Pensacola, 24 Fla. 226, 4 So. 801; Jacksonville v. L'Engle, 20 Fla. 344; Pensacola v. Louisville & N. R. Co. 21 Fla. 492; Orlando v. Orlando Water & Light Co. 50 Fla. 207, 39 So. 532; Ormond v. Shaw, 50 Fla. 445, 39 So. 108; McQuillin Mun. Corp. §§ 269-273; Dill. Mun. Corp. 5th ed. § 353.

The legislature cannot delegate its authority to repeal a statute.

Rex v. Miller, 6 T. R. 277, 3 Revised Rep. 172; Rex v. Barber Surgeons, 1 Ld. Raym. 585; Haywood v. Savannah, 12 Ga. 404.

A municipal corporation may be authorized by its charter to repeal or suspend by ordinance the operation of a general law within its corporate limits.

28 Cyc. 366, 367; Ingersoll, Pub. Corp. 236, 237; Smith, Mun. Corp. § 522; St. Johnsbury v. Thompson, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571; Beiling v. Evansville, 144 Ind. 644, 35 L.R.A. 272, 42 N. E. 621; McQuillin, Mun. Corp. § 43; State v. Binder, 38 Mo. 451; State v. Clarke, 54 Mo. 17, 14 Am. Rep. 471; State v. De Bar, 58 Mo. 395; Seibold v. People, 86 Ill. 33; Olmstead v. Crook, 89 Ala. 228, 7 So. 776; Hooper v. Young, 140 Cal. 274, 98 Am. St. Rep. 56, 74 Pac. 140; Ex parte Hughes, 50 Tex. Crim. Rep. 614, 100 S. W. 160; Iowa City v. McInnerny, 114 Iowa, 586, 87 N. W. 498; Thum v. Pingree, 21 Utah, 348, 61 Pac. 18; Burlington v. Burlington Traction Co. 70 Vt. 491, 41 Atl. 514; State, Cross, Prosecutor, v. Morristown, 33 N. J. L. 57; State v. Clarke, 25 N. J. L. 54; Mark v. State, 97 N. Y. 572; State ex rel. Love v. Cosgrave, 85 Neb. 187, 26 L.R.A. (N.S.) 207, 122 N. W. 885; Theisen v. McDavid, 34 Fla. 440, 26 L.R.A. 234, 16 So. 321; Porter v. Vinzant, 49 Fla. 213, 111 Am. St. Rep. 93, 38 So. 607.

Municipal corporations as an incidental power have the right to create such offices as may be necessary to accomplish the purposes and objects of their creation.

Dill. Mun. Corp. 5th ed. §§ 384, 385; McQuillin, Mun. Corp. § 411. L.R.A.1916D.

Where a statute directs a person to do a thing within a certain time, without any negative words restraining him from doing it afterwards, the naming of the time is usually considered as directory to him, and not as a limitation of his authority.

Pond v. Negus, 3 Mass. 230, 3 Am. Dec. 131; Fay v. Wood, 65 Mich. 390, 32 N. W. 614; Connecticut Mut. L. Ins. Co. v. Wood, 115 Mich. 444, 74 N. W. 656; People ex rel. Solano County v. Lake County, 33 Cal. 487; St. Louis County Ct. v. Sparks, 10 Mo. 117, 45 Am. Dec. 355; Hurford v. Omaha, 4 Neb. 336; Pensacola v. Bell, 22 Fla. 469; Stieff v. Hartwell, 35 Fla. 608, 17 So. 899; Sutherland, Stat. Constr. 2d ed. §§ 616, 617.

Messrs. Kay & Doggett, for appellee:

The holding of an election pursuant to the provisions of a void statute or void ordinance not involving solely the question of public office may be enjoined.

Macon v. Hughes, 110 Ga. 795, 36 S. E. 247; De Kalb County v. Atlanta, 132 Ga. 740, 65 S. E. 72; Conner v. Gray, 88 Miss. 489, 41 So. 186, 9 Ann. Cas. 120.

A taxpayer has a right to restrain a city from holding an election in a new ward unlawfully created, and from expending the public revenues in defraying the expense thereof.

Cascaden v. Waterloo, 106 Iowa, 673, 77 N. W. 333; Peck v. Spencer, 26 Fla. 23, 7 So. 642; Chamberlain v. Tampa, 40 Fla. 74, 23 So. 572; Dill. Mun. Corp. 5th ed. §§ 1479-1587; Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.

The matters and things to be done by the board of election commissioners and inspection of election are merely ministerial functions, and if the acts which they undertook to perform were not authorized by law, and would incur expenses to be paid from public funds, their acts were properly enjoined.

Macon v. Hughes, 110 Ga. 795, 36 S. E. 247; De Kalb County v. Atlanta, 132 Ga. 727, 65 S. E. 72; Crawford v. Gilchrist, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.

When the voters of a district forming part of or contiguous to a city or town, by an affirmative vote, throw off or accept an existing municipal charter, such act does not make or amend such municipal charter.

State ex rel. Cheyney v. Sammons, 62 Fla. 308, 57 So. 196; People ex rel. Cuff v. Oakland, 123 Cal. 598, 56 Pac. 445.

The matter of fixing appropriate boundaries under the general incorporation act is "essentially political or administrative."

Dill. Mun. Corp. 5th ed. § 363; Jacksonville v. L'Engle, 20 Fla. 351.

Therefore, it is not competent for the legislature to delegate to the municipality the

power to repeal or suspend statutes creating municipal offices.

Theisen v. McDavid, 34 Fla. 440, 26 L.R.A. 234, 16 So. 321; *State ex rel. Garrison v. Putnam County*, 23 Fla. 632, 3 So. 164; *Seaboard Air Line R. Co. v. Smith*, 53 Fla. 383, 43 So. 235; *State ex rel. Lamar v. Dillon*, 42 Fla. 95, 28 So. 781; *State, Taintor, Prosecutrix, v. Morristown*, 33 N. J. L. 57; *Iowa City v. McInnery*, 114 Iowa, 586, 87 N. W. 498; *State ex rel. Cheyney v. Sammons*, 62 Fla. 303, 57 So. 196.

When the meaning of a statute is clear, its consequences, if evil, can be avoided only by a change of the law itself, to be effected by the legislature, and not by judicial construction.

Florida R. Co. v. Adams, 56 Fla. 294, 47 So. 921.

The provision of the statute with reference to the time of holding the election is mandatory.

State ex rel. McQuaid v. Duval County, 23 Fla. 486, 3 So. 193; *Southern Bell Teleph. & Teleg. Co. v. D'Alemberte*, 39 Fla. 37, 21 So. 570; *Futch v. Adams*, 47 Fla. 257, 36 So. 575; *Sutherland, Stat. Constr.* 2d ed. 352, § 617; *Washington v. State*, 48 Fla. 62, 37 So. 573; *Lamb v. State*, 50 Fla. 106, 38 So. 906; *Doors v. Varnon*, 94 Ky. 507, 22 S. W. 852; *Jones v. State*, 1 Kan. 273; *La Floridienne v. Seaboard Air Line R. Co.* 59 Fla. 196, 52 So. 298; *State ex rel. Hess v. Washoe County*, 6 Nev. 104; *Gossard v. Vaught*, 10 Kan. 169.

Power to frame or amend a city charter cannot be delegated to a city in the absence of constitutional provisions to that effect.

Elliott v. Detroit, 121 Mich. 611, 84 N. W. 820; *Jackson v. Harrington*, 160 Mich. 550, 125 N. W. 383; *Atty. Gen. ex rel. Hudson v. Detroit*, 164 Mich. 369, 129 N. W. 879; *State, Dexheimer, Prosecutors, v. Orange*, 60 N. J. L. 111, 36 Atl. 706; *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 43 L.R.A.(N.S.) 339, 137 N. W. 20, Ann. Cas. 1913C, 774; *Re Municipal Charters*, 86 Vt. 562, 86 Atl. 307; *Yazoo City v. Lightcap*, 82 Miss. 148, 33 So. 949; *Dobbin v. San Antonio*, 2 Posey, Unrep. Cas. (Tex.) 708; *Cook v. Dendinger*, 38 La. Ann. 262; *Nelson v. Homer*, 48 La. Ann. 258, 19 So. 271; *Brown v. Lakeland*, 61 Fla. 508, 54 So. 716.

Whitfield, J., delivered the opinion of the court:

This appeal is from an order restraining the city of Jacksonville and its officers from submitting to the voters of the city, for adoption or rejection, at an election called for October 28, 1913, certain ordinances that had been adopted by the city council under chapter 6705, Acts of 1913, and designed, upon approval by the electors of L.R.A.1916D.

the city, to supersede portions of the city charter statutes. The suit is properly maintained by Bowden, a resident, citizen, and taxpayer of the city. See *Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963, Ann. Cas. 1914B, 916.

The statute which was, in effect, held by the chancellor to be inoperative, is as follows:

Chapter 6705—(No. 285)

An Act Amending the Charter Affecting the Government, Powers, Duties, Jurisdiction, Officers, Boards, and Elections of the City of Jacksonville, and Extending and Enlarging the Powers of the Government of Said City, and Providing a Method Whereby the Charter of Said City May Be Hereafter Amended by Ordinance, Approved by the Electors of Said City, and to Repeal All Laws Inconsistent Herewith.

Be it enacted by the legislature of the state of Florida:

Section 1. That the numbers, powers, duties, terms of office, and the time and manner of election or appointment of any and all boards and officers of the city of Jacksonville, whether created by or recognized in state legislation or city ordinance, excepting only the legislative powers and duties of the city council, may be amended and changed, and any and all boards and officers, whether created by or recognized in state legislation or city ordinance, may be abolished and new boards and officers created, by ordinance adopted by the affirmative vote of a majority of all the members of the city council, and approved by the mayor or passed over his veto, and at a special municipal election approved by the affirmative vote of a majority of the qualified electors of said city who shall vote thereon in such special municipal election:

Provided, that the first such special municipal election shall be held on a date to be fixed by the city council not less than three months, and not more than six months, after the passage and approval of this act;

Provided, further, that such ordinance or ordinances shall be published in one or more newspapers published in said city not less than three times a week for eight weeks next preceding such special municipal election;

Provided, further, that the electors of said city shall be given an opportunity at such election or elections to vote separately upon each amendment to said charter, and upon the proposed change or changes as to each office to be affected thereby;

Provided, further, that this act shall not

deprive the city council, under existing state legislation, of the power to create or abolish any office not created by or recognized in state legislation or by ordinance approved by the vote of the electors of said city.

Section 2. That all laws or parts of laws inconsistent herewith are hereby repealed.

Section 3. This act shall take effect immediately upon its passage and approval by the governor.

Approved May 23d, 1913.

The ordinance sought to be submitted to the electors for adoption or rejection is designed to transfer to the city council some of the powers and duties now exercised by the board of bond trustees of the city under legislative enactment, and to define the powers and duties of the mayor with reference to the police force of the city. It apparently follows the authority expressly given.

It is contended, in support of the order appealed from, that the statute above set out is unconstitutional, because it attempts to authorize the municipality to repeal certain statutes, and because it attempts to delegate to the municipality the legislative powers of the state in violation of §§ 1 and 24 of article 3 and § 8 of article 8 of the state Constitution.

The lawmaking power of the legislature of a state is subject only to the limitations provided in the state and Federal Constitutions; and no duly enacted statute should be judicially declared to be inoperative on the ground that it violates organic law, unless it clearly appears beyond all reasonable doubt that, under any rational view that may be taken of the statute, it is in positive conflict with some identified or designated provision of constitutional law. See *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633; *Wooten v. State*, 24 Fla. 335, 1 L.R.A. 819, 5 So. 39; *Duval County v. Jacksonville*, 36 Fla. 196, 29 L.R.A. 416, 18 So. 339.

In construing a statute, it must be assumed that in its passage the legislature intended to conform to the requirements and limitations of organic law, and to provide a valid effective statute in accord with all the provisions of the Constitution affecting the subject. Where one construction of a statute would render it unconstitutional, and another construction that is fairly warranted by its terms and purpose would accord with organic law, the latter construction should be adopted, since legislation is subject to applicable limitations of the Constitution, and a valid statute is presumed to have been intended by the lawmaking power in its enactment. A statute should be so construed and applied as to make it

valid and effective, if its language does not exclude such an interpretation. See *Peninsular Industrial Ins. Co. v. State*, 61 Fla. 376, 55 So. 398; *The Abby Dodge*, 223 U. S. 166, 56 L. ed. 390, 32 Sup. Ct. Rep. 310; *United States ex rel. Atty. Gen. v. Central R. Co.* 213 U. S. 366, 53 L. ed. 836, 29 Sup. Ct. Rep. 527.

It is essentially the duty of the courts to sustain the Constitution, and to decline to enforce a statute when its enforcement would violate organic law; yet, in exercising the exceedingly delicate and responsible power and duty to declare legislative enactments to be contrary to the Constitution, and therefore inoperative, the courts should, to maintain the judicial authority unsullied, be assiduous to keep entirely within their own organic limitations, and to refrain from declining to enforce statutes, except in cases of clear and unmistakable violations of the Constitution that require judicial action to give effect to the supreme law of the land on the subject, pursuant to the oath taken by all officials to "support . . . the Constitution."

In order to justify the courts in declaring inoperative as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers, it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted under the provisions of the Constitution. In vesting the legislative power of the state in the senate and house of representatives, the Constitution by implication forbids the delegation by the legislature of the general lawmaking power of the state to any other officers; but, by immemorial usage based on public necessity, this implication does not apply to the powers that may be conferred upon municipalities for local governmental purposes, and the terms of the present Constitution contemplate the giving of large and varied governmental powers to municipalities. Where a statute does not violate the Federal or state Constitution, the legislative will is supreme, and its policy is not subject to judicial review. The courts have no veto power, and do not assume to regulate state policy; but they recognize and enforce the policy of the law as expressed in valid enactments, and decline to enforce statutes only when to do so would violate organic law. See *State v. Atlantic Coast Line R. Co.* 56 Fla. 617, 32 L.R.A.(N.S.) 639, 47 So. 969; *Davis v. Florida Power Co.* 64 Fla. 246, 60 So. 759, Ann. Cas. 1914B, 965, 5 N. C. C. A. 926; *State ex rel. Moodie v. Bryan*, 50 Fla. 293, 39 So. 929; *Escambia County v. Pilot Comrs.* 52 Fla. 197, 120

Am. St. Rep. 196, 42 So. 697; *State ex rel. Wilkinson v. Lane*, 181 Ala. 646, 62 So. 31.

Statutes authorizing municipalities by stated procedure to change their corporate territory and limits as fixed by statute have been applied under the present Constitution of this state. See §§ 172 et seq. Gen. Stat. 1906; *Orlando v. Orlando Water & Light Co.* 50 Fla. 207, 39 So. 532; *Ormond v. Shaw*, 50 Fla. 445, 39 So. 108.

Under the provisions of § 5, art. 9, of the Constitution, "the legislature may . . . provide for . . . a tax on licenses," a statute may authorize a municipality to impose by ordinance license taxes, though such statute and the ordinances adopted under it and the licenses imposed may be inconsistent with other statutes covering the particular subject. *Hardee v. Brown*, 56 Fla. 377, 47 So. 834; *Ferguson v. McDonald*, 66 Fla. 494, 63 So. 915.

The Constitution of the state contains the following:

Section 2, Declaration of Rights: "All political power is inherent in the people. Government is instituted for the protection, security and benefit of the citizens, and they have the right to alter or amend the same whenever the public good may require it."

Section 24, Declaration of Rights: The "renunciation of rights" contained in the Constitution "shall not be construed to impair or deny others retained by the people."

Section 1, art. 3: "The legislative authority of this state shall be vested in a senate and a house of representatives."

Section 24, art. 3: "The legislature shall establish a uniform system of county and municipal government, which shall be applicable except in cases where local or special laws are provided by the legislature that may be inconsistent therewith."

Section 20, art. 3: "The legislature shall not pass special or local laws . . . regulating the jurisdiction and duties of any class of officers, except municipal officers, . . . regulating the practice of courts of justice, except municipal courts."

Section 8, art. 8: "The legislature shall have power to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. When any municipality shall be abolished, provision shall be made for the protection of its creditors."

Whether the first sentence of § 8, art. 8, above quoted, is a declaration of the common-law powers of the lawmaking body of a sovereign state or not, it is a specific definition in general and comprehensive terms of the powers of the legislature with reference to municipalities.

At common law the legislative authority

could empower a municipality to pass ordinances that had the force of law in their proper sphere; and this legislative authority is not curtailed by the provision of the Constitution vesting "the legislative authority of the state . . . in a senate and house of representatives."

In conferring upon municipalities appropriate quasi legislative powers for local governmental purposes, the legislature does not violate the implied principle of organic law that the legislature shall not delegate its general lawmaking power. See *State v. Atlantic Coast Line R. Co.* 56 Fla. 617, text 634, 32 L.R.A. (N.S.) 639, 47 So. 969; *State v. Westmoreland*, 133 La. 1015, 63 So. 502; *Cooley*, Const. Lim. 6th ed. p. 138; *McQuillin*, Mun. Corp. § 124; *Stoutenburgh v. Henrick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256.

The section of the Constitution empowering the legislature "to establish and to abolish municipalities, to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time," does not prescribe the manner by which, or the instrumentalities through which, the legislature, in dealing with municipalities, shall "provide for their government" or "prescribe their jurisdiction and powers." In the absence of organic direction or limitation, the legislature may adopt any appropriate instrumentalities in discharging its duty "to provide for the government" of a municipality. Purely local regulations may as legally and more conveniently be provided through municipal governments, and liberal use of municipalities for local governmental purposes is clearly contemplated by the quoted provisions of the Constitution.

The express authority given to the legislature by the Constitution to "prescribe" the "powers" of municipalities, and "to provide for their government," is not subject to implied limitations that would curtail the real intent and purpose of the authority expressly conferred, as disclosed by a consideration of the language used and the subject-matter upon which it operates.

While, under the express authority "to provide for the government" of municipalities, and to "prescribe their jurisdiction and powers, and to alter or amend the same at any time," the legislature cannot delegate to a municipality its general lawmaking power for the state, nor confer a power that violates any other express provision of organic law, nor confer "powers" other than for municipal purposes, yet the legislature has a wide discretion in the government it may provide and in the powers it may prescribe for a municipality, and also in the means and instrumentalities it may use in

providing the government and prescribing the powers, when organic law is not plainly violated. See *Eckerson v. Des Moines*, 137 Iowa, 452, 115 N. W. 177.

The exercise of the power conferred by the statute here considered does not change existing state laws or declare what the laws of the state shall be, except in so far as the law affects the particular municipality in its municipal affairs; and the specific and limited powers conferred by this particular statute upon the municipality cannot be said to be a delegation of the general law-making power of the legislature in plain violation of the Constitution. Certainly by giving this limited authority the legislature has not lost its control over every municipal power. See *Straw v. Harris*, 54 Or. 424, 103 Pac. 777; *Chicago v. M. & M. Hotel Co.* 248 Ill. 264, 93 N. E. 753. Under the Constitution the legislature may "alter or amend the same at any time."

A statute may be in whole or in part repealed or superseded or abrogated by implication of law as a result of the due enactment of a subsequent statute covering the same subject, or by the operation of a later statute upon the occurrence of a definitely specified contingent event.

If it is clear from its terms and purpose that the intent of a statute is that it shall supersede another statute upon a stated contingent event, the courts will give effect to such intent, when organic law is not thereby plainly violated, since the intent of the law is its vital force, and the province of the courts is to ascertain and effectuate the valid legislative purpose.

The statute expressly provides "that all laws or parts of laws inconsistent herewith are hereby repealed." This repeal of conflicting charter powers becomes operative upon the taking of the specifically designated action by the municipality for municipal purposes, under the limited authority expressly given by the statute. This is manifestly the legislative intent, and such intent is the vitality of the law. Thus, the statute amends the charter powers of the city, but it does not repeal or suspend the operation of particular features of the charter acts, except in the event that expressly authorized action is duly taken by the municipality that is in accord with this statute, but is in conflict with other charter acts. The authority conferred by the statute is for a municipal purpose, and is within the powers that the legislature could lawfully confer upon the municipality, viz., the creation, change, and duty of municipal officers and boards; the legislative powers and duties of the city council being expressly excluded.

Neither the Constitution nor the common L.R.A.1916D.

law defines the line of separation between the powers that shall be exercised directly by the legislature and those that may be indirectly exercised through delegated authority conferred upon municipal governmental agencies. Where the legislature has authority to provide a governmental regulation, and the organic law does not prescribe the manner of adopting or providing it, and the nature of the regulation does not require that it be afforded by direct legislative act, such regulation may be provided either directly by the legislature or indirectly by the legislative use of any appropriate instrumentality, where no provision or principle of organic law is thereby violated. If this rule is not recognized, many useful governmental regulations may be practically unattainable to the detriment of the public, when, in the language of the Constitution, the "government is instituted for the protection, security, and benefit of the citizens." This salutary principle is observed with reference to administrative boards and officers, and it is specifically applicable to powers that may be conferred upon municipalities for local governmental purposes. Such a principle is particularly useful in our system, where the Constitution, in fixing the status and powers of municipalities, expressly authorizes the legislature "to provide for their government," and "to prescribe their jurisdiction and powers, and to alter or amend the same at any time," by "local or special laws" to meet the inherently varied local conditions and requirements that are particular to this state, in the interest of the public welfare.

The Constitution expressly provides the manner in which statutes shall be enacted by the legislature itself; but, in providing for legislative control of municipalities, the Constitution ordains, in general terms, that the legislature shall prescribe the "jurisdiction and powers" of municipalities and "provide for their government." While the legislature may itself enact all the laws required by a municipality, it certainly may delegate to the municipality power to enact ordinances not in conflict with the Constitution, that have the force of law within their proper sphere. In its discretion, the legislature may, by its own direct enactment or through the agency or municipal ordinances and regulations, prescribe and provide for the "numbers, powers, duties, terms of office, and the time and manner of election or appointment of any or all boards and officers of the city of Jacksonville;" and the legislature may itself provide how any and all boards and officers of the city may be abolished and new boards and officers created, or it may delegate this power to the municipality or its electors, without violat-

ing the organic law of the land. This being so, the fact that some of these regulations may be already directly prescribed by statute does not deprive the legislature of the right to alter or amend them; and it may do so through the medium of the municipality, by express authority duly given, where no provision of the Constitution is thereby plainly violated. By authorizing the municipality to adopt regulations pertaining to the creation and abolishment and powers and duties of municipal officers and boards that are in conflict with existing statutes, the legislature, in effect, expressly authorized municipal action within its province; and, when that authorized municipal action is duly taken, the existing statutory regulations in conflict therewith are, by force of the statute giving the authority, suspended or abrogated. This does not in reality amount to the repeal of a statute by municipal action; but the operation of a statute upon a particular subject may be suspended by the force and effect of another statute authorizing conflicting municipal action to be taken for a municipal purpose in accordance with express legislative authority given to that end.

Uniformity is not required in the character and number or in the powers and duties, of municipal officers; and it is entirely clear that the legislature may authorize a municipality to create and abolish its own municipal offices, and to define and change the powers and duties of its municipal officers. If the subject is already covered by the statute, the legislature may abrogate the statute and confer the stated authority upon the municipality. If the conflicting statutes are abrogated by force and operation of the statute conferring upon the municipality the power to create and regulate its own officers and boards, there is no obstacle to the exercise of the authority by the municipality. Such is the situation here. The statute complained of confers a limited power upon the municipality to regulate the character and number and the powers and duties of its administrative officers and boards for municipal purposes; and when that power is duly exercised within the limitations of the law, the conflicting statutes are superseded by the force and operation of the statute in conferring the power upon the municipality, and in expressly repealing all inconsistent statutory provisions.

The statute here involved is limited in its operation, is confined to municipal governmental regulations, and is not, beyond all reasonable doubt, in conflict with the principal of organic law which forbids a L.R.A.1916D.

delegation of the general lawmaking power of the state. Nor does the statute in effect authorize a municipality to repeal a state law. See *Munn v. Finger*, 86 Fla. 572, 51 L.R.A.(N.S.) 631, 64 So. 271; *Yazoo City v. Lightcap*, 82 Miss. 148, 33 So. 949; *Dobbin v. San Antonio*, 2 Posey, Unrep. Cas. (Tex.) 708; *St. Johnsbury v. Thompson*, 59 Vt. 300, 59 Am. Rep. 731, 9 Atl. 571; *San Luis Obispo v. Fitzgerald*, 126 Cal. 279, 58 Pac. 699; *Bearden v. Madison*, 73 Ga. 184, 28 Cyc. 365 et seq; *McQuillin Mun. Corp.* §§ 643, 843; *Plinkiewisch v. Portland R. Light & P. Co.* 58 Or. 499, 115 Pac. 151; *Smith, Mun. Corp.* § 106; *Dill. Mun. Corp.* 69, 573.

The Constitution is the controlling law, and while, in appropriate proceedings properly taken, it may be the duty of the court to declare a legislative enactment to be inoperative in whole or in part, if it plainly violates the Constitution, yet, as under our system of government the lawmaking power of the legislature is subject only to the limitations contained in the state and Federal Constitutions, the court should, in deference to the legislature, take care to so interpret an enactment as to make it consistent with the Constitution, if it can be done upon any reasonable consideration of the legislative intent, as shown by a fair application of all the language used to the purpose designed to be accomplished by the enactment.

In *State ex rel. Lamar v. Dillon*, 42 Fla. 95, 28 So. 781, the portion of the ordinance condemned was in direct conflict with the prior statute on the subject, and not authorized by the later statute. Here the ordinance apparently accords with the statute authorizing its adoption.

In the cases of *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 43 L.R.A.(N.S.) 339, 137 N. W. 20, Ann. Cas. 1913C, 774; *State, Dexeimer, Prosecutor, v. Orange*, 60 N. J. L. 111, 36 Atl. 706; *Elliott v. Detroit*, 121 Mich. 611, 84 N. W. 820, and other cases holding such authority to be a delegation of lawmaking power in violation of organic law, the decisions were apparently controlled by the restrictive provisions of the Constitution or by the unrestricted nature of the authority conferred. In this state uniformity of municipal government is not required, and the legislature has plenary powers in the premises. The ordinance is apparently in substantial accord with the statute, and it is not clearly void for uncertainty. The statute is not affected by the restraining of the first election thereunder at the time required by the act.

See *State ex rel. Law v. Saxon*, 25 Fla. 792, 6 So. 858. The discussion herein has reference to the particular statute as applied to a municipality under the present Constitution of this state.

The restraining order appealed from is reversed.

Schackelford, Ch. J., and Taylor, Cockrell, and Hocker, JJ., concur.

Annotation—Statutes conferring powers upon municipalities or counties in respect to their officers as a delegation of legislative power.

The present note is concerned with the authority which may be delegated by the legislature to a municipality or county over its officers without violating the constitutional restriction against a delegation of legislative power.

The right to confer upon a municipality an option as to whether or not it will adopt a law enacted by the legislature is a different question, although the adoption or rejection of such a law may affect the municipal officers. Consequently, cases of such a character have been excluded. Likewise, the right to confer upon a municipality power to redistrict its subdivisions has been excluded, although a redistricting may indirectly affect its officers.

As to the power of the legislature to delegate to a municipality authority to form or amend its charter, see note to *State ex rel. Mueller v. Thompson*, 43 L.R.A.(N.S.) 339.

Upon the general question of the constitutionality of a commission form of government for municipalities, see note to *State ex rel. Hunt v. Tausick*, 35 L.R.A.(N.S.) 802, and supplementary notes to *State ex rel. Simpson v. Manakato*, 41 L.R.A.(N.S.) 111, and *Munn v. Finger*, 51 L.R.A.(N.S.) 632.

Some constitutional provisions require the legislature to provide for certain offices. The legislature, under such a constitutional provision, cannot delegate to county supervisors the power to create an office included in the provision. *Eldorado County v. Meiss* (1893) 100 Cal. 274, 34 Pac. 716 (dictum); *Los Angeles County v. Lopez* (1894) 104 Cal. 257, 38 Pac. 42; *People v. Wheeler* (1902) 136 Cal. 655, 69 Pac. 435 (dictum), disapproving *People v. Ferguson* (1884) 65 Cal. 288, 4 Pac. 4, holding that the power to appoint a licensed tax collector implied from a statute empowering the board of supervisors of the several counties to levy and collect certain licenses was not in conflict with the constitutional provision requiring the legislature by general and uniform laws to provide for the election or appointment of the county officers, prescribe their duties, and fix their terms of L.R.A.1916D.

office. Nothing is said in the latter case of this being a valid delegation of power to the board of supervisors.

The legislature cannot delegate to a city the power to create police courts, under a Constitution giving to the legislature such power. *Re Cloherty* (1891) 2 Wash. 137, 27 Pac. 1064. The power conferred by such a constitutional provision upon the legislature to create additional inferior courts is not one of its original inherent powers as the supreme legislative body of the state, which can be delegated by it, but is a delegated power which must be exercised in the manner pointed out, and cannot be again delegated.

Without referring to any particular constitutional provision, a statute authorizing a municipal council to create new departments in the government, and to define their powers, was held illegal in *Pittsburgh's Petition* (1890) 138 Pa. 401, 21 Atl. 757, 759, 761, the court stating that the legislature must settle the system of government for each class of cities, and it must be the same for each and every member of each class. No city in any class can change the number or the distribution of powers among the departments into which its government is cast by the legislature.

An act conferring upon the common council of a city power to consolidate any two public offices of the city, or of any of its departments, and to enact that the duties of the offices so consolidated shall thereafter be performed by one and the same person, is an invalid attempt to delegate to municipalities powers which can be exercised only by the legislature itself. *State, Dexheimer, Prosecutor, v. Orange* (1897) 60 N. J. L. 111, 36 Atl. 706. It is stated by the court that, by the exercise of the powers conferred in the act, the common council can, not only consolidate any two public offices of the city, but they have power by ordinance to fix and determine the nature of the duties of the consolidated office, and to a certain extent to fix the length of the term for which the holder thereof shall be elected or appointed; that by the exercise of these powers the

common council can change the whole scheme of government provided by the charter of its city, and, by a series of consolidations, concentrate most, if not all, of the functions of government in one and the same persons.

With reference to the number of officials, it has been held that the legislature cannot delegate to a county board the power to determine the number of municipal courts there shall be in the county, under a Constitution vesting in the legislature the exclusive power to create and establish courts. *State ex rel. Williams v. Sawyer County* (1909) 140 Wis. 634, 123 N. W. 248. The legislature in this case had passed a municipal court act and provided that the board of supervisors of any county may, by a majority vote of all its members, adopt it. So far as the act enabled the board of supervisors to adopt or reject the law for its county, it was held valid, but in so far as it went further and authorized the board to determine the number of municipal courts, it was held an invalid delegation of legislative power.

On the contrary, a provision in a statute empowering cities to frame their own charters, as authorized by a constitutional provision, that the cities so framing their charters shall fix the number of members of the board of education and their terms of office, and regulate the time and manner of their election, has been held not an invalid delegation of legislative power over the school system of the state. *Cotteral v. Barker* (1912) 34 Okla. 533, 126 Pac. 211.

And it has been held that the legislature may delegate to the board of county commissioners authority to increase the number of justices of the peace within their respective counties whenever the precinct of a justice increases to more than a stated number of inhabitants. *Pueblo County v. Smith* (1896) 22 Colo. 534, 33 L.R.A. 465, 45 Pac. 357. This decision is upon the theory, however, that whenever the prescribed conditions are made to appear in any precinct, it is the imperative duty of the board of county commissioners to appoint the additional officers therein prescribed.

A law enacting that whenever a county court shall be of opinion that the public service requires a greater number of justices or constables in any district than those specified in the Constitution, and shall so enter of record and designate the number of such additional officers, and give notice thereof, such

officers shall be elected, is not an unwarranted delegation of legislative power. *Ex parte Bassitt* (1894) 90 Va. 679, 19 S. E. 453. "There is here," says the court, "no delegation of legislative power, but the county courts are merely empowered to declare the event, so to speak, upon which the act is to take effect within their respective counties."

The right to authorize the appointment of municipal officers by the municipality has not been directly decided, but the court expressed an opinion in *Nelson v. Troy* (1895) 11 Wash. 435, 39 Pac. 974, that the legislature might delegate to the board of supervisors of a county authority to appoint deputies for the county officers and fix the compensation. But this appears to have been conceded in the case.

And it is stated in *Re Cleveland* (1889) 52 N. J. L. 188, 7 L.R.A. 431, 19 Atl. 17, 20 Atl. 317, with reference to an act concerning the government of cities which vested in the respective mayors of the cities the power to appoint the chief municipal officers, in substitution for the previously existing methods of appointment, that any legislative act which puts it within the power of any political district to exercise a function of local government, and which is a complete and perfect declaration of the legislative will, is not obnoxious to the charge that it delegates the law-making power. It does not appear, however, that the statute in this case was attacked directly upon this theory.

The right to define the duties or municipal officers may be delegated to the municipality. Thus, the legislature may delegate to a municipal council the power to prescribe the duty and fix the compensation of all officers and employees of the municipality, and require bonds with sureties for the performance of the duties of all officers and employees. *State ex rel. Gentry v. Dodson* (1909) 123 La. 903, 49 So. 635.

It is stated in *Gould v. Baltimore* (1913) 120 Md. 534, 87 Atl. 818, to be perfectly clear that, as the legislature has the right and power to change at any time the duties and compensations of constables, it can also delegate and confer upon a city the power to pass ordinances to accomplish the same purpose.

The legislature may confer upon a municipality power to confer on justices of the city jurisdiction over offenses against its ordinances. *State ex rel. Dunlap v. Nohl* (1902) 113 Wis. 15, 88 N. W. 1004. The act of the legislature

created the justices of the peace and invested them with all jurisdiction belonging to such officers. The city elected from among the other city officers certain justices to enforce its ordinances. The court states that such an act is entirely local in its character; that it relates only to the peace and welfare of the community incorporated, and not of the state generally, and the corporation may properly be given power to legislate thereon.

The legislature may delegate to the board of trustees of a municipality authority to make the city treasurer ex officio city tax collector and license tax collector. *Woodland v. Leech* (1912) 20 Cal. App. 15, 127 Pac. 1040. This simply amounts to a grant of power to be exercised in the discretion of the trustees to relieve one municipal officer of a ministerial executive duty and transfer it to another. Even if it be regarded as a legislative attempt to confer authority upon the local lawmaking body to create the office of city tax collector, it does not seem to be obnoxious to any constitutional provision. The municipal government act in this case made the marshal collector of city licenses, but contained the provision that the board of trustees might make the city treasurer ex officio city tax collector and license tax collector.

And the municipality may be empowered to fix the compensation of its officers. *State ex rel. Gentry v. Dodson* (La.); *Gould v. Baltimore* (Md.); and *Nelson v. Troy* (Wash.) supra.

It was decided in *Re Salary of Superior Ct. Judges* (1914) 82 Wash. 623, 144 Pac. 929, that the legislature might delegate to the board of county commissioners of a county authority to increase the salary of the judges of the superior court to an amount not exceeding a named maximum. The court states: "But if we concede, as we must, that the legislature has power to authorize the board at its option to increase salaries at all, it is difficult to see why it may not authorize such board to fix the amount of such salaries between a minimum and a maximum amount."

The legislature may delegate to the county board authority to fix the fees to be allowed justices of the peace in certain cases before them. *Ryan v. Outgamie County* (1891) 80 Wis. 336, 50 N. W. 340; *Wentworth v. Racine County* (1898) 99 Wis. 26, 74 N. W. 551. So, the legislature may confer upon a city the power to fix the compensation of the members of its police force. *Sullivan* L.R.A.1916D.

v. Bridgeport (1909) 81 Conn. 660, 71 Atl. 906.

The legislature may delegate to the board of county commissioners the discretionary power of fixing the compensation of county officers other than themselves within certain prescribed limits fixed by the legislature. *Stookey v. Nez Perces County* (1899) 6 Idaho, 542, 57 Pac. 312. The Constitution of this state granted to the boards of county commissioners discretionary power with reference to the salary of the county attorney. This is stated to have shaped the public policy with reference to the question under consideration, the court saying that, this vesting of the discretionary power in the board of county commissioners having been indorsed by the people in the Constitution, and there being nothing in the Constitution prohibiting such a delegation of power, the delegation of power must be held valid. This decision was approved in *Reynolds v. Oneida County* (1899) 6 Idaho, 787, 59 Pac. 730.

A statute empowering municipalities to provide by ordinance that certain municipal officers shall receive in lieu of all fees allowed by law or ordinance a fixed salary, and providing further that no such officer shall receive any fees or any other compensation for his services, was held not open to the objection that it was a delegation of power on the theory that it could take effect only upon a vote of the city council, thus making a law of the state dependent upon the action of a municipality. *Des Moines v. Hillis* (1881) 55 Iowa, 643, 8 N. W. 638.

A provision in a statute fixing the compensation of a county superintendent at a per centum of state money disbursed by him, that if the county board of education should by majority vote require the full time of the county superintendent in the discharge of the duties of his office, the county board shall fix his compensation on a salary basis within certain limits and terms of payment, is not a delegation of legislative power to the county board. *McNiell v. Sparkman* (1913) 184 Ala. 96, 63 So. 977. The court states that by the enactment of the law in question the legislature has not delegated any part of that constitutional and prerogative power which is peculiarly its own. It has not delegated any power strictly and exclusively legislative. It has committed to the discretion of the representative county board certain matters of detail in the administration in the educational system in the county.

Some constitutional provisions require the legislature to fix the compensation of certain officers.

Under such a constitutional provision the legislature cannot delegate the power. The board of supervisors of a county cannot be empowered to fix the salaries of officers coming within such a provision. *People ex rel. Atkinson v. Johnson* (1892) 95 Cal. 471, 31 Pac. 611; *Doherty v. Ransom County* (1895) 5 N. D. 1, 63 N. W. 148.

The legislature has no power, after fixing the salaries of county clerks and providing that each clerk should pay his own deputy, to authorize the boards of supervisors to allow one or more deputies at the expense of the county, if in their opinion the salary provided is insufficient. *Dougherty v. Austin* (1892) 94 Cal. 601, 16 L.R.A. 161, 28 Pac. 834, 29 Pac. 1092.

But it has been held under such a constitutional provision, where a maximum is prescribed by the legislature, the county commissioner may be empowered to fix the compensation within this maximum. *Staples v. Llano County* (1894) 9 Tex. Civ. App. 201, 28 S. W. 569, holding that the legislature may empower the commissioners to fix the commission to be received by the county treasurer on moneys received and disbursed by him within a fixed maximum.

And in *Brookings County v. Murphy* (1909) 23 S. D. 311, 121 N. W. 793, a statutory provision fixing the compensation of registrars of deeds and county auditors at a percentage of the value of the property in their respective counties, but containing a proviso that it shall not in any event exceed \$1,200 per annum, and a second proviso that in counties over a certain population the board of county commissioners may in their discretion allow a salary not exceeding \$1,500 per annum to the county auditor, was sustained, the court stating that, while the statute does not prescribe the precise number of dollars which shall be

paid in compensation to the auditor, it does prescribe a definite rule by which compensation shall be determined and allowed.

Deputies of officers have been held not officers within the meaning of such a constitutional provision. Accordingly, the right to delegate authority with reference to deputies is not limited thereby. *Nelson v. Troy* (1895) 11 Wash. 435, 39 Pac. 974.

On the same theory it was held to be within the power of the legislature to direct the county commissioners to fix the sum to be paid deputies, assistants, book-keepers, clerks, and other employees of an officer of the county, as compensation, under a constitutional provision requiring the general assembly to fix the term of office and compensation of all officers. *Theobald v. State* (1907) 30 Ohio C. C. 414.

And in *Bennett v. State* (1915) — Okla. —, 150 Pac. 198, deputies were held not to be officers. Consequently, an act vesting the board of county commissioners with authority to fix their salaries was held not a delegation of legislative power fixed by the constitutional provision that, until otherwise provided by law, the terms, duties, powers, qualifications, and salary and compensation of all county and township "officers" not otherwise provided by this Constitution shall be as now provided by the laws of the territory of Oklahoma for like-named officers.

Such a constitutional provision does not apply to officers created by the legislature under a constitutional provision authorizing the appointment of sealers of weights and measures, who exercise a part of the police powers of the state. Consequently, the legislature may delegate to the board of supervisors of a county or city and county the duty of fixing the salaries of such officers instead of doing so itself. *Scott v. Boyle* (1912) 164 Cal. 321, 128 Pac. 941.

W. A. E.

KENTUCKY COURT OF APPEALS.

KENTLAND COAL & COKE COMPANY
et al.
v.

THOMAS KEEN et al.

(168 Ky. 836, 183 S. W. 247.)

Deed — condition subsequent — prohibition of sale.

1. A provision in a deed that the grantee L.R.A.1916D.

is not to sell the land in the lifetime of the grantor is a condition subsequent.

For other cases, see *Covenants and Conditions*, II. a, in *Dig. 1-52 N. S.*

Same — validity.

2. A condition subsequent in a deed of real estate prohibiting the grantee from

Note. — As to validity and effect of provision in deed that the grantee shall not sell in the lifetime of the grantor, see annotation following this case, post, 930.

selling the property during the lifetime of the grantor is valid.

For other cases, see Covenants and Conditions, II. d, in Dig. 1-52 N. S.

Same — breach of condition — waiver.

3. Failure of a grantor who has deeded land on condition that it shall not be sold during his lifetime to proceed for a forfeiture on condition broken waives the forfeiture.

For other cases, see Covenants and Conditions, III. a, in Dig. 1-52 N. S.

Incompetent person — deed — right to defeat.

4. A deed before inquisition found by one afterwards adjudged incompetent cannot be defeated by the grantor or his heirs in the hands of a subsequent purchaser without notice, in due course, and for a valuable consideration.

For other cases, see Incompetent Persons, II. in Dig. 1-52 N. S.

(March 7, 1916.)

CROSS APPEALS from a judgment of the Circuit Court for Pike County in a suit for the cancelation of certain deeds, defendants appealing from the judgment in plaintiffs' favor, and plaintiffs' appealing from the portion of the judgment directing them to pay to grantee Justice the consideration paid by him to their father for certain land. Reversed.

The facts are stated in the opinion.

Mr. F. W. Stowers for plaintiffs.

Messrs. Auxler, Harman, & Francis and Hager & Stewart, for defendants:

Plaintiffs were estopped, under the circumstances proven in this case, to claim the land sold and deeded by Keen to Justice, or to ask in any way to invalidate the deed or defeat the title of Justice and the subsequent purchasers thereof.

Pond Creek Coal Co. v. Runyan, 161 Ky. 64, 170 S. W. 501; *Foreman v. Lloyd*, 156 Ky. 772, 162 S. W. 83; *Malone v. Mark*, 6 Ky. Opin. 177; *Malone v. Barrell*, 6 Ky. Opin. 502; *Simmons v. Simmons*, 150 Ky. 85, 150 S. W. 59; *Fields v. Napier*, 28 Ky. L. Rep. 240, 80 S. W. 1110; *Poindexter v. Rawlings*, 106 Tenn. 97, 82 Am. St. Rep. 869, 59 S. W. 766; *Beasley v. Phillips*, 20 Ind. App. 182, 50 N. E. 488.

Mr. J. S. Cline also for defendants.

Thomas, J., delivered the opinion of the court:

The purpose of this suit, which was brought in the court below by appellees, being the children and heirs at law of George W. Keen, is to obtain a cancelation of the deeds by which appellants Kentland Coal & Coke Company and G. E. Rowe, who were defendants below, hold title to the land in dispute, and to have the court ad-

judge them to be the owners of the tract of land containing 208 acres.

The facts are these: On the 17th day of December, 1880, Harper Keen, the father of George W. Keen, conveyed the fee simple title to the land to the latter, but in that deed there was inserted this clause: "And said George Keen is not to sell this land in my (Harper Keen's) lifetime." On January 9, 1892, and while Harper Keen was still living, George W. Keen and his wife executed an absolute deed to the land to one W. H. Justice, and by mesne conveyances, consisting of some eight or nine, the appellant G. E. Rowe became the owner of the surface of the land, and the appellant Kentland Coal & Coke Company became the owner of the mineral under the land and all the mineral rights incident thereto, and were such at the time this suit was filed.

The relief is sought upon the two grounds as alleged, that: (1) The deed executed by George W. Keen to W. H. Justice on January 9, 1892, was, because of the prohibitive clause above, absolutely void at the time it was executed, and was wholly ineffectual to convey any kind of title or interest to the grantee Justice, and as a consequence all subsequent conveyances were likewise null and void; (2) that the father of appellees, George W. Keen, at the time he executed the deed to Justice, was non compos, and wholly disabled mentally from realizing the import of his act, and therefore his deed was ineffectual to pass the title to the land, it being claimed that his grantee had knowledge of his mental condition. Upon a submission of the cause the trial court sustained the first contention made by appellees, and not only canceled the deeds of appellants, but also canceled all intervening deeds, although none of the parties to them were parties to the suit. It also by its judgment ordered the appellees, before taking possession of the land, to pay to W. H. Justice the consideration which he had paid their father for the land, and adjudged it to be a lien thereon, all of which was done without Justice being made a party, or without anyone asking that it be done. Complaining of this judgment, the defendants prosecute this appeal, and appellees have prayed a cross appeal from that portion of the judgment directing them to pay Justice the consideration which he paid to their father.

A consideration of the first question raised by the petition involves an inquiry into the nature, effect, and scope of the inserted clause in the deed from Harper Keen to his son, George W. Keen, and also, what would be the effect if the restraint upon alienation attempted to be imposed by it should be violated by the grantee during

the lifetime of the grantor? That this clause creates what is known in the law of real estate conveyances as a condition subsequent there can be no doubt. This is so manifest as to be at once accepted without the citation of authorities. It is well known that this character of condition is disfavored in the law because its tendency is towards an impairment of the fee and in derogation thereof; consequently, the common law, as well as modern courts, have construed such stipulations, wherever the language used was sufficiently ambiguous to justify it, as covenants between the grantor and the grantee, and not as conditions subsequent. Devlin, Deeds, §§ 970b, 970c, and the many cases referred to in the notes thereto. However, where the language used is plain and unambiguous, and the intent of the grantor clear, it will be construed to be a condition subsequent. The rule, as stated by the author of the work on Deeds, supra, in § 970d, is: "The general rule undoubtedly is that courts will incline to construe the language, wherever it is possible to do so, into a covenant rather than a condition. Still, if it is the clear intention of the parties to create an estate upon condition subsequent, the courts must give effect to the intention of the parties."

Restraints upon alienation imposed by conditions subsequent may be absolute or partial, and wherever absolute, unless there is a limitation over of the fee after breach, they are void. Co. Litt, § 360; 24 Am. & Eng. Enc. Law, 2d ed. page 867; Devlin, Deeds, § 965; Lawson v. Lightfoot, 27 Ky. L. Rep. 217, 84 S. W. 739; Harkness v. Lisle, 132 Ky. 767, 117 S. W. 264; Stewart v. Brady, 3 Bush, 623; Stewart v. Barrow, 7 Bush, 368; Rice v. Hall, 19 Ky. L. Rep. 814, 42 S. W. 99; Kean v. Kean, 13 Ky. L. Rep. 956, 18 S. W. 1032, 19 S. W. 184; Johnson v. Dumeyer, 23 Ky. L. Rep. 2243, 66 S. W. 1025; Morton v. Morton, 120 Ky. 251, 85 S. W. 1188. This court, however, has upheld the validity of conditions subsequent imposing a partial restraint upon alienation perhaps to a greater extent than any other state in the Union. This is shown by the opinion of this court in the case of Lawson v. Lightfoot, 27 Ky. L. Rep. 217, 84 S. W. 739, from which we quote as follows: "It must be conceded that the great weight of authority outside of Kentucky is to the effect that where the fee simple title to real estate passes under a deed or will, any restraint attempted to be imposed by the instrument upon its alienation by the grantee or devisee is to be treated as void, and such is clearly the rule announced by Mr. Gray in his excellent work on 'Restraints on Alienation.' But the contrary view has been adopted by this court in re-

peated decisions, beginning with Stewart v. Brady, 3 Bush, 623, and ending with Wallace v. Smith, 43 Ky. 263, 68 S. W. 131 (Stewart v. Barrow, 7 Bush. 368; Rice v. Hall, 19 Ky. L. Rep. 814, 42 S. W. 99; Kean v. Kean, 13 Ky. L. Rep. 956, 18 S. W. 1032, 19 S. W. 184; Johnson v. Dumeyer, 23 Ky. L. Rep. 2243, 66 S. W. 1025.) In other words, the accepted doctrine in this state is that restraints upon alienation may be imposed for a reasonable period. This court has, however, never fixed a limit to such restraint, but in Stewart v. Brady, 3 Bush, 623, it was held that a devise of land to the testator's daughter with the limitation that it should not be disposed of by her until she became thirty-five years of age was reasonable; and in Kean v. Kean, 13 Ky. L. Rep. 956, 18 S. W. 1032, 19 S. W. 184, it was held that a restriction accompanying a devise of real estate to a son of the testator, that he should not have the power to dispose of it until he became twenty-eight years of age, was good. If such a restriction may be imposed for the periods indicated by the cases supra, why may it not endure for a longer time, or, as contemplated by the testator in this case, during the life of his widow, the tenant for life of the real estate, the alienation of which is attempted to be restricted?"

This case was followed by that of Harkness v. Lisle, 132 Ky. 767, 117 S. W. 264, in which the Kentucky doctrine of upholding a partial restraint upon alienation as imposed by the conditions subsequent was upheld to the extent that the limit upon such partial restraint might be for a period during the life of the grantor, or, perhaps, of some third person, but denied the restraint to be extended to the life of the grantee or devisee. The language of this court in so holding is as follows: "Here the testator attempted to impose a restraint upon alienation, not for a specified period of time, nor until the devisee arrived at a certain age, but during the entire lifetime of the devisee. The general rule is that the right of alienation is an inherent and inseparable quality of every vested fee simple estate. To hold that alienation could be restrained during the lifetime of the fee simple holder would be to deprive the fee of all its essential qualities. As said by Littleton: 'If such a condition be good, then the condition should oust him of all power which the law gives him, which should be against reason.' While bound by the former adjudication of this court to adhere to the doctrine that a limitation for a reasonable length of time is valid, we have no hesitation in saying that the limitation attempted to be imposed by the will in question is unreasonable. A testator

cannot devise a fee, and then destroy it entirely. We therefore conclude that clause 15 of the will is invalid."

See also *Chappell v. Frick Co.* 166 Ky. 311, 179 S. W. 203.

It will be seen, therefore, that the settled doctrine in this state is to the effect that the clause restraining the right of George W. Keen is a condition subsequent, and this restraint, being limited by the life of the grantor, in this state, is valid.

What, then, are the rights of the parties if this restraint is violated, or condition broken during the lifetime of the grantor, and he at no time made any effort to re-enter after condition broken, or to take any steps to have a forfeiture declared? A proper solution of this question is dependent upon the still further one as to who can take advantage of a broken condition subsequent. There is no room for dispute in cases where there is a limitation over after condition broken. Manifestly in such cases the person to whom the estate is made by the limitation over, or his heirs, would be the proper ones to re-enter or proceed for a forfeiture. In the instant case there is no limitation over. In such cases the grantor in the deed containing the limitation, or his heirs, are the only ones who can take advantage of a breach. This rule is laid down by all authors upon the subject, and is expressed by the author of the works on Deeds, supra, in § 9679, as follows: "No one can take advantage of a breach of a condition subsequent but the grantor or his heirs. If they do not take steps to enforce a forfeiture of the estate on the ground of a breach of the condition, the title remains unimpaired in the grantee."

And again the rule is stated in 13 Cyc. p. 706, as follows: "A breach of condition subsequent in a deed does not, ipso facto, operate to determine and revert the estate, but the same remains in the grantee, subject to be defeated only by some sufficient act at the election of the grantor or his heirs. So a provision that the title shall revert is not self-executing where the title passes absolutely by the deed and the clause is only a covenant. Again, where a purchase is made under color of lawful authority and at a time when the law was presumptively valid, it must be regarded as having been lawfully made, and the fact that the law is subsequently declared unconstitutional, thereby preventing performance, does not, ipso facto, revert title in the grantor under a condition to that effect: the failure to perform merely making the deed voidable."

The text is fortified by many authorities from various states of the Union, including the Kentucky case of *Kenner v. American* L.R.A.1916D.

can Contr. Co. 9 Bush, 206. In that case Kenner conveyed to the railroad company a right of way over his farm for the purpose of constructing a railroad, but provided that if the people of Christian county should subsequently "vote a tax for the building or completion of said road, then this right of way to be null and void."

The people of the county did subsequently vote a tax for that purpose, but in the meantime Kenner had died. He lived, however, a number of years after executing the deed, during which time the road was constructed, and three years after the voting of the tax the heirs of Kenner, including his widow, brought the suit to recover damages from the railroad company, charging that the happening of the event, which was the voting of the taxes, rendered the conveyance void, ipso facto, and converted the occupancy of the right of way by the railroad company into a trespass, and it was sought to be made to respond in damages for this supposed trespass. The plaintiffs failed in the trial court, and that judgment was affirmed by this court. In declaring the effect of a breach of a condition subsequent, as well as what is requisite to complete the forfeiture, this court in that opinion said: "It is insisted by counsel for appellee that this action cannot be maintained unless there was an entry upon the premises by either the grantor or his heirs after the condition broken. The effect of a subsequent condition is either to enlarge or defeat an estate already created; or, in the language of Chancellor Kent: 'Such conditions operate to defeat estates already created, and there must be an actual entry in order to defeat the livery made on the creation of the particular estate; and, although there is a breach of the condition, it does not defeat the estate until an entry is made by the grantor or his heirs.' 4 Kent, Com. 159. 'Regularly, where a man will take advantage of a condition, if he may enter, he must enter, for an estate of freehold or inheritance will not cease without entry or claim.' 1 Shep. Touch. p. 153. 'Where an estate is upon condition in deed, and to be void provided the grantee goes to York, the law permits the estate to continue beyond the time when the contingency happens, unless either the grantor or his heirs make an entry or claim in order to avoid the estate.' 2 Bl. Com. p. 155. The doctrine is well settled at common law that no freehold or fee simple estate can be destroyed by the breach or non performance of a condition subsequent, unless there is an entry by the grantor or his heirs after the breach, or some claim equivalent to it."

That a deed made in violation of the re-

straint upon alienation found in the condition subsequent is voidable and not void in the absence of a limitation over is recognized by all of the text writers, and, so far as we are able to learn, all the courts of last resort in this country. It is stated in 13 Cyc. p. 711, as follows: "The grantor may elect to re-enter for breach or non-performance of the conditions annexed to his deed. Upon the breach or nonperformance of a condition annexed to the grant of a freehold estate, the title conveyed is not void, but is only voidable by the act of the grantor or his heir, who must take advantage of the condition and repossess himself of the estate by actual re-entry, or by some act equivalent thereto, and manifesting an intent to terminate the estate. This rule applies even though the land is expressly conditioned to revert upon breach or nonperformance of the condition. But ejectment may be maintained without previous entry, demand, or notice. And re-entry is unnecessary where the grantor or his heirs retain possession, but such party must manifest an intent to hold possession."

According to some of the authorities to which we have referred herein, the right of re-entry, or to proceed for a forfeiture, must be exercised by the person in whom it lies within a reasonable time after the breach, and certainly must it be exercised within the lifetime of the one who possesses the right when the limit of the restraint imposed by the condition is measured by his life. The right of such a one under such conditions to insist on the breach is not an estate, but only a personal privilege to reclaim the land at any time after breach within the time limiting the restraint. If it is not exercised within such time, the right is gone, and the title becomes absolute in those to whom the conveyance was made.

We have found no decision in conflict with these views, except two comparatively recent cases in this court, wherein the opinions seem to hold that the deed executed in breach of the partial restraint is absolutely void and conveys no title whatever, and is not effectual for any purpose, these cases being *Frazier v. Combs*, 140 Ky. 77, 130 S. W. 812, and *Pond Creek Coal Co. v. Runyan*, 161 Ky. 64, 170 S. W. 501. The first case mentioned was decided on September 28, 1910, and the other one was decided on November 17, 1914. The deed involved in the *Frazier* Case was not so absolute in its nature as the one involved in the instant case; the clause considered in that case being as follows: "Conditioned that the party of the first part reserves unto himself the full control of the said property during his natural life and all the

rents, profits, and proceeds thereof that are necessary for maintaining the party of the first part during his life, and conditioned further that the party of the second part shall not have power to sell, grant, or convey said lands during the life of the party of the first part, but shall, after the death of the party of the first part, be seised of an indefeasible title to the lands herein described forever."

It will be observed that the grantor in that deed expressly reserved unto himself the full control of the property during his natural life, which was done for his maintenance, and in the subsequent part of the clause it was expressly stated that the grantee should not be seised of an absolute fee until after the death of the grantor. These differences might be held to inject different features in that deed from those in the one we now have under consideration. But, however that may be, the opinion proceeds upon the idea that the attempted conveyance constituting the breach was absolutely void, and that the right to insist upon the forfeiture survived to the children of the grantee (who committed the breach), and permitted them to maintain an action to recover the land from a remote grantee.

In the *Runyan* Case, the suit was brought by the grantor in the deed containing the restriction after the breach of the condition and, of course, during his lifetime, the children of the grantee in that deed becoming parties to the suit by intervening petition. In disposing of the question presented this court therein said: "Appellant contends that the effect of this action is to claim a forfeiture, and that forfeitures are not favored in law. His statement of the law is correct, but we do not understand the question is involved here. Appellant never had any interest in this land to forfeit. One may forfeit a right which at one time he was legally entitled to maintain, but this deed from Jacob Runyan to Bright was void because in direct conflict with Jacob's right to sell, and therefore no claimant thereunder ever acquired any right. If no rights were acquired, there were none to forfeit or surrender."

It will be seen that in these two cases the rule is stated that the deed executed in violation of the condition is void instead of voidable, being directly in conflict with the rule as stated by the authorities to which we have referred. In doing this we are constrained to believe that this court, in the two opinions mentioned, unintentionally departed from the universal rule upon the subject. We fully appreciate the doctrine and the office of the maxim, *stare decisis*. An adherence to it is necessary to preserve the uniformity of the law; and,

where the questions determined by the earlier decisions, in their origin, were doubtful, or were not so far-reaching as to affect the rules governing the acquisition and transmission of real property, the courts should, and do, apply it, but the rule is not so strictly observed where the questioned decision is of recent utterance, nor is the maxim itself always imperative or necessarily binding. 11 Cyc. 745; *Montgomery County Fiscal Ct. v. Trimble*, 104 Ky. 629, 42 L.R.A. 738, 47 S. W. 773. In the volume of Cyc., supra, 749, the circumstances governing the application or non-application of the maxim are stated thus: "Although the rule of *stare decisis* is entitled to great weight, and is adhered to in most courts, yet it is not followed to the exclusion in all cases of a departure therefrom, and it is a doctrine, generally recognized, that the rule will not be invoked to sustain and perpetuate a principle of law which is established by a series of decisions clearly erroneous, unless property complications have resulted therefrom and a reversal would result in greater injury and injustice than would ensue by following the rule. But the rule should not be departed from except on the fullest conviction that such an error has been committed."

See also as bearing upon the point, *Pratt v. Breckenridge*, 112 Ky. 1, 65 S. W. 136, 66 S. W. 405; *Tribble v. Taul*, 7 T. B. Mon. 456; *South v. Thomas*, 7 T. B. Mon. 59.

The limitations of the binding force of the maxim are well stated by the supreme court of Colorado in the case of *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 27 Colo. 1, 50 L.R.A. 209, 83 Am. St. Rep. 17, 59 Pac. 607, 20 Mor. Min. Rep. 192, as follows: "We understand, generally, that when a decision has established a settled rule of property, upon which rights are predicated (and especially those relating to real estate), the law will be adhered to by the court announcing it and those bound to follow its adjudications, even if erroneous (*Black, Interpretation of Laws*, § 152), but this rule is not inflexible. Courts are not bound to perpetuate errors merely upon the ground that a previous erroneous decision has been rendered on a given question. If it is wrong, it should not be continued, unless it has been so long the rule of action, and relied upon to such an extent, that greater injustice and injury will result by a reversal, though wrong, than to observe and follow it. *Ibid*, *Sutherland*, Stat. Constr. § 316; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159."

As we have seen, the rule concerning the nature of conditions subsequent in conveyance of real property, as well as the one governing the rights of the parties upon L.R.A.1916D.

breach of the condition, are each well rooted and anchored in the law, beginning with the earliest writers upon the subject, and followed without dissent, by their successors, and by practically, if not, all courts of last resort, including our own. These rules are bottomed upon sound reasoning, and are a part of the common law of England and this country. Property has been acquired and transferred for more than a century on the faith of their continued existence. To depart from them now would result in great confusion, as well as to mar the symmetry of the law. Such a course is not enjoined upon us by the doctrine of the maxim under consideration, although its application to conditions for which it had its origin and to meet which it was first invoked, is fully recognized and appreciated by us. Entertaining these views we are constrained to, and do, hereby overrule the two cases referred to in so far as they hold that the character of deed here involved is void, and in so far as they vest a right of action in the heirs of the grantee for a breach committed by him, whereby his estate is defeated, these cases being *Frazier v. Combs*, 140 Ky. 77, 130 S. W. 812; *Pond Creek Coal Co. v. Runyan*, 161 Ky. 64, 170 S. W. 501.

It therefore results that the deed executed by George W. Keen to W. H. Justice was not void, but voidable, and, it not having been avoided by any act or proceeding of Harper Keen during his lifetime, the title conveyed by it becomes absolute, nothing else preventing.

We come now to a consideration of the second claim of the appellees, it being the alleged unsoundness of mind of George W. Keen at the time he sold the land to Justice. It will be remembered that this deed was made on the 9th of January, 1892. With the consideration paid him, George Keen purchased other land, upon which he moved and resided until his death in March, 1912, more than twenty years from the time the deed to Justice was executed. He is shown by the testimony to have been a man of irritable temper, and sometimes in fits of anger he would act abnormally. He operated the farm upon which he lived and passed in and out before his neighbors and acquaintances and engaged in trades and transactions such as a man of his circumstances ordinarily does, and but few, if any, persons noticed anything in his actions or condition indicating feebleness of mind until about the year 1904, when from some cause he attempted to commit suicide by cutting his throat. It is shown that he had frequent quarrels with his family, and entertained a great dislike for those supposed to be his enemies. Some two or three years

after the effort to commit suicide he was placed in the insane asylum, but what the proof showed upon that trial we are not informed, nor is a copy of the judgment rendered at the inquisition placed in the record. The rule is that, although one's mind may be impaired by anger or other causes temporarily, still he may at other times possess sufficient mind to make a valid contract, including a sale of realty, and if the contract in question was made before inquisition, the presumption is that it is valid; and, when made under such circumstances, an innocent party, who in due course and for a valuable consideration acquires the title, does so free from the right of the grantor or his heirs to defeat it; the deed, when made before inquisition, being voidable, and not void. 22 Cyc. 1171; Breckenridge v. Ormsby, 1 J. J. Marsh. 236, 19 Am. Dec. 71; Arnett v. Owens, 23 Ky. L. Rep. 1409, 65 S. W. 151.

The evidence does not, by any means, convince us that George W. Keen did not have mind sufficient to execute the deed on January 9, 1892; but, if we are mistaken in this, there is an utter failure to show by any character of testimony that the appellants or their vendors had any knowledge as to his mental condition at that time. Moreover, there was no effort in this case to return, or offer to return, the consideration which George W. Keen received for the land, so that in no view of the case can we find any ground upon which the judgment may be upheld. As the judgment now stands, the appellees are ordered to pay to W. H. Justice the consideration which he paid their father for the land, and which is questioned by the cross appeal.

It results that the judgment should be, and is, reversed on the appeal and on the cross appeal, with directions to set it aside and to dismiss the petition.

Annotation—Validity and effect of provision in deed that the grantee shall not sell in the lifetime of the grantor.

Generally, as to validity of restraints on the alienation of a fee simple during a limited time, see the note to Latimer v. Waddell, 3 L.R.A.(N.S.) 668.

As is indicated in the note in 3 L.R.A.(N.S.) 668, there is much to be said for the theory that any upholding of restraints on alienation for a limited period was originally based on dicta. However, there are cases sustaining such restraints, and in Canada and Kentucky, at least, the doctrine has found considerable countenance; and the approval of the restraint in KENTLAND COAL & COKE CO. v. KEEN, ante, 924, is supported by the local authorities.

There are comparatively few cases involving deeds containing a provision that the grantee shall not sell in the lifetime of the grantor.

Frazier v. Combs (1910) 140 Ky. 77, 130 S. W. 812, is sufficiently dealt with in the opinion in KENTLAND COAL & COKE CO. v. KEEN.

In Pond Creek Coal Co. v. Runyan (1914) 161 Ky. 64, 170 S. W. 501, overruled in part in the principal case, the deed in question was by Asa Runyan and wife to their son and his wife, and contained these clauses: "And Jacob Runyan and Sallie, the party second, is bound not to sell said land during said Asa H. Runyan lifetime without his consent." "The parties of the second part is hereby bound to maintain the said Asa H. Runyan and Sarah Runyan, his wife, they themselves person-

ally. If called on during their natural lives. If they become unable to maintain themselves."

Perhaps the best known of the cases on the subject is M'Williams v. Nisly (1816) 2 Serg. & R. (Pa.) 507, 7 Am. Dec. 654. In that case Gass and wife made a deed of land to their son-in-law M'Williams in consideration of natural love and affection and 5s., conveying the fee simple, but M'Williams was not to sell the estate in the lifetime of Gass, unless Gass sold the land on which he himself then lived; but if M'Williams should die, living Gass, and before Gass had sold the land on which he lived, in such case he was to leave the estate to his wife, Mary, the daughter of Gass, or to the lawful issue of her body. On the contrary, if Gass should sell the land on which he lived during the life of M'Williams, or if he should die and M'Williams survive him, in either of those cases, M'Williams "is at free liberty to bequeath or sell and convey as he chooses." It turned out that Gass sold about 168 acres (out of about 444 acres) of the land upon which he lived, during the life of M'Williams, but retained his dwelling house and the remainder of his land, after which M'Williams, during the life of Gass, sold to the defendants, or those under whom they claimed, the whole of the estate conveyed to him by Gass, amounting to about 150 acres. Afterwards Gass died, and M'Williams survived him, and after

the death of M'Williams his surviving issue brought ejectment for the land and were defeated. Tilghman, Ch. J., seems to have approved of the restriction, but he says: "In the present case, the legal estate being conveyed to James M'Williams, who accepted it on the terms mentioned in the deed, such acceptance may be construed as a covenant by him to stand seised to such uses as appear to be intended in favor of his wife and children." Gibson, J., said: "It is unnecessary to consider whether, as a condition, this restriction would be totally void as being against the policy of the common law, as it is very clear that if the intention of the grantor cannot take effect under this instrument as a conveyance at common law, it may as a conveyance to uses." Both decided that M'Williams's children were estopped to deny their father's deed, and that M'Williams, although selling when he had no power, afterwards became the absolute owner. Christiancy, J., in referring to this case in *Mandlebaum v. McDonell* (1874) 29 Mich. 78, 18 Am. Rep. 61, says *inter alia*: "On a careful examination, I think it is stating the case rather strongly to say that the court judicially decided the restriction to be valid. Tilghman, J., does clearly express that opinion, but in substance his conclusion is that, whether good or not, the heirs were estopped, and the case was clear upon that point. Gibson, J., as I understand him, does not expressly hold the restriction good, but the fair result of his opinion is that, assuming it to be good, still the heirs were estopped, and the case was clear upon that point. The last is clearly the real ground of the decision, and, whether right or wrong, it is quite manifest neither of the judges considered the other question as necessary to the decision upon that point, nor therefore upon the case. But so far as it may be said to have treated the restrictions as valid, it was put upon the ground that the acceptance of the deed was equivalent to a covenant to stand seised 'to such uses as appear to have been intended in favor of his wife and children.' And if Gibson, J., can be said to have sustained the condition as good at all, it was, I think, upon this ground only, and it seems to me to be impliedly admitted by the opinions, when taken together, that such a restriction would not be good in common-law conveyances."

In *Jennings v. O'Brien* (1877) 47 Iowa, 392, where a father conveyed real estate to his son in consideration of \$1, on con-

dition that the said real estate should not be sold or in any manner disposed of during the lifetime of the father, after the father's death the court, in considering whether the land was burdened with any obligation to support the grantor or his wife, found that the deed was intended to convey and did convey the "absolute title," but did not comment on the question whether the restriction was good or not.

In *Gallaher v. Herbert* (1886) 117 Ill. 160, 7 N. E. 511, a deed was made by a father to his son in consideration of love and affection, \$1, the future payment of \$200 yearly during the father's life, "and the further consideration that the said party of the second part shall not, during the lifetime of the said party of the first part, bargain, sell, and convey part of the lands, tenements, or hereditaments hereinafter mentioned," the son waiving and releasing any rights as son and heir to his father's estate, real and personal. The court construed the deed as giving a lien for the \$200 per year, and not as creating a condition subsequent.

In *Cox v. Combs* (1908) 51 Tex. Civ. App. 346, 111 S. W. 1069, it was held that a covenant, and not a condition, was created by a deed providing, after the description, "Conditioned that the said H. L. Cox shall well and truly perform all of the agreements and obligations and undertakings herein mentioned, the title to the above-described premises to become absolutely in the said H. L. Cox at my death, said conditions above mentioned herein having been by him, the said H. L. Cox, fulfilled." The consideration recited is services rendered and to be rendered by Cox, in this: That he and his family are to occupy the premises, and Combs is to occupy a part of the same, and Cox is to furnish him with a room and board free of charge until his death. The property is not to be encumbered any further than the same is encumbered, until Combs's death, nor until then is the same to be sold or given away. Cox is to assume the payment of a certain mortgage on the property, and pay it off at its maturity, but by an instrument subsequently executed Cox is relieved from the condition of paying off this mortgage at its maturity, and is required only to pay off and discharge the same, so that the property shall not be subjected to sale therefor.

In *Chappell v. Chappell* (1909) — Ky. —, 119 S. W. 218, it was held that a life estate with power to cut timber was re-

tained by a deed by a man and wife to their son, then about thirteen years of age, reciting the consideration of love and affection, and providing that the grantors "retain a right to live on said land and use the same as they wish their lifetime; the said party (John Chappell) is not to sell or convey the above land to anyone except the heirs of Reuben Chappell and Sarah M. Chappell. To have and to hold the same with all appurtenances thereon unto the party of the second part, his heirs and assigns forever, with covenant of general warranty."

The restraining provision was held bad, and a mortgage by the grantee to a third party without any notice to the grantors held good, where the deed provided: "The said J. B. Galloway and wife, Alice L. Galloway, retaining for themselves and their heirs and assigns the right to repurchase said land when sold, the said Jefferson Evans conveying a title for said land, either by deed or mortgage, to any person without first giving J. B. Galloway and wife and their heirs and assigns the privilege of repurchasing the same, renders this deed null and void, otherwise to remain in full force." *Hardy v. Galloway* (1892) 111 N. C. 519, 32 Am. St. Rep. 828, 15 S. E. 890.

So, in *Murray v. Green* (1883) 64 Cal. 363, 28 Pac. 118, it was held that the attempted restraint on alienation was void where a wife and husband conveyed land to McLeran, one half in trust for the wife and the other one half to have and to hold to the proper use and behoof of the grantee, his heirs and assigns, subject, however, to the provisions thereafter inserted, viz., "Provided, however, that the said Thomas G. McLeran shall not have power or authority to sell, convey, or in anywise to dispose of, charge, or encumber any part or portion of said property, land, tenements, or hereditaments hereinbefore mentioned and conveyed to him, whether the same be that moiety conveyed to him for his own use or that moiety conveyed to him in trust for the use and benefit of the said Mary Ann; nor shall he have any authority to make or deliver any lease, leases, or releases, nor any acquittance nor adjustment of or concerning said land, tenements, or hereditaments, without obtaining the proper signature and written consent of the said Mary Ann, to each and every instrument or writing L.R.A.1916D.

whereby any of said matters and things may be done." The court referred to Cal. Civ. Code, § 711, providing that conditions in restraint of alienation, when repugnant to an interest created in property, are void as simply declaratory of the common law.

In *Prey v. Stanley* (1895) 110 Cal. 423, 42 Pac. 908, a son bought land as a gift for his mother, the deed being made direct to her, but within a month thereafter a contract was made naming as parties the mother and son, reciting the gift of the land, and containing a covenant by her that no part of the land "shall be sold or conveyed . . . without the consent" of the son; that he was to be known and considered as the manager and superintendent of the land for the interest and benefit of the mother, to whom was to be paid all the income, and that in case of her death the property should be divided between lawful heirs, "who are now at this time" a daughter named and such son. The mother, son, and daughter all signed the instrument. It was held that the mother's later deed to such daughter conveyed an absolute fee.

For the view that a daughter taking a deed from her father with condition to support her parents could not convey so as to transfer the condition, see *Barker v. Cobb* (1858) 36 N. H. 344.

It may be noted that in *Casgrain v. Hammond* (1903) 134 Mich. 419, 104 Am. St. Rep. 610, 96 N. W. 510, it was held that a transaction was void as violating the statute against perpetuities, where a woman made a deed to a trustee, who, at the same time, delivered to her a declaration of trust to hold the property for fourteen years or her life, whichever period should be longer.

For validity of limitation upon power of alienation imposed upon grant or devise of equitable estate to married woman, see the note to *Hauser v. St. Louis*, 28 L.R.A.(N.S.) 426.

For relief of grantor in conveyance in consideration of agreement to support which is broken by grantee, see the note to *Dixon v. Milling*, 43 L.R.A.(N.S.) 916.

For necessity of entry or formal declaration of forfeiture, as a condition of maintaining action, other than for damages, based on breach of condition subsequent in a conveyance of freehold, see the note to *Mash v. Bloom*, 14 L.R.A.(N.S.) 1187.

B. B. B.

MASSACHUSETTS SUPREME JUDICIAL COURT.

RE EDNA MAY HARBROE, Widow of William A. Harbroe, Deceased, Employee.

FURST-CLARK CONSTRUCTION COMPANY, Employer.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Insurer, Appt.

(223 Mass. 139, 111 N. E. 709.)

Master and servant — workmen's compensation act — affray — wilful misconduct.

1. The killing of a night watchman in an affray with police officers whom he mistakes for robbers cannot be said to be by reason of his serious and wilful misconduct within the exception in the workmen's compensation act.

For other cases, see Master and Servant, II. a, in Dig. 1-52 N. S.

Same — course of employment — leaving premises.

2. A night watchman killed during working hours while on a path where he was accustomed to go in the performance of his duties, after he had heard of the presence of robbers in the vicinity, cannot, although he was out of the building, be said not to have been in the course of his employment, on the theory that he had abandoned the care of his employer's property and intended to leave the premises.

For other cases, see Master and Servant, II. a, in Dig. 1-52 N. S.

Same — arising out of employment.

3. The killing of a night watchman by a police officer under the mistaken belief that he was a robber fleeing from the commission of a job on other property is not an injury arising out of the watchman's employment, although the watchman mistook the officer for the robber, if, in the affray which followed, the watchman was not attempting to protect his employer's property, which was not at the time exposed to danger.

For other cases, see Master and Servant, II. a, in Dig. 1-52 N. S.

(March 1, 1916.)

APPEAL by the insurer from a decree of the Superior Court of Suffolk County

confirming a decision of the Industrial Accident Board awarding compensation to the dependent widow in a proceeding by her under the workmen's compensation act to recover compensation for the death of her husband. Reversed.

The facts are stated in the opinion.

Mr. Albin L. Richards, for appellant:

The employee, Harbroe, was injured by reason of his serious and wilful misconduct, and therefore, by § 2, part II. of the workmen's compensation act, there can be no recovery.

Rohan v. Sawin, 5 Cush. 281; Com. v. Drew, 4 Mass. 391; Com. v. Carey, 12 Cush. 246; Com. v. Reynolds, 120 Mass. 190, 21 Am. Rep. 510; Brown v. United States, 159 U. S. 100, 40 L. ed. 90, 16 Sup. Ct. Rep. 29; State v. Taylor, 70 Vt. 1, 42 L.R.A. 673, 67 Am. St. Rep. 648, 39 Atl. 447; State v. Shaw, 73 Vt. 149, 50 Atl. 863, 13 Am. Crim. Rep. 1; Williams v. State, 44 Ala. 41.

The injury did not arise out of and in the course of the employment.

Milliken's Case, 216 Mass. 293, L.R.A. 1916A, 337, 103 N. E. 898, 4 N. C. C. A. 512; Fumicello's Case, 219 Mass. 488, 107 N. E. 349; Mitchinson v. Day Bros. [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190; Pritchard v. Torkington [1914] W. C. & Ins. Rep. 271, 111 L. T. N. S. 917, 58 Sol. Jo. 739; Sheldon v. Needham [1914] W. C. & Ins. Rep. 274, 111 L. T. N. S. 729, 58 Sol. Jo. 652, 30 Times L. R. 590.

To vest the right to future payments in the dependent entitled at the time of the decree is to make provision for dependents of dependents. The death of the beneficiary terminates the obligation to pay the weekly payments for specific compensation, under S. 11 of part II. of the act.

Burns's Case, 218 Mass. 8, 105 N. E. 601, Ann. Cas. 1916A, 787, 5 N. C. C. A. 635; Nichols's Case, 217 Mass. 3, 104 N. E. 566, Ann. Cas. 1915C, 862, 4 N. C. C. A. 5.

Mr. Charles Sumner Morrill, for appellee:

There was evidence in support of the finding of the Industrial Accident Board that the injury resulting in death arose

Note. — The question as to what constitutes "serious and wilful misconduct" within the meaning of the workmen's compensation act is discussed in the annotation following Clem v. Chalmers Motor Co. L.R.A.1916A, 355.

The general subject of workmen's compensation acts is treated in an extensive annotation in L.R.A.1916A, 23. The English cases on the construction of the statutory phrase, "arising out of and in the course of the employment," are treated at pages L.R.A.1916D.

40 et seq. of that annotation (see especially pages 64 et seq., for cases involving an intentional or unlawful injury by a third person); and the American cases at pages 232 et seq. (see especially pages 239 et seq., for cases involving an intentional or unlawful act of a third person).

Other annotation dealing with various specific applications of the phrase may be found by consulting the Index to L.R.A. Notes under the title, "Workmen's compensation."

"out of and in the course of" the employment of the deceased.

Burns's Case, *supra*.

Said finding was not wrong as a matter of law.

McNicol's Case, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. O. A. 516, Sundine's Case, 218 Mass. 1, L.R.A. 1916A, 318, 105 N. E. 433, 5 N. C. C. A. 616.

The burden is on the insurer to show that Harbroe abandoned his duties and abandoned his master's property.

Adams v. Hodgkins, 109 Me. 361, 42 L.R.A. (N.S.) 741, 84 Atl. 530; New England Structural Co. v. Everett Distilling Co. 189 Mass. 145, 75 N. E. 85; Brightman's Case, 220 Mass. 17, L.R.A. 1916A, 321, 107 N. E. 527, 8 N. C. C. A. 102.

It cannot be said that Harbroe was fatally injured "by reason of his serious and wilful misconduct," as stated in the workmen's compensation act.

Nickerson's Case, 218 Mass. 158, 103 N. E. 604, Ann. Cas. 1916A, 790, 5 N. C. C. A. 645.

De Courcy, J., delivered the opinion of the court:

The employee Harbroe was night watchman for the Furst-Clark Construction Company, which was engaged in work on the Cape Cod canal, at Buzzard's bay, in Barnstable county. This company had buildings, machinery, and other property on both the northerly and southerly side of the canal, and on the easterly and the westerly side of the tracks of the New York, New Haven, & Hartford Railroad Company, which tracks extended in a northerly and southerly direction on a bridge over the canal. At about 3 A. M. on October 9, 1914, one Hart, a deputy sheriff at Buzzard's bay, was notified that "yeggmen" had robbed the safe at the Bourne postoffice. Later Albert L. Trench, the bridge operator employed by the railroad company, and whose station was near the buildings of the construction company, notified the deputy sheriff that the robbers had just crossed the bridge. Hart and his brother, fully armed, started in pursuit. In the vicinity of the company's office building, they saw, and were seen by, Trench and Harbroe. Each party, thinking that the others were acting in a suspicious manner, mistook them for the "yeggmen" in the darkness and fog, shots were exchanged, and Harbroe was fatally injured.

1. The insurer contends that the employee was "injured by reason of his serious and wilful misconduct." Stat. 1911, chap. 751, pt. 2, § 2. According to the findings of the L.R.A. 1916D.

Industrial Accident Board he was defending himself from attack by men whom he thought to be desperate criminals. There was some evidence that he did not use his revolver until after they had given the command "hands up," and had fired upon him and his companion, Trench. We cannot say, as matter of law, that the facts show such misconduct as would deprive an employee of compensation under the statute. And assuming that § 2 is applicable where the employee is killed (see pt. 5, § 2, defining "employee"), the same is true as to his dependents. Nickerson's Case, 218 Mass. 158, 105 N. E. 604, Ann. Cas. 1916A, 790, 5 N. C. C. A. 645; Johnson v. Marshall, Sons & Co. [1906] A. C. 409, 75 L. J. K. B. N. S. 868, 94 L. T. N. S. 828, 22 Times, L. R. 565, 5 Ann. Cas. 630.

2. The finding of the board that Harbroe's injury arose in the course of his employment has some support in the evidence. It occurred during his working hours, and on the path between the office and the machine shop of his employer. The fact that he and Trench had left the office after seeing the supposed "yeggmen" approaching is not conclusive that he had abandoned the care of his employer's property. He may have been on his way to some other part of the plant, where he would be in less apparent danger of bodily harm. At the time of the shooting he was in a place where he was accustomed to go in the performance of his duties. It is merely conjecture to say that he intended subsequently to leave the premises of his employer. Pigeon's Case, 216 Mass. 51, 102 N. E. 932, Ann. Cas. 1915A, 737, 4 N. C. C. A. 516. See Ross v. John Hancock, Mut. L. Ins. Co. 222 Mass. 560, 111 N. E. 390.

3. The doubtful question is whether the injury arose out of the employment. It cannot reasonably be said that the risk of being shot by trespassing lawbreakers is incidental to or has its origin in the nature of a night watchman's ordinary employment. Undoubtedly there are particular instances where the occupation of a night watchman exposes him to risk substantially beyond the ordinary normal ones, and where the employment involves and obliges the employee to face such perils. Where the employee's injury is the result of such special risk incident to the employment, and where there is "a casual connection between the conditions under which the work is required to be performed and the resulting injury," the injury "arises out of" the employment, within the meaning of the workmen's compensation act. McNicol's Case, 215 Mass. 497, L.R.A. 1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522.

In the application of this principle to

cases of assault upon employees in the course of their employment the authorities are not in harmony. Some of these cases are referred to in McNicol's Case. In *Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times, L. R. 486, where an engine driver was struck by a stone thrown wilfully by a boy from an overhead bridge; and in *Nisbet v. Rayne & Burn* [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times, L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268, where a cashier employed regularly to carry wages by train to a colliery, was robbed and murdered in the course of the journey, it was held that the injury arose out of the employment. On the other hand, in *Blake v. Head*, 106 L. T. N. S. 822, 5 B. W. C. O. 303, 28 Times, L. R. 321, where a felonious assault was committed by the employer, and in *Mitchinson v. Day Bros.* [1913] 1 K. B. 603, 82 L. J. K. B. N. S. 421, 108 L. T. N. S. 193, 29 Times, L. R. 267, 57 Sol. Jo. 300, 6 B. W. C. C. 190, where a carter in charge of his employer's horse was assaulted by a drunken man (both referred to in McNicol's Case), it was held that the injury did not arise out of the employment. *Anderson v. Balfour*, [1910] 2 I. R. 497, was the case of a game keeper who was attacked by poachers, but the question was whether the injury resulted from an "accident," not whether it arose out of the employment. The same is true of *Murray v. Denholm & Co.* [1911] S. C. 1087, 5 B. W. C. C. 496, 48 Scot. L. R. 896, where a workman was attacked by strikers. It was also held that the injury arose, out of the employment in *Kelly v. Board of Management, Trim Joint Dist. School*, 47 Ir. Law Times, 151, affirmed by H. L. [1914] A. C. 667, 83 L. J. P. C. N. S. 220, 111 L. T. N. S. 305, 30 Times, L. R. 452, 58 Sol. Jo. 493, 7 B. W. C. C. 274, 48 Ir. Law Times, 148, where a schoolmaster was assaulted by some of the boys whose enmity he had incurred owing to his efforts to maintain discipline; and in *Weekes v. Stead*, [1914] W. N. 263, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 30 Times, L. R. 586, 58 Sol. Jo. 633, 7 B. W. C. C. 398, 6 N. C. C. A. 1010, where the yard foreman of a firm of furniture movers was fatally assaulted by one of the odd-job men who was employed at times by the firm. See also *MacFarlane v. Shaw* [1915] W. C. & Ins. Rep. 32, 8 B. W. C. C. 382. Among the cases contra, see *Collins v. Collins* [1907] 2 I. R. 104; *Shaw v. Wigan Coal & I. Co.* 3 B. W. C. C. 81; *Clayton v. Hardwicke Colliery Co.* [1914] W. C. & Ins. Rep. 343, 111 L. T. N. S. 788.

The question we have to determine is whether in the case at bar there was evi-

dence upon which the Board could find that Harbroe's death arose out of a special risk incident to the performance of his duties as a night watchman. There was no evidence that this property ever had been injured by wrongdoers, or that from its character or location it was especially exposed to theft or harm at the hands of trespassers. He was not shot while protecting his employer's property from thieves. At the time of this accident the property was in no way threatened, nor did Harbroe suppose it was. And he was not fired upon because he was the watchman in charge. The injury might quite as well have been suffered by any person who happened to be in the locality, whether employed by the construction company or not. Further, although Harbroe mistakenly believed that the two approaching figures were "yeggmen," they were in fact an officer of the law and his assistant, who were in the performance of their duty, seeking to apprehend the men who recently had robbed the postoffice. The injury which they inflicted was the result of an unfortunate misapprehension on their part (to which Harbroe himself unwittingly contributed), and cannot reasonably be said "to have had its origin in the hazard connected with the employment, and to have flowed from that source as a rational consequence. *Reithel's Case*, 222 Mass. 163, 165, L.R.A. 1916A, 304, 109 N. E. 951. As was said in *Madden's Case*, 222 Mass. 487, post, 1000, 111 N. E. 379: "The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment, and not by some other agency, or there can be no recovery."

We are constrained to say that there was no evidence to support the finding that the employee's injury was one "arising out of" his employment. The decree is reversed and a new decree is to be entered in favor of the insurer.

MINNESOTA SUPREME COURT.

AARON LINDSTROM, Appt.,

v.

MUTUAL STEAMSHIP COMPANY, Respt.

(— Minn. —, 156 N. W. 669.)

State — jurisdiction over vessels.

1. Territorial sovereignty of a state ex-

Headnotes by HALLAM, J.

Note. — As to the construction and effect of the workmen's compensation acts generally, see annotation in L.R.A.1916A, 23.

As to the limitation of the application of workmen's compensation acts by Federal laws, see annotation following *Staley v. Illinois C. R. Co.* L.R.A.1916A, 461.

tends to a vessel of the state, though it is upon navigable waters.

For other cases, see State, in Dig. 1-52 N. S.

Master and servant — workmen's compensation — injury on vessel.

2. The Minnesota workmen's compensation act (Gen. Stat. 1913, §§ 8195-8230) is general in its terms, and it applies to all cases within the territorial jurisdiction of the state save those expressly excepted. The act excepts cases arising from interstate commerce by railroad. Those arising from interstate commerce by water are not excepted.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Commerce — state compensation act — injury on navigable water.

3. The act in its application to such employment is not invalid as an interference with interstate commerce. Congress has not legislated upon that subject as to interstate commerce by water, and until it does so, such legislation is within the province of the several states.

For other cases, see Commerce, II. b, in Dig. 1-52 N. S.

Admiralty — jurisdiction.

4. The injury sustained in this case was sustained upon the navigable waters of the United States. This brings the case within the jurisdiction of the Federal courts of admiralty.

For other cases, see Admiralty, in Dig. 1-52 N. S.

Water — injury on — remedy.

5. By virtue of the clause in judiciary act (act Sept. 24, 1789), § 9, saving to suitors the right of a common-law remedy where the common law is competent to give it, a party so aggrieved may (1) proceed in rem in admiralty, (2) bring suit in personam in admiralty, (3) resort to his remedy at law in personam in a state court, or (4) in the United States circuit court if there are parties proper to give such jurisdiction.

For other cases, see Courts, IV. d, in Dig. 1-52 N. S.

Same — procedure in state court.

6. In its application to this case the important effect of the saving clause is that it saves the right to proceed in the state courts by a suit in personam to redress wrongs committed at sea, although the person injured had the concurrent right to proceed in rem in a Federal court of admiralty.

For other cases, see Courts, IV. d, in Dig. 1-52 N. S.

Conflict of laws — injury on sea.

7. When the action is brought in a state court, it must be determined according to state laws, and not according to the laws of admiralty.

For other cases, see Conflict of Laws, I. e, 1, in Dig. 1-52 N. S.

Same — state law — power to modify.

8. It is competent for the state to modify L.R.A.1916D.

by statute its common-law rules of liability in their application to such cases, so long as the modification does not amount to a regulation of commerce or an interference with some paramount Federal law.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Master and servant — compensation act — exclusiveness.

9. Since the adoption of the Minnesota compensation act, the question of liability in such cases, and the amount thereof, is to be determined by the compensation act.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

(March 3, 1916.)

A PPEAL by plaintiff from an order of the District Court for St. Louis County sustaining a demurrer to a complaint filed to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Wharton & Wharton, for appellant:

The court erred in sustaining the demurrer and in holding that the facts alleged in the complaint brought the case within the provisions of the Minnesota workmen's compensation act.

The Henry B. Smith, 195 Fed. 312; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654; Schuede v. Zenith S. S. Co. 216 Fed. 566; Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A. (N. S.) 1157, 34 Sup. Ct. Rep. 733; The Fred E. Sander, 208 Fed. 724, 4 N. C. C. A. 891; The Rosalie Mahoney, 218 Fed. 695; The Max Morris, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29; The Thode Fagelund, 211 Fed. 685.

Messrs. Washburn, Bailey, & Mitchell, for respondent:

Interstate carriage by water is included under the Minnesota act.

Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875; Stoll v. Pacific Coast S. S. Co. 205 Fed. 169; The Pawnee, 205 Fed. 333; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 22 L. ed. 654.

All employers and employees not expressly excepted in the workmen's compensation act are presumed to be subject to said act.

Harris v. Hobart Iron Co. 127 Minn. 399, 149 N. W. 662, 7 N. C. C. A. 44; Young v. Duncan, 218 Mass. 346, 106 N. E. 1; Sexton v. Newark Dist. Teleg. Co. 84 N. J. L. 85, 86 Atl. 451, 3 N. C. C. A. 569; Borgnis v. Falk Co. 147 Wis. 327, 37 L.R.A. (N. S.) 489, 133 N. W. 209, 3 N. C. C. A. 649; Gre-

gutis v. Wacark Wire Works, 86 N. J. L. 610, 92 Atl. 354; Johnson v. Nelson, 128 Minn. 158, 150 N. W. 620.

When a stevedore is injured on board a vessel moored to a dock, the rights arising thereunder are to be determined by the law of the state in which the accident occurred.

The Bee, 216 Fed. 709; The Scotland (National Steam Nav. Co. v. Dyer) 105 U. S. 29, 26 L. ed. 1003; Thompson Towing & Wrecking Asso. v. McGregor, 124 C. C. A. 479, 207 Fed. 209.

Mr. H. A. Carmichael also for respondent.

Hallam, J., delivered the opinion of the court.

The complaint alleges the following facts:

Defendant is a Minnesota corporation operating the steamship William Livingstone on the Great Lakes, between Duluth, its home port, and ports outside of Minnesota. The Berwind Fuel Company is an employer owning a dock at Duluth. On June 9, 1914, plaintiff was in the employ of the fuel company engaged in unloading a cargo of coal from said vessel onto the said fuel company's dock. While working in the hold of the vessel he was injured through the negligence of defendant. He brings this common-law action to recover damages. Defendant demurred and the demurrer was sustained.

The demurrer raises one main question; that is: Does the Minnesota workmen's compensation law (Gen. Stat. 1913, §§ 8195 et seq.) apply to such a case? If so, it is conceded the demurrer was properly sustained. We are of the opinion that the Minnesota compensation law does apply.

1. No question of territorial jurisdiction arises, for the territorial sovereignty of the state of Minnesota extends to a vessel of the state, though it is upon navigable waters (Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430; The Hamilton (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 28 Sup. Ct. Rep. 133), even upon the high seas (International Nav. Co. v. Lindstrom, 60 C. C. A. 649, 123 Fed. 475; Thompson Towing & Wrecking Asso. v. McGregor, 124 C. C. A. 479, 207 Fed. 209; The Bee [D. C.] 216 Fed. 709.)

No question of conflict of state laws arises. Duluth being the home port, and also the port where the injury occurred, the laws of no state other than Minnesota could apply.

2. There is no serious doubt that the terms of the statute are broad enough to cover the case. The act is general in its terms and it applies to all cases within the territorial jurisdiction of the state which are not excepted. Section 8202 excepts "any employer acting as a common carrier L.R.A.1916D.

when engaged in interstate or foreign commerce by railroad," and "any employee of such common carrier injured or killed while so engaged." No other exception of consequence here is found in the act. This section does not, either in terms or by any possible implication, except carriers by water or the employees of such carriers.

The negligence that caused the injury was not that of plaintiff's employer, but of another employer who is within the terms of the act. The compensation applies to such a case. Mathison v. Minneapolis Street R. Co. 126 Minn. 286, ante, 412, 148 N. W. 71, 5 N. C. C. A. 871.

3. Nor is the act invalid as an interference with interstate commerce. The right of Congress to pass laws governing the liability of employers engaged in interstate commerce for injuries sustained by their employees while engaged in such commerce, to the exclusion of state legislation upon that subject, is unquestioned, and as to railroads Congress has enacted some applicable laws. Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N. S.) 44, 32 Sup. Ct. Rep. 169, 1 N. C. C. A. 875. But Congress has passed no laws regulating the liability of interstate carriers by water, at least not as to any matters here involved, and until Congress legislates upon this subject it is within the province of the several states to do so. Ibid; Stoll v. Pacific Coast S. S. Co. (D. C.) 205 Fed. 169, 177.

4. The only doubtful question in the case is whether the Minnesota compensation act is, in its application to this case, an infringement upon the Federal jurisdiction over the subject of admiralty. The Constitution of the United States extends the power of the Federal courts "to all cases of admiralty and maritime jurisdiction." Article 3, § 2. Section 9 of the judiciary act of 1789 saves to suitors "in all cases the right of a common-law remedy, where the common law is competent to give it." 1 Stat. at L. p. 77, chap. 20. This case hinges on the construction of this saving clause.

The injury was sustained aboard a ship on navigable waters of the United States. This brings the case within the jurisdiction of the Federal courts of admiralty. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 51 L.R.A. (N. S.) 1157, 34 Sup. Ct. Rep. 733. Just as clearly it is subject to the common-law jurisdiction of the courts of this state. The Constitution and the statute conferred upon the national judiciary the admiralty and maritime jurisdiction exactly as it existed in the jurisprudence of the common law. When the admiralty jurisdiction was exclusive, it remained so; when it was concurrent, it re-

mained so. If the suit be in rem against the thing itself the proceeding is essentially one in admiralty, is exclusively cognizable in admiralty courts, and the states cannot confer upon their own courts the cognizance of such cases. But the states did retain jurisdiction in cases of which the cognizance was previously concurrent in the courts of common law, that is, of suits in personam against an individual defendant. "This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction than cases of common-law jurisdiction." *Taylor v. Carryl*, 20 How. 583, 598, 15 L. ed. 1028, 1033; *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 638, 648, 44 L. ed. 921, 926, 20 Sup. Ct. Rep. 824. Accordingly, it is said in *The Belfast*, 7 Wall. 624, 645, 19 L. ed. 266, 272, that proceedings in a suit at common law on a maritime contract "are precisely the same as in suits on contracts not regarded as maritime, wholly irrespective of the fact that the injured party might have sought redress in the admiralty."

5. By virtue of the saving clause a party so aggrieved may (1) proceed in rem in admiralty if a maritime lien arises, (2) bring suit in personam in an admiralty jurisdiction, (3) resort to his remedy at law in a state court, or (4) in the United States court at law if there are parties proper to give such jurisdiction. *American S. B. Co. v. Chase*, 16 Wall. 522, 534, 21 L. ed. 369, 372.

It has been said that what is reserved to a suitor "is not a remedy in the common-law courts, but a common-law remedy." *The Moses Taylor*, 4 Wall. 411, 431, 18 L. ed. 397, 402; *Moran v. Sturges*, 164 U. S. 256, 276, 38 L. ed. 981, 987, 14 Sup. Ct. Rep. 1019. This is true enough, but it is not very helpful here. This language means, on the one hand, that the saving clause does not confer upon common-law courts the power to entertain an admiralty suit in rem, and, on the other hand, that some remedies are reserved that were enforceable at common law, not in a common-law court, but in a court of equity, and also some remedies recognized at common law, like carriers' liens, which need not be enforced in court at all. *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824.

6. In its application to this case, the important effect of the saving clause is that it saves the right of a party to proceed in the state courts in personam "according to the course of the common law" to redress wrongs committed at sea, although the person injured had the concurrent right to proceed in rem in the Federal court of admiralty. *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 638, 648, 44 L. ed. 921, 926, 20 Sup. Ct. 824; *Rounds v. Cloverport Foundry & Mach. Co.* 237 U. S. 303, 59 L. ed. 966, 35 Sup. Ct. L.R.A.1916D.

Rep. 596; *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369; *Reynolds v. The Favorite*, 10 Minn. 242, Gil. 190; *Stapp v. The Clyde*, 43 Minn. 192, 45 N. W. 430; *Benedict*, Adm. § 128.

7. The contention of the plaintiff is that, when action is brought in the state court, the rules of liability are the same as though the proceeding were in admiralty. In other words, the contention is that where a remedy is sought in a state court that court enforces, not the laws of its own jurisdiction, but the general laws of admiralty, much as the courts of one state, in enforcing liabilities which arose in another, will apply the laws of the state where the cause of action arose, and since the state has no right to modify or amend the general maritime law, it is contended the Minnesota compensation law is here inoperative. This is really the crucial question in the case. It is a Federal question, and we think that it is settled adversely to plaintiff's contention by the decisions of the United States Supreme Court.

It is well understood that in the two courts, that is, courts of admiralty and courts of law, not only is the course of proceeding in many respects different, but also "the rules of decision are different." *Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 395, 22 L. ed. 619, 621. A striking instance of this difference is the rule for estimating damages in suits for personal injury. In the common-law courts the defendant must pay all the damages or none. If there has been contributory negligence on the part of the plaintiff, he can recover nothing. In the admiralty court, where there has been contributory negligence, the entire damages must be equally divided between the parties. It is held that when the action is at law the rule of liability prevailing at law, and not the admiralty rule, must be applied. It is also held that the principles which determine the existence of mutual fault in admiralty are not precisely the same as those which establish contributory negligence at law, but that "each court has its own set of rules for determining these questions, which may be in some respects the same, but in others vary materially" (*Atlee v. Northwestern Union Packet Co.* 21 Wall. 389, 396, 22 L. ed. 619, 621; *The Max Morris*, 137 U. S. 1, 10, 34 L. ed. 586, 588, 11 Sup. Ct. Rep. 29), and it is held that if a person injured, though he might proceed in admiralty, elects to sue at law, the common-law rule as to contributory negligence must be applied, and he cannot recover "though defendant were negligent, if it appeared that his own negligence directly contributed to the result complained of." *Belden v. Chase*, 150 U. S. 674,

691, 37 L. ed. 1218, 1224, 14 Sup. Ct. Rep. 264. If this is the true principle to be applied as to contributory negligence, it must be the true principle to be applied as to all of the rules of law upon which liability depends.

On similar principles it was held in *Krapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 638, 44 L. ed. 921, 20 Sup. Ct. Rep. 824, that a bill in equity to foreclose a common-law lien upon a raft for towage was a proceeding to enforce a common-law remedy, and that since the supreme court of Illinois had held that plaintiff had a possessory lien upon the raft, and that he had possession, the Federal court "should defer to the opinion of that court in these particulars, as they are local questions dependent upon the law of the particular state."

We take it these Federal cases establish well the rule that when the action is brought in a state court it must be determined according to state law, and not according to the law of admiralty.

8. As the state court in administering its remedy applies its own rules of liability, it must enforce such rules of liability as are in force in the state, whether they arise from the common law or from the statute, and the state may modify by statute its common-law remedies so long as such statutes do not amount to regulation of interstate commerce or an interference with some paramount Federal law. In *American S. B. Co. v. Chase*, 16 Wall. 522, 21 L. ed. 369, defendant took the position that the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the judiciary act. The contention was held to be unsound. *Knapp, S. & Co. Co. v. McCaffrey*, 177 U. S. 638, 44 L. ed. 921, 925, 20 Sup. Ct. Rep. 824. And in *The Hamilton* (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 404, 52 L. ed. 264, 269, 23 Sup. Ct. Rep. 133, it was said that "as the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouthpiece, the legislature. The same argument that deduces the legislative power of Congress from the jurisdiction of the national courts tends to establish the legislative power of the state where Congress has not acted."

And state courts have used similar language. *Waller v. Kierstead*, 74 Ga. 18, 22; *Dougan v. Champlain Transp. Co.* 56 N. Y. 1, 5; *Stewart v. Harry*, 3 Bush, 438.

This doctrine is further illustrated by other Federal decisions.

In *Rounds v. Cloverport Foundry & Mach. Co.* 237 U. S. 303, 59 L. ed. 966, 36 L.R.A.1916D.

Sup. Ct. Rep. 596, it is held that a common-law court, as auxiliary to the remedy in personam, may enforce a statutory attachment against the vessel itself.

In *Leon v. Galceran*, 11 Wall. 185, 192, 20 L. ed. 74, 76, it was held that in the absence of legislation by Congress it is competent for a state to create such liens upon vessels as its legislature may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement.

In the *Lottawanna* (*Rodd v. Heartt*) 21 Wall. 558, 580, 22 L. ed. 654, 663, it was said that, so long as Congress does not interpose to regulate the subject, the rights of materialmen furnishing necessities to a vessel in her home port may be regulated by state legislation. It was said that the contract for furnishing such necessities is a maritime contract, and that the states cannot alter the limits of maritime jurisdiction, nor confer it upon the state courts so as to enable them to proceed in rem for the enforcement of liens created by such state laws, but that they can authorize the enforcement thereof by "common-law remedies, or such remedies as are equivalent thereto."

It is held that a statute of a state giving to the next of kin of a person an action on the case for damages for the injury caused by the death of such person is a valid and enforceable statute, as applied to maritime torts. It was first held that such a statute was enforceable in an action in the state courts, "whether such a suit may or may not be maintained in the admiralty courts." *American S. B. Co. v. Chase*, 16 Wall. 522, 532, 21 L. ed. 369, 372. Later, indeed, it was held that such a statute was enforceable even in admiralty. *The Hamilton* (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 52 L. ed. 264, 23 Sup. Ct. Rep. 133. See also *The City of Norwalk* (D. C.) 55 Fed. 98, 106, where the applicable principles are fully discussed.

We accordingly hold that, where liability is asserted in the courts of this state against the owner of a vessel of this state to redress a maritime tort, the question of whether liability exists is to be determined by the common law of this state, as the same has been modified by the valid general statutes of the state, and, since the compensation act is now the law of this state, substituted for all common-law remedies before existing, that statute furnishes the rule upon which the liability and the extent of it are to be determined.

The conclusion we have reached is sustained by *Walker v. Clyde* S. S. Co. 215 N. Y. 529, 109 N. E. 604, where it is held that

the compensation law of New York was applicable to a precisely similar situation.

The same result was reached in *Kenner-son v. Thames Towboat Co.* 89 Conn. 367, L.R.A. 1916A, 436, 94 Atl. 372, where it is said that the common-law remedies reserved by the judiciary act of 1789 "embrace all methods of enforcing rights and redressing injuries known to the common or statutory law." *Stoll v. Pacific Coast S. S. Co.* (D. C.) 205 Fed. 169, is also in harmony with our views. See also *McDonnell v. Oceanic Steam Nav. Co.* 74 C. C. A. 500, 143 Fed. 480; *The Fred E. Sander* (D. C.) 212 Fed. 545, 5 N. C. C. A. 97.

The only authority we find to the contrary is a well-considered opinion of Killitis, District Judge, in *Schuede v. Zenith S. S. Co.* (D. C.) 216 Fed. 566, holding that the com-

pensation law of Ohio was not applicable to the case of a seaman employed under a maritime contract who was injured in the course of his employment. It was held that the maritime law as to liability was part of his contract, and that that law determined his rights though the action was at law. So far as that decision is inconsistent with the views herein expressed, we cannot follow it. *Workman v. New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212; *The Henry B. Smith* (D. C.) 195 Fed. 312; *The Fred E. Sander* (D. C.) 208 Fed. 724, 4 N. C. C. A. 891, and *The Thielbek* (D. C.) 211 Fed. 685, are distinguishable from the case at bar, since they were actions or proceedings in admiralty, and not at law.

Order affirmed.

NEBRASKA SUPREME COURT.

MARTHA W. WHIPPLE

v.

JOHN H. ROSENSTOCK et al., Appts.

(— Neb. —, 155 N. W. 898.)

Intoxicating liquor — civil damage — parties to action.

1. A married woman and her minor children consisting of one family may maintain an action for loss of means of support against all those who have furnished intoxicating liquors to the husband and father, which occasioned or contributed to the damages.

For other cases, see Intoxicating Liquors, IV. b, in Dig. 1-52 N. S.

Damages — civil damage act — elements.

2. In estimating the damages the jury may consider the situation of the deceased, his annual earnings, if any, his habits, health, and reasonable expectancy of life. *For other cases, see Damages, III. e; III. i, 3, in Dig. 1-52 N. S.*

Same — value of support.

3. The right of support is not limited to the bare necessities of life, but in no case can the judgment be for a greater sum than the value of the means of support of which plaintiff has been deprived.

For other cases, see Damages, III. e; III. i, 3, in Dig. 1-52 N. S.

Abatement — civil damage act — death of drunkard.

4. The death of the husband and father does not cause an action for loss of means for support to abate, the death being a mere

incident, not the principal cause of action. *For other cases, see Abatement and Revival, II. in Dig. 1-52 N. S.*

Intoxicating liquor — license — effect.

5. "A license is no protection to the vendor of intoxicating drinks in an action for loss of the means of support. The statute, in effect, says to everyone engaged in the traffic, 'Beware to whom you sell or furnish intoxicating liquor.'"

For other cases, see Intoxicating Liquors, IV. b, in Dig. 1-52 N. S.

Parties — civil damage act — joinder of bondsmen.

6. The bondsmen of the liquor dealers who have furnished intoxicating liquors to the husband and father may be joined with the liquor dealers as defendants in an action for the loss of support.

For other cases, see Parties, II. b, in Dig. 1-52 N. S.

Evidence — damages.

7. Evidence examined, and held, that a verdict for \$10,000 was excessive, and that the amount of recovery is reduced to \$5,000.

For other cases, see Damages, III. e; III. i, 4, in Dig. 1-52 N. S.

(December 23, 1915.)

APPEAL by defendants from a judgment of the District Court for Lancaster County in plaintiff's favor in an action brought to recover damages for alleged loss of support because of the sale of intoxicating liquors to plaintiff's husband. Affirmed on condition.

The facts are stated in the opinion.

Mr. T. J. Doyle, for appellants:

An undertaking will be strictly construed in favor of sureties, and their liability will not be extended by construction beyond their specific agreement.

Curtin v. Atkinson, 36 Neb. 110, 154 N. W. 131.

Headnotes by BARNES, J.

Note.—As to excessive damage under civil damage act for death through intoxication, see annotation following this case, post, 943.

L.R.A.1916D.

The gist of the action is the loss of means of support, and not any personal injuries Whipple may have sustained as a result of intoxication.

Nelson v. Nevels, 79 Neb. 699, 113 N. W. 119.

In this action against four dealers and their bondsmen for the death of Whipple resulting from being drunk at the time, only such dealer as furnished liquor which contributed to his drunkenness at that time, will be liable for damage resulting from his death.

Dolan v. McLaughlin, 46 Neb. 449, 64 N. W. 1076.

Messrs. *Burkett, Wilson, & Brown*, for appellee:

As the petition was filed the burden was on the plaintiff to show that her husband had been debauched since January 1, 1912, but if she failed to prove it, and if the court so instructed the jury in effect, then surely the defendants were not prejudiced thereby.

Missouri P. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744, 8 Am. Neg. Rep. 463; *Chmelir v. Sawyer*, 42 Neb. 362, 60 N. W. 547.

Instructions must be construed together.

Omaha & C. B. R. & Bridge Co. v. Levinston, 49 Neb. 17, 67 N. W. 887; *Smith v. Meyers*, 52 Neb. 70, 71 N. W. 1006; *Mack v. Parkieser*, 53 Neb. 528, 74 N. W. 38; *Pledger v. Chicago, B. & Q. R. Co.* 69 Neb. 456, 95 N. W. 1057; *Lincoln Traction Co. v. Brookover*, 77 Neb. 221, 109 N. W. 168, 111 N. W. 357.

The objection of variance was made too late.

Herpolsheimer v. Acme Harvester Co. 83 Neb. 53, 119 N. W. 30; *Struebing v. Stevenson*, 129 Iowa, 25, 105 N. W. 341; *Qualy v. Johnson*, 80 Minn. 408, 83 N. W. 393; *Schwaninger v. E. J. McNeeley & Co.* 44 Wash. 447, 87 Pac. 514, *Galamore v. Olympia*, 34 Wash. 379, 75 Pac. 978; *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Missouri River Transp. Co. v. Minneapolis & St. L. R. Co.* 34 S. D. 1, 147 N. W. 82; *Rome Hotel Co. v. Warlick*, 87 Ga. 34, 13 S. E. 116; *Coppock v. Lampkin*, 114 Iowa, 664, 87 N. W. 665; *Rosenberger v. Marsh*, 108 Iowa, 47, 78 N. W. 837; *Madison v. Missouri P. R. Co.* 60 Mo. App. 599; *Jarmusch v. Otis Iron & Steel Co.* 13-23 Ohio, C. C. 122; *Scott v. Sheakly*, 3 Watts, 50; *Davis v. Atlanta & C. Air Line R. Co.* 63 S. C. 370, 41 S. E. 468; *Childs v. Childs*, 49 Wash. 27, 94 Pac. 660; *Bowers v. Thomas*, 62 Wis. 480, 22 N. W. 710; *Hoyt v. Hoyt*, 68 Iowa, 703, 28 N. W. 27; *Brustie v. Peck Bros.* 135 N. Y. 622, 32 N. E. 76; *Fox v. Utter*, 6 Wash. 299, 53 Pac. 354.

Several saloon keepers and their several L.R.A.1916D.

bondsmen may be joined as parties defendant; and principals and sureties are jointly and severally liable; and those furnishing liquor producing loss may be joined.

Roose v. Perkins, 9 Neb. 304, 31 Am. Rep. 409, 2 N. W. 715; *Kerkow v. Bauer*, 15 Neb. 150, 18 N. W. 27; *McClay v. Worrall*, 18 Neb. 44, 24 N. W. 429; *Elshire v. Schuyler*, 15 Neb. 561, 20 N. W. 29; *Wardell v. McConnell*, 23 Neb. 152, 36 N. W. 278; *Jones v. Bates*, 26 Neb. 693, 4 L.R.A. 495, 42 N. W. 751; *Horst v. Lewis*, 71 Neb. 365, 98 N. W. 1046, 103 N. W. 460.

The same surety is liable on two or more bonds.

Thomas v. Hinkley, 19 Neb. 324, 27 N. W. 231; *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245; *Jones v. Bates*, 26 Neb. 697, 4 L.R.A. 495, 42 N. W. 751.

The verdict, as compared with verdicts in other cases, was not excessive.

Young v. Beveridge, 81 Neb. 180, 115 N. W. 766; *Keeling v. Pommer*, 83 Neb. 510, 120 N. W. 155; *Murphy v. Willow Springs Brewing Co.* 81 Neb. 219, 115 N. W. 763; *Pilkins v. Hans*, 87 Neb. 7, 126 N. W. 864; *Craig v. Chicago, St. P. M. & O. R. Co.* 97 Neb. 586, 160 N. W. 648; *Wright v. Chicago, R. I. & P. R. Co.* 94 Neb. 317, 143 N. W. 220; *Zitnik v. Union P. R. Co.* 95 Neb. 152, 145 N. W. 344; *Scott v. Chope*, 33 Neb. 41, 49 N. W. 940; *Gran v. Houston*, 45 Neb. 813, 64 N. W. 245; *Coleman v. Loeper*, 94 Neb. 270, 143 N. W. 295.

Barnes, J., delivered the opinion of the court:

The plaintiff commenced this action against John H. Rosenstock, Alexander Butz, Charles A. Schwedop, and Leonard Bauer, who were licensed saloon keepers in the city of Lincoln, and their bondsmen, to recover damages which she alleged had accrued to herself and her two infant children by reason of the sale of intoxicating liquor to her deceased husband, Frederic H. Whipple. The action as originally commenced was against the persons and bondsmen above named, together with some others.

It was alleged in the petition that from January 1, 1912, the saloon keepers therein named had sold, given to, and furnished her husband, Frederic H. Whipple, with large quantities of intoxicating liquors, which he drank, and thus had caused him to become intoxicated, debauched, and an habitual drunkard; that her husband had abused her and had neglected to furnish any support for herself and minor children; that before he became so debauched he was kind to her and had furnished his family suitable support in the way of food and clothing; that by reason of the use of the intoxicating liquors so sold, given, and furnished him by

defendants, he became sick and diseased in mind and body, and died on the 18th day of August, 1912, of an injury to his arm, complicated by delirium tremens, and by reason of which she and her children had sustained damages in the sum of \$20,000, for which she prayed judgment.

The defendants answered separately. Each of the saloon keepers denied that he had sold, furnished, or given plaintiff's husband any intoxicating liquors; denied that Whipple was a sober and industrious man, and alleged that for many years he had been a confirmed drunkard. They denied that plaintiff had been damaged in her means of support by reason of any sales of liquor made by them to her husband, and the answers further denied that plaintiff was the wife of Frederic H. Whipple. They admitted that they were licensed saloon keepers doing business in the city of Lincoln, and denied all other allegations of the petition. The reply was a general denial of the facts alleged in the answers.

When the case came on for trial in the district court for Lancaster county, and after plaintiff had introduced her evidence, the action was dismissed as to all of the defendants other than the saloon keepers above mentioned, and their sureties. The petition was amended so as to allege the sale to Whipple of intoxicating liquors from the 1st day of May, 1912, to the 15th day of August of that year, and the case was finally submitted to the jury as to such sales alone. After all of the evidence had been introduced, instructions were given, which were excepted to by each of the defendants. The jury returned a verdict in favor of the plaintiff and against all of the defendants for the sum of \$10,000, on which the court rendered judgment, and the defendants have appealed.

It is contended by the appellants that the evidence is insufficient to sustain a verdict for the plaintiff. The record fairly shows that each one of the defendant liquor dealers sold and furnished to plaintiff's deceased husband intoxicating liquors including beer at some time during the period from the 1st of May to the 15th day of August, 1912; that Frederic H. Whipple died on the 18th day of August, 1912, as alleged in plaintiff's petition. While there is some conflict in the evidence, that branch of the case was properly submitted to the jury. Under the provisions of chapter 40, Rev. St. 1913, as construed by the decision of this court, the verdict of the jury on that question should be sustained. The saloon keepers were jointly liable on their bonds for whatever damages the plaintiff may have sustained by reason of the traffic. *Roose v. Perkins*, 9 Neb. 304, 31 Am. Rep. 409, 2 N. W. 715; *Kerkow v. L.R.A.1916D*.

Bauer, 15 Neb. 150, 18 N. W. 27; *Warrick v. Rounds*, 17 Neb. 411, 22 N. W. 785; *Gorey v. Kelly*, 64 Neb. 805, 90 N. W. 554. The cases cited also dispose of the appellants' claim of misjoinder adversely to their contention, as will presently be seen.

It is strenuously contended that the verdict in this case was excessive. There seems to be merit in this contention. It appears from the record that the plaintiff and Frederic H. Whipple were married on the 28th day of June, 1904; that two children were born to them, both of whom are living, and at the time of the trial were aged five and eight, respectively; that at the time of the marriage the plaintiff's husband had employment as a buggy washer at the Palace Livery Stable in the city of Lincoln. The amount of his earnings at that time is not shown, but it is apparent that they were not large. It also appears that at that time he was addicted to the use of intoxicating liquors, but not to the extent of destroying his ability to work. For some time he had no steady employment, but worked at different places in the city and in private families; and his earnings did not exceed \$35 a month. It also appears that about four years before his death Whipple became an itinerant peddler of horse-radish, peanut butter, hominy, and some other household articles of food. There is no evidence in the record as to the amount of his earnings while he was engaged in that business, but it seems clear that they must have been limited to a rather small sum. A little later on Whipple commenced to prepare horse-radish and hominy on his own account. This was peddled, together with ice-cream, popcorn, pop, and some other things which he purchased of the manufacturers. These articles were peddled by him from about the 1st day of June until the latter part of September of each year. The record also shows that he sold hominy, horse-radish, and peanut butter a great part of the year. The plaintiff testified that he made in his business \$150 a month, but that was purely her opinion without any competent evidence to support it. She also testified that he furnished, for the support of his family, \$25 a week. That testimony was also her opinion, and is not supported by any other evidence. The testimony of the grocer of whom Whipple bought his groceries was that his bills ran from \$3.50 to \$5 a week, but he was unable to state that Whipple bought all of his meats and foods from him. It may be presumed that, while Whipple had credit at the grocery and ran a weekly account, he bought practically all of his supplies from him. There is no evidence in the record as to how much or what kind of clothing Whipple furnished his family. Plaintiff testified that after the 1st of Jan-

uary, 1912, he furnished them nothing, and that the only money she was able to obtain from him was \$5. The record clearly shows that Whipple at all times during the last ten years was an habitual user of intoxicating liquors; that his drinking had increased by January, 1912, to such an extent that he was unable to attend to his business; that just before his death he was trying to sell his wagon and outfit for \$40; that his business had become unprofitable; that he procured intoxicating liquors in bottles and jugs from some place other than that disclosed by the testimony, and kept intoxicating liquors in his house, his wagon, and at other places; that he drank to such an extent that on the evening of the 14th day of August, 1912, he fell and broke his arm; that his wife helped him into the house, undressed him, and put him to bed; that on the morning of the 15th a physician was called, who dressed the arm and sent him to a hospital, where he remained until the afternoon of the 17th of August, when he was sent home because of his conduct; that when he arrived at the house he became wild and

incoherent and developed symptoms of delirium tremens; his conduct was such that his wife was afraid of him, and he was taken to a room in the county jail, where he died on the morning of August 18, 1912.

At the time of Whipple's death he was fifty-four years of age and had a life expectancy of eighteen years. Considering the evidence contained in the record, we are of opinion that the verdict was excessive; that by Whipple's death plaintiff and her children could not have been damaged in their means of support in any sum exceeding \$5,000.

The amount of plaintiff's recovery having been reduced to the penalty mentioned in a single bond furnished by the sureties, there can be no contention of a misjoinder of parties defendant. Plaintiff therefore is required to file a remittitur in the sum of \$5,000, within twenty days, and, if this is done, the judgment of the trial court will be affirmed for that amount, with the costs of that court. Otherwise, the judgment will be reversed, and the cause remanded.

Letton, J., not sitting.

Annotation—Excessive damage under civil damage act for death through intoxication.

For illustrative cases as to inadequate or excessive damages for fatal injury to person under survival or death acts, see note appended to *St. Louis, I. M. & S. R. Co. v. Craft*, L.R.A. 1916C, 817.

And for the rules guiding the courts on appeal in determining the excessiveness or adequacy of damages for personal injuries resulting in death, see note appended to *Lane v. United Electric Light & W. Co.* L.R.A. 1916C, 808.

In general.

It has been said that there is no reason for adopting a different rule in assessing damages under the civil damage act for the death of a person through intoxication, from that applicable where death results through the negligence of another. *Pilkins v. Hans* (1910) 87 Neb. 7, 126 N. W. 864.

The court on appeal should not interfere with the judgment of the jury in assessing the damages for death through intoxication, where the action is based on a civil damage act, unless the circumstances are such that all reasonable men, when not influenced by passion or prejudice, must agree that the verdict is excessive. (Neb.) *Ibid*.

The amount of exemplary damages to be awarded where such damages are recoverable rests in the sound discretion of the jury, subject to the control of the L.R.A. 1916D.

court only when the discretion is abused. *Schneider v. Hosier* (1871) 21 Ohio St. 98.

Not excessive.

In the following cases the damages assessed for death through intoxication, where the action was based on the civil damage act, were held not so excessive as to require the interference of the court on appeal:

—\$5,000—married man—twenty-seven years of age—survived by widow and daughter two years old, *Roach v. Wolff* (1914) 96 Neb. 43, 146 N. W. 1019;

—\$5,000—sustained—retired farmer—sixty-two years of age—in good financial circumstances—loss to widow of means of support, *Poole v. Lansden* (1913) 183 Ill. App. 609;

—\$4,500—laborer—twenty-eight years old—strong, able-bodied—earned and capable of earning a good living for his family—widow and four minor children—deceased addicted to the use of intoxicating liquors, *Pilkins v. Hans* (Neb.) *supra*;

—\$3,500—moderate and equitable damages—laborer about forty years of age—industrious—left surviving and dependent upon him a widow thirty-four years old and infant child four years old, *Conklin v. Tice* (1888) 48 Hun, 618, 15 N. Y. S. R. 835, 1 N. Y. Supp. 803;

—\$2,000—married man — twenty-eight years old—able-bodied, good general health, good education, sober and steady habits—machinist by trade—had been soldier in the regular army for five years—recently discharged, had not yet secured another position—survived by widow, *Marschall v. Laughran* (1893) 47 Ill. App. 29;

—\$1,550—sustained—loss to means of support of minor children—death of father, *Buck v. Maddock* (1897) 167 Ill. 219, 47 N. E. 208, affirming (1896) 67 Ill. App. 466;

—\$1,000—farmer — forty-two years old—contributed to support of wife of same age \$200 to \$300 per year, *Brown v. Butler* (1896) 66 Ill. App. 86;

—\$850—mechanic—thirty-eight years old—healthy—earning about \$3 per day, which he devoted to the support and maintenance of his family, a wife and four minor children, the eldest of whom was twelve years of age—the court said that the evidence was sufficient to support a verdict of \$5,000, *Schiek v. Sanders* (1898) 53 Neb. 664, 74 N. W. 39;

—\$254.25—sustained—married man — loss to widow, *Fink v. Garman*. (1861) 40 Pa. 95;

—\$200—including exemplary damages—laborer—loss to wife of means of support, not including damages for the death of husband, which finally resulted, however, from the intoxication, *Schneider v. Hosier* (1871) 21 Ohio St. 98.

Excessive and reduced.

In the following cases damages assessed by the jury for death through intoxication, where the action was based on the civil damage act, were held to be

excessive and were reduced as a condition to avoiding a new trial:

—\$10,000, reduced to \$5,000—laborer and peddler—fifty-four years of age—addicted to the use of intoxicants—for some time prior to death had done but little toward support of family; prior thereto had supported them, but amount of support indefinite — survived by widow and two minor children, aged respectively five and eight years, *Whipple v. Rosenstock*, ante, 940;

—\$3,000, reduced to \$2,000—well digger and ditcher—addicted to excessive use of intoxicating liquors—spent a considerable portion of earnings in dissipation—earned about \$300 per year—loss to widow, *Lahey v. Crist* (1906) 130 Ill. App. 152;

—\$2,500 reduced to \$2,000—married man fifty-eight years old—only partially supported family—extent of support indefinite—survived by widow and four minor children, *Curran v. Percival* (1887) 21 Neb. 434, 32 N. W. 213.

Excessive.

In *Hapenny v. Huffman* (1913) 184 Ill. App. 351, the case was reversed on the ground of an erroneous instruction as to the measure of damages to be awarded for the death of a man through intoxication; but the court, in considering the amount assessed by the jury,—\$5,000,—said that the amount was excessive. The deceased was a farmer twenty-six years of age, selling as much as \$1,200 worth of crops per year, and when not engaged in farm work earned \$3 per day teaming. The damages were limited to the loss sustained to the means of support of the widow.

A. G. S.

OHIO SUPREME COURT.

STATE OF OHIO EX REL. LILLIAN MUNDING, Admr., etc., of Mary Pickering, Deceased,

v.

INDUSTRIAL COMMISSION OF OHIO.

(92 Ohio St. 434, 111 N. E. 299.)

Master and servant — workmen's compensation — death of beneficiary.

An award of compensation from the state insurance fund, under § 35 of the workmen's

Headnote by NICHOLS, Ch. J.

Note. — As to the construction and effect of the workmen's compensation acts generally, see annotation in L.R.A. 1916A, 23. The cases passing upon the right of the L.R.A. 1916D.

compensation act (103 O. L. 72), to wholly dependent person, vests in the dependent when the award is made; so that, in case of the death of such dependent, his or her personal representative is entitled to the balance, if any, remaining unpaid.

For other cases, see *Master and Servant*, II. a, 1, in *Dig. 1-52 N. S.*

(July 2, 1915.)

PETITION for a writ of mandamus to compel defendant to pay to petitioner a certain amount alleged to be due her, as personal representative, upon an award of

personal representative of a dependent to any compensation remaining unpaid on the death of the dependent will be found discussed on page 135 of this annotation.

compensation made by defendant to her decedent. Writ awarded.

The facts are stated in the opinion.

Messrs. Walter L. Connors and McGhee, Davis, & Boulger, for plaintiff:

Plaintiff, as personal representative of her decedent, was entitled to the unpaid balance of the award.

Seely v. State, 12 Ohio, 523; Lewis's Sutherland, Stat. Constr. 879, 880; Northern P. R. Co. v. Washington, 222 U. S. 370, 56 L. ed. 237, 32 Sup. Ct. Rep. 160; McLean v. United States, 226 U. S. 374, 380, 57 L. ed. 260, 263, 33 Sup. Ct. Rep. 122; Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 333, 53 L. ed. 1013, 1019, 29 Sup. Ct. Rep. 671; Mosle v. Bidwell, 65 C. C. A. 533, 130 Fed. 334; Minneapolis, St. P. & S. Ste. M. R. Co. v. Industrial Commission, 153 Wis. 552, 141 N. W. 1119, Ann. Cas. 1914D, 655, 3 N. C. C. A. 707; United Collieries v. Simpson [1909] A. C. 383, 78 L. J. P. C. N. S. 129, 101 L. T. N. S. 129, 25 Times L. R. 678, 53 Sol. Jo. 630, 2 B. W. C. C. 308; Darlington v. Roscoe [1907] 1 K. B. 219, 76 L. J. K. B. N. S. 371, 96 L. T. N. S. 179, 23 Times L. R. 167, 9 W. C. C. 1, 121 L. T. Jo. 96, 8 W. C. C. 4; Knowles, Workmen's Compensation, 190; 1 Bradbury, Workmen's Compensation Law, 2d ed. p. 585; Ruegg, Employers' Liability & Workmen's Compensation, 404; Boyd, Workmen's Compensation, § 508; Labatt, Maat. § 5474.

Messrs. Edward C. Turner, Attorney General, Freeman T. Eagleson, and Jolin G. Price, for defendant:

Plaintiff, not being a dependent, nor the representative of a dependent, is not entitled to receive any part of this trust fund, which is held in trust exclusively for the injured workman or his dependents.

Polled v. Great Northern R. Co. 5 B. W. C. C. 620; New Monckton Collieries v. Keeling. 27 Times L. R. 551, 4 B. W. C. C. 332; Howells v. Vivian, 50 Week. Rep. 163, 85 L. T. N. S. 529, 18 Times L. R. 36, 4 W. C. C. 106.

Nichols, Ch. J., delivered the opinion of the court:

The petition in this case and demurrer thereto present the question whether an award of compensation from the state insurance fund, under § 35 of the workmen's compensation act (103 O. L. 72), to a wholly dependent person vests in the dependent when the award is made, so that, in case of the death of such dependent, his or her personal representative is entitled to the balance, if any, remaining unpaid.

The original Ohio workmen's compensation act was passed May 31, 1911 (102 O. L. 524). Its purpose, well expressed in its title, was: "To create a state insurance

fund for the benefit of injured, and the dependents of killed employees, and to provide for the administration of such fund by a state liability board of awards."

This act was optional or elective in principle. On February 6, 1912, its constitutionality was upheld by this court in the case of State ex rel. Yapple v. Creamer, 85 Ohio St. 349, 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30. On September 3, 1912, a constitutional amendment was adopted by the people of Ohio (§ 35, art. 2) authorizing the passage of laws providing for a state fund to be created by compulsory contribution thereto by employers, and administered by the state.

Pursuant to this authority the legislature passed the present act (103 O. L. 72). This act is in effect an amendment to the act of 1911, the principal changes being that it is compulsory as to all employers employing five or more workmen, and optional as to those employing less. Section 35 of the act, so far as the question before the court in this case is concerned, may be said to be identical with § 28 of the old law.

The present act was the result of much thought and careful consideration of the operation of workmen's compensation laws of other states and foreign countries, and of the administration of the plan in Ohio under the original law. It made the compensation plan more workable and efficient, and provided fully for the administration of the act in all its features by the state liability board of awards, and may be said to be a model of legislative expression in clarity and comprehension. For convenience the board in charge of the administration of the fund will be referred to in this opinion as the board of awards rather than as the Industrial Commission of Ohio for the commission, in matters pertaining to its administration of the workmen's compensation fund, acts as the state liability board of awards.

Section 14 of the act defines the terms "employee," "workman," and "operative" as used in the act. Section 21 provides in part: "Every employee mentioned in subdivision 1 of § 14 hereof, who is injured, and the dependents of such as are killed in the course of employment, . . . provided the same was not purposely self-inflicted, . . . shall be entitled to receive . . . from the state insurance fund, such compensation for loss sustained on account of such injury or death, . . . as is provided by §§ 32 to 40 inclusive."

Section 35 provides for compensation in case of death, and is as follows:

"In case the injury causes death within the period of two years, the benefits shall

be in the amounts and to the persons following:

"1. If there be no dependents, the disbursements from the state insurance fund shall be limited to the expenses provided for in § 42 hereof.

"2. If there are wholly dependent persons at the time of the death, the payment shall be 66% per cent of the average weekly wages, and to continue for the remainder of the period between the date of the death, and six years after the date of the injury, and not to amount to more than a maximum of \$3,750 nor less than a minimum of \$1,500.

"3. If there are partly dependent persons at the time of the death, the payment shall be 66% per cent of the average weekly wages, and to continue for all or such portion of the period of six years after the date of the injury, as the board in each case may determine, and not to amount to more than a maximum of \$3,750.

"4. The following persons shall be presumed to be wholly dependent for support upon a deceased employee:

"(A) A wife upon a husband with whom she lives at the time of his death.

"(B) A child or children under the age of sixteen years (or over said age if physically or mentally incapacitated from earning) upon the parent with whom he is living at the time of the death of such parent.

"In all other cases, question of dependency, in whole or in part, shall be determined in accordance with the facts in each particular case existing at the time of the injury resulting in the death of such employee, but no person shall be considered as dependent unless a member of the family of the deceased employee, or bears to him the relation of husband or widow, lineal descendant, ancestor, or brother or sister. The word 'child' as used in this act, shall include a posthumous child, and a child legally adopted prior to the injury."

Under this section, in case of an injury resulting in death, the essential facts to be determined by the board of awards are: (1) That the employee was injured in the course of his employment; (2) that the injury was not self-inflicted; (3) that it resulted in death within the period of two years; and (4) the question of dependency at the time of death.

The last question is determined by the statute in the case of a wife living with her husband at the time of his death, and children under the age of sixteen living with the parent at the time of death of such parent. Such persons must be presumed to be wholly dependent for support on the deceased employee. All other questions of dependency must be determined by the board L.R.A.1916D.

of awards. If it be found that there were dependents at the time of death, then the board must determine the average weekly wage of the deceased. If it is found that there were wholly dependent persons at the time of death (as in the instant case, the award having been made to relatrix's intestate as sole dependent), then the board can make no determination or finding as to the amount of the compensation which must be awarded; that is fixed by law in a sum certain. See § 35, ¶ 2. The payment shall be two thirds of the average weekly wage, and to continue for a period of six years, and not to exceed \$3,750, nor is it to be less than \$1,500. There are no qualifying words whatever. The board's duty, after finding the existence of dependents, is but to make a calculation. It is entirely without discretion in the premises.

The statute, in fact, orders that in the case of wholly dependent persons the payment, subject to the fixed maximum and minimum, must be a certain definite sum (two thirds of the average weekly wage multiplied by a certain definite figure (6 times 52 weeks)). Thus, in the case now before the court, the board awarded the defendant \$1,872, to be paid in biweekly instalments of \$6 a week, and to continue for a period of six years from the date of the death of the employee.

This paragraph of § 35 is practically conclusive of the case, as it has every element necessary to confer a vested right. A fixed amount is awarded to a definite person as a matter of right, with no language suggesting in any way an abatement of the award on the death of the person to whom it is made prior to the payment of the same in full, and we must hold that it speaks for itself, unless some other section or sections of the act condition or limit the right, to this compensation.

Section 36 is not applicable to the instant case. It only has application where there are plural dependents, and while it provides for the determination by the board as to the manner in which the benefits or compensation may be apportioned among the several dependents and to which one the payments shall be made for the benefit of all, it gives no discretion whatever to alter the amount of the award so fixed, nor to abate any part of the same.

Sections 39, 40, and 41 of the act provide as follows:

"Section 39. The powers and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion may be justified.

"Section 40. The board, under special cir-

cumstances, and when the same is deemed advisable, may commute periodical benefits to one or more lump sum payments.

"Section 41. Compensation before payment shall be exempt from all claims or creditors and from any attachment or execution, and shall be paid only to such employees or their dependents."

It is urged by the attorney general that § 39 must be construed as giving the board continuing power and jurisdiction over the compensation when awarded, so that in case of the death of dependent it can abate the balance due under the award, if any, and revert the same to the state insurance fund. That such was the intention of the legislature is not apparent from the section. We do not think findings and orders which may be changed mean findings and orders which are definitely fixed by law and as to which the board of awards has no discretion.

If the deceased employee left a widow who was living with him at the time of his death, the board must find that she was wholly dependent upon her deceased husband, and must make a certain award of compensation to her. The questions of dependency and amount of award in such case are both determined absolutely by the statute. The board can only act formally, and must so act. If § 39 gave power to modify, alter, or amend the finding as to the amount of the compensation or its payment, it would do so likewise as to the question of dependency. There are many findings and orders of the board to which § 39 is plainly applicable, and for which it was no doubt intended,—thus, in § 32, in cases of temporary disability; § 33, in cases of partial disability; § 34, in cases of permanent total disability; § 35, in the matter of commuting periodical payments to one or more lump sum payments; § 36, in the matter of the apportionment of compensation, etc.

Section 34, providing for compensation in case of permanent total disability, presents a very strong, if not conclusive, indication that the amount awarded under ¶ 2 of § 35 vests in the dependent, and that § 39 is without application. Section 34 provides in part that in cases of permanent total disability the award shall be two thirds of the average weekly wage, and shall continue until the death of such person so totally disabled.

In ¶ 2 of § 35 the words "until the death of such person" (dependent) are omitted, and substituted therefor, after the words "to continue," appears the phrase, "for the remainder of the period between the date of the death, and six years after the date of the injury."

As both of these sections were enacted by the same legislature, at the same time, as L.R.A.1916D.

part of the same act, and upon the same subject, it must be conceded that the legislature had before it the question of the abatement of an award upon the death of a dependent, and as it provided for such abatement in one instance and failed to do so in another, its action must be deemed intentional, and that § 39 cannot be construed to be equivalent to the words "until the death of such person," or similar words, omitted after the phrase "to continue" in ¶ 2 of § 35, or to vest in the board of awards the power to read in such words.

If § 39 could be construed as giving the board power to abate an award made under ¶ 2 of § 35, in case of the death of dependent prior to completion of payments, it necessarily follows that it could be construed also as giving the board power and jurisdiction to determine dependency at any time during the period covered by the payments, instead of having its determination expressly limited by the statute as it is to dependency at time of death, and although the statute is inflexible as to amount of award, abate the award at any time the person to whom the compensation was granted ceased to be a dependent. This construction would be directly contrary to the statutory requirements.

If this construction were possible, the board, having power to abate compensation, must necessarily keep a strict watch over each case, numbering many thousands, so as to discontinue payments as soon as dependency ceases to exist. Such construction would render § 40 of very doubtful, if any, value, for in each case there would be the possibility of the death of the dependent during the period and the consequent reversion to the insurance fund of all unpaid instalments, and the board would certainly hesitate to commute periodical payments to a lump sum, and thus lose the increment to the fund in case of death of dependent. This would be a distinct backward step toward the old system which resulted in passage of the act. In fact, it is difficult to conceive the theory on which periodical payments can be commuted if the right to the entire award does not vest when made in the dependent.

The word "commute" in this section must mean that the board by commuting the payments pays the dependent something less than he otherwise would receive. So, if the construction contended for by the state were adopted, it would mean that the board, when it made a lump sum award, not only gave dependent something to which he was not entitled and might never be entitled, but also instead of commuting the award, actually increased it. Section 41 exempts "compensation before payment" from attachment and execution. If compensation were not

vested, then there could be neither attachment nor execution, and this section would be without meaning, unless we should add after the word "compensation" the words "and each instalment thereof after it has become due and payable."

Since § 35 is entirely clear and unambiguous and is consistent with §§ 39, 40, and 41, the court is not authorized to legislate under the guise of statutory construction and upon the theory that the legislature intended, or should have intended, that the compensation awarded under ¶ 2 of § 35 should abate at the death of dependent, thus changing the plain wording of the statute.

The language of this part of the section, as we have pointed out, is that the payment shall be two thirds of the weekly wage and to continue for the remainder of the period between the date of death and six years after the injury. As stated by Donahue, J., in *Sipe v. State*, 86 Ohio St. 80, 87, 99 N. E. 208, 210:

"That intent [of the legislature] must be ascertained first, if possible, from the language used, and, where that language is clear and unambiguous, courts have no authority to change it,"—citing *King v. Greenwood Cemetery Asso.* 67 Ohio St. 244, 65 N. E. 882; *Hough v. Dayton Mfg. Co.*, 66 Ohio St. 427, 64 N. E. 521; *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N. E. 574.

In the last-cited case, Spear, J., uses language applicable here, when he says:

"To endeavor to make this plainer would be like an effort to reason upon a sum in simple addition. . . . The province of construction is to arrive at the true sense of the language of the act, not to supply language to help out a conjectured intent not to be gathered from the words used. . . . The words asked to be incorporated would be the words of the expounders, and not of the lawmakers."

The only construction that can justifiably be given ¶ 2 of § 35, in the case of a sole dependent, is the plain meaning of the words used. There is no authority under any rule of statutory construction to add to, omit, or change the words used. Compensation is awarded in a definite sum, with no conditions attached, except that the payments are to be periodical.

There seems to be no decision of an American court upon this question arising under workmen's compensation statutes, but long ago this court decided a question which in principle is quite similar. The case of *Dorah v. Dorah*, 4 Ohio St. 292, presented the question whether the allowance made by the appraisers to a widow for her year's support conferred a vested right of property in such widow, so that, in case of her death before the expiration of the year and L.R.A.1916D.

before the entire allowance had been paid, her personal representative could recover the balance. The court held that the entire amount vested when the allowance was made, and the balance remaining unpaid, though, on account of the death of the widow, impossible of application for which it was intended, could be recovered. Ranney, J., in his opinion, used language and reason applicable to the case we are considering. He says, after pointing out that if the amount allowed did not vest then, if it had been paid, part could be recovered back by the estate upon the death of the widow prior to the expiration of the year, or a proportionate amount in case of the death of a child when the allowance had been made to a widow and minor children: "We can see no reason to suppose that it was ever intended to allow a recovery back of any part of the amount upon the happening of such a contingency [death of a child]. . . .

To allow such a deduction, either by giving an action to the administrator to recover it back where it has been paid, or by permitting him to withhold it where it has not, is to introduce the most perplexing uncertainty as to the rights of the widow and the duties of the administrator. . . . With the construction we adopt, the rights and duties of all concerned are clear, definite, and fixed. It gives to the widow and children a paramount claim upon enough of the estate to support them for one year, over creditors and distributees; and where it has been fixed or set apart by the appraisers, or by the court on review, effectually withdraws it from the balance of the estate, and has all the force and effect of an adjudication in their favor. It confers a vested right of property, conclusively disposes of so much of the estate, and leaves no discretion to the administrator as to complying with it."

The right of the dependent to whom an award has been made under ¶ 2 of § 35 is clearer than that of a widow to whom an allowance has been made on her year's support. The compensation is awarded to the dependent in a fixed sum out of an insurance fund provided wholly for the purpose of paying such compensation. This award effectually withdraws the amount awarded from the fund, and makes it exempt from execution and attachment. Any other holding would introduce into the administration of the workmen's compensation act most perplexing uncertainty both as to the rights of dependents and the duties of the board of awards.

The precise question involved in this case has been before the courts of England, and it is the holding there, not only that an award of compensation to a dependent vests

on allowance, but that the right to claim an award vests in the dependent at the time of death of the employee, and if dependent dies before presenting such claim the personal representative of dependent may make the claim and recover upon it. While the English acts are different from ours in many respects, an examination of the cases to which we now refer and to the statutes will show that the same question was before the English courts as is presented by the instant case, and that practically the same reasons were advanced in opposition to the theory which the court adopted as are now advanced by counsel for the state.

In the case of *United Collieries v. Simpson*, [1909] A. O. 383, the House of Lords held that where a workman has been killed by an accident arising out of and in the course of his employment, and his dependent dies without making a claim, the dependent's legal personal representative is entitled to compensation under the workmen's compensation act of 1906.

At page 389, Lord Loreburn says: "The 8th paragraph also contemplates payment to a dependent. And though the 9th [similar to § 36 of the Ohio act as to apportionment of benefits] reserves a power to vary the apportionment, neither it nor any other paragraph proceeds upon any other view than that there is a definite right on the part of dependents as a class to the money, subject to a parental power of the court in dividing and applying it for their advantage."

The dissenting opinion of Lord Dunedin is interesting because it shows that the court had before it the objection that payments to a personal representative were not authorized because the law provides only for payment to dependents. This case expressly approves the case of *Darlington v. Roscoe*, [1907] 1 K. B. 219, 76 L. J. K. B. N. S. 371, 96 L. T. N. S. 179, 23 Times L. R. 167, where it was held that if a notice of claim under the workmen's compensation act of 1897 has been given by a sole dependent, who dies before a request for arbitration is made or other proceedings are taken, the right to claim survives to such dependent's legal personal representative, and the maxim, *actio personalis moritur cum persona*, does not apply.

The only case we have been able to find advancing a contrary view is that of *O'Donovan v. Cameron* [1901] 2 I. R. 633, where it was held:

"The sole total dependent of a workman, who was killed by an accident arising out of his employment, died before she had filed or served a claim for compensation, under the workmen's compensation act, 1897. Had L.R.A.1916D.

she lived, and taken the necessary steps to recover it, she would have been entitled to £150 compensation. The personal representative of the deceased workman subsequently took proceedings . . . to recover compensation, to be applied for the benefit of the dependent, and in payment of her debts. Held, that neither her personal representative nor the personal representative of the deceased workman was entitled to recover the amount."

This case was distinctly disapproved by the House of Lords in *United Collieries v. Simpson*, *supra*. Thus in England the authority is all in favor of the view that the right to compensation vests in the dependent at the time of the death of the employee and is transmitted to his personal representative, even though the dependent has died without having made a claim for compensation. And this is a much more doubtful question than that before us, where the claim has been filed, compensation awarded, and part payment made before death of dependent.

The English cases emphasize the fact that a fixed sum is provided by the act and no provision made for a refund of any part of the award, and that in the case of a dependent dying before the compensation was exhausted, the absence of such a provision shows that, when once the compensation is fixed, there is to be no refund.

The question here, by the application of the most elementary rule of statutory construction, is settled by the statute. It speaks for itself, and there is no ambiguity. It is also settled by all the adjudicated cases on the subject. But, were it necessary to go outside of the statute to sources which we may consider, the result is even more conclusive.

Let us start at the beginning of workmen's compensation in Ohio. On May 10, 1910, the general assembly passed an act (101 O. L. 231) authorizing the governor to appoint a commission of five persons, representative of both employers and employees, to investigate the subject of a direct compensation law and to report to the next session of the general assembly the result of their investigation, together with a bill or bills providing for the speedy remedy for employees for injuries received in the course of their employment. This commission, of which Mr. J. Harrington Boyd was chairman, filed its report with the legislature in January, 1911.

This report is a remarkable document, probably the most valuable report ever submitted by an investigating committee or commission to the general assembly. It goes into the subject of workmen's compensation from every conceivable angle,

gives the result of investigations with the greatest detail, together with a complete statement of the causes which have brought about workmen's compensation, and a full explanation of the laws of other states and countries, and produces an array of facts in regard to industrial accidents which is appalling.

The conclusions of this commission were admirably summed up by Johnson, J., in his opinion in *State ex rel. Yaple v. Creamer*, supra, at page 389 of 85 Ohio St., 39 L.R.A.(N.S.) 694, 97 N. E. 602, 1 N. C. C. A. 30. And the theory upon which the compensation law is based (which is now generally accepted) is that each time an employee is killed or injured there is an economic loss which must be made up or compensated in some way; that most accidents are attributable to the inherent risk of employment—that is, no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than by society as a whole; that a fund should be provided by the industry from which a fixed sum should be set apart as every accident occurs to compensate the person injured, or his dependents, for his or their loss.

The commission recommended that a compensation plan of this kind be adopted, not as "in any sense charity, but only simple justice."

The commission filed with its report, for the consideration of the General Assembly, two tentative acts, one suggested by a majority of the commission, and the other by a minority member. Section 8 of the majority bill provides for compensation in case of death, and is in substance the same as § 35 of the present act. Section 13, paragraph "b," provided:

"The compensation awarded shall never be vested, except subject to such changes as the provisions of this Code allow."

Section 20 (the section on which present § 39 is based) provided: "The said state board of compensation awards shall have entire jurisdiction of the disbursement of the insurance fund provided for in this Code, and in determining the validity of all applications for compensation out of said fund, and of fixing the amount of the award in each instance; but so long as the award or any part of it remains unpaid, their jurisdiction as to the amount of such award and as to the person in any particular class of beneficiaries to which the same shall be payable, shall be continuing so that they may have power to make such changes therein as the circumstances may warrant, and as right and justice may require."

This proposed section reads, it is to be presumed, about as the state would have us L.R.A.1916D.

now read § 30. In the bill submitted by the minority, the following sections appeared: Section 28, providing compensation in case of death, is practically similar to present § 35; § 33, providing that: "The power and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modification or change with respect to former findings or orders with respect thereto, as, in its opinion, may be justified."

Both bills were before the legislature, and at the same session at which the report was submitted the original compensation act was passed, §§ 28 and 33 of which (except for the maximum and minimum amounts) are identical with §§ 35 and 39 of the present act.

It is thus apparent that the legislature, having before it the proposition of limiting payments to the lifetime of dependents and of granting power to the board to change awards, so long as any part of it remained unpaid, by rejecting § 20 of the act proposed by the majority and by accepting § 33 of the minority measure, clearly indicated its intention as to this matter, and in rejecting § 13 (§ "b" of the majority measure) it refused to provide that "compensation awarded shall never be vested."

The only fair inference to be drawn is that the legislature intended that compensation, under ¶ 2 of § 35, should be vested in the dependent when awarded. Again this law was passed, not in a spirit of "charity," but only simple justice. The fund it provides is called, and is in fact, an "insurance" fund, from which payments are to be made, and is in no sense a pension fund, and never, so far as we are aware, has it been contended that injured employees and their dependents were not entitled to compensation as a matter of right.

The right to be compensated for an injury has no element of bounty or charity about it. No part of the fund (except such part as it pays for the protection of its own employees) is contributed by the state.

As we have before stated, the theory is that when an employee is injured or killed in course of his employment, a sum fixed by law is set off from the fund to compensate him for his injuries, or his dependents for his death, to compensate for taking away the man's right to earn a livelihood, which, but for the accident, he would have earned. A fixed sum goes out from the fund to compensate for the loss which has occurred.

In case of death with no dependents, there is no loss to any one except the employee other than the expenses provided for by the statute, which would otherwise fall on society. In case of dependents, the sum is likewise fixed by law and ordered paid to

the dependent. There is nothing to indicate that this loss is to be compensated in part by the death of dependents, and the part thus compensated to be returned to the state. On the contrary, the only situation considered is that existing at the date of death. At that time the amount is fixed, not by the board, but by the statute; it is set apart from the general fund, may be paid in lump sums, and there is no provision whatever for rebate.

Thus, the payments being fixed in amount, ordered paid from a certain fund, and awarded to a definite person, every element of a vested right is present, and no element or suggestion of a pension that is to cease at the death of the pensioner. The report of the investigating commission, as well as all of our compensation laws and reports, shows that the provision for periodical payments is solely for the benefit of the injured employee or dependents, for the reason that experience teaches that in a very great many cases a lump sum, if allowed, is dissipated, while small payments, on the other hand, are carefully husbanded.

It may also be noted that the words, "insurance fund," "compensation," "award," and "commutation," all negative the idea of a pension or rebate of any kind.

The intent, apparent and express throughout the act, that compensation is to be paid only to dependents, was not for the purpose of securing an abatement of unpaid compensation upon the death of a dependent. The purpose is to insure that compensation shall go intact to the injured employee or his dependents without any shrinkage by passing through or into the hands of assigns, agents, attorneys, friends, or relatives, it being common knowledge that if a sum of money on its journey from the one from whom to the one to whom it is due passes through the hands of others it is inevitable that it suffer diminution, sometimes almost to the vanishing point.

We hold that when the award is once made to a sole dependent, the right to the compensation vests, and once vested there can be no condition attached except as to the time of payment, and it is equally immaterial whether the dependent subsequently dies or becomes independent.

As to the argument that unless a rebate or refund is allowed in case of death of dependent, a great wrong is done the injured and dependents of killed employees, it is perhaps sufficient to say that the assumption upon which this argument is based is utterly opposed to the theory on which the fund is established, maintained, and administered. It is so plain as to be beyond all argument that the fund is provided to compensate in the manner and amount fixed by L.R.A.1916D.

law for all losses which it covers; that it was never intended that the fund should be enhanced by lapses; that there is no conception of profit in the plan, and no one entitled to an award can have his right affected at all, either as to amount or in any other manner, by the allowance or denial of the claim of any other person to compensation. A study of the act will show that it is the duty of the board to provide an adequate fund to pay all the compensation provided by the act. What amount will be necessary is calculated by the board, the theory being that all losses will be and must be paid in full; the methods of establishing the fund and the sources from which the money is to come are specified, and nowhere, even by inference, is the board authorized to speculate that a greater or less sum will be needed on account of unpaid or partly unpaid awards. Both the letter and spirit of the law show that the right to compensation vests when the same is awarded under ¶ 2 of § 35, and the demurrer to the petition is therefore overruled.

As the board in this case awarded the dependent the sum of \$1,872, and ordered the same paid in biweekly instalments at the rate of \$6 per week, to continue for six years from the date of the death of the employee, it has, in making the award, fully complied with the law, and the court is without power to require it to commute the balance remaining due to one lump sum. That is a matter, under §§ 39 and 40, wholly within the discretion of the board, but the petition shows that the board has refused to pay to relator any part of the award since the death of the dependent or to continue the biweekly payments. The writ therefore must order the board to pay to relator the sum of the biweekly payments which have accrued since dependent's death, and to continue such payments until the full amount originally awarded is fully paid, unless commutation is ordered by the board.

Demurrer overruled and writ awarded.

Johnson, Wanamaker, and Newman, JJ., concur.

TENNESSEE SUPREME COURT.

STATE OF TENNESSEE EX REL.
FRANK H. THOMPSON, Attorney General.

v.

EDWARD H. CRUMP et al., Appts.

(— Tenn. —, 183 S. W. 505.)

Office — ouster — effect on succeeding term.

1. Judgment against an officer under a

statute providing that he shall forfeit his office and shall be ousted therefrom for certain specified offenses does not preclude his entering upon a succeeding term to which he had been elected before the judgment was entered.

For other cases, see Officers, I. a, 2, in Dig. 1-52 N. S.

Statute — ouster of officer — conflict with Constitution.

2. A constitutional provision for the indictment of civil officers guilty of crimes and misdemeanors in office, and removal from office as an incident of conviction, does not deprive the legislature of the power to provide for the ouster of such officers for malfeasance in office.

For other cases, see Officers, I. c, 3, in Dig. 1-52 N. S.

Constitutional law — testing sections of statute not invoked in case.

3. The constitutionality of sections of a statute which have not been invoked in a case before the court will not be considered if they could be elided and the remainder of the statute enforced should they prove to be unconstitutional.

For other cases, see Statutes, I. c, in Dig. 1-52 N. S.

(February 16, 1916.)

APPEAL by defendants from a decree of the Chancery Court for Shelby County ousting them from office, and from an order restraining them from qualifying for new terms to which they had been elected, in a suit for their removal on account of alleged misconduct in office. Decree affirmed and order vacated.

The facts are stated in the opinion.

Messrs. T. K. Riddick, J. L. McRee, and K. T. McConico, for appellants:

Whenever the state Constitution provides the causes for the removal of an officer and the provision under which such removal is to be accomplished, such provisions are exclusive, and such officers cannot be removed for any other causes or in any other manner.

Smith v. Normant, 5 Yerg. 272; Lynn v. Polk, 8 Lea, 169; State ex rel. Halsey v. Gaines, 2 Lea, 347; Mechem, Pub. Off. § 457; Cooley, Const. Lim. 99; Com. v. Williams, 79 Ky. 42, 42 Am. Rep. 204; Lowe v. Com. 3 Met. (Ky.) 240; Throop, Pub. Off. § 341.

Defendants are civil officers within the meaning of the Constitution.

Mechem, Pub. Off. § 471; Pom. Const. Law, § 716; Rawle, Const. p. 231; Story, Const. § 792; Porterfield v. State, 92 Tenn. 289, 21 S. W. 519; State v. Critchett, 1 Lea, 272, 3 Am. Crim. Rep. 83; Wood v. Quimby, 20 R. I. 482, 40 Atl. 161; Gooch v. Exeter,

70 N. H. 413, 85 Am. St. Rep. 637, 48 Atl. 1100; Mallory v. United States, 3 Ct. Cl. 257; Re Newport Charter, 14 R. I. 659; Ballantyne v. Bower, 17 Wyo. 356, 99 Pac. 69, 17 Ann. Cas. 82; Montgomery v. State, 107 Ala. 372, 18 So. 157; Baltimore v. Lyman, 92 Md. 591, 52 L.R.A. 406, 84 Am. St. Rep. 524, 48 Atl. 145; Re House Bill No. 166, 9 Colo. 628, 21 Pac. 473; Opinion to Governor, 28 R. I. 629, 72 Atl. 417; Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169; State v. O'Driscoll, 3 Brev. 527; United States v. Maurice, 2 Brock. 96, Fed. Cas. No. 15,747; Prescott v. Duncan, 126 Tenn. 146, 148 S. W. 229; Cross v. Fisher, 132 Tenn. 31, 177 S. W. 43; Atty. Gen. v. Tillinghast, 203 Mass. 539, 89 N. E. 1058, 17 Ann. Cas. 449; Throop, Pub. Off. § 10, pp. 10-12.

Wrongs committed outside of the office furnish no grounds for punishment by removal, and officers cannot be removed from office for a violation of their duties in another term of the same office or while serving in another office.

Thurston v. Clark, 107 Cal. 287, 40 Pac. 435; Speed v. Detroit, 98 Mich. 360, 22 L.R.A. 842, 39 Am. St. Rep. 555, 57 N. W. 406; State ex rel. Tyrrell v. Jersey City, 25 N. J. L. 536; State ex rel. Gill v. Watertown, 9 Wis. 261; Re Advisory Opinion, 31 Fla. 1, 18 L.R.A. 594, 12 So. 114, 64 Fla. 168, 60 So. 337; Carlisle v. Burke, 82 Misc. 282, 144 N. Y. Supp. 163; State ex rel. Rawlings v. Loomis, — Tex. Civ. App. —, 29 S. W. 415; Re King, 53 Hun, 631, 25 N. Y. S. R. 792, 6 N. Y. Supp. 420; State ex rel. Schultz v. Patton, 131 Mo. App. 628, 110 S. W. 636; State ex rel. Atty. Gen. v. Hasty, 184 Ala. 121, 50 L.R.A. (N.S.) 553, 63 So. 559; Com. v. Shaver, 3 Watts & S. 338; State ex rel. Hart v. Duluth, 53 Minn. 238, 39 Am. St. Rep. 595, 55 N. W. 118; Richards v. Clarksburg, 30 W. Va. 491, 4 S. E. 774; People ex rel. Bancroft v. Weygant, 14 Hun, 546; Rex v. Wells, 4 Burr. 1999; Reg. v. Newberry, 1 Q. B. 751, 1 Gale & D. 388, 6 Jur. 365; Dill. Mun. Corp. 4th ed. § 252; Conant v. Grogan, 6 N. Y. S. R. 322; Brackenridge v. State, 27 Tex. App. 513, 4 L.R.A. 360, 11 S. W. 630; Thurston v. Clark, 107 Cal. 285, 40 Pac. 435; Gordon v. State, 43 Tex. 330; 23 Am. & Eng. Enc. Law, 2d ed. 444, 445; 29 Cyc. 1411; Throop, Pub. Off. § 378, p. 372; 20 Harvard L. Rev. pp. 316, 317; Smith v. Normant, 5 Yerg. 272; Cooley, Const. Lim. p. 79.

Messrs. Barton & Barton also for appellants.

Messrs. Frank M. Thompson, Attorney General, G. T. Fitzhugh, and P. W. Lanier, for appellee:

The refusal of municipal officers to attempt the enforcement of laws on the ground that the sentiment of the majority

Note. — As to re-election of public officer after ouster for misconduct, see annotation following this case, post, 959. L.R.A. 1916D.

of the community was thought by them to be opposed to the enforcement of said laws is no defense to an action brought to remove them from their offices for wilful neglect of their duties.

State ex rel. Johnston v. Foster, 32 Kan. 14, 3 Pac. 537; State v. Yager, 250 Mo. 388, 157 S. W. 557.

The fact that county officials may not do their duty in the enforcement of said laws is no excuse for the neglect of municipal officers to attempt to discharge their duties in the matter of such enforcement.

State ex rel. Coleman v. Trinkle, 70 Kan. 396, 78 Pac. 854; State v. Roth, 162 Iowa, 638, 50 L.R.A.(N.S.) 841, 144 N. W. 339.

The court on quo warranto will award a judgment ousting the city from the exercise of unwarranted corporate powers.

State ex rel. Jackson v. Coffeyville, 78 Kan. 599, 130 Am. St. Rep. 386, 97 Pac. 372.

The agreement made between defendants, under which violators of the law were to be permitted to continue their unlawful business on the payment of fines or forfeitures of \$50 each, amounted to a conspiracy "for the perversion or obstruction of justice or the due administration of the law."

Williams v. State, 2 Sneed, 162; McMinnville v. Stroud, 109 Tenn. 569, 72 S. W. 949.

The ouster act is a civil and remedial statute, and as such should be liberally construed, in order to effectuate the purpose of the legislature, which was "to rid the public of an unworthy public servant," and in this particular is entirely different from common-law proceedings criminal in nature.

Cannon v. Wood, 2 Sneed, 177; State ex rel. Timothy v. Howse, 132 Tenn. 452, 178 S. W. 1110.

By their flagrant acts of misconduct in office after their re-election on April 8, 1915, for another term, established on their own admissions, defendants disqualified themselves to continue in the same offices under any commission given them by the people prior to said acts of misconduct.

State ex rel. Billon v. Bourgeois, 45 La. Ann. 1350, 14 So. 28; State v. Hill, 37 Neb. 81, 20 L.R.A. 573, 55 N. W. 794; Territory v. Sanchez, 14 N. M. 493, 94 Pac. 954, 20 Ann. Cas. 109; State v. Welch, 109 Iowa, 19, 79 N. W. 369; Brackenridge v. State, 27 Tex. App. 513, 4 L.R.A. 360, 11 S. W. 630; State ex rel. Perez v. Whitaker, 116 La. 947, 41 So. 218; Tibbs v. Atlanta, 125 Ga. 20, 53 S. E. 811; People ex rel. Burby v. Auburn, 85 Hun. 601, 67 N. Y. S. R. 3, 33 N. Y. Sup. 165; State ex rel. Douglas v. Megaarden, 85 Minn. 41, 89 Am. St. Rep. 539, 88 N. W. 412; State ex rel. Coleman v. Rose, L.R.A.1916D.

74 Kan. 262, 6 L.R.A.(N.S.) 843, 86 Pac. 296, 10 Ann. Cas. 927.

The fact that at the time of the filing of the bill there had been no formal reinduction into the same offices to which the defendants Crump and Utley were re-elected on April 8, 1915, prior to the commission of many of the grossest acts of misconduct complained of, does not prevent a forfeiture of all rights to said officers.

Brackenridge v. State, 27 Tex. App. 513, 4 L.R.A. 360, 11 S. W. 630.

The commission given to defendants to succeed themselves in said offices as the result of the election of April 8, 1915, for an additional term of four years, was subject to the provision of the ouster statute, that the acts of misconduct in office therein set forth would work an absolute forfeiture of such commission, and disqualify them from continuing in said offices for such additional term.

State ex rel. Caldwell v. Wilson, 121 N. C. 456, 28 S. E. 554.

The ouster act is clearly applicable to municipal officers.

The legislature does not derive the power from the Constitution, but has all power not expressly withheld from it by the Constitution.

Bell v. Bank of Nashville, Peck (Tenn.) 269; Tipton v. Harris, Peck (Tenn.) 414; Louisville & N. R. Co. v. County Ct. 1 Sneed, 637, 62 Am. Dec. 424; Knoxville & O. R. Co. v. Hicks, 9 Baxt. 442; The Judges' Cases, 102 Tenn. 509, 46 L.R.A. 567, 53 S. W. 134; Grainger County v. State, 111 Tenn. 234, 80 S. W. 750; Wright v. Cunningham, 115 Tenn. 445, 91 S. W. 293.

Municipal corporations and their officers are creatures solely of the legislature.

Luehrman v. Taxing Dist. 2 Lea, 425; State v. Wilson, 12 Lea, 246; Davis v. Knoxville, 90 Tenn. 599, 18 S. W. 254.

While municipal officers are agents of the state for the purpose of enforcing the laws of the state within the confines of the municipality, they are agents only in their relation to the state government, and not primarily state officers, and certainly not so in a constitutional sense.

Porterfield v. State, 92 Tenn. 289, 21 S. W. 519; State ex rel. Wilkinson v. Lane, 181 Ala. 646, 62 So. 31; Draper v. State, 175 Ala. 547, 57 So. 772, Ann. Cas. 1914D, 301; State ex rel. Young v. Robinson, 101 Minn. 277, 20 L.R.A.(N.S.) 1127, 112 N. W. 269; Atty. Gen. ex rel. Wilkins v. Connors, 27 Fla. 329, 9 So. 7; State v. Wilmington, 3 Harr. (Del.) 300; Santo v. State, 2 Iowa, 220, 63 Am. Dec. 487; Britton v. Steber, 62 Mo. 374; State ex rel. Hastings v. Smith, 35 Neb. 13, 16 L.R.A. 791, 52 N. W. 700;

State ex rel. Ward v. Churchman, 3 Penn. (Del.) 361, 51 Atl. 50.

A municipal corporation, expressly the city of Memphis, has inherent power to remove its officers for cause.

Hayden v. Memphis, 100 Tenn. 582, 47 S. W. 182.

The state has the power to remove municipal officers for official misconduct.

State ex rel. Young v. Robinson, 101 Minn. 277, 20 L.R.A. (N.S.) 1127, 112 N. W. 269; Rankin v. Jauman, 4 Idaho, 53, 36 Pac. 502.

But even if the officers of municipal corporations which were not a part of the system of government established by the Constitution were nevertheless intended by the Constitution to be embraced in the title "civil officers," the power of the legislature to provide for the removal of officers of such corporations so created by it was not limited to securing such removal as an incident to indictment and conviction for misdemeanor in office.

Fields v. State, Mart. & Y. 168; Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; State ex rel. Henson v. Shepard, 192 Mo. 497, 91 S. W. 477; Moore v. Strickling, 46 W. Va. 515, 50 L.R.A. 279, 33 S. E. 274; McDonald v. Guthrie, 43 W. Va. 595, 27 S. E. 844.

Green, J., delivered the opinion of the court:

This bill was filed by the state, on relation of the attorney general, against Edward H. Crump, mayor of the city of Memphis, R. A. Utley, vice mayor and commissioner of the department of fire and police of the city of Memphis, Oliver H. Perry, inspector of police of the city of Memphis, and W. M. Stanton, city judge of Memphis, to remove them from their several positions on account of alleged misconduct in office. The suit was instituted on October 14, 1915, and was based on chapter 11 of the Acts of 1915, known as the ouster law.

The bill averred that defendant Crump was first inducted into the office of mayor of Memphis in January, 1910, and that he was thereafter re-elected for a term of four years beginning January 1, 1912, and it appeared from the bill that said Crump was again re-elected to the said office for a term beginning January 1, 1916.

It was averred that R. A. Utley was first inducted into the office of vice mayor and commissioner of the department of fire and police in 1912, for a term of four years, and it appeared that he was also re-elected in April, 1915, for another term beginning January 1, 1916.

It was averred that defendant Stanton was elected to the office of city judge by the L.R.A. 1916D.

commissioners of the city of Memphis in the summer of 1915, apparently to fill out an unexpired term which ended January 1, 1916.

Proceedings against defendant Perry were dismissed below, and there was no appeal on the part of complainant, and the case against him need not therefore be further noticed.

The bill filed by the attorney general was quite lengthy, and charged defendants Crump, Utley, and Stanton with various acts of misfeasance and nonfeasance in office covering the entire time during which they held their several positions. It was charged that they had neglected to enforce the laws against the sale of liquor, against gambling, and against prostitution, that they had connived at and encouraged the violation of these laws, and that there existed and had been conducted, during their terms, in open violation of law, in the city of Memphis, numerous liquor saloons, gambling houses, and houses of ill fame. All these matters were set out in detail, and the bill charged the employment of certain colorable devices by which the defendants permitted the aforesaid unlawful occupations to be pursued in the city of Memphis.

Passing over some of the preliminary steps taken by the defendants, and noticing only those things which are before us on this appeal, it is sufficient to say that defendants filed an answer to the bill of the attorney general in which they denied many of the charges made against them, and assailed the ouster act as unconstitutional, and contended that at any rate said act had no application to them. Defendants also demanded a jury to try the issues of fact, and raised some other questions which will be noticed in the course of this opinion.

The chancellors were of opinion that chapter 11 of the Acts of 1915 was constitutional, and that it did apply to the defendants, and they were furthermore of opinion that defendants were not entitled to a jury trial. Certain other questions of law were likewise determined adversely to defendants, and the case was thereupon set for hearing on its merits by the chancellors.

When the case was called for trial, counsel were asked for a preliminary statement of the issues and the probable course of the proof. Counsel for the attorney general told the court that they expected to prove and had witnesses ready to prove every material allegation of the bill.

Counsel for defendants thereupon stated that, relying on all the preliminary questions made by them, such as the right to trial by jury, the applicability of the act, etc.; and desiring an early determination of those questions by this court, they had con-

cluded to introduce no proof and thereby delay final determination of the cause. They agreed that for the purposes of this case they would admit that the attorney general could prove all the relevant charges made against defendants in the bill.

After much controversy between the court and counsel as to the effect of this admission, the chancellors proceeded to treat the facts charged in the bill as if they were facts proven, and pronounced a judgment of ouster against the defendants.

We do not deem it necessary to dwell upon the discussion of counsel as to the effect of defendants' admission. According to the language of defendants' counsel, the relevant facts charged in the bill were admitted to be true for the purposes of this case. "This case" is the only case we are here undertaking to determine, and we accordingly treat the charges of the bill as true.

The decree of the chancellors herein removing defendants from office was pronounced November 4, 1915.

The first question presented for our determination is as to the effect of this decree upon the terms of defendants Crump and Utley beginning January 1, 1916. Their terms pending at the date of the decree expired January 1, 1916.

These defendants insist that their terms, beginning January 1, 1916, were not in issue in the proceedings below, and were not affected thereby. Defendants were assuming that such was the case, and were about to qualify and enter into the office of mayor and vice mayor, to which they had been elected in April, 1915, for terms beginning January 1, 1916, when they were restrained from so doing by an interlocutory order heretofore made by this court. The court thought it best to preserve the existing status until the case was finally determined.

It is insisted on behalf of the state that the decree of November 4, 1915, was effective, not only to remove defendants Crump and Utley from their offices for the terms they were then serving, ending January 1, 1916, but that said decree deprived said defendants of all rights to their future terms, beginning January 1, 1916, to which they had been elected in April, 1915.

There has been much discussion as to whether the 1916-20 terms of defendants Crump and Utley were fairly involved upon the pleadings in this case, and likewise as to whether the decree below undertook to adjudicate anything with reference to defendants' rights respecting these terms. We do not find it necessary to consider either the pleadings or the decree to determine this dispute. To reach the true result, we must go further back and examine the act upon which these pleadings and this de-

creed are based, and ascertain from this statute if proceedings had thereunder can by any possibility affect defendants' enjoyment of a term of office not then current.

Chapter 11 of the Acts of 1915, known as the ouster act, is entitled: "An Act to Provide for the Removal of Unfaithful Public Officers, and Providing a Procedure therefor."

The first section of the act provides that any state, county, or municipal officer who knowingly or wilfully misconducts himself in office, or who knowingly or wilfully neglects to perform any duty enjoined upon him by the laws of the state, or who shall become intoxicated, engage in gambling, or violate any penal statute involving moral turpitude, "shall forfeit his office, and shall be ousted from such office in the manner hereinafter provided."

Section 8 of this statute provides: "That if the defendant shall be found guilty, judgment of ouster shall be rendered against him, and he shall be ousted from his office."

There is no provision whatever in the act attaching to a judgment of ouster any disqualification on the part of the ousted official to hold any other office in the state or to hold the same office thereafter. It was stated at the bar that the bill originally contained this feature, but that such provision for disqualification was eliminated before it was finally enacted into a law.

The sole penalty provided by the statute is that a defendant found guilty thereunder shall forfeit his office or shall be ousted from his office.

What, then, was defendant Crump's "office," and what was defendant Utley's "office," at the time of the institution of the present suit and at the time of final decree?

This court has recently had several occasions to consider the matter of title to office and possession of office. In *State ex rel. Gann v. Malone*, 131 Tenn. 149, 174 S. W. 257, a sheriff-elect died between the time of his election and the date fixed by law for the beginning of the term. After his death the county court assumed that there was a vacancy in his office, and proceeded to elect his successor. This court, however, held that deceased never acquired the office, and never possessed it, inasmuch as he had never executed bond and taken the oath. It was accordingly concluded that, since deceased died prior to his qualification, his death created no vacancy in the office. The case was the same as if there had been no election at all, and the old official was adjudged entitled to hold over, under well-known provisions of the law. It follows from this decision that defendants Crump and Utley had no title accrued to their

offices for the 1916-20 term at any time during the proceedings below. They were not in office at the time of the chancellors' decree in such a way as that the death of either of them would have created a vacancy in office for the 1916-20 term; that is to say, they were not in possession of these offices for this subsequent term.

To "oust" means "to put out of possession; to eject or dispossess or deprive of." International Dictionary. Our statute gives no additional force to the word. There can, therefore, be no ouster without previous possession, and the contrary contention involves a contradiction in terms and disregard of the meaning of the English language.

But to return to the legal definition of the term "office" and to a consideration of the legal effect of removing one from office. In the late case of *Day v. Sharp*, 128 Tenn. 340, 161 S. W. 994, the court said that "office" implied "not merely place, but term or tenure as well."

In *Day v. Sharp*, supra, the court quoted with approval the case of *United States v. Hartwell*, 6 Wall. 385, 18 L. ed. 830, in which it was said that the term "office" "embraces the ideas of tenure, duration, emolument, and duties."

Likewise this court cited with approval *State ex rel. Childs v. Dart*, 57 Minn. 261, 59 N. W. 190; *State ex rel. Coleman v. Rose*, 74 Kan. 262, 6 L.R.A.(N.S.) 843, 86 Pac. 296, 10 Ann. Cas. 927; *People v. Ahearn*, 196 N. Y. 221, 26 L.R.A.(N.S.) 1153, 89 N. E. 930.

In the cases just referred to certain officials were removed from office or declared ineligible for office during the terms to which they had been elected, and undertook to have themselves re-elected to fill out the unexpired portions of the identical terms. Under these facts in all these cases it was held that the particular term or tenure of the officer was a part of and included in his office, and that, when he was removed from his office, he was removed for the particular term or tenure he was then enjoying.

So, when one is removed from an office, he is removed for the current term, and he cannot thereafter be re-elected to that term. This is so because the term is part of the office.

Accordingly, when defendants were removed from the offices of mayor and vice-mayor, they were deprived of the right to exercise certain functions and receive certain compensation, and they were deprived of that right for their terms then current. A removal from office extends to the limit of the current term, but such removal, unless a statute give it greater effect, cannot go beyond the current term because the L.R.A.1916D.

office itself is limited by the term. If we go beyond the current term, then we have to deal with another office.

Another case referred to in *Day v. Sharp*, which the court said was in accord with the reasoning of *Day v. Sharp*, was *Re Advisory Opinion*, 31 Fla. 1, 18 L.R.A. 594, 12 So. 114.

In the latter case one Johnson was tax collector of Duval county, Florida. He was elected for a term beginning in January, 1891, and ending in January, 1893. He was re-elected in the early part of October, 1892, for another term beginning in January, 1893, and ending in January, 1895. On October 29, 1892, after his re-election, he was suspended from office for misconduct, under provisions of the Florida laws. Under these circumstances the governor of Florida was in doubt as to whether he should issue to Johnson, pending his suspension, a commission for the term to which he had been elected, beginning in 1893, and submitted this question to the supreme court of Florida. The court concluded that it was the duty of the governor so to issue such commission, and said:

"The final consummation intended by a suspension must, as shown in *State ex rel. Atty. Gen. v. Johnson*, 30 Fla. 433, 18 L.R.A. 410, 11 So. 845, lately decided, always be a removal of the officer; and this removal is for the remainder of the term from which he is suspended, and nothing more. The remainder of the existing term is, including its incidents and rights, in our judgment, all the removal can act on or affect. There is certainly no express provision in the organic law that it shall affect any other term: nor is the officer in the exercise of other official functions than those covered by his title to the pending term.

"Again, the Constitution has not given to the suspension or removal the effect of disqualifying the suspended or removed person from holding the same or any other office in the future: on the contrary, not only is there an utter absence of any such provision, but an intention that it shall not have this effect is also shown in a separate and distinct declaration of what the framers of the Constitution and the people intended should have that effect, which declaration is to be found in the 5th section of the 6th article. That section directs the legislature to enact the necessary laws to exclude from every office of honor, power, trust, or profit, civil or military, within the state, all persons convicted of bribery, perjury, larceny, or of infamous crime, and for other causes therein stated, yet provides that this legal disability shall not accrue until after trial and conviction in due form of law. The legislation enforcing this section is to be

found in the Revised Statutes, § 211; and the 214th section enacts that every office shall be deemed vacant upon the conviction of the incumbent of any felony or of an offense involving a violation of his official oath.

"The limited effect which it was intended that the suspensions and removals under discussion should have is also shown by the provision of the section which authorizes them (§ 15, art. 4), that 'the suspension or removal herein authorized shall not relieve the officer from indictment for any misdemeanor in office.'

"A suspension or removal not having of itself the effect to taint the person or officer, either while suspended or after removal, with any disqualification to hold any office, we are unable to see how it can affect his right to exercise the functions of a future term of the same office. He is as qualified for or as eligible to election to a future term pending the suspension, or after the removal, as he was before the suspension.

"Perhaps it may be said that it is contrary to good public policy that a person who has been suspended during one term of an office should be permitted to enter upon the duties of a subsequent term of the same office, pending such suspension. To this the answer is that a public policy which would impose upon the citizen disabilities as to official station must at least be consistent with the organic law which defines the requisites for such station, and not antagonistic thereto. If the Constitution attached to the removal, whenever it might be consummated by the concurrence of the senate, a disability to hold the succeeding or future term or terms of the same office, it might naturally and logically follow that, pending the suspension, the functions of the succeeding term could not be performed; but, where it fails entirely, as it does, to give even the removal, whenever consummated, any such effect, no room is left as a standing place for any such theory of public policy."

The foregoing advisory opinion is referred to by the editor of volume 18 L.R.A. 591, as presenting an unusual question. The question being unusual, and the court's conclusion so well reasoned, we have thought it proper to make the extended quotation.

We find the Florida case referred to only twice,—in *Day v. Sharp*, supra, as above stated, and in *People v. Ahearn*, 196 N. Y. 221, 26 L.R.A.(N.S.) 1153, 80 N. E. 930. It seems to be exactly in point here.

In *People v. Ahearn* a borough president had been removed from office, and his rights were being considered under a subsequent appointment to the same term of the same L.R.A.1916D.

office. It was argued that, if defendant's removal was to be construed as having the effect of barring him from appointment to the vacancy created by his removal, it must likewise be regarded as having effected a general disqualification to hold any office.

The New York court of appeals said: "That argument does not require serious attention. The defendant was tried on charges affecting his administration of a certain office during a certain term, and as a punishment he was removed from that office. Because such removal barred him from immediate appointment to fill the vacancy for the unexpired term, it ought not to be seriously claimed that it disqualified him to take some other office or to be elected to a new term of the same office, neither of which were in any way involved in his trial and from neither of which he was removed." 196 N. Y. 221.

It is urged, however, that inasmuch as these defendants had already been elected to office to the 1916-20 term, at the time the ouster suit was filed, they had some sort of title to the office which could be involved and set aside in the ouster proceedings.

This argument is difficult to follow. The ouster act was passed to remove unworthy public servants from offices they held, not to contest their qualifications for other offices or other terms of the same office. No judgment of disqualification to hold any other office or any other term of the same office can be pronounced in an ouster suit.

Without doubt defendants might have been elected at any time after the decree passed in the case below to the 1916-20 term of their offices; for the judgment of ouster imposed absolutely no disqualification upon them. Since the judgment of ouster in no way affected their eligibility for the subsequent term, and since in such proceedings the validity of their election could not be called into question, it seems utterly immaterial that the election to the 1916-20 term was held prior to the rendition of the court's judgment below. This election did not put them in possession of any offices, as shown in *State ex rel. Gann v. Malone*, 131 Tenn. 149, 174 S. W. 257, and without possession there can be no ouster. The election without qualification did not make them public officers, and they were therefore not within the purview of the statute as to the future term. To contend that there can be an ouster when there has been no entry, under our statute, is an argument too paradoxical to require further notice.

We do not find the authorities relied on by learned counsel for the attorney general in this connection to be relevant to the facts of this case, and consequently omit any discussion of them.

While from what has been said it seems that little can be accomplished by this particular proceeding, since the terms of the offices in litigation have expired, nevertheless we find it necessary to dispose of other questions arising in the case, inasmuch as salaries and costs are involved.

The first assignment of error makes the point that the defendants below were entitled to a jury to try the issues of fact presented by the pleadings in this case.

It is to be doubted whether defendants are in any position to make such a question in this court after conceding for the purposes of the case that the pertinent allegations of the bill were to be taken as true. If they could, however, reserve the jury question under these circumstances, it has been fully treated by the court, and their contention overruled in the case of *State ex rel. Timothy v. Howse*, *infra*, and need not be discussed here.

The second assignment of error goes to the action of the chancellors in holding chapter 11 of the Acts of 1915 applicable to the present defendants. It is contended that defendants are civil officers within the meaning of § 5 of article 5 of the Constitution of Tennessee, and that, as such civil officers, they can only be proceeded against and removed from office by criminal prosecution or indictment under the said section of the Constitution.

An elaborate argument is made by counsel for defendants in which they undertake to demonstrate that defendants are civil officers within the meaning of the Constitution. This question is difficult, but for the purposes of this decision only it will be conceded that defendants are civil officers within the meaning of the Constitution.

In order to get the context and intelligently consider the constitutional provisions relied on, we set out §§ 4 and 5 of article 5 of the Constitution of Tennessee, as follows:

"Section 4. Who may be Impeached.—The governor, judges of the supreme court, judges of the inferior courts, chancellors, attorneys for the state, treasurer, comptroller and secretary of state, shall be liable to impeachment, whenever they may, in the opinion of the house of representatives, commit any crime in their official capacity which may require disqualification; but judgment shall only extend to removal from office, and disqualification to fill any office thereafter. The party shall, nevertheless, be liable to indictment, trial, judgment and punishment according to law. The legislature now has, and shall continue to have, power to relieve from the penalties imposed, any person disqualified from holding office L.R.A.1916D.

by the judgment of a court of impeachment."

Section 5. Officers Liable to Indictment.—Justices of the peace, and other civil officers, not hereinbefore mentioned, for crimes or misdemeanors in office, shall be liable to indictment in such courts as the legislature may direct; and, upon conviction, shall be removed from office by said court, as if found guilty on impeachment; and shall be subject to such other punishment as may be prescribed by law."

The argument for defendants is that, when the Constitution provides the causes for the removal of an officer and the procedure under which such removal is to be accomplished, such provisions are exclusive, and such officers cannot be removed for any other cause or in any other manner. We are referred to Judge Catron's observation, as follows: "Whenever a state Constitution prescribes a particular manner in which power shall be executed, it prohibits every other mode of executing such power. On that particular subject, the authority is exhausted by the constitutional provision, and an attempt to render it nugatory by law would be an attempt at repeal. The Constitution being the paramount law, the act of assembly coming in conflict would be void." *Smith v. Normant*, 5 Yerg. 272.

To the same effect, see *Cooley's Constitutional Limitations*, p. 99; *Mechem*, Pub. Off. § 457; dissenting opinion of Judge Freeman in *State ex rel. Halsey v. Gaines*, 2 Lea, 347.

It is urged that by § 5 of article 5 of the Constitution, above quoted, the procedure for removal of certain civil officers is provided; namely, by indictment in such courts as the legislature may direct, and upon conviction therein. It is accordingly contended that, the defendants being such civil officers, and the Constitution having prescribed a method for their removal, the method so prescribed is exclusive, and defendants may not be removed from office in any other way.

The vice on this argument lies in the assumption that § 5 of article 5 of the Constitution designs primarily to provide a method for the removal of the civil officers therein mentioned. Such is not the real object of this section.

The dominant purpose of this section of the Constitution is to provide for the indictment or criminal prosecution of the civil officers indicated. As a part of the penalty to be inflicted upon conviction, officials are to be removed from office as prescribed, and to suffer any other punishment fixed by the legislature. The removal of the officer is incidental in this section. The

true subject thereof is the indictment and criminal prosecution of the officer.

This is made manifest by a comparison of § 4 of article 5 of the Constitution with this § 5 of the same article.

Section 4 provides both for the removal and for the criminal prosecution of the governor, judges, and officers therein named. Section 4 provides that the governor, judges, and others shall be liable to impeachment by the house of representatives, and removed from office, disqualified, etc. It also provides that the governor and others shall be liable to indictment, trial, judgment, and punishment according to law.

Section 5, however, contains no provisions with reference to bare proceedings for removal. The simple removal of officers is not considered in § 5 at all. No method is provided or suggested for removal alone. Section 5 is obviously intended to secure criminal prosecution of those committing crimes and misdemeanors in office, and, as said before, removal from office is only an incident or part of the punishment following conviction.

Inasmuch, therefore, as the Constitution has not undertaken to regulate proceedings for the removal of officers when such proceedings are civil in character, it follows that it was competent for the legislature to formulate a scheme of its own.

As observed in *State ex rel. Timothy v. Howse*, 132 Tenn. 452, 178 S. W. 1110, ouster proceedings are civil in their nature. Such is the weight of authority. See cases collected in note to *Territory v. Sanches*, 20 Ann. Cas. 112.

Section 5 of article 5 relates alone to criminal proceedings against the officers therein named. No civil remedy is suggested. The matter of civil procedure is left entirely open.

We have a number of cases sustaining the removal of officers by civil procedure, where such officers have been guilty of offenses punishable by indictment and criminal prosecution. In such civil proceedings the defendant is not entitled to constitutional rights we might demand in a criminal prosecution. Those civil proceedings are merely collateral to criminal proceedings which result incidentally upon conviction in a judgment of removal. *Sevier v. Justices of Washington County*, Peck (Tenn.) 335; *Tipton v. Harris*, Peck (Tenn.) 414; *Fields v. State*, Mart. & Y. 168.

Consider also proceedings against public officers under our so-called quo warranto statutes contained in Shannon's Code, §§ 5165 et seq.

Our cases are in accord with the general rule. Speaking of statutory removals by civil procedure in court, it is said: "In these cases of removals by courts the courts may remove one for an offense which is punishable criminally, even where such person has not been convicted on an indictment for such offense, and constitutional provisions that one shall not be answerable for a criminal offense except on indictment do not apply." 29 Cyc. 1407.

The other assignments of error interposed in behalf of defendants go to the liability of defendants to proceedings under the ouster act for misdemeanors committed in terms of office previous to the one pending at the time of the suit, and to misdemeanors committed prior to the passage of the ouster act, and prior to the passage of chapter 37, Acts of 1915, imposing certain duties upon municipal officers. These assignments raise no material issues whatever in this case, and need not be considered by the court. The more flagrant misdemeanors charged against these defendants were committed during the terms pending at the time this bill was filed, and after the passage of the ouster act, and after the passage of chapter 37 of the Acts of 1915. All these charges of fact being admitted, there was abundant evidence to justify the decree of the court below.

In a supplemental brief filed for defendants it is insisted that §§ 11 and 12 of the act are without its caption and are otherwise objectionable. We think these sections are within the title. If we should conclude such sections violated other provisions of the Constitution, it would be our duty to elide them from the statute in a proper case in accordance with § 16 of the same statute. Sections 11 and 12 have not, however, been invoked in this case, and there is no occasion to test their validity.

It results that the decree of the chancellors is affirmed. Said decree does not, however, affect the rights of defendants Crump and Utley to their term beginning January 1, 1916. The order heretofore entered restraining them from qualifying for their offices for the 1916-20 term is vacated and set aside.

Annotation—Re-election of public officer after ouster for misconduct.

For unexpired term.

It is generally held that the removal of an officer for misconduct will preclude his re-election for the unexpired L.R.A.1916D.

term. As stated in *STATE EX REL. THOMPSON v. CRUMP*, ante, 951, the term is part of the office, and when an officer is removed his removal is for the current

term, and he cannot thereafter be elected to that term.

Thus, where a mayor of a city of the first class by official misconduct forfeits his office and the forfeiture is judicially declared in a quo warranto proceeding, the judgment of ouster will operate to deprive him of the right to take or hold the office during the remainder of the term to which he has been elected. *State ex rel. Coleman v. Rose* (1906) 74 Kan. 262, 6 L.R.A.(N.S.) 843, 86 Pac. 296, 10 Ann. Cas. 927 (writ of error dismissed in (1906) 203 U. S. 580, 51 L. ed 326, 27 Sup. Ct. Rep. 779).

So, the electors of such a city cannot, in a special election, restore that which was forfeited, nor limit the effect of the enforcement of the judgment of ouster by electing the unfaithful officer for the remainder of the term forfeited (Kan.) *Ibid.*

In *State ex rel. Childs v. Dart* (1894) 57 Minn. 261, 59 N. W. 190, a county treasurer was removed in a proper proceeding for the misappropriation of public funds; afterward, the board of county commissioners, which had authority to fill the vacancy, elected him to fill out the term. The question arose whether there was power in the board to reinvest him with the office in that manner. In deciding that there was not, the supreme court of Minnesota said: "The removal proceedings cannot be nullified or reversed in that manner. Such removal proceedings are not merely for the purpose of ousting the person holding the office; they include a charge that he has forfeited his qualification for the office for the remainder of the term. They are brought to declare a forfeiture of a civil right, his eligibility, his qualification to hold that office for the rest of that term. The proceeding is not brought for his removal from a day or a week or a month of his term, but from the whole of the remainder of his term, and the final order of removal is not made for his removal from a day or a week or a month of his term, but from the whole of the remainder of his term. Nothing less is involved in the proceedings. Whether the voters at the polls could condone the offense by which he forfeited his office it is not necessary here to decide. We are of the opinion that the county commissioners could not do so."

So, where a councilman has been ousted from office it is held in *Com. v. Hamilton* (1910) 19 Pa. Dist. R. 794, that he cannot exercise the office by subsequent appointment during the unexpired term.

The court said that "under the pleadings it is admitted that, immediately on learning of the judgment of ouster, the respondent resigned his office of councilman and was appointed by the borough council to the vacancy created by his resignation. The action of council, we are clear, gives the respondent no title to the office. That which the respondent possessed and enjoyed prior to the entry of judgment of ouster was a term of office, a piece of property as definite and well defined as a piece of land, and that definite entire thing is what he forfeited,—is what the judgment took from him. Manifestly he must remain divorced from this term of office unless the judgment is reversed. While the judgment stands, no power can unite him with his forfeited term."

So, one removed from a municipal office by the governor under statutory authority for maladministration therein is not eligible to re-election by the aldermen, under a statutory provision empowering them to fill a vacancy so caused for the unexpired term. *People v. Ahearn* (1909) 196 N. Y. 221, 26 L.R.A.(N.S.) 1153, 89 N. E. 930. "It is of course plain," observed the court, "that the legislature intended that the proceeding should be a serious one and an effective method of getting rid of unfit public officials. It is equally clear, and will doubtless be so conceded in anything which may be said or written on the other side of this question, that this purpose will be frustrated and the administration of the law turned into a farce if under it an official may be immediately reappointed and a removal turned into a mere temporary suspension. In order to avoid such a result, and keeping in mind the purpose of the statute, we are justified, in my judgment, in construing the removal for which it provides as meaning a permanent and lasting ouster for the entire remaining term of the incumbent from the office which he has been filling and whose obligations he has been found unable or unwilling to discharge."

The court further observed: "Passing beyond the decisions of courts, the attempt has been made to sustain the views urged in behalf of appellant by reference to the action of legislative bodies in passing on the cases of those who had been re-elected to fill vacancies caused by their expulsion, and much importance has been given to the action of the English House of Commons in the *Wilkes Case* (1763) 2 Wils. (Eng.) 151. *Wilkes* was expelled for an offense of a

political nature,—a seditious libel,—which does not appear to have been committed in any official capacity or to have involved personal turpitude or misfeasance in office; the House of Commons exercising a very broad power to expel for any cause which in its judgment unfits a member for parliamentary duties. *Story, Const. § 838.* It was at first determined by the House of Commons that this expulsion rendered Wilkes ineligible for election to fill the vacancy caused by his expulsion; but this action was subsequently rescinded. If necessary it would seem that a substantial distinction might be drawn in resulting effects between a case of expulsion by a legislative body exercising very comprehensive jurisdiction over its own membership, for political or other reasons not amounting to betrayal of official duties, and where there may be no hearing, and a case where the removal is based solely on official misfeasance, and only occurs after a hearing; but it is unnecessary to consider this here, for the legislative doctrine and practice adopted by the House of Commons in the Wilkes Case, if considered applicable to a case of expulsion for official misfeasance, has been fairly rejected by our national House of Representatives upon facts which make the latter's action a basis of very pertinent argument here. In 1870 expulsion proceedings were instituted against one Whittemore for alleged sale of appointments to the naval and military academies. Pending such proceedings, the accused resigned from his office, and he was then, at a special election, chosen to fill the vacancy caused by such resignation. When the credentials of such election were laid before the House, a resolution was duly adopted 'that the House of Representatives decline to allow said Whittemore to be sworn as a representative, . . . and direct that his credentials be returned to him.' Accompanying this resolution was a preamble reciting the facts of the proceedings of expulsion against Whittemore and the fact that he had escaped expulsion by resigning. It was thus determined: First, that a member might not escape the effect of expulsion proceedings by resigning; and, second, that a member thus proceeded against for official misfeasance was not eligible for election to fill the vacancy caused by his resignation to escape expulsion."

It may be stated incidentally that one cannot avoid removal from office for intoxication by resigning and being re-appointed by the proper authority. L.R.A.1916D.

State ex rel. Cosson v. Baughn (1913) 162 Iowa, 308, 50 L.R.A.(N.S.) 912, 143 N. W. 1100. See also to the same effect, *State v. Welsh* (1899) 109 Iowa, 19, 79 N. W. 369, involving the right to remove an officer during a term for which he has been re-elected, for official misconduct or neglect of duty during his previous term, wherein it is stated that the very object of removal is to rid the community of a corrupt, incapable, or unworthy official. His acts during his previous term quite as effectually stamp him as such, as those of that he may be serving. Re-election does not condone the offense.

So, as stated in *Skeen v. Paine* (1907) 32 Utah, 295, 90 Pac. 440, if an official, a member of a board or body in which is vested the power to fill vacancies, can, when his derelictions are discovered, resign and be at once reinstated in his former position and thus escape the effects of a violation of positive law, then the statute giving the right of removal might as well be repealed. In this case one charged with receiving illegal fees as a city councilman resigned his office after the fees had been declared illegal and refunded the same to the city; the council accepted his resignation and then reappointed him to fill the vacancy caused by his resignation. It was held that the resignation was a mere sham and no defense to removal proceedings.

The view, however, taken by the above cases is opposed by *State ex rel. Tyrrell v. Jersey City* (1856) 25 N. J. L. 536, wherein it was held that where an alderman was expelled from office because of official corruption and bribery, the sentence of expulsion did not disqualify the individual expelled from being re-elected for the unexpired term. The court said: "We are of opinion that the sentence of expulsion, or amotion, did not disqualify Tyrrell to be re-elected to the same office. When the council expelled him, they had exhausted their power; their authority went no further; the charter does not annex to the sentence of expulsion that of disqualification; nor have the council, nor could they legally. Where the law annexes a disqualification to an offense, as part of its punishment, it does it in express terms. U. S. Const. art. 1, § 3, pl. 7; N. J. Const. art. 6, § 3, pl. 3; Nix. Dig., title 'Witness' § 1. It was argued, with some earnestness, that the virtual effect of the re-election in this case was to reverse the judgment of the common council, and that the electors of the ward had no power to do that. The conclusion may be ad-

mitted if the premises are sound. But in point of fact here is no reversal of the judgment; that was executed; the offender was deprived of his office. The judgment was a judgment of expulsion, and that was carried into effect. The judgment extended no further, it was not a judgment of disqualification operating in futuro. The law does not add that penalty to the offense of which he was convicted, and we can add nothing to the law. The same answer must be given to the argument that the expulsion was for the term, and operated as a disqualification for the remainder of the term for which Tyrrell had been originally elected. As future disqualification is no part of the sentence authorized or inflicted, no such effect can be given to it by the court. The operation, the effect, the consequences of the judgment, began and ended with the expulsion. It is asked with pungency, by those who represent the common council, whether a member of that body, who is adjudged to-day to be guilty of receiving bribes, of selling his vote and influence, or of other gross official corruption, and is therefore expelled as unfit to exercise his office, or even to associate with men of character, can possibly be fit to fill the same office to-morrow; and whether such a man can be thrust back upon a body of honorable and upright men, as their official compeer and associate, by a misguided constituency, with the odor of his corruption fresh about him. These, however, are questions for the lawmaking power to consider. It is for the legislature to say how far it is necessary, in particular cases, to limit the power of the members of a common council, or punish particular offenses, and not for the courts. The legislature may well have supposed that the power to expel was all that was necessary; and that what remained might safely be trusted to the

hands of the voting members of the corporation."

For another or following term.

A removal, however, does not extend beyond the limits of the current term. And the following cases support *STATE ex rel. THOMPSON v. CRUMP*, ante, 951. in holding that an officer who has been ousted for misconduct is not thereby precluded from entering upon a succeeding term to which he had been previously elected.

Thus, the decision, *Re Advisory Opinion* (1893) 31 Fla. 1, 18 L.R.A. 594, 12 So. 114, discussed at length in *STATE ex rel. THOMPSON v. CRUMP*, holds that a suspension from office and appointment to fill the office, under § 15 of article 4 of the Constitution, do not affect the suspended officer's right to qualify for or exercise the duties of a succeeding term of the same office; nor do they prevent a governor succeeding the one who made the suspension from commissioning the suspended officer for the new term.

So, as stated in *People v. Ahearn* (1909) 196 N. Y. 221, 26 L.R.A. (N.S.) 1153, 89 N. E. 930, it is true that it is urged that, if defendant's removal is to be construed as having the effect of barring him from appointment to the vacancy, it must be regarded as having effected a general disqualification to hold any office. That argument does not require serious attention. The defendant was tried on charges affecting his administration of a certain office during a certain term, and as a punishment he was removed from that office. Because such removal barred him from immediate appointment to fill the vacancy for the unexpired term it ought not to be seriously claimed that it disqualified him to take some other office, or to be elected to a new term of the same office, neither of which were in any way involved in this trial and from neither of which he was removed. J. D. C.

WEST VIRGINIA SUPREME COURT OF APPEALS.

JOHN W. PERRY, Admr., etc., of Clifford R. Dugger, Deceased,
v.

OHIO VALLEY ELECTRIC RAILWAY COMPANY, Plff. in Err.

(72 W. Va. 282, 78 S. E. 692.)

Master and servant — risk of electric wires.

1. A servant employed to reset electric L.R.A.1916D.

poles, requiring his climbing amongst live wires for the purpose of attaching a pulley to the old poles used in hoisting the new ones, assumes the risk of all ordinary dangers incident to so hazardous an employment, but not the risk of unknown and ab-

Headnotes by WILLIAMS, J.

Note. — Upon the general question of a duty to prevent contact of wires carrying electric current, see note to *Paducah Light & P. Co. v. Parkman*, 52 L.R.A. (N.S.) 587. As to injury to linemen through defect

normal dangers due to the master's negligence.

For other cases, see *Master and Servant*, II. b, in *Dig.* 1-52 N. 8.

Same — un-insulated joint.

2. It is negligence for which the master is liable to a servant so employed, who is injured or killed on account thereof, to permit a joint or connection to be made in a highly charged electric wire and remain un-insulated, and so close to one of the metal braces supporting a cross-arm on the pole as to charge it.

For other cases, see *Master and Servant*, II. a, 4, in *Dig.* 1-52 N. 8.

Same — duty of master — inspection.

3. The master, acquiescing in the use which his servant makes of the old poles in performing his work, is bound to see that the wires thereon are not in an abnormally dangerous condition. The rule in regard to reasonably safe appliances with which to work applies, and the servant is not required to make inspection.

For other cases, see *Master and Servant*, II. a, 4, in *Dig.* 1-52 N. 8.

Trial — jury — contributory negligence.

4. In view of the evidence in this case the question of contributory negligence is held to be a fact for the jury to determine. For other cases, see *Trial*, II. c, 8, in *Dig.* 1-52 N. 8.

(April 15, 1913.)

ERROR to the Circuit Court for Cabell County to review a judgment in plaintiff's favor in an action brought to recover damages for the unlawful death of plaintiff's intestate, for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Messrs. Vinson & Thompson for plaintiff in error.

Messrs. L. D. Isbell, J. W. Perry, and Holt & Duncan, for defendant in error:

The fact that the work in which the servant is employed is that of repairing or making preparations to repair a railroad track does not diminish the company's duty to furnish safe and suitable means and instruments to do his work. If it requires him to use the old track in doing the work, it should make the track reasonably safe for that purpose.

1 Labatt, Mast. & S. p. 69, note 7; Madden v. Minneapolis & St. L. R. Co. 32 Minn. 303, 20 N. W. 317.

in poles or appurtenances, see note to Lynch v. Saginaw Valley Traction Co. 21 L.R.A. (N.S.) 174, and Consolidated Gas, E. L. & P. Co. v. Chambers, 26 L.R.A. (N.S.) 509.

As to whether a servant may assume the risk of dangers created by the master's negligence, see note to Scheurer v. Banner L.R.A.1916D.

Williams, J., delivered the opinion of the court:

Trespass on the case by the administrator of Clifford R. Dugger, deceased, to recover damages for his unlawful death, alleged to have been caused by defendant's negligence. Verdict and judgment for plaintiff for \$7,500, and defendant was awarded a writ of error.

Deceased was in the service of defendant as foreman of a gang of men engaged in erecting electric poles. Two methods are commonly employed in raising them. One is to lift them by means of spike poles, and the other is, if they are being erected to take the place of old ones, to hoist them with block and tackle attached to the old pole. On the 12th of September, 1910, deceased was preparing to hoist a pole at the corner of Third avenue and Seventh street in the city of Huntington. He ascended the old pole, which was equipped with a primary wire carrying 2,300 voltage, a transformer, and telephone wires, and had fastened the block and pulleys to the pole, just above the lower or third crossbeam, and had begun to descend, when J. W. Sturgeon, defendant's general line foreman, who was standing near the foot of the pole, called to him that the "fall" line was not properly adjusted; that it should hang next to the pole, instead of on the outside of the block, as it was. Deceased then returned, adjusted the rope, and in descending the pole caught hold of one of the metal braces supporting the crossarm. The brace being highly charged with electricity, and his body coming in contact with one of the telephone wires, a short circuit was formed, and he was killed. There was an un-insulated joint, 3 inches long, in the primary wire, which, by contact with the brace, caused it to become charged with a deadly current of electricity.

Workmen in climbing the pole were liable to come in contact with the exposed joint, and it was liable to come in contact with the brace. It was negligence to leave it in such a condition. Mitchell v. United States Coal & Coke Co. 67 W. Va. 480, 68 S. E. 366; Thomas v. Wheeling Electrical Co. 54 W. Va. 395, 46 S. E. 217; and Thornburg v. City & E. G. R. Co. 65 W. Va. 379, 64 S. E. 358. It is a common practice among pole climbers to take hold of the metal braces, and, if the wiring is normal, there is no danger in doing so.

Rubber Co. 28 L.R.A. (N.S.) 1207; and as to servant's assumption of risk of dangers created by the master's negligence, which he might have discovered by the exercise of ordinary care, see note to St. Louis, I. M. & S. R. Co. v. Birch, 28 L.R.A. (N.S.) 1250.

But nonliability is claimed on two grounds: (1) Assumption of risk, and (2) contributory negligence. The availability of the first defense depends upon the scope of deceased's employment. If he was employed to do any and all kinds of work in repairing an old line which he knew was abnormally dangerous, then he assumed the risk of all the dangers incident to that kind of work. If he knew the wires, as well as the poles, were out of repair, and was employed to put both in proper condition, while the current was on the wires, the cause of his death was one of the assumed risks, and plaintiff cannot recover. If such was his knowledge and such the scope of his undertaking, he must have expected to encounter such dangers as the one that caused his death.

But if he was simply employed to set poles, and did not know that the wires were in an abnormally unsafe condition, he had a right to assume that they were no more dangerous than similar wires, in like use, ordinarily are. If such be the case, the exposed wire was an extraordinary hazard which he did not assume, because it is not reasonable to suppose he could have anticipated a condition so abnormal and unusual. The law does not burden the workman with the assumption of extraordinary risks. He assumes only such as an ordinarily prudent man knows are incident to the employment. However dangerous the employment, the workman is never held to assume risks not ordinarily incident thereto, and of which he has no knowledge. 1 Labatt, Mast. & S. § 270.

The scope of deceased's employment was a fact for jury determination, and we think they could very properly infer from the testimony of defendant's own witnesses that it was limited to setting poles. He had worked as a member of the same gang of which he was made foreman, under another foreman by the name of Shafer, from some time in June to some time in August, 1910, when Shafer quit. He then applied to W. W. Magoon, defendant's general manager, for the position of foreman, and was employed as such. Mr. Magoon testifies that he then said to him: "'You must remember that this work down here takes a very careful man, a man who knows how to handle live wires, because that work has got to be done with live wires, in order to keep our service going in town.' He said, 'I can handle that all right,' and I then gave him instructions. I said, 'All right, go ahead,' and he took charge of the work."

On cross-examination he said:

Q. He was removing old poles and putting in new ones at the time?
L.R.A.1916D.

A. He was working in the line of his work; yes, sir.

Q. His duty was simply to put in new poles, was it?

A. No, sir; his duties were to make all corrections on that line, changing the wires and general line of work.

But he had been working in this gang either as a common laborer or as foreman, from June to September 12th, and there is no proof that he ever transferred a single wire from an old pole to a new one.

J. W. Sturgeon, who was the "line foreman," testified on his examination in chief as follows, viz.:

Q. Do you know who had charge of the work that was being done there at that place, Mr. Sturgeon?

A. What do you mean, what time?

Q. At the time this accident occurred?

A. Mr. Dugger had charge of setting the poles.

Q. Was there anything else being done?

A. Nothing, only setting poles, at that time.

On cross-examination he testified as follows:

Q. You were foreman there, were you, Mr. Sturgeon?

A. I was foreman over the whole line; yes, sir.

Q. And Dugger was under you, was he?

A. Yes, sir.

The rule in regard to a safe place and safe appliances applies in this case, because the old pole was a means or appliance which deceased used in the performance of his work, with the master's acquiescence. It was therefore defendant's duty to see that the wires on the pole were in a reasonably safe condition. Deceased was bound, of course, to take notice of whether the strength of the pole was sufficient for the purpose for which he was about to use it, because the new one was being erected to take its place, and that was sufficient to put him on guard as to any defect in the pole; but he was not chargeable with the duty to use extraordinary care to avoid unknown danger from imperfect wiring. There being no proof that the line was being repaired because the wires were bad or imperfectly strung, deceased was not bound to use extraordinary caution. He was not required to inspect the wiring to see if there were hidden dangers or latent defects. This case is distinguishable from *Whorley v. Raleigh Lumber Co.* 70 W. Va. 122, 73 S. E. 263, 3 N. C. C. A. 524, cited by counsel for defendant. In that case *Whorley*

was assisting in installing machinery in a sawmill, and was injured by the bursting of a steam pipe while he was tightening a leaky joint in it. In the present case deceased was killed while making use of an electric pole, an already completed appliance, as a proper means of accomplishing the work he was set to do. He was neither installing nor repairing the appliance that killed him. The case is more analogous to *Madden v. Minneapolis & St. L. R. Co.* 32 Minn. 303, 20 N. W. 317, in which Madden, a brakeman on a gravel train, was injured because of a defect in the old track over which gravel and ties were being hauled for the purpose of repairing it. The company was held liable. Says the court: "The fact that the work in which plaintiff was employed was that of repairing or making preparations to repair the track did not diminish its duty to furnish safe and suitable means and instruments to do his work. As it required him in that work to use the old track, it should have had it reasonably safe for the purpose." That the appliance—the old pole in this case—was not erected and equipped with reference to its use as a means for erecting new poles can make no difference in the application of the principle that it is the master's duty to furnish reasonably safe appliances, because defendant knew that the poles were constantly so used, and acquiesced therein. The proof is that block and tackle attached to the old pole was a usual and customary means employed in raising poles. "The master's acquiescence in the use of an appliance for some purpose other than that for which it was intended puts him in the same position as if the appliance had been originally furnished for that purpose." 1 Labatt, Mast. & S. § 28. The same rule was applied in the following cases, which are very similar to the *Madden Case*: *Dunn v. New York, N. H. & H. R. Co.* 46 C. C. A. 546, 107 Fed. 686; *Lauter v. Duckworth*, 19 Ind. App. 535, 48 N. E. 864. The rule applied in cases of injury to a servant by falling platforms, erected by the master for the use of his servant, is the proper rule to be applied here. In such cases it is uniformly held: (1) That the servant is not bound to make inspection; (2) that the workmen who prepare the place or appliance are not fellow servants to those who are employed to work in the place or with the appliance; and (3) that the master is liable if the defect causing the injury was unknown to the servant. *McLean v. Standard Oil Co.* 86 Hun, 635, 50 N. Y. S. R. 626, 21 N. Y. Supp. 874; *Benzing v. Steinway & Sons*, 101 N. Y. 547, 5 N. E. 449; *Goldie v. Werner*, 50 Ill. App. 297, affirmed in 151 Ill. L.R.A.1916D.

551, 38 N. E. 95; *Edward Hines Lumber Co. v. Ligas*, 172 Ill. 315, 64 Am. St. Rep. 38, 50 N. E. 225, 4 Am. Neg. Rep. 257; *Giles v. Diamond State Iron Co.* 7 Houst. (Del.) 453, 8 Atl. 368; and *Cole v. Warren Mfg. Co.* 63 N. J. L. 626, 44 Atl. 647, 7 Am. Neg. Rep. 93.

Whether deceased was guilty of negligence contributing to his death was likewise a question of fact for the jury. It is contended that his failure to see that the untaped joint in the primary wire rested against the metal brace was proof of his negligence. It is proven that he was an experienced lineman, and that he climbed the pole in the usual manner. He ascended it on the side opposite the transformer, and the metal brace came between him and the exposed joint in the wire. There is evidence tending to prove that a person in his position could not see whether the wire came contact with the brace or not; and, it being an unusual condition, he may not have been on the lookout for it. He may have noticed that the insulation on other parts of the primary wire, which he could see, was sound and in good condition, and he may have supposed that the parts he could not see were equally good. He had a right to assume that defendant had performed its duty, and that the wires were normal, both as to place and condition, because the evidence is that it is the custom to tape such joints when made. The primary wire carried 2,300 voltage, and the untaped joint, so close as to touch the brace, made the position of deceased extraordinarily dangerous. He was not bound to anticipate such danger. A number of persons were present, around the pole, when deceased was killed, among them defendant's line foreman, and none of them knew that the primary wire was against the brace. It was not discovered until afterwards. That no other witness saw it is evidence tending to disprove that the deceased was negligent. And that witness Rodgers climbed the pole a few minutes before, and found it charged and hot, is not conclusive that deceased was negligent. Why did not Rodgers discover the cause of its being charged? Such evidence is a sword cutting both ways, and the jury considered it.

There were two theories of the case, depending upon the scope of deceased's employment as affecting the risk which he had assumed, and both were fairly presented by the court's instructions to the jury.

We find no error and affirm the judgment.

Petition for rehearing denied June 30; 1913.

WISCONSIN SUPREME COURT.

BYSTROM BROTHERS, Appt.,

v.

ERIC JACOBSON et al., Respts.

(— Wis. —, 155 N. W. 919.)

Master and servant — workmen's compensation act — strain as accident.

A strain of muscles causing incapacity to work, by lifting, in the regular duties of the employment, is, although there is no external evidence of injury, an accident within the meaning of the workmen's compensation act.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

(January 11, 1916.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dane County affirming an award of the Industrial Commission in favor of defendant Jacobson, in an action to test the award. Affirmed.

Statement by Marshall, J.:

The action was to test an award made by the Wisconsin Industrial Commission in favor of defendant Eric Jacobson. The award was sustained.

The Commission made the award and it was confirmed on this state of facts, as indicated in a memorandum which such Commission filed in the proceeding as a basis for its conclusion: "May 16, 1914," Eric Jacobson "was in the employ of" Bystrom Brothers "laying cement blocks. He was at work under the porch of a residence, and in attempting to lift a block weighing, approximately, 80 pounds, on the foundation of the wall, while in a sitting position, he strained the muscles of his right side. The accident occurred during the forenoon. . . . He . . . consulted a physician who pronounced the injury as a muscular spasm. There was no external evidence of injury, but he suffered pain and was disabled until July 6, 1914."

Messrs. Robert R. Freeman, Timothy Brown, and Russell B. James, for appellant:

It is not sufficient that the employee is overtaken by some physical ill, even though

Note.—For the construction and effect of workmen's compensation acts generally, see annotation in L.R.A.1916A, 23. The question whether compensation is recoverable for injuries caused by strain under the English act is discussed on page 22 of the annotation, and the American cases treating the question, what constitutes an accident or personal injury within the meaning of the acts, will be found on page 227. L.R.A.1916D.

it be partially caused by the work he is doing, but an additional element is expressly made necessary by the statute, and the words, "where the injury is proximately caused by accident," do not mean merely that the injury was not anticipated, but that some accident must be present which caused the injury.

Milwaukee v. Industrial Commission, 160 Wis. 238, 151 N. W. 247; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157, 7 Am. Neg. Cas. 174; 1 Cyc. 228; *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & El. 478, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; *Trew v. Railway Pass. Assur. Co.* 6 Hurlst. & N. 839, 30 L. J. Exch. N. S. 317, 7 Jur. N. S. 878, 4 L. T. N. S. 833, 9 Week. Rep. 671; *Vennen v. New Della Lumber Co.* 161 Wis. 370, L.R.A. 1916A, 273, 154 N. W. 640; *Northwestern Iron Co. v. Industrial Commission*, 154 Wis. 97, L.R.A. 1916A, 366, 142 N. W. 271, Ann. Cas. 1915B, 877; *Borgnis v. Falk Co.* 147 Wis. 327, 37 L.R.A. (N.S.) 489, 133 N. W. 209, 3 N. C. C. A. 649.

Messrs. W. C. Owen, Attorney General, and Winfield W. Gilman, Assistant Attorney General, for respondents:

A strain, a sudden injury, resulting from the work in which one is engaged, is an accident.

Dawbarn, Employers' Liability, 4th ed. 100; *Boyd, Workmen's Compensation*, § 458; 1 *Bradbury, Workmen's Compensation*, 2d ed. 367.

An injury due to strain in performing the work is one covered by the act.

Doughton v. Hickman [1913] W. C. & Ins. Rep. 143; *Scales v. West Norfolk Farmers' Manure & Chemical Co.* [1913] W. C. & Ins. Rep. 165; *Brown v. Kemp* [1913] W. C. & Ins. Rep. 595; *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684; *Winter v. Atkinson Frieze Co.* 37 N. J. L. J. 195; *Hanglin v. Swift & Co.* 37 N. J. L. J. 81; *Boardman v. Scott* [1902] 1 K. B. 43, 85 L. T. N. S. 502, 18 Times L. R. 57, 71 L. J. K. B. N. S. 3, 66 J. P. 260, 50 Week. Rep. 184, 4 W. C. C. 1, affirming 3 W. C. C. 33; *Purse v. Hayward*, 125 L. T. Jo. 10, 1 B. W. C. C. 216; *Fulford v. Northfleet Coal & Ballast Co.* 1 B. W. C. C. 222; *M'Innes v. Dunsmuir & Jackson*, 45 Scot. L. R. 804, 1 B. W. C. C. 226; *Timmins v. Leeds Forge Co.* 16 Times L. R. 521, 83 L. T. N. S. 120, 2 W. C. C. 10; *Trodden v. J. McLennard & Sons*, 4 B. W. C. C. 190; *Borland v. Watson, G. & Co.* 49 Scot. L. R. 10, 5 B. W. C. C. 514; *Voorhees v. Smith Schoonmaker Co.* 86 N. J. L. 500, 92 Atl. 280, 7 N. C. C. A. 646; *Connor v. Seattle*, 82 Wash. 296, 144 Pac. 52;

Poccardi v. Public Service Commission, — W. Va. —, L.R.A.1916A, 299, 84 S. E. 242, 8 N. C. C. A. 1063; Stewart v. Wilson's & C. Coal Co. 40 Scot. L. R. 80, 5 F. 120; Broforst v. Bloomfield [1913] 1 W. C. & Ins. Rep. 594; Aitken v. Finlayson, B. & Co. [1914] S. C. 770, 51 Scot. L. R. 653, 7 B. W. C. C. 918; Fisher's Case, 220 Mass. 581, 108 N. E. 361; Zappala v. Industrial Ins. Commission, 82 Wash. 314, L.R.A. 1916A, 295, 144 Pac. 54; Clover, C. & Co. v. Hughes [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 47 Scot. L. R. 885, 3 B. W. C. C. 275; Martin v. Travellers' Ins. Co. 1 Fost. & F. 505; North American Life & Acci. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212; Horsfall v. Pacific Mut. L. Ins. Co. 32 Wash. 132, 63 L.R.A. 425, 98 Am. St. Rep. 846, 72 Pac. 1028; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Vennen v. New Dells Lumber Co. 161 Wis. 370, L.R.A. 1916A, 273, 154 N. W. 640.

Marshall, J., delivered the opinion of the court:

The question raised in this case is whether the injury for which compensation was granted was "proximately caused by accident" within the meaning of those words in section 2394—3 (3) of the workmen's compensation law. On behalf of appellant, it is contended that the statute calls for an accident in the sense of the application of some violence or external force to the person of the workman; that a physical ill caused by the labor the workman is engaged in is not sufficient.

It is considered that the term "accident" as used in the workmen's compensation act has a much broader signification than that contended for by counsel for appellant. It is susceptible of being given such scope that one would hardly venture to define its boundaries. Courts have indulged in very general statements in regard to it, but have not worked out any very definite guide. True, as stated by a text writer, such term has been more discussed, probably, in adjudications, "than any other word in the whole English language." What the meaning of it is, in the technical sense, is quite different from what it is in the popular sense. The latter sense was adopted in *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, the leading English case on the subject in regard to such situations as the one we have to deal with. There a workman, in straining to turn a wheel to open a lid, ruptured himself, and it was held that he was injured by accident. The logic of the L.R.A.1916D.

decision is thus stated in *Dawbarn, Employers' Liability*, 4th ed. 100: "The essential principle and foundation of their judgment was that no arbitrary, legal, technical, or contractual meaning was to be given to the word 'accident,' but that it was to be regarded as used in its popular or ordinary sense. . . . Accident might mean an accident external to, distinct from, or in addition to, the injury to the man, or the accident might mean . . . nothing wrong or no mishap apart from the actual injury sustained by the man himself. The accident was not the lid sticking; the accident was the man rupturing himself."

That was approved in *Clover, C. & Co. v. Hughes* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 47 Scot. L. R. 885, 3 B. W. C. C. 275, as applied to the English workmen's compensation act, where a person was ruptured by overexerting himself about his work.

From numerous authorities such as those cited, *Dawbarn*, at page 100, deduced this rule: "Roughly speaking, accidents divide into two great classes: (a) Accidents popularly known as such, such as railway accidents, breakdown of machinery, explosions, collisions, etc., where persons injured by them are spoken of as injured by accident; and (b) accidents where there is no such external mishap, but where the man injures himself, as he would say, by accident. when he either strains a muscle or ricks his back or ruptures himself, or otherwise hurts himself in an unexpected manner."

These further English cases are cited in support of that conclusion and illustrating it: *Timmins v. Leeds Forge Co.* 16 Times L. R. 521, 83 L. T. N. S. 120, 2 W. C. C. 10, where a man strained his back in lifting a plank which unexpectedly stuck owing to frost; *Boardman v. Scott* [1902] 1 K. B. 43, 85 L. T. N. S. 502, 18 Times L. R. 57, 71 L. J. K. B. N. S. 3, 66 J. P. 260, 50 Week. Rep. 184, 4 W. C. C. 1, where a man strained himself in adjusting a beam he was carrying; *Stewart v. Wilson's & C. Coal Co.* 5 F. 120, where a minor injured himself trying to replace a derailed hutch; and *M'Innes v. Dunsmuir & Jackson*, 45 Scot. L. R. 804, 1 B. W. C. C. 226, where a man brought on a cerebral hemorrhage by overexerting himself.

Like conclusions as those above are drawn from the authorities in *Boyd, Workmen's Compensation*, § 458, and 1 *Bradbury, Workmen's Compensation*, 2d ed. 367, cited to our attention. From the former we quote: "With good reason, strains sustained by employees of normal health in raising unusual weights in the course of their employment are generally regarded as

accidental injuries. . . . Ruptures resulting from lifting heavy objects are generally held fortuitous and unexpected events, in other words, accidents."

Quite commonly these words from *Fenton v. J. Thorley & Co. supra*, are quoted with approval: "If a man, in lifting a weight, or trying to move something not easily moved, were to strain a muscle or rick his back or rupture himself, the mishap, in ordinary parlance, would be described as an accident."

There are several American authorities to the same effect as the foregoing, to which we are referred, and among them are the following: *Fisher's Case* (1915) 220 Mass. 581, 108 N. E. 361; *Zappala v. Industrial Ins. Commission*, 82 Wash. 314, L.R.A. 1916A, 295, 144 Pac. 54; *Voorhees v. Smith Schoonmaker Co.* (1914) 86 N. J. L. 500, 92 Atl. 280, 7 N. C. C. A. 646; *Poccardi v. Public Service Commission* (W. Va.) L.R.A. 1916A, 299, 84 S. E. 242, 8 N. C. C. A. 1065.

The broad meaning attributable to the word "accident," as above indicated, and which is called for by the spirit of the workmen's compensation act, was adopted by this court in *Vennen v. New Dells Lumber Co.* 161 Wis. 370, L.R.A. 1916A, 273, 154 N. W. 640. There the court said: "The term 'accidental,' as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury. . . . It contemplates an event not within one's foresight and expectation, resulting in a mishap, causing injury to the employee."²

The contracting of typhoid fever by an employee by his drinking impure water furnished by the employer was held to satisfy all the calls of that definition. It seems, as counsel for respondents contend, that such calls are quite as well satisfied by the circumstances here. The thing which occurred was somewhat unusual. It was unexpected and undesigned. There was an external occurrence. The lifting of the heavy block while the workman was not in an advantageous position to do so required him to unduly strain the muscles of his right side. The undue strain was not foreseen or expected. A mishap resulted,—muscular spasm and consequent disability. There was, plainly, the physical causation spoken of in *Milwaukee v. Industrial Commission*, 160 Wis. 238-240, 151 N. W. 247,—the effort to handle the block while the workman was so circumstanced as to cause a perilous strain on the muscles of his right side.

We cannot well add anything of value by further discussion. As we have seen, authorities, English and American, generally agree that the term "accident" when used in workmen's compensation laws, should be taken in the broad sense above indicated,—as including a violent straining of the muscles, resulting in a rupture or other bodily hurt to an employee from overphysical exertion in performing his work. It is considered that it was so used by the legislature in § 2394—3 (3) of the statutes, and that the trial court in this case reached the correct conclusion.

The judgment is affirmed.

WISCONSIN SUPREME COURT.

FEDERAL RUBBER MANUFACTURING
COMPANY, Appt.,

v.

JOHN HAVOLIC et al., Respts.

(— Wis. —, 156 N. W. 143.)

Master and servant — workmen's compensation — forcing air into body.

The rupture of an employee's intestines

by the forcing of compressed air into his body by a fellow employee, when, contrary to rules, he is using the hose to remove dust from his clothing after working hours, is not an injury incidental to and growing out of the employment within the workmen's compensation act.

For other cases, see *Master and Servant, II. a, 1*, in *Dig. 1-52 N. S.*

(February 1, 1916.)

Note. — As to the construction and effect of the workmen's compensation acts generally, see annotation in L.R.A.1916A, 23.

As to the recovery of injuries received while indulging in horseplay, see pages 47 and 240 of the foregoing annotation; and the cases passing upon the recovery of compensation where a workman suffers injury from assault are gathered and discussed in a note following *Re McNicol*, L.R.A.1916A, L.R.A.1916D.

309. For other cases in which compensation is sought for injuries resulting from an assault or from play, see *Pierce v. Boyer-Van Kuran Lumber & Coal Co.* post, 970, and *Hulley v. Moosbrugger*, L.R.A.1916C, 1203.

As to master's common-law liability for injuries inflicted upon an employee maliciously or in sport by other employees, see notes in 34 L.R.A.(N.S.) 109, and 52 L.R.A.(N.S.) 385.

APPEAL by plaintiff from a judgment of the Circuit Court for Dane County confirming an order of the Industrial Commission awarding compensation to defendant Havolic for injuries received while in plaintiff's employ, in an action to set aside the award. Reversed.

Statement by Winslow, Ch. J.:

This is an appeal from a judgment of the circuit court of Dane county confirming an award of the Industrial Commission in favor of the respondent Havolic under the workmen's compensation act. Wis. Stat. 1915, §§ 2394—1 — 2394—31.

The essential facts are not disputed. Havolic worked for the plaintiff in its rubber tire factory; his duties being to feed stock into a tubing machine. In the department in which he worked there was a compressed air system with hose and nozzles attached for use in some of the factory operations, but Havolic had no duty which required him either to use or come in contact with the system or the hose. Employees were forbidden to use the hose for the purpose of cleaning their clothes, and Havolic knew of the prohibition, but many employees did do so, and on the evening of the accident Havolic, on quitting work, took down the hose from its place and began to use it to blow the dust from his clothing. He had cleaned a part of his clothing when a fellow workman came up and (whether of his own motion or at Havolic's request is a matter in dispute), took the hose from Havolic's hand, and proceeded to clean his (Havolic's) back. The air in the hose was at a pressure of nearly or quite 90 pounds, and the fellow workman, apparently by way of practical joke, held the nozzle to Havolic's rectum, with the result that the intestines were ruptured. Havolic was compelled to go to the hospital for several weeks, and was totally disabled for seventeen weeks. For these injuries the award complained of was made.

Messrs. Robert R. Freeman and Henry J. Bendinger, for appellant:

Defendant's injury was not one growing out of and incidental to his employment within the meaning of the workman's compensation act.

Moore v. Manchester Liners, [1910] A. C. 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 618, 54 Sol. Jo. 703, 3 B. W. C. C. 527; Reed v. Great Western R. Co. [1909] A. C. 31, 78 L. J. K. B. N. S. 31, 99 L. T. N. S. 781, 25 Times L. R. 36, 46 Scot. L. R. 700, 53 Sol. Jo. 31, 2 B. W. C. C. 109; Parker v. Pout, 105 L. T. N. S. 493, 5 B. W. C. C. 45; Pope v. Hill's Plymouth Co. 105 L. T. N. S. 678, 5 B. W. C. L.R.A.1916D.

C. 175; M'Allan v. Perthshire County Council, 8 Sc. Sess. Cas. 5th series, 783, 43 Scot. L. R. 592; Jenkinson v. Harrison, A. & Co. 4 B. W. C. C. 194; Marriott v. Brett & Beney, 5 B. W. C. C. 145; Bice v. Edward Lloyd [1909] 2 K. B. 804, 101 L. T. N. S. 472, 25 Times L. R. 759, 53 Sol. Jo. 744, 127 L. T. Jo. 322, 2 B. W. C. C. 26; Clifford v. Joy, 43 Ir. Law Times 192, 2 B. W. C. C. 32; Peel v. William Laurence & Sons, 106 L. T. N. S. 482, 28 Times L. R. 318, 5 B. W. C. C. 274; Dawbarn, Workmen's Compensation, 1910—12, p. 25.

Messrs. W. C. Owen, Attorney General, and Winfield W. Gilman, Assistant Attorney General, for respondents:

There is evidence to sustain the finding that Havolic, at the time of the accident, was performing service growing out of and incidental to his employment.

Hoenig v. Industrial Commission, 159 Wis. 646, L.R.A.1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192.

The accident arose in the course and out of the employment

Milwaukee v. Althoff, 156 Wis. 68, L.R.A. 1916A, 327, 145 N. W. 238, see note to that case in 4 N. C. C. A. 110; Sundine's Case, 5 N. C. C. A. 616, and note, 218 Mass. 1, L.R.A.1916A, 318, 105 N. E. 433; Helmke v. Thilmany, 107 Wis. 216, 83 N. W. 360, 8 Am. Neg. Rep. 172; Terlecki v. Strauss, 85 N. J. L. 454, 89 Atl. 1023, 4 N. C. C. A. 584; Challis v. London & S. W. R. Co. [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23; Hulley v. Moosbrugger, 87 N. L. L. 103, 93 Atl. 79, 8 N. C. C. A. 283; State ex rel. People's Coal & Ice Co. v. District Ct. 129 Minn. 502, L.R.A. 1916A, 344, 153 N. W. 119; McNicol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697; Richardson v. Denton Colliery Co. [1913] W. N. 238, [1913] W. C. & Ins. Rep. 554, 109 L. T. N. S. 370, 6 B. W. C. C. 629; East Line & R. River R. Co. v. Scott, 71 Tex. 708, 10 Am. St. Rep. 804, 10 S. W. 298; Kreutz v. Neumann Hardware Co. 37 N. J. L. J. 58; Whitehead v. Reader [1901] 2 K. B. 48, 70 L. J. K. B. N. S. 546, 65 J. P. 403, 49 Week. Rep. 562, 84 L. T. N. S. 514, 17 Times L. R. 387, 3 W. C. C. 40; Edmunds v. The Peterston, 28 Times L. R. 18, 5 B. W. C. C. 157; Cobb v. Simon, 119 Wis. 597, 100 Am. St. Rep. 909, 97 N. W. 276; Daley v. Chicago & N. W. R. Co. 145 Wis. 249, 32 L.R.A.(N.S.) 1164, 129 N. W. 1062; Reinke v. Bentley, 90 Wis. 457, 63 N. W. 1055; Ratcliffe v. Chicago, M. & St. P. R. Co. 153 Wis. 281, 141 N. W. 229; Louisville & N. R. Co. v. Fleming, — Ala. —, 69 So. 125; Scott v. Payne Bros. 85 N. J. L. 446, 89 Atl. 927, 4 N. C. C. A. 682.

Winslow, Ch. J., delivered the opinion of the court:

This court has endeavored to give to the workmen's compensation act a broad and enlightened construction, to the end that it may accomplish to the fullest extent its beneficent purpose. It is to be remembered, however, that this purpose was to compensate for injuries resulting from one class of accidents only, namely, industrial accidents. There is liability only "where, at the time of the accident, the employee is performing service growing out of and incidental to his employment." Wis. Stat. 1915, § 2394—3, subd. 2. It was held in *Hoenig v. Industrial Commission*, 159 Wis. 646, L.R.A.1916A, 339, 150 N. W. 996, 8 N. C. C. A. 192, after full argument and consideration, that the injuries covered by the act are such as "are incidental to and grow out of the employment." This seems practically to mean the same thing as the expression in the English compensation act, "arising out of and in the course of the employment." Under the English act it has been held that accidents resulting from "larking" or playing with machinery cannot be held to arise out of the employment. *Furniss & Co. v. Gartside*, 3 B. W. C. C. 411; *Cole v. Evans, Son, Lescher & Webb*, 4 B. W. C. C. 138.

The Massachusetts act provides compensation for an injury which "arises" out of the employment, and it was well said by the Massachusetts supreme court in *McNicol's Case*, 215 Mass. 497, L.R.A.1916A, 306, 102

N. E. 697, 4 N. C. C. A. 522: "The causative danger must be peculiar to the work, and not common to the neighborhood. It must be incidental to the character of the business, and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

The "causative danger" in the present case does not come within the test here prescribed, nor anywhere near it. Had the claimant hurt himself in some way while he was handling the hose in the effort to remove the dust from his clothes, a different question would have been presented. There was proof that employees were accustomed to brush their clothes in this manner without rebuke from the foreman, though there was a formal prohibition of such action, and we express no opinion as to the rights of the parties had the accident happened in this way. But how injuries resulting from such inexcusable and revolting horseplay as this can be said to be incidental to the employment we are unable to understand. It is equally impossible to understand how it can be said that the claimant at the time of the accident was performing service "growing out of and incidental to his employment."

Judgment reversed, without costs, and action remanded, with directions to reverse the award of the Industrial Commission.

NEBRASKA SUPREME COURT.

JAMES PIERCE

v.

BOYER-VAN KURAN LUMBER & COAL COMPANY, Appt.

(— Neb. —, 156 N. W. 509.)

Master and servant — workmen's compensation — when granted.

1. An employee is not entitled to compensation for injury under the employers' liability act (Laws 1913, chap. 198), unless the accident which caused the injury happened in the course of his employment and arose out of his employment.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Headnotes by SEDGWICK, J.

Note.—As to the construction and kind of workmen's compensation acts generally, see annotation in L.R.A.1916A, 23.

As to recovery of injuries received while indulging in horseplay, see pages 47 and 240 of the above annotation; and as to the recovery of compensation where workman L.R.A.1916D.

Same — accident arising out of employment.

2. An accident resulting from a risk reasonably incidental to the employment should be considered as "arising out of the employment."

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Same — assault by fellow servant.

3. If an employee is assaulted by a fellow workman, whether in anger or in play, an injury so sustained does not arise "out of the employment," and the employee is not entitled to compensation therefor under the employers' liability act.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Same — statutory provisions.

4. The employers' liability act allows the parties interested to "settle all matters of

suffers injury from an assault, see annotation following *Re McNicol*, L.R.A.1916A, 309. For other cases in which compensation has been sought for injuries caused by horseplay or assault, see *Federal Rubber Mfg. Co. v. Havolic*, ante, 968, and *Hulley v. Moosbrugger*, L.R.A.1916C, 1203.

compensation between themselves." Rev Stat. 1913, § 3677. The amount of compensation, when not agreed upon by the parties, is to be determined by the district court (§ 3680), and, except as expressly provided in the act, must be payable periodically (§ 3686).

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Same — lump sum.

5. When the amount of compensation in periodical payments has been determined, either by the agreement of the parties or by the decision of the court, it "may be commuted to one or more lump sum payments, except compensation due for death and permanent disability." Rev. Stat. 1913, § 3681.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Same — agreement of parties.

6. In such case no other, or different authority for making such commutation is provided by that section. It still depends upon the agreement of the parties, except that their right to so agree in the specified cases depends upon "the consent of the district court."

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Same — consent of court.

7. In general, the agreement of the parties will authorize such commutation of payments. In case of death or permanent disability, the consent of the court is also necessary. If the district court, upon careful investigation, finds that special circumstances exist, making it necessary to commute to a lump sum for the protection of the workman or his dependents, the court may "consent" to such agreement by the parties.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

(February 5, 1916.)

APPEAL by defendant from a judgment of the District Court for Douglas County in plaintiff's favor in an action brought under the employers' liability act to recover compensation for injuries sustained by plaintiff while in the employ of defendant. Reversed.

The facts are stated in the opinion.

Messrs. Mahoney & Kennedy for appellant.

Messrs. Dunham & Aye, for appellee:

The findings of the court are sustained by sufficient evidence, and are the only findings which the court, under the evidence, was justified in making.

Menson v. Kelley, 81 Neb. 206, 115 N. W. 769; Cooley v. Rafter, 80 Neb. 181, 113 N. W. 1003; Wetherell v. Adams, 80 Neb. 584, 114 N. W. 778, 116 N. W. 861.

Plaintiff's injury was caused by an accident arising out of his employment. L.R.A.1916D.

Hulley v. Moosbrugger, 87 N. J. L. 103, 93 Atl. 79, 8 N. C. C. A. 283; State ex rel. People's Coal & Ice Co. v. District Ct. 129 Minn. 502, L.R.A.1916A, 344, 153 N. W. 119; Challis v. London & S. W. R. Co. [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23; Weekes v. Stead [1914] W. N. 263, 83 L. J. K. B. N. S. 1542, 111 L. T. N. S. 693, 30 Times L. R. 586, 58 Sol. Jo. 633, 7 B. W. C. C. 398 [1914], W. C. & Ins. Rep. 434, 6 N. C. C. A. 1010; Martin v. J. Lovibond & Sons [1914] 2 K. B. 227, 83 L. J. K. B. N. S. 806, 110 L. T. N. S. 455 [1914] W. C. & Ins. Rep. 78, 7 B. W. C. C. 243, 5 N. & C. C. A. 985.

If the Nebraska workmen's compensation act be excluded from consideration as inapplicable, there would be a liability at the common law on the part of the master.

Barrentine v. Henry Warpe Co. — Ark. —, 179 S. W. 328.

There was no error in the order of the court commuting the weekly compensation payments to one lump sum payment.

Sedgwick, J., delivered the opinion of the court:

While the plaintiff was in the employ of the defendant, another employee of the defendant threw a small stick which struck the plaintiff in the eye. The plaintiff brought this action in the district court for Douglas county to recover compensation under the employers' liability act. The trial court found in plaintiff's favor, and defendant has appealed.

The defendant presents two questions for consideration, and contends: First, that the finding of the court that the accident arose out of plaintiff's employment is not supported by the evidence; second, that the court erred in finding that the plaintiff is entitled to have his weekly compensation payments commuted to one lump sum payment, and the court erred in entering judgment for the plaintiff for a lump sum. These are important questions under this statute. Rev. Stat. 1913, § 3650, provides: "If both employer and employee become subject to article II. of this article, both shall be bound by the schedule of compensation herein provided, which compensation shall be paid in every case of injury or death caused by accident arising out of and in the course of employment, except accidents caused by, or resulting in any degree from, wilful negligence, as hereinafter defined, of the employee."

It is clear that the meaning is that the employee shall not be entitled to compensation under the act unless the accident which caused his injury happened in the course of his employment. The facts conceded by the

parties are that the plaintiff was regularly in the employment of the defendant. He was acting as a teamster, and at the time of the accident complained of was returning with his team and wagon to the yards of the defendant, and as he was entering the yards another employee, Brown, jumped into the wagon and began a playful scuffling with the plaintiff. Brown soon left the wagon, and, after running a short distance, picked up a small stick which he playfully threw at the plaintiff, and which struck the plaintiff in the eye, causing the loss of his eye. The contention is that the plaintiff scuffled with Brown while he was upon the wagon, and that after Brown left the wagon the plaintiff attempted to strike him with one of the lines. This latter contention is alleged in the answer, as follows: "Such injury as the plaintiff has was received through a playful assault or friendly scuffle, which plaintiff provoked and brought upon himself by attempting to strike said Guy Brown with the end of one of the lines with which plaintiff was driving his team, and the action of said Guy Brown in throwing the stick which injured the plaintiff was incited and caused by plaintiff's own action."

The plaintiff in his testimony denied that he engaged voluntarily in any scuffle with Brown, and denied that he struck Brown with the line, or made any attempt or motion towards doing so. Brown testified to something of a scuffle upon the wagon, and also testified positively that the plaintiff attempted to strike him with the line after he left the wagon, which was the cause of his throwing the stick. There was some other evidence upon these two points, but it may be said to be substantially conflicting.

"The accident must 'arise out of' the employment, as well as 'in the course of' the employment. Thus, where a workman during the course of the employment does something entirely foreign to the work which he is employed to do (playing a practical joke, for example), whereby he is injured, this accident could be said to have occurred 'during the course of' the employment, but it could not be said to 'arise out of' the employment, because the workman was not doing anything which he was employed to do when the accident happened." 1 Bradbury, *Workmen's Compensation*, p. 398.

The parties cite other authorities in the briefs establishing this rule. In this case clearly the plaintiff was not doing "something entirely foreign to the work which he is employed to do." He did not leave his wagon; the team was not stopped; he con-

tinued his regular employment. If he resisted the advances of Brown, and attempted to force him from the wagon, there is no evidence whatever that plaintiff did anything to encourage Brown to continue his performances. There is no doubt, under the many authorities cited by both parties, that if the workman abandons his employment, even for a short time, and engages in play, or some occupation entirely foreign to his employment, he is not entitled to compensation for an accident by which he is injured while so doing. It would seem also to be clear that, even if he does not abandon his employment, and even while engaged in the performance of his duty, if he does some act or thing not connected with his employment, which was intended to and probably did provoke an assault or retaliation, he would not be entitled to compensation for an injury the result of an accident so caused by himself. It is difficult to determine from this evidence whether the plaintiff made any motion at or towards striking Brown with his lines, and if he did it was in direct connection with Brown's interference with him, and may reasonably be said to be a part of that transaction.

There is evidence in the record that the defendant's employees were accustomed to join in what they called horseplay, and that the defendant took no precautions to stop such a custom or protect his employees. There is also evidence that this plaintiff was not in the habit of joining in such playful performances. Under such circumstances the supreme court of New Jersey said: "Where the accident is the result of a risk reasonably incident to the employment, it is an accident arising out of the employment (citing cases). The trial judge found, as a fact, that the decedent did nothing to invite the attack, and it is not denied that the decedent was acting, at the time, within the scope of his employment. . . . In the case under consideration, it appears that the prosecutor employed young men and boys. It is but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age, or even of maturer years, to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge to everyone who employs labor. At any rate, it cannot be said that the attack made upon the decedent was so disconnected from the decedent's employment as to take it out of the class of risks reasonably incident to the employment of labor." *Hulley v. Moosbrugger*, 87 N. J. L. 103, 93 Atl. 79, 8 N. C. C. A. 283.

Such rule would perhaps not be unjust in

its general application. The question is whether our statute can be so construed. The language of the statute is identical with the earlier statute of England, which was adopted also by some of our states. It had been many times construed by the English courts before it was adopted by our legislature. Under such circumstances the courts always consider that, if the legislature was not satisfied with the construction which had been given to language adopted from another jurisdiction, the language adopted would have been so guarded in the statute adopting it as to make the intention of the legislature clear. In other words, as it is generally stated, when a statute of another jurisdiction is adopted, its known construction and meaning in the jurisdiction of its origin are adopted also, unless a contrary intention is expressed by the legislature adopting it. The case of *Hulley v. Moosbrugger*, upon appeal to the court of errors and appeals (— N. J. —, L.R.A.1916C, 1203, 95 Atl. 1007), was reversed, and the law stated to be: "An employer is not charged with the duty to see that none of his employees assaults any other one of them, either wilfully or sportively. An employer is not liable, under the workmen's compensation act (P. L. 1911, p. 134), to make compensation for injury to an employee which was the result of horseplay or skylarking, so called, whether the injured or deceased party instigated the occurrence or took no part in it; for while an accident happening in such circumstances may arise in the course of, it cannot be said to arise out of, the employment."

The court cited and quoted from many decisions of the English courts which had so construed the statute long before our legislature adopted it, and we must conclude that our legislature intended that it should be so construed.

Did the court err in entering judgment for the plaintiff in a "lump sum?" The following sections of the Revised Statutes of 1913 appear to bear upon this question:

"Except as hereinafter provided, all amounts of compensation payable under the provisions of this article shall be payable periodically in accordance with the methods of payment of the wages of the employee at the time of his injury or death." Section 3666.

"The interested parties shall have the right to settle all matters of compensation between themselves in accordance with the provisions of this article." Section 3677.

"The amounts of compensation payable periodically under the law, either by agreement of the parties, or by decision of the L.R.A.1916D.

court, may be commuted to one or more lump sum payments, except compensation due for death and permanent disability. These may be commuted only with the consent of the district court." Section 3681.

This court had occasion to consider one phase of this question in the recent case of *Bailey v. United States Fidelity & G. Co.* — Neb. —, 155 N. W. 287. In that case the employer and the workman had agreed upon such commutation and the trial court rendered judgment in a lump sum. The question was whether the court had power to do so without the consent of the insurance company, which was also a party to the suit and was objecting to such commutation. This court sustained the trial court in so holding. It may no doubt sometimes happen that the workman, or his dependents, will be placed at a disadvantage by the refusal of the employer to agree to commutation in a lump sum. He may be compelled to receive a much less amount than he is entitled to because of his necessity to have the same paid in a lump sum. In the recent case above cited the court construed the statute and held that the statute implies "that a previous agreement must have been reached which will be ratified by the district court, and that without such an agreement the court cannot compel such a commutation of payments. . . . We do not feel at liberty to transpose the language of this section as plaintiff desires, and change its meaning so as to make commutation compulsory. The meaning is not ambiguous. The fact that the legislature did not express such a thought, while many such statutes do, is significant."

The law provides that "interested parties shall have the right to settle all matters of compensation between themselves." Section 3677.

Section 3681, which provides that periodical payments may be commuted, is in harmony with this provision. It does not provide that the district court may order commutation at the request of one of the parties, but does provide that the parties themselves cannot agree upon a commutation in certain cases without the consent of the court. If there is doubt in regard to the justice of this provision, there seems to be nothing in the language of the statute that would justify the court in construing it differently, and the remedy, if one is needed, must be by the legislature. It does not appear that the parties had agreed upon commutation, and the court has no authority to order it without such agreement.

The judgment of the District Court is reversed and the cause remanded.

FLORIDA SUPREME COURT.

GULF COAST TRANSPORTATION COMPANY, Plff. in Err.,
v.

C. A. HOWELL et al., Doing Business as
Howell & Son.

(— Fla. —, 70 So. 567.)

Carrier — acceptance of freight — location.

1. A common carrier may, by special arrangement with a shipper or by implication through habitual custom and usage, agree to accept and receive goods for transportation placed along its line of shipment at places other than the regularly designated places for the reception and delivery of freight.

For other cases, see Carriers, III. b, in Dig. 1-52 N. S.

Same — loss of goods — negligence and act of God.

2. Where goods are lost or injured as a result of the negligent act of the carrier to whom they have been delivered for transportation, concurring with an act of God, the carrier cannot maintain that the act of God was the sole proximate cause of the loss of or injury to the goods, so as to relieve it from liability.

For other cases, see Carriers, III. c, in Dig. 1-52 N. S.

Same — obligation of carrier.

3. The liability of a common carrier entrusted with goods for transportation is that of an insurer of the goods, and it is held to a strict accountability for injury to or loss of such goods.

For other cases, see Carriers, III. c, in Dig. 1-52 N. S.

Pleading — negligence of carrier.

4. A declaration which in substance alleges that, although the goods which were delivered to a carrier for transportation were destroyed by an act of God, yet the carrier could have foreseen such result, and by the exercise of prudence and diligence could have protected the goods from injury, but that it negligently failed to do so, states a cause of action against the carrier.

For other cases, see Pleadings, II. j, in Dig. 1-52 N. S.

Carrier — negligence of shipper — effect.

5. Negligence of the shipper concurring with an act of God in the destruction of goods delivered to a carrier for transportation constitutes no defense by the carrier

Headnotes by ELLIS, J.

Note. — As to duty of carrier where act of God has occurred or is threatened, see annotation following this case, post, 981.

For prior delay or deviation as affecting carrier's liability for loss of or damage to goods from act of God, see annotation following Seaboard Air Line R. Co. v. Mullin, post, 982
L.R.A.1916D.

to an action brought against it by the shipper for damages for loss of the goods, where the carrier is also guilty of negligence which, concurring with the act of God, resulted in the loss of the goods.

For other cases, see Carriers, III. c, in Dig. 1-52 N. S.

Evidence — burden of proving custom.

6. Where usage and custom are relied upon to show a constructive delivery of goods to a common carrier for transportation, the burden is upon the party relying upon such custom and usage to clearly and definitely establish it; and where the evidence is uncertain and contradictory, it will be deemed insufficient.

For other cases, see Evidence, II. m, in Dig. 1-52 N. S.

Same — burden of proving negligence.

7. Where the claim is made that, notwithstanding the intervention of an act of God, injury to the goods delivered to a common carrier for transportation would not have occurred but for the negligence of the carrier in exposing them, the burden of proof is upon the party asserting such claim.

For other cases, see Evidence, II. h, b, (2), in Dig. 1-52 N. S.

Evidence — sufficiency.

8. The evidence examined, and found to be insufficient to establish a constructive delivery of the goods by the shipper to the carrier for transportation.

For other cases, see Evidence, XII. k, in Dig. 1-52 N. S.

(December 16, 1915.)

ERROR to the Circuit Court for Lafayette County to review a judgment in plaintiffs' favor in an action brought to recover damages for alleged negligent failure of defendant to accept and transport certain freight belonging to plaintiffs which had been delivered by them at a landing for transportation by defendant. Reversed.

The facts are stated in the opinion.

Mr. William T. Hendry, for plaintiff in error:

The declaration was not sufficient to show that the negligence of the defendant as alleged was the proximate cause of the injury.

Benedict Pineapple Co. v. Atlantic Coast Line R. Co. 55 Fla. 514, 20 L.R.A.(N.S.) 92, 46 So. 732; Thomp. Neg. §§ 73, 74; Denny v. New York C. R. Co. 13 Gray, 481, 74 Am. Dec. 645; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Central of Georgia R. Co. v. Sigma Lumber Co. 170 Ala. 627, 54 So. 205, Ann. Cas. 1912D, 965; Rodgers v. Missouri P. R. Co. 75 Kan. 222, 10 L.R.A.(N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441; Williams v. Atlantic Coast Line R. Co. 56 Fla. 736, 24 L.R.A.(N.S.) 134, 131 Am. St. Rep. 169, 48 So. 209.

A prior and a remote cause cannot be made the basis of an action if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior and remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury

29 Cyc. 496; Missouri P. R. Co. v. Columbia, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338.

Plaintiffs' evidence fails to make out such a custom and usage as would bind the defendant; and, furthermore, defendant's evidence shows clearly that there was no such custom and usage as charged by the plaintiffs.

12 Cyc. 1100, 1101; Gulf Coast Transp. Co. v. Howell, 67 Fla. 508, 65 So. 661.

Mr. O. C. Howell, for defendants in error:

If the carrier and shippers agree that the goods may be deposited for transportation at a particular place and without express notice to the carrier, such deposit will be a sufficient delivery.

Hutchinson, Carr. § 90; Meyer v. Vicksburg, S. & P. R. Co. 41 La. Ann. 639, 17 Am. St. Rep. 408, 6 So. 218; Montgomery & E. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; East Line & R. River R. Co. v. Hall, 64 Tex. 615; Converse v. Norwich & N. Y. Transp. Co. 33 Conn. 166; Whitehurst v. Texas & P. R. Co. 131 La. 139, 59 So. 42; 4 R. C. L. 693; Merriam v. Hartford & N. H. R. Co. 20 Conn. 354, 52 Am. Dec. 344; Evansville & T. H. R. Co. v. Keith, 8 Ind. App. 57, 35 N. E. 296.

It is unquestionably the law of proximate cause generally, apart from its specific relation to acts of God, that whether the injury is the natural and probable consequence of the act or omission complained of, and such as ought to have been anticipated, is ordinarily a question of fact for the jury.

Cooley, Torts, § 15; 4 R. C. L. 707.

The carrier, in order to excuse himself from liability because of an act of God, must show that the act of God was the proximate, and not the remote, cause of loss.

Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; King v. Shepherd, 3 Story, 349, Fed. Cas. No. 7,804; The Majestic, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597, 2 Am. Neg. Rep. 282.

The negligence of a carrier in failing to forward promptly goods delivered to him for transportation is the proximate cause of their loss, where, because of such delay, they are overtaken in transit by a flood and destroyed by an act of God, even though the act of God could not have been reasonably anticipated.

Bibb Broom Corn Co. v. Atchison, T. & S. L.R.A.1916D.

F. R. Co. 94 Minn. 269, 69 L.R.A. 509, 110 Am. St. Rep. 361, 102 N. W. 709, 3 Ann. Cas. 450, 17 Am. Neg. Rep. 590; Michaels v. New York C. R. Co. 30 N. Y. 564, 86 Am. Dec. 415; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Deming v. Grand Trunk R. Co. 48 N. H. 455, 2 Am. Rep. 267; Cook v. Minneapolis, St. P. & S. Ste. M. R. Co. 98 Wis. 624, 40 L.R.A. 457, 67 Am. St. Rep. 830, 74 N. W. 561; Wolf v. American Exp. Co. 43 Mo. 421, 97 Am. Dec. 406; 1 Am. & Eng. Enc. Law, 2d ed. 596; Phillips v. Brigham, 26 Ga. 617, 71 Am. Dec. 227; Salisbury v. Herchenroder, 106 Mass. 458, 8 Am. Rep. 354.

It was the grossest continuing negligence of the defendant to pass by and leave the rosin at the mercy of a probable flood, knowing, also, that the height of this flood could be determined only by him who sent it.

Norris v. Savannah, F. & W. R. Co. 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. 475; Summerlin v. Seaboard Air Line R. Co. 56 Fla. 687, 19 L.R.A.(N.S.) 191, 131 Am. St. Rep. 164, 47 So. 557; Clyde S. S. Co. v. Burrows, 36 Fla. 121, 18 So. 349; Ethridge v. Central of Georgia R. Co. 136 Ga. 677, 38 L.R.A.(N.S.) 932, 71 S. E. 1063, Ann. Cas. 1912D, 128; Durden v. Southern R. Co. 2 Ga. App. 66, 58 S. E. 66; Georgia Southern & F. R. Co. v. Marchman, 121 Ga. 235, 48 S. E. 961; Galena & C. Union R. Co. v. Rae, 18 Ill. 488, 68 Am. Dec. 574; 4 R. C. L. 722; Alabama G. S. R. Co. v. Quarles, 145 Ala. 436, 5 L.R.A.(N.S.) 867, 117 Am. St. Rep. 54, 40 So. 120, 8 Ann. Cas. 308; Michaels v. New York C. R. Co. 30 N. Y. 564, 86 Am. Dec. 415; Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co. 130 Iowa, 123, 5 L.R.A.(N.S.) 882, 106 N. W. 498; Constable v. National S. S. Co. 154 U. S. 51, 38 L. ed. 903, 14 Sup. Ct. Rep. 1062; Hutchinson, Carr, 2d ed. § 200.

Proof of a constant and habitual practice and usage of the carrier to receive goods when they are deposited for him in a particular place, without special notice of such deposit, is sufficient to show a public offer by the carrier to receive goods in that mode, and to constitute an agreement between the parties by which the goods, when so deposited, shall be considered delivered to him without any further notice.

Montgomery & E. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; Metropolitan L. Ins. Co. v. Shane, 98 Ark. 132, 135 S. W. 836; Garrett v. Garrett, 252 Ill. 318, 96 N. E. 882; Tarrant v. Tarrant, 156 Mo. App. 725, 137 S. W. 56; O'Kane v. O'Kane, 103 Ark. 382, 40 L.R.A.(N.S.) 655, 147 S. W. 73; Wolff v. Pomponia, 52 Colo. 109, 120 Pac. 142; Taylor v. Union Sawmill Co. 105 Ark. 518, 152 S. W. 150; Glantz v. Chicago, B. &

Q. R. Co. 90 Neb. 606, 134 N. W. 242; Western R. Co. v. Hart, 160 Ala. 599, 49 So. 371; Gulf Coast Transp. Co. v. Howell, 67 Fla. 508, 65 So. 661.

Ellis, J., delivered the opinion of the court:

C. A. Howell and C. C. Howell, partners as Howell & Son, brought suit against the Gulf Coast Transportation Company, a corporation, common carriers of freight for hire upon the Suwannee river, for the alleged negligent failure of the common carrier to accept and transport 101 barrels of rosin belonging to the plaintiffs, and which had been delivered by them at a landing on the river for transportation by the defendant corporation, and by reason of which alleged negligent failure of the defendant corporation to accept and transport the freight, a flood which was then rising in the river swept away 16 barrels of the rosin, which were lost to the plaintiff.

The declaration alleged, in substance, that the defendant corporation was engaged in the business of a common carrier of freight for hire upon the Suwannee river, and for such purpose used a certain steamboat which ran between Cedar Keys and Branford, touching at other landings on the river, among which were Old Town, Wannee, and Rocky Bluff, which latter landing is in Lafayette county. That the defendant kept no agent, station master, nor other servant or agent at Rocky Bluff, but for years previous to the 24th day of April, 1912, it was the constant and habitual custom and usage for persons who desired to ship freight by the defendant's boat to place the freight at the landing at Rocky Bluff, and it was the constant and habitual custom and usage of the defendant to accept and transport all freight placed there for transportation. That prior to said date the plaintiffs and their predecessors in business for years had been engaged in the manufacture of rosin and spirits of turpentine, and had been for years habitually and constantly accustomed to place rosin at that landing for transportation by the defendant without designating the consignee, place of destination, or giving to the defendant any instructions as to the same, but merely marked on the barrels a symbol, initials, or name denoting the consignors, and that the defendant continuously and habitually accepted and carried the rosin so placed for transportation. That when rosin was placed by the plaintiffs at the landing for transportation marked as aforesaid, the defendant would, as the boat made the trip up the river, take the rosin to Branford and deliver it to the Atlantic Coast Line Railroad Company, and on the trip down the river would take the rosin

and deliver it to the Seaboard Air Line Railway at Wannee or to the Atlantic Coast Line Railroad Company at Old Town. That on the 24th day of April, 1912, the plaintiffs had placed 101 barrels of rosin at the Rocky Bluff landing for transportation by the defendant corporation. The rosin was marked and labeled with the name of the consignors, "Howell & Son." That the rosin had been placed there by the plaintiffs for transportation, relying upon the custom of the defendant corporation to carry it to Branford, or Wannee or Old Town, accordingly as the first boat of the defendant passed up or down the river. That on the 24th day of April, 1912, the water in the Suwannee river was rapidly rising, which fact was known to the defendant. That immediately following that date the water rose to such a height that plaintiffs could not get to Rocky Bluff to protect the rosin from the rapid rise of the river. That during that rise of the river Rocky Bluff landing was totally submerged by water, and 16 barrels of the rosin floated away and were lost. That on the said 24th day of April, 1912, and after the 101 barrels of rosin had been placed by the plaintiffs at the landing for transportation, the steamboat of the defendant passed the landing at Rocky Bluff between noon and sundown on its way down the river to Wannee and Old Town. That the agent of the defendant in charge of the boat knew that the rosin was at the landing for transportation, and could have, by the exercise of ordinary diligence and care, taken it aboard the boat and carried it to Wannee or Old Town, as had been its constant and habitual custom to do, but the defendant carelessly, improperly, and negligently failed to stop its boat at the landing, and "to accept and receive" and promptly and securely carry the freight therefrom, by reason of which negligence the plaintiffs lost the 16 barrels of rosin which were washed away by the flood.

A demurrer to the declaration was interposed by the defendant, the first, second, third, fifth, sixth, seventh, eighth, and ninth grounds of which are argued. These grounds present the following points: First, the defendant had no notice from the plaintiffs, or "otherwise," that the goods had been placed at the landing for shipment; second, that the declaration did not allege that the barrels of rosin were properly marked with the name of the consignee and destination, and it was not alleged that the rosin was ready for delivery when the defendant's steamer passed the landing; third, the name of the consignee and destination of the rosin was not alleged; fifth, that the declaration showed that the alleged negligence of the defendant was not the proximate cause of the

loss to the plaintiff; sixth, that the declaration showed the damage resulted from the act of God; seventh, the declaration showed that the loss resulted from plaintiffs' negligence; eighth, that the declaration showed contributory negligence on the part of the plaintiffs; and, ninth, that no contract was shown on the defendant's part to carry the goods; that the barrels of rosin were not marked so as to indicate the name of the consignee and destination; that it did not appear that the landing was the "premises of the defendant," nor did the declaration show on the part of the defendant any breach of contract or duty in not carrying the rosin.

The overruling of the demurrer was assigned as the first error.

The theory upon which the declaration is framed is that the defendant, as a common carrier of freight, by habitual custom and usage, agreed with its patrons, particularly the plaintiffs, that the deposit of goods by the shipper for transportation at Rocky Bluff landing would constitute a delivery to the defendant at that point upon the passage of its first steamer; that such custom constituted an offer by the defendant to receive goods in that way for transportation. That by habitual custom and usage, as practised between the plaintiffs and the defendant, rosin in barrels shipped by the plaintiffs bore no other mark or symbol of ownership than the name or initials of the plaintiffs, and no other shipping directions or instructions were required to be given, and that the defendant should, upon the passage of its first steamer, take the freight and carry it to Wannee and deliver it to the Seaboard Air Line Railway, or to Old Town and deliver it to the Atlantic Coast Line Railroad, if the defendant's first passing steamer was going down the river, or, in case the steamer should be going up the river, to carry the rosin to Branford and deliver it to the Atlantic Coast Line Railroad; that pursuant to this custom the plaintiffs placed at Rocky Bluff landing 101 barrels of rosin, for transportation by the defendant, marked with the plaintiffs' trading name, "Howell & Son," and that on the 24th day of April, 1912, the rosin so placed by the plaintiffs at the landing was ready for shipment; that the defendant's steamer on its way down the river passed the landing on the afternoon of that date, after the rosin was ready for shipment, but negligently failed to carry it, which act of negligence, in view of the rising river, contributed to the loss which the plaintiffs sustained; that although the flood in the river was the act of God, yet the injury would not have occurred but for the defendant's departure from its line of duty.

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It is distinctly alleged in the declaration that when the defendant's boat passed the Rocky Bluff landing on the afternoon of April 24, 1912, the rosin was "ready and waiting" to be carried by the defendant.

That a carrier may, by habitual custom and usage, agree to accept and receive freight for transportation under the circumstances alleged in the declaration, we think is undoubtedly true. See 4 Elliott, Railroads, §§ 1411-1413; 5 Am. & Eng. Enc. Law, 2d ed. 184; 1 Hutchinson, Carr. §§ 115, 116; Van Zile, Bailm. & Carr. § 440; Ethridge v. Central of Georgia R. Co. 136 Ga. 677, 38 L.R.A.(N.S.) 932, 71 S. E. 1063, Ann. Cas. 1912D, 128; Montgomery & E. R. Co. v. Kolb, 73 Ala. 396, 49 Am. Rep. 54; Merriam v. Hartford & N. H. R. Co. 20 Conn. 354, 52 Am. Dec. 344; Pittsburg, C. C. & St. L. R. Co. v. American Tobacco Co. 126 Ky. 582, 104 S. W. 377; 4 R. C. L. "Carriers," § 170; Pratt v. Grand Trunk R. Co. 95 U. S. 43, 24 L. ed. 336.

If the act of the defendant in passing the landing with its boat after the rosin had been placed and was ready for transportation was a negligent breach of its duty under the circumstances, then such breach of duty, concurring with the rise of water in the river, caused the loss, and the defendant could not claim that the act of God was the sole proximate cause so as to relieve the defendant from liability. In such case the rise of water in the river was not the immediate, direct, and efficient cause of the loss, but only a secondary cause which without the defendant's negligence would not have resulted in loss to the plaintiffs. See Clyde S. S. Co. v. Burrows, 36 Fla. 121, 18 So. 349; Norris v. Savannah, F. & W. R. Co. 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. 475; Seaboard Air Line R. Co. v. Mullin, — Fla. —, post, 982, 70 So. 467, decided at this term; 4 R. C. L. "Carriers," § 183; Wolf v. American Exp. Co. 43 Mo. 421, 97 Am. Dec. 406; Davis v. Wabash, St. L. & P. R. Co. 89 Mo. 340, 1 S. W. 327; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; New Brunswick S. B. & Canal Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394.

The liability of a common carrier is that of an insurer of goods intrusted to it for transportation, and it is held to a strict accountability for injury to or loss of such goods. While an act of God, as that term is defined in law, may relieve the carrier from liability for the loss of goods in its custody occasioned thereby when the carrier itself is not at fault, it may happen that by the exercise of reasonable diligence and prudence a carrier may foresee the results likely to follow an impending storm or approaching flood, and make such effort and exercise such care and skill as the circum-

stances seem reasonably to require to protect the goods in its custody for transportation from injury or loss. In the case of *Seaboard Air Line R. Co. v. Mullin*, — Fla. —, post, 982, 70 So. 467, this court rejected the doctrine announced in *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.* 130 Iowa, 123, 5 L.R.A. (N.S.) 882, 106 N. W. 498, 8 Ann. Cas. 45, to the effect that a negligent delay by a common carrier in transporting goods which are injured by an act of God before they reach their destination renders the carrier liable, notwithstanding the destructive act of God could not reasonably have been foreseen at the time of the negligent delay, but adopted what we consider the more reasonable rule, which exempts the carrier from liability under such circumstances. The declaration in this case, however, presents a situation different from that in which a delay in transporting goods resulted in placing them in the path of a storm or the way of a flood which could not have been reasonably foreseen at the time of the delay. It presents a situation in which the act of God was transpiring at the time of the alleged negligent departure by the carrier from its line of duty, and the question presented is, Could the probable results of that act of God have been reasonably foreseen by the carrier, and by the exercise of reasonable prudence and diligence on its part been guarded against and the goods protected from injury? 1 *Hutchinson*, Carr. § 292. This question, we think, should have been submitted to the jury.

The seventh and eighth grounds of the demurrer raise the point that the plaintiffs' negligence contributed to the loss. Since a common carrier is liable for loss or injury to goods in its custody for transportation, although such loss resulted from an act of God aided by the carrier's own negligence, it must negative all contributing fault of its own when it relies upon the fault or negligence of the shipper as concurring with the act of God in producing the loss. A case like this is differentiated from those cases resting primarily upon the defendant's negligence in carrying persons. As stated by Judge McClellan in the case of *McCarthy v. Louisville & N. R. Co.* 102 Ala. 193, 48 Am. St. Rep. 29, 14 So. 370: "The unaided, uncontributed to negligence of the plaintiff producing the injury is a defense, but where there is negligence also on the part of the defendant, without which, notwithstanding plaintiff's fault, the injury would not have happened, this fault of the defendant neutralizes and eviscerates the negligence of the plaintiff as a ground of defense. In the one case, plaintiff's contributory negligence destroys the cause of action; in the other, defendant's concurring

negligence destroys the defense." 4 R. C. L. "Carriers," § 203; *Atlantic Coast Line R. Co. v. Rice*, 169 Ala. 265, 29 L.R.A. (N.S.) 1214, 52 So. 918, Ann. Cas. 1912B, 389.

The declaration does not show that the act of the plaintiffs in placing the rosin at the landing was such a negligent act on their part as, concurring with the act of God, without any aiding negligence of the defendant, resulted in the loss. While it is true that the rosin would have been carried away in the flood, if the defendant had not passed the landing with its boat, or if its failure to take it was not a negligent act on its part under the circumstances, the declaration expressly alleges that the defendant's failure to carry the rosin was negligence on its part. The demurrer was properly overruled.

The defendant filed six pleas as follows: First, the general issue; second, that Rocky Bluff landing was not a regular landing for defendant's boat; that it received freight from that landing only on notice; and that it had no notice that the rosin mentioned in the declaration had been placed at the landing for transportation by defendant, and the rosin was never delivered to defendant for transportation; third, that the defendant did not receive the goods for transportation; that they were not marked in the name of the consignee or point of destination nor was defendant requested to receive and transport the goods, and was not advised by plaintiff that the goods were marked and placed at the landing for transportation by defendant. The fourth plea in full is as follows: "(4) And for a fourth plea this defendant says that on the occasion of the alleged negligence, the recent heavy rains had swollen the Suwannee river to such a great extent as to render transportation thereon extremely difficult and perilous, both to defendant and shippers; that at that date the waters in said river were rapidly rising; that down stream, between the point where defendant's steamboat was then located and the mouth of the river and the Gulf of Mexico, there was, and is, a railroad trestle spanning said river, and it had been repeatedly observed by the defendant's employees and agents that when the waters in said river should rise to a great height it was extremely difficult for boats such as ply upon said river to pass through said railroad bridge; that on the date alleged the water in said river was rapidly rising as aforesaid, and defendant's servants realized that it was of great importance, not only to the safety of the defendant's steamboat, but to the shippers whose freight and goods was then in the possession of the defendant and on de-

fendant's steamboat, that the said steamboat should be run by and below said railroad bridge before the waters in said river should rise to such a great height as to endanger the goods of the defendant and shippers who had placed goods in defendant's hands; that if the defendant's servants and agents had stopped said steamboat at said Rocky Bluff landing and remained there for the period of time necessary to take on board the said lot of 101 barrels of rosin, the waters in said river would have risen to such a great height before they could have reached said railroad bridge with said steamboat that the defendant verily believes that the said steamboat would have been in great danger of being wrecked and the owners of the cargo would have suffered a loss of at least a portion of their goods; that the perilous circumstances were beyond defendant's control, and the great freshet then upon said river was the act of God and beyond the defendant's knowledge or control."

Fifth, that it was not defendant's duty to stop its boat at the landing for the purpose of taking the rosin at the time alleged, not having been notified and requested to do so by the plaintiffs; that the plaintiffs, when they placed the rosin on the landing knew, or should have known, that it was in danger of being lost on account of the rising waters of the river; that they placed the rosin at the landing at their own risk and its loss was due to their negligence. It is also alleged in this plea that the loss was due to the act of God. And, sixth, that it had not been the custom and usage of the defendant to receive from the plaintiffs or other shippers rosin or other goods for transportation at said landing without notice to the defendant that the goods were ready for shipment and were properly marked showing consignee and destination.

The plaintiff's demurrer to the second, third, and fifth pleas, replied to the fourth, and joined issue upon the first and sixth pleas, and the defendant joined issue upon the plaintiff's replication to the fourth plea. The demurrer was sustained, and the defendant assigns as the second error that "the court erred in sustaining plaintiffs' demurrer to defendant's third, fourth, and fifth pleas." There was no demurrer to the fourth plea. The counsel for plaintiff in error, probably intended to assign as error the order sustaining the demurrer to the defendant's second, third, and fifth pleas. There was no error in sustaining the demurrer. The matters of defense set up in the second and third pleas were admissible under the general issue, while the fifth plea, stripped of its surplusage, and regarded as one setting up the act of God

as a defense, was fully covered by the fourth plea.

The fourth, fifth, and sixth assignments question the sufficiency of the evidence. The case presents questions of constructive delivery by custom and usage of the plaintiffs' goods to the defendant for transportation, and negligence of the defendant in failing to take the goods and carry them under the circumstances; an act of God threatening and impending at the time of such failure of the defendant to carry them. The burden of proof on both issues, we think, was upon the plaintiffs. On the point of an implied or constructive delivery of the goods by the plaintiffs to the defendant, this court said, when this case was here before, that such custom must be clearly and definitely proven, and where the evidence is uncertain and also contradictory, the usage and custom are not established. *Gulf Coast Transp. Co. v. Howell*, 67 Fla. 508, 65 So. 661.

Where the claim is made, as in this case, that notwithstanding the intervention of an act of God, the loss would not have happened but for the negligence of the carrier in unreasonably delaying the transportation of the goods, and thus negligently exposing them to the destructive act of God, the burden of proof is upon him who affirms it. While it is true that the liability of a common carrier for injury or loss of goods intrusted to him for transportation is that of an insurer, he is relieved of such liability where the destruction of or injury to the goods result solely from an act of God. The carrier's liability in cases where goods are injured or destroyed in his custody by act of God rests upon his negligence, which, mingling or concurring with the act of God, resulted in producing the loss. The carrier's liability in such cases is that of a common carrier, and not that of an insurer. The carrier's position is the same as that where he contracts with the shipper against liability for loss or damage to goods from certain causes or accidents. In one case the carrier is relieved from liability by the act of God, in the other by his contract with the shipper. In each case the plaintiff, alleging negligence of the carrier notwithstanding the excepted causes, has the burden of proof. See *Mitchell v. United States Exp. Co.* 46 Iowa, 214; *Muddle v. Stride*, 9 Car. & P. 380; *The Glendarloch*, 63 L. J. Prob. N. S. 89; *L. R. [1894] P. 226*, 6 Reports, 686, 70 L. T. N. S. 344, 7 Asp. Mar. L. Cas. 420, 24 Eng. Rul. Cas. 385; *Little Rock, M. R. & T. R. Co. v. Corcoran*, 40 Ark. 373; *Insurance Co. of N. A. v. Lake Erie & W. R. Co.* 152 Ind. 333, 53 N. E. 382; *Terre Haute & L. R. Co. v. Sherwood*, 132 Ind. 129, 17 L.R.A. 339, 32 Am. St. Rep. 239, 31 N. E. 781; *Morse v. Canadian P. R. Co.* 97

Me. 77, 53 Atl. 874; Sager v. Portsmouth, S. & P. & E. R. Co. 31 Me. 228, 50 Am. Dec. 659; Read v. St. Louis, K. C. & N. R. Co. 60 Mo. 199; Witting v. St. Louis & S. F. R. Co. 101 Mo. 631, 10 L.R.A. 602, 20 Am. St. Rep. 636, 14 S. W. 743; Lamb v. Camden & A. R. & Transp. Co. 46 N. Y. 271, 7 Am. Rep. 327; Cochran v. Dinsmore, 49 N. Y. 249; Long v. Pennsylvania R. Co. 147 Pa. 343, 14 L.R.A. 741, 30 Am. St. Rep. 732, 23 Atl. 459; Schaeffer v. Philadelphia & R. R. Co. 168 Pa. 209, 47 Am. St. Rep. 884, 31 Atl. 1088; Hubbard v. Harnden Exp. Co. 10 R. I. 244; Nashville, C. & St. L. R. Co. v. Stone, 112 Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. 1031; Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Schaller v. Chicago & N. W. R. Co. 97 Wis. 31, 71 N. W. 1042; Clark v. Barnwell, 12 How. 272, 13 L. ed. 985; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; Cau v. Texas & P. R. Co. 194 U. S. 427, 48 L. ed. 1053, 24 Sup. Ct. Rep. 663, 16 Am. Neg. Rep. 659; The Lennox (D.C.) 90 Fed. 308; The Henry B. Hyde, 32 C. C. A. 534, 61 U. S. App. 147, 90 Fed. 115; The Hindoustan, 14 O. C. A. 650, 35 U. S. App. 173, 67 Fed. 794; 1 Hutchinson Carr. § 312. Negligence is presumed only when certain facts naturally and logically impute the absence of that degree of care required by law. See *East Tennessee V. & G. R. Co. v. Mitchell*, 11 Heisk. 400, text, 404, 6 Am. Neg. Cas. 444. The cases touching this point, however, are in irreconcilable conflict. It would be useless to attempt a discussion of the more important adjudications upon both sides of the controversy; it would lead to but one result, and that is that the conflict is irreconcilable. We consider that the safer course is to follow the rule laid down in the authorities above cited, and hold that where the loss or injury to the goods in the hands of a common carrier for transportation is occasioned by an act of God, the carrier is prima facie relieved from all liability, and casts upon the shipper the burden of showing liability nevertheless by evidence of the carrier's negligence. *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. ed. 160.

A careful examination of the evidence in the case as exhibited by the bill of exceptions fails to show that the second trial of the case developed any clearer proof of the alleged usage and custom of the defendant to stop its boat at Rocky Bluff landing upon its first passage, after goods had been placed there by the plaintiffs for transportation, than was exhibited upon the record when the case was here before. In some particulars the evidence for the plaintiffs may be more certain, but that for the defendant is equally so. Upon the entire record, L.R.A.1916D.

ord, however, there is, in our opinion, a lack of that degree of clearness and definiteness as to the existence of the custom which, in the former opinion, this court said was necessary. C. A. Howell for the plaintiffs testified, that it was the "custom for the boat people to take this rosin on the boat and carry to the railroad company at one of the three points mentioned on their first trip after the rosin was placed there, unless there was just a few barrels."

On cross-examination he said: "I did not know this of my own personal knowledge. I was not always present." That he knew nothing more about the custom than he knew when he testified at the first trial. "I say they took it the first trip so far as I knew."

Dr. J. M. Mann said: "The custom as to carrying freight was, we always taking it when we found it at the landing, and if there was anything for shipment, we carried it on our first trip up the river."

This witness was at one time in the employment of the defendant as purser. On cross-examination he said that at the former trial he testified that "it was the general rule to stop and take on the rosin at the first passing of the boat; and, if we were loaded, we would sometimes pass without taking it on, and then later double back and get it."

E. S. Gauldin said, he had been engaged in the steamboat business on the Suwannee river about twelve years. "Rocky Bluff was a landing from which rosin was carried by my boat. We had a list of the landings all along the river from where we received stuff and delivered to the railroad, and delivered stuff there to the landing were kept on our regular waybills and advertising, and everything. All of the landings we received freight, but at these special landings delivered anything shipped to the landings and received anything on the landing to the railroad; that was the custom of shipping at Rocky Bluff at that time. I am familiar with the custom."

This witness worked for the defendant at one time. He further testified that it was "always customary for the steamboat company to take the spirits and rosin at the landing away on the trip that they went to the point that we shipped to."

On cross-examination he said: "I don't know of my own personal knowledge that the defendant company always took the rosin and spirits placed at the landing on their first trip past."

He also said that, if "it ever failed to carry any rosin we had on the landing on the first trip that way that it was shipped to, I don't know it, and I would have known it if it had." "When it was going the way

it was shipped, it never passed there without taking it on."

John H. Peck for the defendant said: he was in the employment of the defendant during the year 1912. He was master of the steamer and agent of the company. He said the custom was to take rosin from the landing when there was a sufficient amount gathered on the bank for shipment; that he did not always stop and take on rosin at Rocky Bluff landing when there was a carload on the bank; he used his own discretion about it, "all the landings the same way." I did not always stop at the first passing and take on rosin deposited at Rocky Bluff; we generally took it off if there was an occasion, but sometimes passed by and got it going back."

The evidence does not, as we stated, clearly and definitely show such a usage or custom, and as to carrying of freight by the defendant from Rocky Bluff landing as is

alleged in the declaration. The plaintiffs, therefore, failed to show any contract with the defendant relative to the shipment of the rosin, and showed no actual or constructive delivery of it to the defendant for transportation.

As to proof of defendant's negligence in failing to remove the rosin under the circumstances, even if it had been its duty by reason of any contract of shipment to do so, there is no evidence whatsoever. On the other hand, there was evidence that the flood was an unusual one, and no evidence that the defendant had any reason to believe or anticipate the rising of the waters to the great height which they reached.

The judgment of the court below is reversed.

Taylor, Ch. J., and Shackelford, Cockrell, and Whitfield, JJ., concur.

Annotation—Duty of carrier where act of God has occurred or is threatened.

For the earlier cases upon this question, see note to *Armstrong v. Illinois C. R. Co.* 29 L.R.A.(N.S.) 671.

For the duty of a carrier to hasten shipment or take other precaution to prevent loss threatened without any antecedent fault on its part, see *Pine Bros. v. Chicago, B. & Q. R. Co.* 39 L.R.A.(N.S.) 639, and note.

As to prior delay or deviation as affecting carrier's liability for loss of or damage to goods by act of God, see *Seaboard Air Line R. Co. v. Mullin*, post, 982.

It is the duty of a carrier to take notice of all signs of an approaching flood, and, if they are of such character as reasonably to awaken apprehension, to take such means as are reasonably within its control for the safety of goods in its care. *Davis v. Wabash, St. L. & P. R. Co.* (1883) 13 Mo. App. 449.

So, where a carrier has notice of a flood which is likely to damage goods in its charge, it is its duty to exercise reasonable care in protecting the property, and this duty is a continuing one as long as the loss is avoidable. *Cunningham v. Pennsylvania R. Co.* (1912) 50 Pa. Super. Ct. 609.

Where the evidence tends to show that the carrier might, by the exercise of due care, have placed a car so that the goods contained in it would not have been injured, notwithstanding the severity of the storm, the question of the carrier's liability is for the jury. *St. Louis & S. F. R. Co. v. Dreyfus* (1914) 42 L.R.A.1916D.

Okl. 401, L.R.A. 1915D, 547, 141 Pac. 773.

If a carrier, after becoming aware of a storm and the impending danger to goods in its care, could, by the exercise of such care as a man of ordinary prudence would have exercised under like circumstances, have protected the goods from the consequences of the disaster, and failed to do so, it will be liable notwithstanding the storm itself was of unprecedented violence and could not have been foreseen. *International & G. N. R. Co. v. Bergman* (1901) — *Tex. Civ. App.* —, 64 S. W. 999.

Where a carrier knew that the water of a river had risen from 2 to 4 feet above all previous records, and was then rising at a rapid rate, the question whether an ordinarily prudent and diligent person would then have taken steps to save property which was exposed to the perils of the flood was properly submitted to the jury. *Ferguson v. Southern R. Co.* (1911) 91 S. O. 61, 74 S. E. 129.

Where the evidence is sufficient to sustain a finding that a carrier was guilty of negligence in depositing goods in its yards at the time it did, in view of the history of the stream and of the warnings sent out by the weather bureau, and other evidence of an approaching flood, a verdict against it will be sustained. *Atchison, T. & S. F. R. Co. v. Madden* (1907) 46 *Tex. Civ. App.* 597, 103 S. W. 1193.

Where there was some evidence that

the carrier had sufficient warning of an approaching flood, and by the exercise of proper care might have protected plaintiff's goods from it, the question of its negligence is for the jury. *Fentiman v. Atchison, T. & S. F. R. Co.* (1906) 44 Tex. Civ. App. 455, 98 S. W. 939.

In an action for the destruction of goods in a carrier's yards, by an unprecedented flood, based upon its negligence in not removing them before the destructive part of the flood came, the question is whether the defendant was warned, not merely of a rise in the river, but of the approach of the unprecedented flood. *Merritt Creamery Co. v. Atchison, T. & S. F. R. Co.* (1909) 139 Mo. App. 149, 122 S. W. 322.

Where a carrier placed a car of goods in its yards next to a car of unslaked lime, at a time when it knew that the water was higher than it ever had been known to be before, and was still rising, the negligent placing of the car was the proximate cause of its loss by fire started by the ignition of the unslaked lime upon contact with the rising flood. *Barnet v. New York C. & H. R. R. Co.* (1915) 167 App. Div. 738, 153 N. Y. Supp. 374.

In *National Rice Mill. Co. v. New Orleans & N. E. R. Co.* (1912) 132 La. 615, 61 So. 708, Ann. Cas. 1914D, 1099, where the rise of the river was forecast to within a few inches of the maximum actually attained, and the carrier had notice of this, and of the increasing height of the flood, but made no effort to save the cars containing plaintiff's rice, which had been stored in the lowest part of its yards next to cars containing unslaked lime, which would ignite on contact with water, until it was too late to save them without the risk of life, it was held that the carrier was not excused from liability because of the unprecedented flood.

Where goods were delayed for an un-

reasonable length of time in the yards of a carrier, and were there overtaken by a flood, the carrier was liable, especially in view of the fact that ample warnings were given of the approach of the flood. *Wabash R. Co. v. Sharpe* (1906) 76 Neb. 424, 124 Am. St. Rep. 823, 107 N. W. 758; *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.* (1911) 89 Neb. 660, 131 N. W. 1047.

A carrier is liable for injury to stock because of delay en route, when it knew, or should have known, when it accepted them for shipment, that it could not transport them to destination within a reasonable time because of unusual floods. *Tate v. Missouri P. R. Co.* (1910) 157 Ill. App. 105.

Where cattle were delayed in shipment by a severe snowstorm, but their injury was in part due to failure of the carrier to properly care for them during the delay, it was held liable, as its negligence mingled as an active co-operative cause with the act of God. *Bell v. Union P. R. Co.* (1913) 177 Ill. App. 374.

In *Jonesboro, L. C. & E. R. Co. v. Dunnavant* (1915) 117 Ark. 451, 174 S. W. 1187, where the carrier negligently delayed the shipment of corn, although informed that the consignee badly needed it, and that the levee was liable to break and prevent its shipment, a verdict for the cost of shipping it to another point and hauling it by wagon to its destination, which was made necessary by the breaking of the levee, was sustained.

Where a carrier negligently stored casks of wine while they were delayed during a period of severe cold weather, so that they were frozen, it was held that the carrier was liable, as its negligence co-operated with the act of God. *Wolf v. American Exp. Co.* (1869) 43 Mo. 421, 97 Am. Dec. 406.

R. L. S.

FLORIDA SUPREME COURT.

SEABOARD AIR LINE RAILWAY, Piff.
in Err.,
v.
W. H. MULLIN.

(— Fla. —, 70 So. 467.)

Carrier — loss by act of God — liability.

1. Where, in the course of transportation, goods are injured by an unprecedented flood, and there is no negligence on the part of

the common carrier in taking care of the goods, or otherwise, the loss is attributable to the flood as an "act of God," and the carrier is not liable.

For other cases, see *Carriers, III. c.*, in *Dig.* 1-52 N. S.

Note. — For prior delay or deviation as affecting carrier's liability for loss of or damage to goods from act of God, see annotation following this case, post, 988.

As to duty of carrier where act of God has occurred or is threatened, see annotation following *Gulf Coast Transp. Co. v. Howell*, ante, 974.

Headnotes by WHITFIELD, J.
L.R.A.1916D.

Same — negligent delay — effect.

2. Whether a common carrier is liable for injury to goods, where, after being negligently delayed in transit, they, while still in transit, are injured by an act of God, such as an unprecedented flood, depends upon whether the negligent delay of the carrier has a proximate casual relation, or a mere remote or casual relation, to the subsequent injury.

For other cases, see *Carriers*, III. c, in Dig. 1-52 N. 8.

Same — proximate cause.

3. A merely negligent delay in transporting goods, which delay causes the goods to be at a point in transit where they are injured or destroyed by an unprecedented flood that could not have been foreseen at the time of the delay, does not render the carrier liable for the direct consequences of the flood upon the goods, if there be no malconduct by the carrier, and negligence of the carrier in not providing reasonably safe and adequate facilities for and attention to the safety of the goods does not directly contribute to the injury, even though the goods would not have been at the point where they were injured, and would have escaped the flood, but for the negligent delay of the carrier at the time when the flood could not have been foreseen. Such an injury is not an ordinary sequence of the delay.

For other cases, see *Proximate Cause*, III. in Dig. 1-52 N. 8.

(December 10, 1915.)

ERROR to the Circuit Court for Marion County to review a judgment in plaintiff's favor in an action brought to recover damages for loss of freight injured by flood while in transit. Reversed.

The facts are stated in the opinion.

Mr. L. N. Green for plaintiff in error.

Mr. H. M. Hampton, for defendant in error:

Defendant being negligent, the act of God will not excuse him from liability.

Michaels v. New York C. R. Co. 30 N. Y. 564, 86 Am. Dec. 415; Norris v. Savannah, F. & W. R. Co. 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. 475; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Condit v. Grand Trunk R. Co. 54 N. Y. 500; Southern Exp. Co. v. Womack, 1 Heisk. 257; Wabash R. Co. v. Sharpe, 76 Neb. 424, 124 Am. St. Rep. 823, 107 N. W. 758; McClary v. Sioux City & P. R. Co. 3 Neb. 44, 19 Am. Rep. 631; Wald v. Pittsburg, O. C. & St. L. R. Co. 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888; Wolf v. American Exp. Co. 43 Mo. 421, 97 Am. Dec. 406; Michigan C. R. Co. v. Curtis, 80 Ill. 324; McGraw v. Baltimore & O. R. Co. 18 W. Va. 361, 41 Am. Rep. 696; Deming v. Grand Trunk R. Co. 48 N. H. 455, 2 Am. Rep. 267; Read v. St. Louis, K. C. & N. R. Co. 60 Mo. 199; Davis L.R.A.1916D.

v. Garrett, 6 Bing. 716, 4 Moore & P. 540, 8 L. J. C. P. 253, 31 Revised Rep. 524, 5 Eng. Rul. Cas. 273; Williams v. Grant, 1 Conn. 487, 7 Am. Dec. 235; Crosby v. Fitch, 12 Conn. 410, 31 Am. Dec. 745; Rodgers v. Central P. R. Co. 67 Cal. 607, 8 Pac. 377, 13 Am. Neg. Cas. 346; Salisbury v. Herchenroder, 108 Mass. 458, 8 Am. Rep. 354; Higgins v. Dewey, 107 Mass. 494, 9 Am. Rep. 63; Shearm. & Redf. Neg. § 39; Savannah F. & W. R. Co. v. Commercial Guano Co. 103 Ga. 590, 30 S. E. 555; Thomas v. Lancaster Mills, 19 C. C. A. 88, 34 U. S. App. 404, 71 Fed. 481; New Brunswick S. B. & Canal Transp. Co. v. Tiers, 24 N. J. L. 697, 64 Am. Dec. 394; 1 Thomp. Neg. §§ 68-72; Hutchinson, Carr. §§ 274, 301; Adams Exp. Co. v. Jackson, 92 Tenn. 326, 21 S. W. 666; Bostwick v. Baltimore & O. R. Co. 45 N. 1. 712; 6 Cyc. 382.

Whitfield, J., delivered the opinion of the court:

An action was brought by Mullen against the carrier to recover damages for the loss of freight injured by a flood in transit. There was judgment for the plaintiff, and the defendant took writ of error.

It appears by an agreed statement of facts that the goods were delivered to the defendant carrier at Ocala, Florida, on February 22, 1913, for transportation to Youngstown, Ohio, according to the terms and conditions of a bill of lading delivered to the shipper by the agent of the defendant. That the shipment was loaded on the same day and was by the defendant forwarded on the route towards its destination in the state of Ohio, arriving in Atlanta, Georgia, on March 18, 1913, where it was delivered by the defendant at once to the next succeeding carrier for further transportation. That, if said transportation by the defendant had been with due and reasonable speed and diligence, said shipment would have arrived in Atlanta, Georgia, and been delivered to the next succeeding carrier not later than February 28, 1913, instead of March 18, 1913. That on receipt of said shipment the next succeeding carrier, and those carriers thereafter in the line of transportation, forwarded said shipment with all due and reasonable speed toward the ultimate destination thereof in the state of Ohio, and with no negligence which in any manner contributed to the loss or damage, as hereinafter mentioned, of the aforesaid personal property. That if the defendant had transported said shipment to Atlanta, Georgia, and delivered the same to the next succeeding carrier with due and reasonable speed and despatch, the same would have arrived at its destination in the state of Ohio and been delivered to the

plaintiff in time to have avoided the loss. That said shipment having arrived from Atlanta, Georgia, in due course, in the state of Ohio, was caught in the latter state in great rains and floods of water which destroyed certain portions of said shipment and badly injured other portions thereof. That the rains and floods aforesaid were the most sudden and violent ever known at or in the vicinity where said shipment was then caught and damaged as aforesaid, and they occurred at least six days after the defendant had delivered said shipment to the next succeeding carrier at Atlanta, Georgia, as hereinbefore mentioned, the coming or happening of which rains and floods it was utterly impossible for the defendant under any circumstances to have foreseen at any time prior to the delivery of said shipment to the aforesaid next succeeding carrier. That during the months of February, March, April, and May, 1913, the defendant, and other common carriers over whose line of road plaintiff's shipment aforesaid moved, had on file with the Interstate Commerce Commission of the United States, and in full force and effect, certain tariffs or schedules of freight rates applicable to this shipment. That as a matter of fact the shipment was turned over by the representative of the plaintiff to the defendant as a carload shipment, which the defendant accepted. The car was duly sealed up at Ocala and moved forward to Youngstown, Ohio, under that seal for the entire distance. That had the shipment gone forward as less than a carload movement, it would have been subject to a number of removals between Ocala and Youngstown, aforesaid, thereby greatly increasing danger of damage and loss thereto. The statement of fact shows that a carload of household goods being transported in interstate commerce from Ocala, Florida, to Youngstown, Ohio, was negligently delayed en route before it reached Atlanta, Georgia. After leaving Atlanta and before reaching destination the goods were injured by an unprecedented flood—an act of God—which could not reasonably have been foreseen when the negligent delay occurred. If there had been no delay in the transportation before reaching Atlanta, the shipment might have been completed without injury from the flood.

The liability of a common carrier of goods is that of an insurer; and in cases of loss of or injury to goods intrusted to it for transportation, no excuse avails the carrier, except that such loss or injury was caused by the act of God, or by the public enemies of the state, or by the sole fault of the shipper or his agent. 1 Moore, Carr. 306. A common carrier of goods is an in-

surer against all risks of loss or injury, except those resulting directly from the act of God or the public enemy without the intervention of human agency. *Clyde S. S. Co. v. Burrows*, 36 Fla. 121, 18 So. 349.

The only acts of God that excuse common carriers from liability for loss of or injury to goods in transit are those operations of the forces of nature that could not have been anticipated and provided against, and that by their superhuman force unexpectedly injure or destroy goods in the custody or control of a common carrier. See 4 R. C. L. p. 709; *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.* 55 Fla. 514, 20 L.R.A.(N.S.) 92, 46 So. 732. See also 13 Mod. Am. Law, 79.

Where in the course of transportation goods are injured by an unprecedented flood, and there is no negligence on the part of the common carrier in taking care of the goods or otherwise, the loss is attributable to the flood as an act of God, and the carrier is not liable. *Norris v. Savannah, F. & W. R. Co.* 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. 475. But where the flood should have been anticipated in time to save the goods, or the carrier was negligent in not protecting the goods, or exposed the goods to the flood, or tortiously withheld the goods, or so deviated from the proper route as to amount to a conversion of the goods, or the negligence of the carrier contributes directly to the injury, or the carrier fails to provide reasonably adequate and safe facilities, which directly contributed to the injury, the carrier is liable. See *National Rice Mill Co. v. New Orleans & N. E. R. Co.* 132 La. 615, 61 So. 708, Ann. Cas. 1914D, 1099; *Wabash R. Co. v. Sharpe*, 76 Neb. 424, 124 Am. St. Rep. 823, 107 N. W. 758; *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415; *Wolf v. American Exp. Co.* 43 Mo. 421, 97 Am. Dec. 406; *New Brunswick S. B. & Canal Transp. Co. v. Tiers*, 24 N. J. L. 697, 64 Am. Dec. 394; *Crosby v. Fitch*, 12 Conn. 410, 31 Am. Dec. 745; *Henry v. Atchison, T. & S. F. R. Co.* 83 Kan. 104, 28 L.R.A.(N.S.) 1088, 109 Pac. 1005; *Davis v. Wabash, St. L. & P. R. Co.* 89 Mo. 340, 1 S. W. 327; *Pruitt v. Hannibal & St. J. R. Co.* 62 Mo. 527; *Richmond & D. R. Co. v. Benson*, 86 Ga. 203, 22 Am. St. Rep. 446, 12 S. E. 357, 4 R. C. L. p. 718; *Pinkerton v. Missouri P. R. Co.* 117 Mo. App. 288, 93 S. W. 849; *Wabash R. Co. v. Sharpe*, 76 Neb. 424, 124 Am. St. Rep. 823, 107 N. W. 758; *McGraw v. Baltimore & O. R. Co.* 18 W. Va. 361, 41 Am. Rep. 696; *Hewett v. Chicago, B. & Q. R. Co.* 63 Iowa, 611, 19 N. W. 790; *St. Louis & S. F. R. Co. v. Drayfus*, 42 Okla. 401, L.R.A. 1915D, 547, 141 Pac. 773; *Bell v. Union P. R. Co.* 177 Ill. App. 374; *Thomas*

v. Lancaster Mills, 19 C. C. A. 88, 34 U. S. App. 404, 71 Fed. 481; Texas & P. R. Co. v. Coutourie, 68 C. C. A. 177, 135 Fed. 465; Atchison, T. & S. F. R. Co. v. Madden S. & Co. 46 Tex. Civ. App. 597, 103 S. W. 1193. See also Benedict Pineapple Co. v. Atlantic Coast Line R. Co. 55 Fla. 514, 20 L.R.A. (N.S.) 92, 46 So. 732; De Funiak Springs v. Perdue, 69 Fla. 326, 68 So. 234.

In *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Green-Wheeler Shoe Co. v. Chicago*, R. I. & P. R. Co. 130 Iowa, 123, 5 L.R.A. (N.S.) 882, 106 N. W. 498, 8 Ann. Cas. 45; *Bibb Broom Corn Co. v. Atchison*, T. & S. F. R. Co. 94 Minn. 269, 69 L.R.A. 509, 110 Am. St. Rep. 361, 102 N. W. 709, 3 Ann. Cas. 450, 17 Am. Neg. Rep. 590; *Alabama G. S. R. Co. v. Quarles*, 145 Ala. 436, 5 L.R.A. (N.S.) 867, 117 Am. St. Rep. 54, 40 So. 120, 8 Ann. Cas. 308; *Wald v. Pittsburg*, C. C. & St. L. R. Co. 162 Ill. 545, 35 L.R.A. 356, 53 Am. St. Rep. 332, 44 N. E. 888; and other somewhat similar cases.—the courts hold that when there is a negligent delay by a common carrier in transporting goods, and subsequently before reaching destination the goods are injured by an act of God that could not reasonably have been foreseen at the time of the negligent delay, the carrier is liable. 4 R. C. L. p. 722; *Moore*, Carr. p. 371. Such holdings are presumably predicated upon the theory that the delay is a concurring and proximate cause of the loss or injury, or that because of the delay the law enlarges the liability of the common carrier by withdrawing the exemption from liability that usually exists when goods in transit are injured by an act of God.

The United States Supreme Court and the courts of a number of the states hold that a delay in transportation which places the shipment in the track of an unprecedented flood is a remote, and not a proximate, cause of an injury to the shipment by the flood, and the carrier is not liable merely because of the delay. Such courts base the exemption of the carrier from liability upon the ground that the delay was too remote, and that the proximate cause of the injury, to wit, the destructive act of God, could not have been foreseen and provided against as a probable result of the negligent delay. In this view the carrier is held not liable even though the injury would not have occurred but for the previous delay in transportation which caused the shipment to be in the track of the flood. See *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909; *St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co.* 139 U. S. 223, text 237, 35 L. ed. 154, 11 Sup. Ct. Rep. 554; *Empire State Cattle Co. v. Atchison, T. & S. F. R. L.R.A.* 1916D.

Co. (C. C.) 135 Fed. 135; *Scott v. Baltimore, C. & R. S. B. Co.* (C. C.) 19 Fed. 56; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Yazoo & M. Valley R. Co. v. Millsaps*, 76 Miss. 855, 71 Am. St. Rep. 543, 25 So. 672; *Herring v. Chesapeake & W. R. Co.* 101 Va. 778, 45 S. E. 322; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Rodgers v. Missouri P. R. Co.* 75 Kan. 222, 10 L.R.A. (N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441; *Sauter v. Atchison, T. & S. F. R. Co.* 78 Kan. 331, 97 Pac. 434; *Grier v. St. Louis Merchants' Bridge Terminal R. Co.* 108 Mo. App. 565, 84 S. W. 158; *Armstrong, B. & Co. v. Illinois C. R. Co.* 26 Okla. 352, 29 L.R.A. (N.S.) 671, 109 Pac. 216; *Hunt v. Missouri, K. & T. R. Co.* — Tex. Civ. App. —, 74 S. W. 69; *International & G. N. R. Co. v. Bergman*, — Tex. Civ. App. —, 64 S. W. 999; *Denny v. New York C. R. Co.* 13 Gray, 481, 74 Am. Dec. 645; 4 R. C. L. 721; 1 *Hutchinson*, Carr. 3d ed. §§ 297 et seq.; *Moffatt Commission Co. v. Union P. R. Co.* 113 Mo. App. 544, 88 S. W. 117; *Lamar Mfg. Co. v. St. Louis & S. F. R. Co.* 117 Mo. App. 453, 93 S. W. 851; *General Fire Extinguisher Co. v. Carolina & N. W. R. Co.* 137 N. C. 278, 49 S. E. 208; *Lightfoot v. St. Louis & S. F. R. Co.* 126 Mo. App. 532, 104 S. W. 482; 2 *Mod. Am. Law*, p. 125.

Interstate shipments of freight are subject to the paramount regulations of Congress. One of the regulations prescribed by an act of Congress is "that any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass." [34 Stat. at L. 595, chap. 3591, § 7, Comp. Stat. 1913, § 8592].

Within the meaning of the quoted act of Congress, Was the injury to the goods "caused by" any of the railroad companies to which they were intrusted en route?

Treating the interstate shipment under the Federal law or otherwise as involving only one transportation from the point of origin to destination, though different carriers severally covered portions of the entire route, the liability of the defendant initial carrier is no greater than it would be if it transported over the entire route.

Whether a common carrier is liable for injury to goods, where, after being negligently delayed in transit, the goods, while still in transit are injured by an act of

God, such as an unprecedented flood, depends upon whether the negligent delay of the carrier has a proximate casual relation, or a mere remote or casual relation, to the subsequent injury.

At common law, in the absence of a binding contract otherwise fixing liability, a common carrier is, with certain exceptions, liable as an insurer to a shipper for losses of or injuries to goods being transported. If the losses or injuries are caused by an act of God that could not have been foreseen, and from which the carrier could not by the exercise of due care protect the goods, the carrier is not liable. But if, prior to a loss of or injury to goods in transit, the conduct of the carrier constitutes in fact or in law a tortious conversion of the goods, the carrier is liable as for the unlawful conversion, even though the goods are subsequently injured or destroyed by an unforeseen and overpowering act of God. And if negligence or fault of the carrier contributed proximately to an injury or loss that was directly caused by an act of God, the carrier is liable if the loss or injury followed in ordinary natural sequence from, or was a natural and probable result of, the carrier's negligence or fault. In the latter class of cases, the liability of the carrier is for a negligent breach of contract or legal duty, and the rights of the parties are determined by the rules of law relative to actionable negligence.

Actionable negligence exists when a loss or injury to one without fault results directly from another's mere negligence, or when the loss or injury sustained by one is such as results in ordinary natural sequence from the negligence, or such as naturally and ordinarily should have been regarded as a probable, not as a merely possible, result of the simple negligence of another. Conversely, when the loss or injury is not a direct result of the mere negligence, and the loss or injury is not a natural ordinary sequence, or such as naturally and ordinarily should have been regarded as a probable, and not a merely possible, result of the simple negligence, the negligence is not actionable. See 2 Mod. Am. Law, pp. 114 et seq. If an independent efficient cause intervenes between the negligence and the injury, and the original negligence does not directly contribute to the force or effectiveness of the intervening cause, the original negligence is not regarded as a proximate cause of the injury, even though the injury might not have occurred but for the original negligence. A proximate cause stands next in casual relation to the effect. *Chicago & E. I. R. Co. v. Heerey*, 105 Ill. App. 647; *Perkins v. Morgan Lumber Co.* 68 Fla. 503, 67 L.R.A.1916D

So. 126; *Illinois C. R. Co. v. Siler*, 292 Ill. 390, 15 L.R.A.(N.S.) 819, 82 N. E. 362, 11 Ann. Cas. 368. A proximate cause produces the result in continuous sequence, and without which the result would not have occurred. *Ramsbottom v. Atlantic Coast Line R. Co.* 138 N. C. 38, 50 S. E. 448. These principles are applicable where injuries occur from mere negligence that is a breach of contract or of a public duty by a common carrier, where no malconduct is involved, and the negligence is not in failing to provide reasonable facilities required by law or to give proper attention which directly contributed to the injury. In this case the carrier was merely negligent in delaying the shipment, there being no conversion in law or deviation from the proper route, or malconduct or lack of reasonably adequate and safe facilities. There was subsequent to the delay "no negligence which in any manner contributed to the loss or damage," as is expressly stipulated. An assumption that the goods would not have been injured had the carrier not negligently delayed the shipment en route before the flood happened will not conclusively show liability of the carrier, since the negligent delay did not directly cause or contribute to the injury, and had no causal relation to, and did not contribute to, the injury or to the effectiveness of the flood, the direct cause of the injury, and any character of injury to the shipment from an unprecedented flood could not reasonably be regarded as being an ordinary natural sequence or as naturally and ordinarily a probable result of the merely negligent delay during a period when there was nothing to foretell an unusual flood on the route. The shipment being household goods, loss of their use for a period equal to the delay, and perhaps other losses, would be natural and ordinary results of the delay in their transit that should reasonably have been anticipated for which the carrier would be liable in damages; but injury or loss from an unprecedented flood overtaking them before arriving at their destination was not an ordinary natural sequence of the delay, and such an injury was not naturally or ordinarily a probable result of a delay in transit that should reasonably have been anticipated by the carrier, when there was no reason in experience or in a warning at the time of the delay, for anticipating the unprecedented flood that subsequently injured the goods before they reached their destination. It is expressly agreed that "the coming or happening of which rains and floods it was utterly impossible for the defendant under any circumstances to have foreseen at any time prior to the delivery of said shipment

to the aforesaid next succeeding carrier," and "that the rains and floods aforesaid were the most sudden and violent ever known at or in the vicinity where said shipment was then caught and damaged as aforesaid."

Common carriers are not liable in damages for injuries to goods in transit caused solely by an act of God that could not have been foreseen. This exemption from liability is allowed by law because of the assumed inability of the carriers to provide against the consequences of an act of God that could not be foreseen and that is overpowering in its destructive force and effect. A flood of unprecedented volume and destructive force may be such an act of God as relieves a common carrier from its damaging effect upon goods being transported by the carrier, when the flood could not have been anticipated or its effect avoided by the exercise of reasonable foresight and diligence based upon common experience and available information. This rule is predicated upon the principle that, as a carrier cannot reasonably be required to foresee the appearance and consequences of an act of God, or to provide against consequences of an unforeseen and overpowering act of God, it should not be held liable in damages for the injurious effects of an act of God upon the goods being transported by the carrier, when the carrier does not contribute to the injury or loss by some malconduct such as acts amounting to a conversion in law of the goods by an unnecessary deviation, or by a tortious withholding of the goods, or otherwise, and when negligence of the carrier in not providing reasonably adequate and safe facilities and proper use of them for the discharge of its duty as a common carrier, does not directly contribute to the loss or injury.

A merely negligent delay in transporting goods, which delay causes the goods to be at a point in transit where they are injured or destroyed by an unprecedented flood that could not have been foreseen at the time of the delay, does not render the carrier liable for the direct consequences of the flood upon the goods, if there be no malconduct by the carrier, and negligence of the carrier in not providing reasonably safe and adequate facilities for and attention to the safety of the goods does not directly contribute to the injury, even though the goods would not have been at the point where they were injured, and would have escaped the flood, but for the negligent delay of the carrier at a time when the flood could not have been foreseen. Such an injury is not an ordinary natural sequence of the delay.

The rule in this state is that damages

may not be recovered for all the injurious consequences that might be shown to have resulted from mere negligence in performing a stipulated or legal duty or service. But where there is negligence, damages may be recovered for such injurious consequences as follow in ordinary natural sequence from the negligence, or such as reasonably should have been contemplated as an ordinary, natural, and probable result of the negligence had proper attention been given to the subject. The particular injury sustained need not have been anticipated. *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.* 55 Fla. 514, 20 L.R.A. (N.S.) 92, 46 So. 732; *Williams v. Atlantic Coast Line R. Co.* 56 Fla. 735, 24 L.R.A. (N.S.) 134, 131 Am. St. Rep. 169, 48 So. 209; *Hildreth v. Western U. Teleg. Co.* 56 Fla. 387, 47 So. 820; *Western U. Teleg. Co. v. Milton*, 53 Fla. 484, 11 L.R.A. (N.S.) 560, 125 Am. St. Rep. 1077, 43 So. 495; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 157, 17 L.R.A. 33, 65, 9 So. 661, 689; *Brock v. Gale*, 14 Fla. 523, 14 Am. Rep. 356. See also *Moore v. Lanier*, 52 Fla. 353, 42 So. 462; *James v. Tampa*, 52 Fla. 292, 120 Am. St. Rep. 203, 42 So. 729, 11 Ann. Cas. 510.

In determining the liability of common carriers for goods injured or lost in transit by an act of God, the true rule is that, in order to relieve the carrier from liability the act of God must be one that could not have been foreseen, and must be the sole proximate cause of the loss or injury. But where the carrier is otherwise without fault, and its mere delay in transportation causes the goods to be where they are injured by an act of God, the carrier is liable only when the injury resulted from the delay by ordinary natural sequence, or where the injury is of a character that is within the probable consequences of the previous negligent delay of the carrier; for otherwise the carrier's liability would be extended to losses that it is not by law required to anticipate and provide against. See *Merritt Creamery Co. v. Atchison, T. & S. F. R. Co.* 139 Mo. App. 149, 122 S. W. 322. As the injury to the goods in this case was directly caused by an admittedly unprecedented flood,—an excusing act of God,—to which injury the defendant did not directly contribute, and as such flood could not have been anticipated or the injury regarded as resulting by ordinary natural sequence, or as a natural and probable result of the preceding delay in transit, the injury was not "caused by" the defendant within the meaning of the law, and the defendant is not liable.

The interstate commerce act does not render carriers liable for injuries to ship-

ments that are caused by an act of God. *Cleveland, C. C. & St. L. R. Co. v. Hayes*, 181 Ind. 87, 103 N. E. 839, 104 N. E. 581. The delay in transportation prior to the injury was "caused by" the defendant, but the injury to the goods was "caused by" an unprecedented flood,—an act of God,—the preceding negligence of the carrier in delaying the shipment having merely a casual

relation, and not a causal relation, to the act of God and the injury.

The judgment is reversed.

Taylor, Ch. J., and Shackelford and Ellis, JJ., concur.

Cockrell, J., absent on account of sickness.

Annotation—Prior delay or deviation as affecting carrier's liability for loss of or damage to goods from act of God.

This note is not concerned with any question as to the duty or negligence of the carrier in view of an act of God which is threatened or has occurred, that question being treated in the notes to *Armstrong v. Illinois C. R. Co.* 29 L.R.A. (N.S.) 671, and *Gulf Coast Transp. Co. v. Howell*, ante, 974; but is confined to the effect upon the carrier's liability of its negligent delay or deviation prior to, and independently of, the duty arising when the act of God was threatened or had occurred. In other words, the question is not as to the existence of a duty, or negligence, on the part of the carrier, but whether its prior breach of duty can be regarded as the proximate cause of a loss or damage immediately caused by a subsequent act of God. The two questions are quite distinct from a legal point of view, although both may arise in the same case. See *Wabash R. Co. v. Sharpe* (1906) 76 Neb. 424, 124 Am. St. Rep. 823, 107 N. W. 758, and *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.* (1911) 89 Neb. 660, 131 N. W. 1047.

For the duty of a carrier to hasten shipment or take other precaution to prevent loss threatened without any antecedent fault on its part, see *Pine Bros. v. Chicago, B. & Q. R. Co.* 39 L.R.A. (N.S.) 639, and note.

The question as to the burden of proof when the defense in an action to recover for loss of or injury to goods during carriage is act of God or vis major is discussed in notes to *Chicago, R. I. & P. R. Co. v. Logan*, 29 L.R.A. (N.S.) 663, and *St. Louis & S. F. R. Co. v. Dreyfus*, L.R.A. 1915D, 547.

Negligent delay.

The position taken in *SEABOARD AIR LINE R. Co. v. MULLIN*, ante, 982, that a prior delay of goods, but for which they would not have encountered the act of God which injured them, is not such a proximate or concurring cause as will render the carrier liable, is sustained by many of the cases, though there is a L.R.A.1916D.

decided conflict of authority on the point.

A carrier will not be liable for goods destroyed by an act of God unless there is some causal connection recognized by law between the negligence of the company in failing to make timely delivery of the goods and their destruction by the act of God, and, in order to constitute such negligence, the proximate cause of an injury, the injury must be the natural and probable result of a negligent act. So, mere negligent delay on the part of the carrier in forwarding and delivering cotton, and its destruction by the great Galveston flood while in the company's possession, will not, standing alone, raise the issue of the company's liability. *International & G. N. R. Co. v. Bergman* (1901) — *Tex. Civ. App.* —, 64 S. W. 999.

So, the mere fact that a canal boat was started on its way with a lame horse, which caused considerable delay, but for which delay the boat would not have been overtaken by an overwhelming flood, was too remote a cause to make the carrier liable. *Morrison v. Davis* (1852) 20 Pa. 171, 57 Am. Dec. 695.

An unnecessary delay of a barge, but for which it would not have encountered a storm in which it was lost on one of the Great Lakes, was not the proximate cause of the loss, so as to render the carrier liable. *Daniels v. Ballantine* (1872) 23 Ohio St. 532, 13 Am. Rep. 264.

Even though there had been a contract by the carrier to start the goods on their way at an earlier time than they were started, and but for the delay they would not have encountered an unprecedented flood, the failure of the carrier to comply with the contract would have been only the remote cause of the loss, and the carrier would not be liable. *Memphis & C. R. Co. v. Reeves* (1870) 10 Wall. (U. S.) 176, 19 L. ed. 909.

Antecedent delay of a shipment of horses is not the proximate cause of injury to them by encountering an un-

usually severe storm, although they would not have encountered such storm but for the delay. *Herring v. Chesapeake & W. R. Co.* (1903) 101 Va. 778, 45 S. E. 322.

So, a few days' delay in transporting wheat to Galveston, and in keeping it there before the storm, would not render the carrier liable for its destruction by flood. *Gulf, C. & S. F. R. Co. v. Darby* (1902) 28 Tex. Civ. App. 229, 67 S. W. 129.

In *Lamont v. Nashville & C. R. Co.* (1871) 9 Heisk. (Tenn.) 58, it was held that the negligent act of a carrier in detaining goods before shipment was not a proximate cause of the loss, so as to render it liable for their destruction by a flood while en route.

Although it is fairly inferable from the facts that the carrier had negligently delayed forwarding goods, and that, had the usual and reasonable diligence been employed, they would have escaped a flood, the carrier would not be liable where its negligence was the remote, and not the direct, cause of the injury to the goods. *Lamar Mfg. Co. v. St. Louis & S. F. R. Co.* (1906) 117 Mo. App. 453, 93 S. W. 851. See second appeal (1908) 131 Mo. App. 115, 110 S. W. 601, holding that the carrier was not negligent in failing to anticipate the unusual nature of the flood.

The rule as to when an act of God will excuse a carrier for the loss of or injury to goods is stated in *Moffatt Commission Co. v. Union P. R. Co.* (1905) 113 Mo. App. 544, 88 S. W. 117, as follows: "The act of God must be the sole cause of the loss or injury; and whenever the negligence of the carrier mingles with the act of God as a co-operative cause, he is liable; provided, the resulting loss is within the probable consequences of the negligent act; otherwise, it will be too remote and disconnected to be considered the proximate cause."

So, where a carrier was negligent in delaying for one day the transfer of a car of wheat which was in its yards, and it was destroyed by a sudden and probably unprecedented flood, so that the result was almost altogether out of the course of nature, the loss from such a cause was wholly unlooked for, and was not to be expected, or even taken into consideration, by the most cautious, and therefore the carrier was not liable. (Mo.) *Ibid.*

In *Denny v. New York C. R. Co.* (1859) 13 Gray (Mass.) 481, 74 Am. Dec. 645, where the carrier negligently delayed wool while en route over its

line, but carried it to the end of its line, and while it was in its depot at that place it was damaged by an unusual flood, it was held that the carrier was not liable, the delay not being the proximate cause of the injury.

The negligent delay of a carrier in moving goods intrusted to it for transportation, not being so unreasonable as to amount to a conversion, will not render it liable for the loss of the goods after they have been carried to their destination, if they are there destroyed by an act of God before delivery. *Rodgers v. Missouri P. R. Co.* (1907) 75 Kan. 222, 10 L.R.A. (N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 Ann. Cas. 441.

Where the carrier's negligence in delaying a car in which eggs were shipped was but the remote cause of the injury, the direct cause being a flood which appeared so suddenly and with such magnitude and force that its advent could not be anticipated, nor its consequences averted by the exercise of human care and foresight, it was not liable. *Lightfoot v. St. Louis & S. F. R. Co.* (1907) 126 Mo. App. 532, 104 S. W. 482.

But it has been held that if a carrier negligently delays the shipment of goods, and they are overtaken and damaged by an act of God which would not have caused the damage but for the delay, it is liable, even though the act of God could not reasonably have been anticipated, the negligent delay being such a proximate or concurring cause as to render the carrier liable. *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.* (1905) 94 Minn. 269, 69 L.R.A. 509, 110 Am. St. Rep. 361, 102 N. W. 709, 3 Ann. Cas. 450, 17 Am. Neg. Rep. 590.

So, where goods were negligently delayed by a carrier at a junction point, and while so delayed were overtaken by an unusual flood, the carrier was liable because of its concurring negligence. *Michaels v. New York C. R. Co.* (1864) 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding* (1864) 30 N. Y. 630, 86 Am. Dec. 426; *Dunson v. New York C. R. Co.* (1870) 3 Lans. (N. Y.) 265.

In *Chicago, R. I. & P. R. Co. v. Miles* (1909) 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043, it was held that a carrier was liable for the loss of a market for cattle owing to a delay in delivery where the delay was caused by its own negligence concurring with an act of God in the shape of a flood which washed away a bridge and caused further delay, which would not have been encountered but for the prior delay, as both the neg-

Co. (1903) — **Tex. Civ. App.** —, 74 S. W. 69, it is held that, while the negligence of the carrier in failing to notify plaintiff of the arrival of wheat in Galveston, and its failure to place cars on the proper elevator tracks to be unloaded, and to move cars from the lower ground to the middle yard, concurred with the flood in producing the injury complained of, and but for such negligence the damage would not have occurred, still such negligence was the remote, and not the proximate cause, of the damage, and the carrier would be excused by the act of God.

Deviation.

For deviation as affecting carrier's right to avail itself of provisions of special contract of affreightment, see note to *McKahan v. American Exp. Co.* 35 L.R.A.(N.S.) 1046.

Deviation by a carrier of live stock from the usual and most direct route, because of a washout on a connecting line and the bad condition of its own track, will not, in the entire absence of negligence in selecting the new route, which is as reasonably direct as is available under existing conditions, render the carrier liable for a loss occasioned by a flood at a point on such new route. *Empire State Cattle Co. v. Atchison, T. & S. F. R. Co.* (1907) 210 U. S. 1, 52 L. ed. 931, 28 Sup. Ct. Rep. 607, 15 Ann. Cas. 70, affirming (1906) 77 C. C. A. 601, 147 Fed. 457.

And where the deviation is made necessary by an act of God, such deviation will not render the carrier liable as an insurer for loss in value of sheep owing to delay. *International & G. N. R. Co. v. Wentworth* (1894) 8 **Tex. Civ. App.** 5, 27 S. W. 680.

In *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.* (1906) 130 Iowa, 123, 5 L.R.A.(N.S.) 882, 106 N. W. 498, 8

Ann. Cas. 45, the court says that the distinction which is sometimes attempted to be made between cases in which the goods in the hands of a carrier are brought within the operation of an act of God by a negligent prior delay on the part of the carrier, and those in which they are brought within its operation by a deviation from the route, that a deviation amounts to a conversion, rendering the carrier absolutely liable, is too technical to be considered as persuasive.

But where the master of a barge unnecessarily deviated from the usual course with a cargo of lime, and the vessel was lost through the action of a tempest in wetting the lime and setting it on fire, it was held that the carrier was liable. *Davis v. Garrett* (1830) 6 Bing. (Eng.) 716, 4 Moore & P. 540, 8 L. J. C. P. 253, 31 Revised Rep. 524, 5 Eng. Rul. Cas. 273.

Where a carrier by boat agreed to deliver a cargo at a certain place, but stopped at a point short of that place, and while there the goods were damaged by a storm, which was either an excepted peril of the river or an act of God which would have relieved the carrier from liability, if it had been encountered in the ordinary course of the voyage, the carrier was liable for the loss because of its disregard of its duty and of the contract. *Cassilay v. Young* (1843) 4 B. Mon. (Ky.) 265, 39 Am. Dec. 505.

Although the running of a vessel upon an unknown rock is an act of God, where it appears that the master of the vessel was ignorant of the navigation, had no pilot, and had taken the vessel out of the usual course, the running of the vessel on the rock may be attributed to his negligence, and the carrier will be liable. *Williams v. Grant* (1816) 1 Conn. 487, 7 Am. Dec. 235. R. L. S.

ILLINOIS SUPREME COURT.

EASTERN ILLINOIS STATE NORMAL SCHOOL, Plff. in Certiorari,

v.

CITY OF CHARLESTON.

(271 Ill. 602, 111 N. E. 573.)

Water — nominal rates — power of municipality to grant.

1. Authority conferred upon a municipal corporation to supply water to its inhabitants at such rates as the common council shall deem expedient does not include power to contract to furnish water for fifty years L.R.A.1916D.

at a nominal rate to a public institution, to secure its location in the municipality.

For other cases, see *Waters, III, b, 3, in Dig. 1-52 N. S.*

Municipal corporation — authority to contract for location of public institution.

2. A municipal corporation has no implied authority to undertake to furnish water from its plant to a public institution

Note. — For power of municipality operating a public utility to make a special rate to a particular company or person for public utilities controlled by it, see annotation following this case, post, 996.

for fifty years at a nominal cost, in consideration of its location in the city.
For other cases, see *Waters*, 111, 6, 3, in Dig. 1-52 N. S.

Estoppel — to question municipal contract.

3. The establishment of a state institution in a municipal corporation at large expense on the faith of the municipality's offer to furnish it water for a long term of years at nominal rates does not estop the municipality from questioning the validity of the contract.

For other cases, see *Estoppel*, I. a, in Dig. 1-52 N. S.

(February 16, 1916.)

CERTIORARI to the Appellate Court, Third District, to review a judgment affirming a decree of the Circuit Court for Coles County dismissing a bill filed to enforce an alleged contract to supply water to plaintiff and to enjoin the shutting off of the water supply. Affirmed.

The facts are stated in the opinion.

Messrs. T. N. Cofer and P. J. Lucey, Attorney General, for plaintiff in certiorari:

A contract to secure the location of a state normal school at a city is within the corporate purposes of the municipality.

Burr v. Carbondale, 76 Ill. 455.

A municipal corporation is estopped to deny the power to make a contract entered into when acting in its private capacity, after it has been fully performed by the other party, and municipality has accepted the benefits and cannot place the other party in statu quo.

10 Cyc. 1156, 1157; 28 Cyc. 674; *People ex rel. Fitz Henry v. Union Gas & E. Co.* 260 Ill. 395, 103 N. E. 245; *Winnetka v. Chicago & M. Electric R. Co.* 204 Ill. 304, 68 N. E. 407; *De Kalb v. Luney*, 193 Ill. 185, 61 N. E. 1036; *People ex rel. Jackson v. Suburban R. Co.* 178 Ill. 607, 49 L.R.A. 650, 53 N. E. 349; *Chicago & N. W. R. Co. v. People*, 91 Ill. 251; *Chicago v. Nicholson*, 130 Ill. App. 466; *Sanitary Dist. v. Martin*, 227 Ill. 260, 81 N. E. 417, 10 Ann. Cas. 227, 129 Ill. App. 308; *Darst v. Gale*, 83 Ill. 141; *Bradley v. Ballard*, 55 Ill. 413, 8 Am. Rep. 656, 3 Mor. Min. Rep. 563; *West v. Madison County Agri. Board*, 82 Ill. 205.

A municipality can no more work a fraud upon property owners than an individual, and may be estopped by conduct.

Sullivan v. Tichenor, 179 Ill. 102, 53 N. E. 561; *Burr v. Carbondale*, 76 Ill. 455.

A municipality may be estopped by acquiescence of its officers.

Chicago & N. W. R. Co. v. People, 91 Ill. 251; *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307; *Dill. Mun. Corp.* § 533. L.R.A.1916D.

A municipality has implied powers to do all things necessary or fairly in or incident to the powers expressly granted.

Rockford v. Mower, 259 Ill. 607, 102 N. E. 1032; *Maywood Co. v. Maywood*, 140 Ill. 216, 29 N. E. 704.

An ordinance of a city owning its waterworks system, exempting an educational school from payment for water rents, is valid and enforceable.

Chicago v. University of Chicago, 131 Ill. App. 361, affirmed in 228 Ill. 605, 81 N. E. 1138, 10 Ann. Cas. 669.

A municipal corporation is estopped where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done.

Chicago v. Chicago & O. P. Elev. R. Co. 261 Ill. 497, 104 N. E. 240; *Washingtonian Home v. Chicago*, 157 Ill. 414, 29 L.R.A. 798, 41 N. E. 893; *Logan County v. Lincoln*, 81 Ill. 156; 7 Am. & Eng. Enc. Law, 2d ed. 345.

A contract to establish a college "at" or "in" a town does not require it to be located "within" the corporate limits.

7 Cyc. 26, note; *Rogers v. Galloway Female College*, 64 Ark. 627, 39 L.R.A. 636, 44 S. W. 454.

If a city may lawfully exercise a power, it may be estopped to deny its validity because of informalities.

Chicago v. Pittsburg, C. C. & St. L. R. Co. 244 Ill. 232, 135 Am. St. Rep. 316, 91 N. E. 422.

A contract by a municipal corporation with a consumer, to furnish water, is made by the city in its private capacity.

Quincy v. Chicago, B. & Q. R. Co. 92 Ill. 21; *Rogers v. Wickliffe*, 29 Ky. L. Rep. 587, 94 S. W. 24; *Dyer v. Newport*, 123 Ky. 203, 94 S. W. 25.

The operation of a waterworks system by a municipal corporation is conducted by the city in its private capacity or business powers, as contradistinguished from its public governmental capacity.

People ex rel. Brockamp v. Schlitz Brewing Co. 261 Ill. 25, 103 N. E. 555; *Wagner v. Rock Island*, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; *Palestine v. Siler*, 225 Ill. 636, 8 L.R.A.(N.S.) 205, 80 N. E. 345; *Chicago v. University of Chicago*, 131 Ill. App. 361, affirmed in 228 Ill. 605, 81 N. E. 1138, 10 Ann. Cas. 669; *Chicago v. Cicero*, 210 Ill. 298, 71 N. E. 356; *People ex rel. Park Comrs. v. Detroit*, 28 Mich. 238, 15 Am. Rep. 202; *Rogers v. Wickliffe*, and *Dyer v. Newport*, supra.

Messrs. John T. Kincald, Albert Anderson, and Ben F. Anderson, for defendant in certiorari:

The powers of cities and other municipal corporations are only those expressly grant-

ed, and such powers as are necessarily implied in order to make such grant effective.

Illinois Central Hospital v. Jacksonville, 61 Ill. App. 199; Smith v. McDowell, 148 Ill. 55, 22 L.R.A. 393, 35 N. E. 141; Chicago v. M. & M. Hotel Co. 248 Ill. 265, 93 N. E. 753; Seeger v. Mueller, 133 Ill. 87, 24 N. E. 513; People ex rel. Biddison v. Board of Education, 255 Ill. 572, 99 N. E. 659.

A municipal corporation has no power to donate any of its funds or property, and no one can be misled, as all are bound to know this and its powers generally.

People use of Alton v. Parker, 231 Ill. 481, 83 N. E. 282; Hope v. Alton, 214 Ill. 102, 73 N. E. 406; Danville v. Danville Water Co. 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118; May v. Chicago, 222 Ill. 595, 78 N. E. 912; Roemheld v. Chicago, 231 Ill. 467, 83 N. E. 291; Chicago v. Williams, 182 Ill. 135, 55 N. E. 123.

Everyone is presumed to know the extent of the power of a municipal corporation, and a municipal corporation cannot be estopped to aver its incapacity when an attempt is made to enforce a contract which it has made without authority.

People use of Alton v. Parker, 231 Ill. 481, 83 N. E. 282; Hope v. Alton, 214 Ill. 105, 73 N. E. 406; Dill. Mun. Corp. 5th ed. § 791; Chicago v. M. & M. Hotel Co. 248 Ill. 272, 93 N. E. 753; Danville v. Danville Water Co. 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118; Roemheld v. Chicago, 231 Ill. 467, 83 N. E. 291.

The business of furnishing water by municipalities is a right derived wholly from the statute, and it is impressed with a public interest.

Wagner v. Rock Island, 146 Ill. 140, 21 L.R.A. 519, 34 N. E. 545; Illinois Central Hospital v. Jacksonville, 61 Ill. App. 200; Danville v. Danville Water Co. 178 Ill. 309, 69 Am. St. Rep. 304, 53 N. E. 118; People ex rel. Gaskill v. Forest Home Cemetery Co. 258 Ill. 41, L.R.A.—, 101 N. E. 219, Ann. Cas. 1914B, 277; Dill. Mun. Corp. § 1301.

If the power is wholly wanting, a purely private corporation is in the same situation as to estoppel as a public one.

National Home Bldg. & L. Asso. v. Home Sav. Bank, 181 Ill. 45, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619.

When the power is lacking, there is no estoppel to plead ultra vires as to private corporation, even where the contract is executed, and the only remedy is for recovery of the consideration paid.

United States Brewing Co. v. Dolese & S. Co. 259 Ill. 280, 47 L.R.A. (N.S.) 898, 102 N. E. 753; Converse v. Emerson, T. & Co. 242 Ill. 627, 90 N. E. 269; Steele v. Fraternal Tribunes, 215 Ill. 190, 106 Am. L.R.A. 1916D.

St. Rep. 160, 74 N. E. 121; De la Vergne Refrigerating Mach. Co. v. German Sav. Inst. 175 U. S. 40, 44 L. ed. 65, 20 Sup. Ct. Rep. 20.

A city has no power to bind itself to pay a fixed rate for water for a term of years.

Danville v. Danville Water Co. 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118; Freeport Water Co. v. Freeport, 186 Ill. 179, 57 N. E. 862.

A city council cannot curtail powers of succeeding councils in fixing water rates.

Ibid.

In order to raise an estoppel in pais, a party must have so acted and influenced the conduct of another as to amount to a fraud.

Covenant Mut. Life Asso. v. Kentner, 188 Ill. 431, 58 N. E. 966.

A party claiming the benefit of estoppel must have relied on the faith of the representations. If he knows they are false, no estoppel.

Vail v. Northwestern Mut. L. Ins. Co. 192 Ill. 567, 61 N. E. 651; Union Mut. L. Ins. Co. v. Slee, 123 Ill. 57, 12 N. E. 543.

Cartwright, J., delivered the opinion of the court:

The general assembly passed an act, in force July 1, 1895, entitled, "An Act to Establish and Maintain the Eastern Illinois State Normal School" (Laws 1895, p. 63), which was created a corporation to be governed by a board of trustees appointed by the governor with the advice and consent of the senate. The trustees were appointed, and planned to receive donations from different localities in consideration of the location of the school. The city of Charleston owned and operated a waterworks plant and system, and as an inducement to procure the location of the school at said city the city council adopted a resolution on July 5, 1895, as follows: "A resolution offering the trustees of the Eastern Illinois State Normal School, providing it be located in this city, all the water it may require for use in its buildings and on its grounds, also for fire protection, for the consideration of \$5 for the period of fifty years; which was read and on motion adopted by all voting aye."

As a result of the inducement offered by the resolution, the trustees located the school at the city of Charleston and tapped the water main and connected its water pipes therewith, extending to the building and grounds, at its own expense, and has since kept and maintained the same. The trustees located buildings on the ground where the school was located, adjoining the south corporate line of the city, and the ground was afterward brought within the corporate limits and is now within the city.

The buildings were completed and the school conducted, and it now has an attendance of 500 scholars, with 33 teachers. It has a dormitory furnishing board and rooms to a large number of students, and requires a large amount of water to generate steam for heating and for the other uses of the school. The city complied with its agreement until May 15, 1913, when the city council repudiated it and refused to continue furnishing water as agreed. On July 17, 1913, an ordinance was passed for the installation of water meters, and in compliance with that ordinance meters were installed to measure the water consumed by the school. The cost of meters and installation and a regular rate for water was charged to the school, amounting to \$309.30 up to October 1, 1913, and the city threatened to cut off the water and disconnect the water pipes unless the bill were paid. On November 25, 1913, the Eastern Illinois State Normal School filed its bill of complaint in the circuit court of Coles county, alleging in its amended bill the foregoing facts, and asking the court to compel the city to specifically perform its agreement, and to enjoin it from shutting off the water supply. A temporary injunction was ordered and issued, and the defendant appeared and demurred to the amended bill, admitting the facts, but alleging that it had no legal right to make the contract. The demurrer was sustained, and the complainant elected to stand by its bill, and the bill was dismissed. An appeal was prosecuted to the appellate court for the third district, where the decree was affirmed, and a writ of certiorari was granted by this court to review the judgment of the appellate court.

Section 1 of the act authorizing cities, incorporated towns, and villages to construct and maintain waterworks, in force April 15, 1873 (Laws 1873, p. 190), as amended in 1879 (Laws 1879, p. 64), authorizes all cities, incorporated towns, and villages to provide for a supply of water for the purpose of fire protection and for the use of the inhabitants of such cities, incorporated towns, and villages, by erecting, constructing, and maintaining a system of waterworks for fire protection and the use of the inhabitants for domestic and commercial purposes. Section 4 of the act provides that the common council of cities or trustees of towns or villages having a waterworks system shall have power to tax, assess, and collect such tax, rent, or rates for the use and benefit of water used or supplied by such waterworks as the common council or board of trustees, as the case may be, shall deem just and expedient.

Municipalities are created primarily for the exercise of such portion of the powers L.R.A.1916D.

of sovereignty within the corporate limits as the general assembly may see fit to bestow upon them, and they may also be authorized to supply conveniences to the inhabitants, such as bringing water from some source of supply and distributing it to those desiring it. In the creation of a system of waterworks and the operation of the same for the purpose of protection against fire, flushing sewers, or other uses pertaining to the public health and safety, the city is in the exercise of the police power, and is therefore exercising a governmental function. *Wilcox v. Chicago*, 107 Ill. 334, 47 Am. Rep. 434; *Chicago v. Selz, S. & Co.* 202 Ill. 545, 67 N. E. 386, 14 Am. Neg. Rep. 23. In supplying water for the use of the inhabitants for domestic and commercial purposes, a municipality is not in the exercise of a governmental power, but acts in the same capacity as a private corporation, although the business is carried on for the public advantage, and, being public in its nature, is impressed with a public use. *Wagner v. Rock Island*, 146 Ill. 139, 21 L.R.A. 519, 34 N. E. 545; *Chicago v. Cicero*, 210 Ill. 290, 71 N. E. 356; *People ex rel. Brockamp v. Schlitz Brewing Co.* 261 Ill. 22, 103 N. E. 555. There are material distinctions between the exercise of governmental powers and those which are in their nature private, in the fact that in the exercise of governmental powers a municipality is not liable to a private action, while it is liable for injuries resulting from improper exercise of a power in its private capacity. Any distinction, however, based on the nature of the power exercised, is of very little importance in determining whether the city of Charleston is bound by its contract, which rests on the question whether the city had power to enter into it in any capacity. The argument for the sufficiency of the bill is that, because the city was authorized to construct and maintain waterworks and supply water to the inhabitants of the city, and the exercise of that power was in its private capacity, therefore the city could enter into any contract it saw fit for a term of fifty years and would be bound by it. The conclusion does not follow either from the fact that the city had authority to supply water, or that the exercise of the power was in a private capacity; but the question is whether the city had power to make the contract it did make to furnish water to the complainant or to any person or corporation for fifty years for \$5. The rule is that the powers of municipalities are only those expressly granted or necessarily implied to make the grant of specific powers effective. *Seeger v. Mueller*, 133 Ill. 86, 24 N. E. 513; *Chicago v.*

M. & M. Hotel Co. 248 Ill. 264, 93 N. E. 753.

The only statutory powers conferred by law upon cities in respect to waterworks and water supply are those which have been stated above. If there is no legitimate corporate purpose from which the power to enter into the contract may be implied, the contract was void and cannot be enforced.

The question whether a donation to secure the location of a state institution was a corporate purpose of a county came before this court in *Livingston County v. Weider*, 64 Ill. 427. In that case the board of supervisors of Livingston county authorized an issue of bonds for the purpose of securing the location of the State Reform School at Pontiac, and afterward filed a bill to enjoin the county treasurer from paying interest on the bonds. Mr. Justice Breese, in delivering the opinion of the court, declared that setting up the location of state institutions to the highest bidder was contrary to public policy and the interests of the people of the state; but the bonds were declared void because of a want of power to issue them, although the county had secured the location of the reform school. The term "corporate purposes" was there defined to be such purposes, and such only, as are germane to the objects of the incorporation of the municipality,—at least such as have a legitimate connection with those objects and a manifest relation thereto,—and it was held that providing a location for a state institution was not a corporate purpose.

Afterward the case of *Burr v. Carbondale*, 76 Ill. 455, was considered by the court. In that case the general assembly provided for the location of the Southern Illinois Normal University, and required the trustees to advertise for proposals from localities desiring to secure the location of the institution, and to open and examine the proposals and locate the institution at such point as should, all things considered, offer the most advantageous terms. The general assembly passed, also, an act to authorize cities and towns in southern Illinois to issue bonds to be used by municipal authorities in aid of the institution, if the same should be located in the municipality issuing the bonds. The act provided for an election, and an election was held and bonds issued in pursuance thereof and were in the hands of innocent holders. The institution was located at Carbondale, and the city afterward filed its bill to declare its action void. Mr. Justice Breese, speaking for the majority, again expressed the view that setting up the location of the institutions of the state to the highest bidder was impolitic and unwise, but found sufficient distinction

between the *Livingston Case* and that one to sustain the validity of the bonds. The reasons given were that the bonds were issued under an act of the general assembly by a vote of the majority of the legal voters and the bonds were in the hands of innocent holders. The court said: "The disreputable feature of the case is that the same authority doing all these acts, and whose city has received the benefit of them, now seeks to repudiate them. There is no rule of law, equity, justice, or morals compelling this, and we cannot sanction it."

The substantial reason for the decision, however, was that the general assembly had authorized the transaction and was acting within its powers in doing so.

In the case of *Danville v. Danville Water Co.* 178 Ill. 299, 69 Am. St. Rep. 304, 53 N. E. 118, the city council of Danville passed an ordinance granting to the water company the right to construct and maintain waterworks for a term of thirty years, and by the same ordinance rented fire hydrants for specific sums for that period, with provisions for the rates to be paid for hydrants installed in the future. The city, after obtaining the waterworks and complying with its contract for a time, denied its liability and passed an ordinance reducing the rates fixed by the contract. It was held that the ordinance reducing the rates was valid, and that the city had a right, under the law authorizing it to fix rates, to reduce the rates agreed upon by the contract, notwithstanding its agreement, and had no power to bind itself by fixing a rate for its water supply for thirty years.

In the case of *Freeport Water Co. v. Freeport*, 186 Ill. 179, 57 N. E. 862, the city of Freeport granted to the water company the right to supply the city, by a system of waterworks, with water for a term of thirty years, and the city agreed to pay certain rates for hydrants and was to be given the free use of water for flushing sewers and various other public purposes. The city council afterward passed an ordinance changing and reducing the price to be paid for each hydrant, and it was held that the city had no power to bind itself to the payment of the fixed sums for the entire period, but might make reasonable reductions in the rates to be paid, notwithstanding its contract and the fact that it had obtained the consideration.

In the *Danville* and *Freeport Cases*, the consideration was the construction of waterworks and a supply of water, and upon the faith of the contract waterworks were built in both cities, while in this case the supposed consideration for the agreement was the location of the state institution. If neither the city of Danville nor the city of

Freeport could make a binding agreement how much the city would pay for water for a term of years, it cannot be said that the city of Charleston, without legislative authority, could agree to furnish water to the complainant or anybody else for fifty years for \$5, whether the exercise of the power was in its nature private or governmental.

It is contended that because it has been held that a private corporation may enter into a contract to secure the location of a postoffice site or a military encampment, a city must have the same right to secure the location of a state institution that will benefit its inhabitants. The question whether a private corporation can make such a contract depends upon the nature of the corporation, and whether the contract is connected with the legitimate exercise of its corporate powers. It has been held that a corporation engaged in business may make a contract to secure the location of a postoffice site at a place that will tend to increase its business, and that a hotel company may contract for the location of a military encampment (*Richelieu Hotel Co. v. International Military Encampment Co.* 140 Ill. 248, 33 Am. St. Rep. 234, 29 N. E. 1044; *B. S. Green Co. v. Blodgett* 159 Ill. 169, 50 Am. St. Rep. 146, 42 N. E. 176); but that was because the contract was not foreign to the business of the corporation. If a contract is ultra vires in the proper sense, it is void. *National Home Bldg. & L. Asso. v. Home Sav. Bank*, 181 Ill. 35, 64 L.R.A. 399, 72 Am. St. Rep. 245, 54 N. E. 619. In the case of *Chicago v. University of Chicago*, 228 Ill. 605, 81 N. E. 1138, 10 Ann. Cas. 669, the university filed its bill to enjoin the

city from shutting off the water supply of the complainant, which had been remitted by ordinance. The city by its answer alleged that the city waterworks system was private property of the city, conducted as a private enterprise, and not as a governmental function, and that it had a right to charge whatever reasonable rates it saw fit. This court held that the question whether the ordinances were void because the city could not give away public property did not arise on the record, for the reason that the city, having alleged the validity of the ordinances in its answer, could not be heard to say that the circuit court erred in adopting its view. There was therefore no question concerning the want of power of the city to pass the ordinances or its right to assert their invalidity.

The final argument in support of the bill is that the city is estopped to dispute the validity of the contract; although it had no power to enter into it, for the reason that it has received the consideration. That reason did not prevail in any of the cases heretofore considered. Everyone is presumed to know the extent of the powers of a municipal corporation, and it cannot be estopped to aver its incapacity, which would amount to conferring power to do unauthorized acts simply because it has done them and received the consideration stipulated for. *Stevens v. St. Mary's Training School*, 144 Ill. 336, 18 L.R.A. 832, 36 Am. St. Rep. 438, 32 N. E. 962; *Hope v. Alton*, 214 Ill. 102, 73 N. E. 406; *May v. Chicago*, 222 Ill. 595, 78 N. E. 912; *People use of Alton v. Parker*, 231 Ill. 478, 83 N. E. 282.

The judgment of the Appellate Court is affirmed.

Annotation—Power of municipality operating a public utility to make a special rate to a particular company or person.

A municipality owning or controlling a public utility is subject to the limitation that there must be no unjust discrimination in furnishing the commodity. *McQuillin, Mun. Corp.* § 1697, p. 3591. This general limitation lends support to the decision in *EASTERN ILLINOIS STATE NORMAL SCHOOL v. CHARLESTON*, ante, 991.

The decision in *EASTERN ILLINOIS STATE NORMAL SCHOOL v. CHARLESTON* is in accord with an Ohio inferior court decision which denies the power of a municipality through its council or board of gas trustees to enter into a contract to supply gas to a manufacturing company at a special rate made as an inducement to it to rebuild its factory, which had been destroyed by fire. *Bel-laire Goblet Co. v. Findlay* (1891) 5 L.R.A.1916D.

Ohio C. C. 418, 3 *Ohio C. D.* 205. A contract to furnish a manufacturing company with gas at a special rate was held invalid in *Dalzell, G. & L. Co. v. Findlay* (1891) 5 *Ohio C. C.* 435, 3 *Ohio C. D.* 214. But this case seems to have turned upon the power of the board of gas trustees to enter into the contract.

Although not directly in point, as a special rate was not involved, a decision tending to support the conclusion that a municipality cannot make a special rate for a particular company or person is that in *Kirksville Light Co. v. Kirksville* (1911) 159 *Mo. App.* 460, 141 *S. W.* 484, holding that a municipality owning its waterworks system has no power to contract with an ice company using the city water, for a credit to it for water returned, the effect of which was that

the ice company was permitted to run the city water over and across the heated coils of its pipes for the purpose of cooling them, after which it returned all the water to the city. The court states that "it ought not to require argument or illustration to show that the city, a trustee for the inhabitants thereof, had not the authority to gratuitously divert the city water for private use without compensation. Necessarily, the city was put to great expense in constructing and maintaining a water plant whereby water was pumped from a distant river into reservoirs. The water thus obtained and stored was for the use of citizens upon payment of uniform prices by all of a like class; and any device whereby one or more would obtain the use of it without rendering compensation is contrary to the intent of the statute and object of the power conferred upon the city, and is unlawful." A statute authorizing a municipality owning its waterworks system to supply water to persons and private corporations, and to enter into contracts therefor upon such terms as may be agreed upon, is cited in support of the contract, but not commented upon by the court.

A distinction must be observed between making a special rate to a particular company or person, and making a special rate to a class of consumers, such as manufactories or large consumers. This note does not discuss the power of a municipality to make a special rate to a class.

As to whether money may be raised by taxation for an aid to business corporations or enterprises, see note to Daggett v. Colgan, 14 L.R.A. 474, 478.

As to the general question of discrimination in rates in a public water supply, see note to State ex rel. Hallauer v. Gosnell, 61 L.R.A. 33, on the establishment and regulation of municipal water supply, at page 113.

As to the right of a municipal corporation to contract for free transportation or special rates on street cars, see note to Oklahoma City v. Oklahoma R. Co. 16 L.R.A. (N.S.) 651.

As to the power of a municipality to assume part or all of the burden of adapting street or bridges for use of railroads or street railways, see note to Minneapolis St. P. R. & D. Electric Traction Co. v. Minneapolis, 50 L.R.A. (N.S.) 143. W. A. E.

KENTUCKY COURT OF APPEALS.

ALBERT F. HAUSS, Appt.,
v.
GEORGE SURRAN.

(168 Ky. 686, 182 S. W. 927.)

Sale — warranty — damages or return of property.

1. A purchaser of machinery under a guaranty of satisfaction may retain it and recoup his damages for breach of warranty in an action for the price, although the contract provides that he will be allowed fifteen days' trial and refund of money if

Note.—The holding of HAUSS v. SURRAN that a provision in a contract of sale, permissive in form, and authorizing the seller to return the property for a breach of warranty, furnishes merely an additional remedy, and not a remedy in exclusion of those ordinarily existing, and that hence a seller may retain the article and assert the breach in recoupment in an action for the purchase price, is supported by the great weight of authority, as is shown at pp. 769 et seq. of a note appended to Detwiler v. Downes, 50 L.R.A. (N.S.) 753. That note also discusses the general question as to the exclusiveness of remedy for breach of warranty provided in a contract for the sale of machinery. In the same volume, at page L.R.A.1916D.

not satisfied and purchaser writes for shipping directions.

For other cases, see *Sale*, III. a, in *Dig.* 1-52 N. S.

Same — rescission — necessity of return.

2. A purchaser of machinery cannot, without offering to return it, rescind and recover what he paid for it for breach of warranty.

For other cases, see *Sale*, III. c, in *Dig.* 1-52 N. S.

Damages — breach of warranty of machinery.

3. The measure of damages for breach of warranty of machinery not wholly worthless, and retained by the purchaser, is the

774, is a note discussing the question with reference to the sale of animals, and at page 778 there is a note discussing the question with reference to the sale of other articles. At page 783 there is a note on the necessity and sufficiency of compliance with the conditions of a warranty in the sale of personal property; at page 796, a note on waiver of conditions in a contract of sale, limiting the warranty; at page 805, a note on remedies of parties where the contract of sale provides that the seller will remove the property if it does not fulfil the warranty; and at page 808, a note on remedies of parties under a contract for the sale of an article on approval.

difference between the value of the property as installed and its value as warranted.
For other cases, see Damages, III. a, 4, c, in Dig. 1-52 N. S.

(February 24, 1916.)

APPEAL by plaintiff from a judgment of the Circuit Court for Campbell County in defendant's favor, in an action brought to recover the balance of the purchase price of certain machinery sold by plaintiff to defendant. Reversed.

The facts are stated in the opinion.

Messrs. Judson A. Shuey and Edward C. Lovett for appellant.

Messrs. Barbour & Basemann for appellee.

Clay, C., filed the following opinion:

Plaintiff, Albert F. Hauss, brought this suit against George Surran to recover the balance of the purchase price of a small electric light plant. Defendant counter-claimed for damages for breach of warranty. The jury found for defendant, and judgment was entered accordingly. Plaintiff has moved for an appeal.

On May 7, 1914, plaintiff contracted with the defendant to install an electric light plant, consisting of machinery and appliances connected to 150 light outlets for tungsten lamps and one G. E. arc light. The purchase price was \$611, payable \$200 when the machinery was shipped, \$200 on June 15, 1914, and \$211 on July 15, 1914. Under the contract, the machinery was to consist of one six horse power "Sandow" kerosene engine mounted on skids, fully equipped with oil and water tanks and throttling governor, belted to a 4-kilowatt 115-volt Robbins & Myers direct current generator, type "I," connected to a slate switchboard by main wires, one voltmeter, voltage regulator, and fused main dynamo switch. The warranties of the manufacturers of the engine and generator were made a part of the contract between plaintiff and defendant. With respect to the generator, the warranty is as follows:

"It is guaranteed that the generator installed will be a 4 kilowatt at 115 volts and is capable of carrying 200 twenty watt (16 C. P.) tungsten lamps at its rated voltage continuously without injurious heating.

"The company agrees to furnish all generators in good operative condition, free from all defects in labor and material, and agrees that they will deliver their rated output successfully, provided they are kept in proper condition and operated normally.

"The company agrees to correct at its own expense any defects in labor and material in its apparatus which may develop under normal and proper use within thirty L.R.A.1916D.

days after said apparatus has been placed into service, provided the purchaser gives to the company immediate written notice of such defects. Responsibility for defects resulting from improper storage or handling, prior to placing the apparatus into service, will not be assumed by the company. Liability for consequential damages, due to failure to meet the conditions of this guaranty, will not be assumed by the company."

With respect to the engine, the warranty is as follows:

"We guarantee that the engine will be entirely satisfactory to you, you to be the judge and jury. You will be allowed a fifteen days' trial dating from the time you receive the engine, and if, for any reason whatever, you do not feel entirely satisfied with the engine and wish your money back, every cent you have paid us for it will be refunded without question and without argument if you will write us for shipping instructions, which we will immediately furnish within the fifteen days.

"We guarantee every Sandow engine to be free from defect when shipped from our factory and any part proven defective from this cause will be replaced without costs if the part to be replaced is returned to our factory for examination, transportation charges prepaid. This guaranty is effective for five years from date of sale.

"Furthermore—we guarantee that every Sandow engine has before shipment been tested under actual conditions to insure its satisfactory operation and power and that it has developed its rated horse power on our stand test."

According to the evidence for plaintiff, the plant was installed at Phoenix Grove Park and tested, and gave perfect results. Shortly after the plant was installed, in answer to a complaint, he went to the plant and found that they had blown a fuse, and that the lights had been short-circuited in one of the amusement tents. About a week after the plant was installed he put on a muffling device. One time in August he went up there to see how the plant was running, and operated the plant for two hours. He was in the habit of calling up the plant over the telephone every Monday or Tuesday morning and inquiring how it was working, and always received the message that it was working nicely. The only two times he went to the plant in response to complaints were when the fuse was blown and when he took Mr. Pickett up there in the month of August.

Defendant and his witnesses testified that the plant from the very beginning failed to work properly or to give the necessary light. Plaintiff, in response to numerous complaints, came to the plant on several occa-

sions and was unable to make it work properly. Notwithstanding the failure of the plant to work properly, defendant continued to operate it up to about the 25th day of August. There is further evidence to the effect that the engine in question was not a six horse power engine, and was not sufficient for 150 lights.

For the plaintiff it is insisted that if the defendant retained the machinery and failed to return, or offer to return it, within a reasonable time, he thereby waived the breach of warranty, and the court erred in failing to submit this phase of the case to the jury. In our opinion, this principle is not applicable to the facts of this case. Here the contract was executed. Of course, where the condition is that the article sold shall be deemed to fulfil the warranty unless returned within a specified or reasonable time, and the buyer retains the goods after that time, he cannot avail himself of the breach unless requested by the seller to keep the machinery under the promise that he will make it operate in a satisfactory manner, or the seller, by his course of dealing, has induced the buyer to believe that he may keep the machinery without losing his right to return it within the time fixed. *Dick v. James Clark, Jr. Electric Co.* 181 Ky. 622, 171 S. W. 108; *McCormick Harvesting Mach. Co. v. Arnold*, 116 Ky. 508, 76 S. W. 323. But where the sale is executed and the provision of the contract is not imperative, but merely permits the buyer to return the property, he may, at his election, resort to that remedy, or he may retain the article and recoup his damages for the breach of the warranty in an action by the vendor for the price. *Shupe v. Collender*, 56 Conn. 489, 1 L.R.A. 339, 15 Atl. 405; *Elwood v. McDill*, 105 Iowa, 437, 75 N. W. 340; *Cook v. Gray*, 2 Bush, 121; *Harrigan v. Advance Thresher Co.* 26 Ky. L. Rep. 317, 81 S. W. 261; *Ruby Carriage Co. v. Kremer*, 26 Ky. L. Rep. 274, 81 S. W. 251. Unless the article is absolutely worthless for every purpose, the buyer cannot recover the price unless he returns the article or offers to return it. In the case under consideration, defendant not only warranted that the engine was a six horse power engine, but that it had sufficient power to light 150 lights and one arc light. The additional warranties were those contained in catalogues of the manufacturers. It does not appear that there was any defect in the generator. The chief complaint is with respect to the power of the engine. The warranty of the manufacturer with respect to the engine merely permits the buyer to return it. It does not provide that a failure to return shall constitute a waiver of the warranty. That be-

ing true, defendant's retention of the machinery did not constitute a waiver of the warranty.

Here the answer and counterclaim, after setting out the breach of warranty, asked for damages to defendant's business. To this portion of the answer and counterclaim a demurrer was sustained. The answer and counterclaim further alleges that the light plant was useless to the defendant, and—"that by reason of said failure of said electric light plant, he lost the sum of \$200, paid to the said plaintiff."

The mere fact that the plant was useless to the defendant did not dispense with the necessity for his returning, or offering to return, the machinery, if he desired to rescind and recover the price. It is only where the plant is absolutely worthless, and not merely worthless to the defendant, that he may sue for the price without having returned or offered to return the plant. We, therefore, conclude that the answer and counterclaim was not good on demurrer. On the return of the case defendant will be permitted to amend and set up his damages for the breach of the warranty.

The court instructed the jury as follows:

"(1) The jury will find for the plaintiff in the sum of \$411, with interest from July 15, 1914, unless they believe from the evidence that the engine installed at the place in question, if kept in proper condition and properly operated, would not develop six horse power and sufficient to successfully and continuously operate the plant with 150 tungsten lamps of 16 and 8 candle power as per contract, and one arc lamp, in which event they will find for the defendant.

"(2) If the jury find for the defendant under instruction No. 1 and believe from the evidence that the engine in question was not sufficient to develop 6 horse power, etc., they shall find for the defendant as damages the difference between what they may believe from the evidence the plant as installed to have been reasonably worth and the amount paid thereon by defendant, to wit, the sum of \$200, not to allow under this instruction, however, an amount in excess of \$100."

It will be observed that instruction No. 1 authorizes a finding for the defendant if the plant did not come up to the warranty, regardless of the amount of damages to which defendant was entitled. In other words, the jury were compelled, under this instruction, even though they believed defendant had been damaged only to the extent of \$100 or \$150, to disregard the balance of plaintiff's claim and render judgment for the defendant. It follows, therefore, that instruction No. 1 is erroneous.

The effect of instruction No. 2 is to as-

sume that if the plant did not comply with the warranty, it was worth less than \$200. It seems to disregard entirely the fact that defendant was liable for \$411, and that, unless his damages exceeded this amount, there should still be a finding in favor of plaintiff. In a case like this, the measure of damages is the difference between the value of the machinery as installed and its value as warranted. *Marbury Lumber Co. v. Stearns Mfg. Co.* 32 Ky. L. Rep. 739, 107 S. W. 200.

Since the machinery is not absolutely worthless and was not returned, or offered to be returned, defendant's defense is confined to his claim for damages. That being true, the court on another trial will instruct the jury in substance as follows:

(1) You will find for plaintiff in the sum of \$411, with 6 per cent interest from July 14, 1914.

(2) If you believe from the evidence that the engine in question, if kept in prop-

er condition and properly operated, would not develop six horse power, or power sufficient successfully and continuously to operate the plant with 150 tungsten lamps of 16 and 8 candle power, and one arc lamp, you will find for the defendant and fix his damages as provided in instruction No. 3.

(3) If you find for defendant under instruction No. 2, the measure of his damages is the difference between the value of the plant as warranted and its value as installed.

(4) If you find for defendant, and your finding be less than your finding for plaintiff, you will return a verdict in favor of plaintiff for the difference; but if your finding for defendant exceed or equal your finding for plaintiff, you will either return a verdict in favor of defendant for the excess not exceeding \$200, or merely find for the defendant on the whole case.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

MASSACHUSETTS SUPREME JUDICIAL COURT.

HONORA E. MADDEN, Employee.

M. J. WHITTALL CARPET COMPANY,
Employer.

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY, Insurer, Appt.

(222 Mass. 487, 111 N. E. 379.)

Master and servant — workmen's compensation — aggravation of existing condition.

1. The further injury of a weak heart so as to incapacitate its owner for physical labor by the performance of the duties of his employment, such as pulling carpet from a roll to repair it, may, although the required exertion was not such as to affect a healthy person, be found to be a personal injury arising out of the employment within the meaning of the workmen's compensation act, so as to entitle the injured person to full compensation under the act.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Note.—As to the construction and effect of the workmen's compensation acts generally, see annotation in L.R.A.1916A, 23.

As to the constitutionality of the workmen's compensation acts, see annotation attached to *Jensen v. Southern P. Co.* L.R.A. 1916A, 403.

As to the recovery of compensation where accident merely aggravates an existing condition, see annotation in L.R.A.1916A, 32 et seq. and 228 et seq. L.R.A.1916D.

Damages — workmen's compensation act — aggravation of existing trouble.

2. Full compensation for the disability may be awarded under the workmen's compensation act in case of the aggravation by the work required by the employment of an existing heart trouble, so that the employee is no longer able to perform service.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Constitutional law — deprivation of property — compensation for aggravation of employee's malady.

3. An employer is not deprived of his property without due process of law by the provisions of an elective workmen's compensation act, entitling an employee to full compensation in case an existing malady is aggravated so as to incapacitate him for labor by an injury arising out of the employment.

For other cases, see Constitutional Law, II. b, 2, in Dig. 1-52 N. S.

(February 7, 1916.)

APPEAL by the insurer from the findings of the Industrial Accident Board, affirming the findings and decision of the committee of arbitration, awarding compensation to plaintiff in a proceeding under the workmen's compensation act to recover compensation for personal injuries sustained by her while in defendant's employ. Affirmed.

The facts are stated in the opinion.

Messrs. T. Hovey Gage, Frank F. Dresser, and Charles A. Hamilton for appellant.

Mr. John C. Mahoney, for appellee:

On the findings of the committee of arbi-

tration, Honora E. Madden, at the time she sustained her injury, was acting in the course of her employment.

Brightman's Case, 220 Mass. 17, L.R.A. 1916A, 321, 107 N. E. 527, 8 N. C. C. A. 102.

Her heart muscles may have been tired and exhausted at the time of the injury, and, under all the circumstances, that may have been sufficient cause for the inability of the heart to temporarily perform its ordinary functions.

Fisher's Case, 220 Mass. 581, 108 N. E. 361.

Acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the workmen's compensation act.

Brightman's Case, *supra*; Wiemert v. Boston Elev. R. Co. 216 Mass. 598, 14 N. E. 360; Clover, C. & Co. v. Hughes [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 50 Sol. Jo. 375, 47 Scot. L. R. 885, 3 B. W. C. C. 275.

Rugg, Ch. J., delivered the opinion of the court:

Honora E. Madden was an employee of a carpet company, which was a subscriber under the workmen's compensation act, Stat. 1911, chap. 751. The Industrial Accident Board found that, while engaged in the performance of the work for which she was hired, she "received a personal injury arising out of . . . her employment, . . . aggravating and accelerating a weak heart condition to the point of total incapacity for work." This finding, standing alone, might be considered indecisive. It simply is a categorical repetition of the words in the statute by which the result is reached entitling the employee to compensation, without a statement of what the personal injury was out of which grows the right to money payments. But, as the Industrial Accident Board "affirms and adopts the findings and decision of the committee of arbitration," resort may be had to the proceedings of that committee and the evidence there reported for the foundation of its conclusions. After reciting the substance of the evidence, most of which was uncontroverted except that from physicians, the finding of the arbitration committee was that "the work which Mrs. Madden was doing on the day on which the injury was received so aggravated and accelerated a weak heart condition as to incapacitate her for work, and that she received a personal injury arising out of and in the course of her employment," whereby she was incapacitated. The personal injury and the circumstances under which

it was received are set out in the evidence. A finding was warranted that she had "a weak heart condition" before her injury and before she entered the service of the subscriber. Her work for it was to repair bad spots in the weaving on rolls of carpet. The roll was placed on some device nearby, and she pulled the carpet along and over a table in front of her. Her own description was that "her work was more pulling [that is, dragging the carpet along over the table] than sewing; . . . the carpet was brought to them in a roll and a bar was put through this roll and two girls had to lift it; they undid the carpet on that roll, turned the back over and had to pull it; then they had to turn the face of it over and it was taken to the shears—they had to pull it to them, they dragged them on the floor; there were some carpets that had to be put on the table, but not all of them. . . . She had not been sewing all morning on the day of the alleged injury—there is not as much sewing to do as pulling. . . . She had never had any attack before this one."

Her description of the "personal injury" (part 2, § 1) on which the claim is founded, was this: "She went to work on the morning of July 10 as she had every morning, and worked up to the time she was taken with the pain—that was about 11:40 o'clock; she was pulling carpets at the time she felt something give—she thought it would pass away. . . . She continued to work until it was time to wash up—she heated her tea . . . and sat down to eat her dinner—she could not eat, so she . . . started to work again; then she felt something else give way," and she was taken to the hospital.

Other witnesses testified that the employee exclaimed that she "had an awful pain under her heart" and that she placed some ice over her heart. It might have been inferred from this and other evidence that she suffered an attack of "angina pectoris," which is defined as a "peculiarly painful disease . . . usually associated with organic change of the heart." There was, also, medical testimony to the effect that "hard, laborious work would produce a heart lesion; if there were any previous heart trouble, it would accelerate it." The question is, whether reasonable men could draw an inference that this was a personal injury received by the employee, arising out of her employment. We are not concerned with the inquiry whether there are other inferences, or whether this is the most reasonable one.

Rational minded persons endeavoring to get at the truth might have found upon this evidence, with the deductions reasonably to be drawn from it, that the employee, being under some degree of disability, due to a

weak heart, suffered by reason of the exertion in pulling the carpet, as required by her contract of service, a further acute impairment of the strength of the heart, whereby it was disabled from performing its normal functions as it had done theretofore. This was a damage to a physical organ. It was a definite and specific detriment to the physiological structure of her body.

The standard established in this respect by our workmen's compensation act as the ground for compensation is simply the receiving of "personal injury arising out of and in the course of" the employment. This standard is materially different from that of the English act and of the acts of some of the states of this nation. That standard is "personal injury by accident," both in the act of 1897 and 1906. See Stat. 60 & 61 Vict. 1897, chap. 37, § 1 (1); 6 Edw. VII. 1906, chap. 58, § 1 (1).

The difference between the phraseology of our act and the English act in this respect cannot be regarded as immaterial or casual. The English act in its present form was passed several years before ours. It was known to the legislature which enacted our statute and was followed as to its general frame and in many important particulars. Gould's Case, 215 Mass. 480, 486, 102 N. E. 693, 4 N. C. C. A. 60, Ann. Cas. 1914D, 372; McNicol's Case, 215 Mass. 497, 499, L.R.A.1916A, 306, 102 N. E. 897, 4 N. C. C. A. 522. Indeed, "the language of the English act of 1897 was followed whenever possible." See Report of Commission on Compensation for Industrial Accidents, 1912, p. 46. This difference must be treated as the result of deliberate design by the general court after intelligent comprehension of the limitation expressed by the words of the English act. The freer and more comprehensive words in our act must be given their natural construction with whatever added force may come from the intentional contrast in phraseology with the English act. The "personal injury by accident," which by the English act is made the prerequisite for the award of financial relief, is narrower in its scope than the simple "personal injury" of our act. As was said in Fenton v. J. Thorley & Co. [1903] A. C. 443, at 448: "The words 'by accident' are . . . introduced parenthetically, as it were, to qualify the word 'injury,' confining it to a certain class of injuries, and excluding other classes; as, for instance, injuries by disease, or injuries self-inflicted by design."

To the element of "personal injury" the further condition is added, that it must have been received as "an unlooked for mishap or an untoward event which is not expected or designed;" and to this have been appended the words "by the workman himself" L.R.A.1916D.

in Trim Joint Dist. School v. Kelly [1914] A. C. 667, 679, whereby injuries "designed" by persons other than the workmen are included within that act. An illustration of the difference between "personal injury" and "personal injury by accident," put by Lord Reading, the present Chief Justice of England, in the case last cited, at page 720, is apposite in this connection: "For example, if a workman became blind in consequence of an explosion at the factory, that would constitute an injury by accident; but if, in consequence of the nature of his employment, his sight was gradually impaired and eventually he became blind, that would be an injury, but not an injury by accident."

The wide divergence between a simple "personal injury," the standard of our act, and the "personal injury by accident" of the English and other acts, is exemplified further by reference to some of the decisions. It was held in Steel v. Cammell, L. & Co. [1905] 2 K. B. 232, 74 L. J. K. B. N. S. 610, 53 Week. Rep. 612, 93 L. T. N. S. 357, 21 Times L. R. 490, 2 Ann. Cas. 142, that lead poisoning resulting from a gradual accumulation of the poison in handling lead, in Broderick v. London County Council [1908] 2 K. B. 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 885, that enteritis from inhaling sewer gas in the course of the employment, and in Eke v. Hart-Dyke [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230, that ptomaine poisoning from clearing out cesspools, were not within the act. As we understand those judgments, each one rests on the ground that there was a "personal injury," but that it was not "by accident," and hence there could be no recovery. If the words "by accident" had been omitted from the English act, the inference seems irresistible from the chain of reasoning adopted in each of these judgments that a different judicial result would have been reached. That a different result seems to us inevitable is manifest from the course of reasoning and the conclusion in Hurle's Case, 217 Mass. 223, L.R.A.1916A, 279, 104 N. E. 336, 4 N. C. C. A. 527, Ann. Cas. 1915C, 919, and Johnson's Case, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843. In any event, decisions made as to workmen's compensation acts which base compensation upon "personal injury by accident" instead of upon "personal injury" well may be and may be expected to be divergent from our own, and compensation be denied under them which would be awarded under ours. See Liondale Bleach, Dye & Paint Works v. Riker, 85 N. J. L. 426, 89 Atl. 929, 4 N. C. C. A. 713, and Adams v. Acme White

Lead & Color Works, 182 Mich. 157, L.R.A. 1916A, 283, 148 N. W. 485, 6 N. C. C. A. 482. Although the Ohio act in this respect is similar to ours, the history and terms of the Ohio constitutional amendment touching the subject, and of the governing statute and construction placed upon it by the administrative board, led to an interpretation of intent to restrict the operation of that act to personal injuries by accident by a chain of reasoning which has no relevancy to our act. *Industrial Commission v. Brown*, — Ohio St. —, L.R.A.1916B, 1277, 110 N. E. 744. If there is anything in any of the three decisions last cited inconsistent with our conclusion, we are constrained not to follow them.

Actions for personal injury arising from disease contracted in the course of employment and without physical impact are not uncommon where the other elements exist to establish liability. *Thompson v. United Laboratories*, 221 Mass. 276, 108 N. E. 1042; *Cox v. American Agri. Chemical Co.* 24 R. I. 503, 60 L.R.A. 629, 53 Atl. 871, 13 Am. Neg. Rep. 434; *Wagner v. H. W. Jayne Chemical Co.* 147 Pa. 475, 30 Am. St. Rep. 745, 23 Atl. 772; *Fox v. Peninsular White Lead & Color Works*, 84 Mich. 676, 682, 48 N. W. 203. That they have not been more frequent, perhaps, has been due to the fact that such dangers usually are well known and are assumed by the contract of employment, or are not matters about which a duty has been owed by the employer.

"Personal injury" is materially broader in its scope than is "personal injury by accident." "Personal injury" standing by itself comprehends a wide range of physical harm. Indeed, the phrase has been extended in other connections to comprise a large category of mischiefs which have a theoretical rather than corporeal adjunction to the human body, and which may be intangible or mental rather than tactile and physical. It may comprehend damage to those inherent personal rights which generally are recognized as protected by the law and as sacred as the security from bodily violence. Doubtless many decisions include among personal injuries, wrongs which would not be personal injuries under the workmen's compensation act. For example, the phrase "personal injury" has been held to include even injuries to reputation resulting from libel (*Thompson v. Judy*, 95 C. C. A. 51, 54, 169 Fed. 553), malicious prosecution and false imprisonment (*McChristal v. Clisbee*, 190 Mass. 120, 3 L.R.A.(N.S.) 702, 76 N. E. 511, 5 Ann. Cas. 769), invasion of the right to privacy (*Riddle v. MacFadden*, 201 N. Y. 215, 94 N. E. 644), as well as the alienation of affection of a husband or wife, L.R.A.1916D.

seduction, false arrest, and kindred tortious acts. That was pointed out in *Hurle's Case*, 217 Mass. 223, L.R.A.1916A, 279, 104 N. E. 336, 4 N. C. C. A. 527, Ann. Cas. 1915C, 919, after a considerable review of the authorities. It there was expressly held that a disease of the eyes directly induced by inhalation of poisonous gases in the course of the employment might be found to be a "personal injury arising out of" the employment. To the same effect in substance is *Johnson's Case*, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843. These cases hold that it is not necessary to "personal injury" that there be a physical impact. That was adjudged also, with a full review of the English decisions, in *Coyle v. John Watson* [1915] A. C. 1, 12-14, 83 L. J. P. C. N. S. 307, [1914] W. C. & Ins. Rep. 228, 7 B. W. C. C. 259, 111 L. T. N. S. 347 [1914] W. N. 196, 30 Times L. R. 501, 58 Sol. Jo. 533. Even liability for personal injury arising out of tort is not always restricted to cases of physical impact. This was shown by Chief Justice Knowlton in *Mulvey v. Boston*, 197 Mass. 178, 180, 83 N. E. 402, 14 Ann. Cas. 349. See *Megathlin v. Boston Elev. R. Co.* 220 Mass. 558, 108 N. E. 362. There is nothing at variance with this in *Spade v. Lynn & B. R. Co.* 168 Mass. 285, 38 L.R.A. 512, 60 Am. St. Rep. 393, 47 N. E. 88, 2 Am. Neg. Rep. 566; *Id.*, 172 Mass. 488, 43 L.R.A. 832, 70 Am. St. Rep. 298, 52 N. E. 747, 5 Am. Neg. Rep. 367, which was an action for negligence, and where, on the facts presented, it was held that there could be no recovery for mental disturbance without physical injury. In other connections "damage to the person" has a more constricted signification, which excludes indirect and consequential injury ensuing from immediate bodily harm to another. See, for example, *Dixon v. Amerman*, 181 Mass. 430, 63 N. E. 1057; *Hey v. Prime*, 197 Mass. 474, 17 L.R.A.(N.S.) 570, 84 N. E. 141; *Keating v. Boston Elev. R. Co.* 209 Mass. 278, 282, 95 N. E. 840. These and like decisions do not affect the case at bar.

Varying facts may give rise to questions of difficulty. In this connection it is to be noted that there is no explicit provision for compensation for occupational disease as such. "Personal injury" is the only ground for compensation. The legislative principle declared by the workmen's compensation act, to the test of which all cases arising under it must be subjected, is that whatever rightly is describable as a "personal injury," if received "in the course of" and "arising out of" the employment, becomes the basis for a claim.

If the harm suffered by the employee in

the case at bar had been received as the result of physical endeavor or strain in striving to resist tortious conduct by the employer, or in merely being subjected to such conduct, there would be little doubt that recovery could be had in an action at law as for a "personal injury" in the common-law sense of those words. *Coleman v. New York, N. H. & H. R. Co.* 106 Mass. 160, 178; 8 Am. Neg. Cas. 375; *Larson v. Boston Elev. R. Co.* 212 Mass. 262, 98 N. E. 1048, and cases collected; *Wiemert v. Boston Elev. R. Co.* 216 Mass. 598, 104 N. E. 360.

Without undertaking to define "personal injury," or to go beyond the requirements of the facts here presented, it is enough to say that the occurrence described by the dependent when she said "she felt something give" and "felt something else give way," accompanied by the symptoms of angina pectoris, may have been found to be a "personal injury."

That injury also may have been found to have arisen out of the employment. The pulling of the carpet, although not requiring such putting forth of muscular power as would have affected a healthy person, yet may have been enough to cause the injury which the employee suffered. It could have been regarded as resulting from the work as a contributing proximate cause. *McNicol's Case*, 215 Mass. 497, 499, L.R.A. 1916A, 306, 102 N. E. 697; *Brightman's Case*, 220 Mass. 17, L.R.A. 1916A, 321, 107 N. E. 527, 8 N. C. C. A. 102; *Fisher's Case*, 220 Mass. 581, 108 N. E. 361.

Even under the English act it seems that a personal injury such as that here disclosed would be held to have arisen "by accident" and hence to be within the act. It has been decided that perforation of a diseased intestine by slight pressure such as would be harmless to a healthy person (*Woods v. Wilson, Sons & Co.* 84 L. J. K. B. N. S. 1067, [1915] W. C. & Ins. Rep. 285, 8 B. W. C. C. 288, 113 L. T. N. S. 243, [1915] W. N. 109, 31 Times L. R. 273, 59 Sol. Jo. 348, the breaking of an aneurism by normal activity of the workman (*Clover, C. & Co. v. Hughes* [1910] A. C. 242, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 859, 54 Sol. Jo. 375, 47 Scot. L. R. 885, 3 B. W. C. C. 275), rupture resulting from ordinary exertion (*Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684), and pneumonia induced by exposure (*Coyle v. John Watson* [1915] A. C. 1, 83 L. J. P. C. N. S. 307, [1914] W. C. & Ins. Rep. 228, 7 B. W. C. C. 259, 111 L. T. N. S. 347, [1914] W. N. 195, 30 Times L. R. 501, 58 Sol. Jo. 533), were "personal injuries by accident." None L.R.A. 1916D.

of these instances come within the occupational diseases described in the Third Schedule of Stat. 6 Edw. VII. chap. 58, and hence these decisions are quite pertinent as persuasive authorities in a case like the present.

It has been argued with force on behalf of the insurer that since the harm to the employee was not wholly the effect of the work, but came in large part from the previous weakened condition of the employee's heart, hence, either there can be no award of compensation, or it should be restricted to that part of the injury which resulted directly from the work, and the part of the injury which flowed from the previous condition should be excluded. Even though the premise be sound, the conclusion does not follow. The act makes no provision for any such analysis or apportionment. It protects the "employee." That word is defined in part 5, § 2, as including "every person in the service of another under any contract of hire," with exceptions not here pertinent. There is nothing said about the protection being confined to the healthy employee. The previous condition of health is of no consequence in determining the amount of relief to be afforded. It has no more to do with it than his lack of ordinary care or the employer's freedom from simple negligence. It is a most material circumstance to be considered and weighed in ascertaining whether the injury resulted from the work or from disease. It is the injury arising out of the employment, and not out of disease of the employee, for which compensation is to be made. Yet it is the hazard of the employment acting upon the particular employee in his condition of health, and not what that hazard would be if acting upon a healthy employee or upon the average employee. The act makes no distinction between wise or foolish, skilled or inexperienced, healthy or diseased employees. All who rightly are describable as employees come within the act.

The act is not a substitute for disability or old-age pensions. It cannot be strained to include that kind of relief. Its ultimate purpose simply is to treat the cost of personal injuries incidental to the employment as a part of the cost of the business. It does not afford compensation for injuries or misfortunes which merely are contemporaneous or coincident with the employment, or collateral to it. Not every diseased person suffering a misfortune while at work for a subscriber is entitled to compensation. The relief is so new that the tendency may be to inquire only as to the employment and the injury, and to assume that these two factors constitute ground for compensation. But the essential connecting link of direct

causal connection between the personal injury and the employment must be established before the act becomes operative. The personal injury must be the result of the employment, and flow from it as the inducing proximate cause. The rational mind must be able to trace the resultant personal injury to a proximate cause set in motion by the employment, and not by some other agency, or there can be no recovery. In passing upon this question, an humanitarian emotion ought not to take the place of sound judgment in the weighing of evidence. The direct connection between the personal injury as a result and the employment as its proximate cause must be proved by facts before the right to compensation springs into being. A high degree of discrimination must be exercised to determine whether the real cause of an injury is disease or the hazard of the employment. A disease which, under any rational work, is likely to progress so as finally to disable the employee, does not become a "personal injury" under the act merely because it reaches the point of disablement while work for a subscriber is being pursued. It is only when there is a direct causal connection between the exertion of the employment and the injury that an award of compensation can be made. The substantial question is whether the diseased condition was the cause, or whether the employment was a proximate contributing cause. In the former case, no award can be made; in the latter, it ought to be made. This in substance is the test stated in *McNicol's Case*, 215 Mass. 497, 499, L.R.A. 1916A, 306, 102 N. E. 697. It must be applied here, as in other cases. In this respect the same rule governs as under the English act, where acceleration of a diseased bodily condition to the point where it constitutes a personal injury by reason of the strain or exertion of the employment is ground for recovery. See *Clover, C. & Co. v. Hughes* [1910] A. C. 242, 243, 79 L. J. K. B. N. S. 470, 102 L. T. N. S. 340, 26 Times L. R. 359, 54 Sol. Jo. 375, 47 Scot. L. R. 885, 3 B. W. C. C. 275, and like cases cited above.

This point is governed by *Brightman's Case*, 220 Mass. 17, L.R.A. 1916A, 321, 107 N. E. 527, 8 N. C. C. A. 102. The insurer asks us to review *Brightman's Case*, and especially the sentence (220 Mass. at page 20) where it is said: "Acceleration of previously existing heart disease to a mortal end sooner than otherwise it would have come is an injury within the meaning of the workmen's compensation act."

Of course that sentence was applied in its context to an acceleration directly traceable to the employment as the cause. It L.R.A. 1916D.

expressed the deliberate and matured judgment of the court. There is not thereby imported into the workmen's compensation act any theory of the law founded upon wrong doing of the employer. It is plain and has been said repeatedly that the act eliminates all consideration of tort, penalty, or negligence, save where there has been "serious and wilful misconduct." It establishes a unique theory of distribution of the human loss directly arising out of commercial and industrial enterprises hitherto unknown to our law. When a pre-existing heart disease of the employee is accelerated to the point of disablement by the exertion and strain of the employment, not due to the character of the disease acting alone, or progressing as it would in any rational work, there may be found to have been a personal injury.

It is contended that since the act contemplates a kind of accident insurance as the means of affording relief to the employee, it cannot have been the intent of the legislature to include such risks as that here disclosed, because of the difficulty of fixing a rate of insurance. But there does not appear as matter of law to be any insuperable difficulty in this respect. Fortuitous events, which appear to be as difficult of forecast as this, are common subjects of insurance.

It is argued that grave economic consequences of far-reaching effect may follow from the act as thus construed. It is said that persons not in good health may be altogether excluded from employment, to their severe hardship, while the cost of conducting commercial and industrial enterprises may become prohibitively large, all to the detriment of the general welfare and of the financial resources of the commonwealth. These considerations are of great public moment. But these factors relate to legislative questions, and the arguments founded on them are distinctly legislative arguments. They may be entitled to attention and deliberation at the hands of the legislative department of government. In the present forum they cannot have decisive significance, even if it were plain that the enumerated consequences were inevitable. The function of the judicial department of the government is simply to determine whether an act is within the power vested by the Constitution in the legislature, and then to enforce it according to its true meaning in cases as they arise. While the consequences to which a particular construction or application of a statute would lead have an important bearing in determining what may have been the intent of the legislature in using words of doubtful import (*Greene v. Greene*, 2 Gray, 361, 364, 61 Am. Dec. 454), they cannot control a plain rule,

of positive law established by clear language in a legislative mandate. The words "personal injury" had meaning in the law before the passage of the workmen's compensation act sufficiently well defined clearly to include the kind of personal harm here disclosed, so that it hardly can be assumed, under all the circumstances, that the legislature used them in a different or unusually constricted sense. There are no conditions which warrant a judicial interpretation of the words "personal injury" in the act as meaning the same as "personal injury by accident," or as excluding from the scope of "personal injuries" those instances where a diseased physical condition may have invited, or rendered the employee unusually susceptible to, "personal injury." It may be that the legislature intended a more narrow field than actually was described by the words used. But if that be so, the remedy must be sought from the legislature. There are no means by which the court can ascertain "the purpose and effect of a statute except from the words used when given their common and approved meaning." *Re Bergeron*, 220 Mass. 472, 475, 107 N. E. 1007.

The constitutionality of the act as thus interpreted is assailed. It is urged that the employer is compelled to part with property for causes for which he is in no wise responsible, and that thus he is deprived of property without due process of law. In its essence that is an attack upon the act as a whole, for in none of its ordinary aspects does the payment required by the act depend upon fault, and may be required in many cases where the employer was wholly free from fault. In support of this attack, cases like *Camp v. Rogers*, 44 Conn. 291,

Dougherty v. Thomas, 174 Mich. 371, 45 L.R.A.(N.S.) 699, 140 N. W. 615, Ann. Cas. 1916A, 1163, Ohio & M. R. Co. v. Lackey, 78 Ill. 55, 20 Am. Rep. 259; *Com. v. Herr*, 229 Pa. 132, 78 Atl. 68, Ann. Cas. 1912A, 422, and *Eastman v. Jennings-McRea Logging Co.* 69 Or. 1, 138 Pac. 216, Ann. Cas. 1916A, 185, are relied upon where statutes have been stricken down which have undertaken to make one liable in an action at law for injuries, losses, or expenses for which he was in no way responsible directly or remotely, morally or legally. The case at bar is quite distinguishable. The workmen's compensation act is elective, and not compulsory. It is wholly optional with the employer, as it is with the employee, whether he comes under the provisions of the act or stays outside and stands on his legal rights. The connection between the employment and the injury in the case at bar is the same in kind as in the manifold other instances where the personal injury to the employee is caused by a definite physical blow wholly without fault of the employer. The act is not unconstitutional in this respect. *Opinion of Justices*, 209 Mass. 607, 96 N. E. 308, 1 N. C. C. A. 557; *Young v. Duncan*, 218 Mass. 346, 351, 106 N. E. 1.

The reasons which have been set forth in this opinion and in the cases to which reference has been made seem to us to compel the conclusion that, on the evidence here disclosed, it was competent for the Industrial Accident Board to find that the employee had received a "personal injury arising out of and in the course of" her "employment," according to the true meaning of those words in the workmen's compensation act.

Decree affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

KATHERINE GEARING

v.

JOHN BERKSON et al., Appts.

PERCY A. GEARING

v.

SAME, Appts.

(223 Mass. 257, 111 N. E. 785.)

Food — Implied warranty — action for injury.

1. One whose wife, as his agent, purchases meat for food, may hold the vendor liable in damages in case he is made ill by

its unfitness, under a statute providing that where the buyer makes known to the seller the purpose for which goods are required, and relies on the seller's skill and judgment, there is an implied warranty that the goods shall be reasonably fit for such purpose.

For other cases, see Food; also Sale, II. c, in Dig. 1-52 N. S.

Same — action by agent.

2. One who, as agent for her husband, purchases meat for food, of which she subsequently partakes, and is made ill by its unfitness, cannot hold the seller liable in damages as for breach of warranty, since no contractual relation exists between them. *For other cases, see Food; also Sale, II. c, in Dig. 1-52 N. S.*

Note. — The liability of a manufacturer, packer, or vendor to persons not in privity of contract, for injuries from defects in articles sold, including many cases dealing with articles of food, is treated in annotations to L.R.A.1916D.

Tomlinson v. Armour & Co. 19 L.R.A.(N.S.) 923; *Mazetti v. Armour & Co.* 48 L.R.A.(N.S.) 213; and *Crigger v. Coca-Cola Bottling Co.* L.R.A.1916B, 879.

Evidence — presumption — overcoming by finding.

3. A finding that a vendor of food was not negligent in selling that which was unfit overcomes whatever presumption as to evidence of negligence arises from the violation of the statute forbidding such sale.

For other cases, see *Evidence*, XII. d, in Dig. 1-52 N. S.

(March 1, 1916.)

APPEAL by defendants from orders of the Municipal Court of Boston in plaintiffs' favor, in actions brought to recover damages resulting from a sale by defendants of unwholesome food, in violation of statute. Affirmed as to defendant husband; reversed as to defendant wife.

The facts are stated in the opinion.

Mr. Harry Bergson, for appellants:

Only parties to the contract can maintain an action upon it:

Roberts v. Anheuser Busch Brewing Asso. 211 Mass. 449, 98 N. E. 95.

This court has never taken the position that the violation of the sales act constitutes negligence per se. At most, it has held such a violation of the statute to be evidence of negligence, for the jury's consideration.

Berdos v. Tremont & S. Mills, 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912B, 797.

Unless a breach of a warranty or condition, expressed or implied, is shown, it is incumbent upon the plaintiff to prove negligence.

Crocker v. Baltimore Dairy Lunch Co. 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B, 884.

Pork chops are not manufactured concoctions, like drugs or poisons, which may be inherently dangerous; nor were there any representations made by the defendants which could be considered as continuing for the benefit of any person ultimately using the goods, as in *Roberts v. Anheuser Busch Brewing Asso.* supra.

Mr. Eugene C. Upton, for appellees:

The plaintiff husband is entitled to recover either on "implied warranty" or "malum prohibitum."

Farrell v. Manhattan Market Co. 198 Mass. 271, 15 L.R.A. (N.S.) 884, 126 Am. St. Rep. 436; 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142; *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339; *Divine v. McCormick*, 50 Barb. 116; *Hoover v. Peters*, 18 Mich. 51; *Wallis v. Russell*, [1902] 2 I. R. 585.

A man who deals out to consumers meat that may contain poisonous germs is held to a high degree of care and knowledge. Inherent dangers of the occupation carry responsibility.
L.R.A.1916D.

Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; *Hammack v. White*, 11 C. B. N. S. 588, 31 L. J. C. P. N. S. 129, 8 Jur. N. S. 796, 5 L. T. N. S. 676; 10 Week. Rep. 230; *Hutchison v. York, N. & B. R. Co.* 5 Exch. 343, 6 Eng. Ry. & C. Cas. 580, 19 L. J. Exch. N. S. 296; *Munro v. Pacific Coast Dredging & Reclamation Co.* 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303; *Lebourdais v. Vitriified Wheel Co.* 194 Mass. 343, 80 N. E. 482; *George v. Skivington*, L. R. 5 Exch. 1; *Huset v. J. I. Case Threshing Mach. Co.* 61 L.R.A. 303, 57 C. C. A. 237, 120 Fed. 865; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Lewis v. Terry*, 111 Cal. 39, 31 L.R.A. 220, 52 Am. St. Rep. 146, 43 Pac. 398; *Roberts v. Anheuser Busch Brewing Asso.* 211 Mass. 449, 98 N. E. 95; *Flint & W. Mfg. Co. v. Beckett*, 167 Ind. 491, 12 L.R.A. (N.S.) 924, 79 N. E. 503; *Farrant v. Barnes*, 11 C. B. N. S. 553, 31 L. J. C. P. N. S. 137, 8 Jur. N. S. 868; *Langridge v. Levy*, 2 Mees. & W. 519, 6 L. J. Exch. 137; *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, 19 Eng. Rul. Cas. 81; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210.

Notice to the defendant of the intended use of the pork chops was unnecessary.

Farrell v. Manhattan Market Co. 198 Mass. 271, 15 L.R.A. (N.S.) 884; 126 Am. St. Rep. 436, 84 N. E. 481, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142.

Violation of a statutory duty is negligence per se.

Berdos v. Tremont & S. Mills, 209 Mass. 489, 95 N. E. 876, Ann. Cas. 1912B, 797; *Gately v. Taylor*, 211 Mass. 60, 39 L.R.A. (N.S.) 472, 97 N. E. 619; *Parker v. Barnard*, 135 Mass. 116, 46 Am. Rep. 450; *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354; *Stone v. Boston & A. R. Co.* 171 Mass. 544, 41 L.R.A. 794, 51 N. E. 1, 4 Am. Neg. Rep. 490; *Queen v. Dayton Coal & I. Co.* 95 Tenn. 458, 30 L.R.A. 82, 49 Am. St. Rep. 935, 32 S. W. 460; *Burk v. Creamery Package Mfg. Co.* 126 Iowa, 730, 106 Am. St. Rep. 377, 102 N. W. 793, 18 Am. Neg. Rep. 62; *Shields v. Paul B. Pugh Co.* 122 App. Div. 586, 107 N. Y. Supp. 604; *Nickey v. Steuder*, 164 Ind. 189, 73 N. E. 117; *Binford v. Johnston*, 82 Ind. 426, 42 Am. Rep. 508; *Hyde Park v. Gay*, 120 Mass. 589; *Conn v. May*, 36 Iowa, 241; *Com. v. Phelps*, 210 Mass. 109, 96 N. E. 69; *Com. v. Wheeler*, 205 Mass. 385, 137 Am. St. Rep. 456, 91 N. E. 415, 18 Ann. Cas. 319; *Com. v. Boynton*, 2 Allen, 160; *Com. v. Huntley*, 156 Mass. 236, 15 L.R.A. 839, 30 N. E. 1127; *Thomp. Neg.* § 10.

The plaintiff husband is entitled to recover for loss of services of his wife and expenses of her sickness.

Feneff v. New York C. & H. R. R. Co. 203 Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436.

The plaintiff wife may recover either as a *malum prohibitum* or a breach of warranty, or for injuries which, according to the common experience of mankind, were a natural consequence of the defendants' negligence.

Osborne v. Morgan, 130 Mass. 102, 39 Am. Rep. 437.

The plaintiff wife, if agent only of the husband, had sufficient interest in the satisfactory performance of her duty as agent to support an action against a wrongdoer.

Rhoades v. Blackiston, 106 Mass. 334, 8 Am. Rep. 332; *Baltimore & P. S. B. Co. v. Atkins*, 22 Pa. 522; *Graham v. Duckwall*, 8 Bush, 12; *Tiffany, Principal & Agent*, pp. 388, 389.

A mere casual view of meat lying on a plate in a window does not bar this plaintiff.

White v. Newborg, 208 Mass. 280, 94 N. E. 269.

The sale was a prohibited act, and negligence per se.

Hyde Park v. Gay, 120 Mass. 589.

De Courcy, J., delivered the opinion of the court:

The sales act, Stat. 1908, c. 237, § 15, provides:

"Subject to the provisions of this act, and of any other statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, . . . there is an implied warranty that the goods shall be reasonably fit for such purpose."

"(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed."

Even before the enactment of this statute, it was recognized as the law in this commonwealth, that where the buyer at a shop relies on the skill and judgment of the dealer in selecting food, and it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, he is liable if it is not fit to be eaten; while, in case the buyer himself selects provisions, the dealer's implied warranty does not go beyond the implied assertion that he believes the food to be sound. *Farrell v. Manhattan Market Co.* 198 Mass. 271, 15 L.R.A.(N.S.) 884, 84 N. E. 481, 126 Am. L.R.A.1916D.

St. Rep. 436, 15 Ann. Cas. 1076, 21 Am. Neg. Rep. 142.

The application of this rule of law to the facts as found by the trial judge is decisive in the action of *Percy A. Gearing*. His wife, acting as his agent, left to the defendants the selection of the meat, and paid for it at the current price for sound, wholesome pork chops. See *Hunt v. Rhodes Bros.* Co. 207 Mass. 30, 92 N. E. 1001. The defendant Freshman undertook to make the selection so left to him. The meat was cooked, and was eaten by the plaintiff and his wife, and both were made sick "because of the unwholesome, unsound, poisonous, or unfit quality or condition of said pork chops. The order of the appellate division in this action must be affirmed.

In the action of the wife, *Katherine Gearing*, the appellate division ordered judgment for the plaintiff on the first count of her declaration, and from this the defendants appealed. The count is apparently framed in contract, for breach of an implied warranty or condition of fitness for food. The declaration purports to be "in tort," presumably on the theory that an action of tort may be maintained upon a false warranty. See *Farrell v. Manhattan Market Co.* 198 Mass. 271, 274, 15 L.R.A.(N.S.) 884, 126 Am. St. Rep. 436, 84 N. E. 481, 21 Am. Neg. Rep. 142, 15 Ann. Cas. 1076, and cases cited. The difficulty with the case on this ground is that there was no contractual relation, and hence no warranty, between Mrs. Gearing and the defendants. The only sale was that made to her husband through her as his agent; and a cause of action in contract accrued to him thereon, as above set forth. The implied warranty, or, to speak more accurately, the implied condition of the contract, to supply an article fit for the purpose required, is in the nature of a contract of personal indemnity with the original purchaser. It does not "run with the goods." *Williston Sales*, § 244; *Lebourdais v. Vitri-fied Wheel Co.* 194 Mass. 341, 80 N. E. 482; *Roberts v. Anheuser Busch Brewing Asso.* 211 Mass. 449, 451, 98 N. E. 95.

It may be added that Mrs. Gearing's right to recover on her second count, added by amendment, which is in tort for negligence is concluded by the findings of fact against her. The sale apparently was one of "adulterated food" under Rev. Laws, chap. 75, §§ 16, 18, 24; and the violation of the statute by the defendants presumably was some evidence of negligence. *Berdos v. Tremont and S. Mills*, 209 Mass. 496, 95 N. E. 876, Ann. Cas. 1912B, 797. But that is controlled by the finding of the judge, that no negligence in fact was shown on the part of the defendants. In

the absence both of an implied warranty and of negligence on the part of defendants, the action of Mrs. Gearing fails. *Roberts v. Anheuser Busch Brewing Asso. ubi supra*; *Crocker v. Baltimore Dairy Lunch Co.* 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B, 884; *Gately v. Taylor*, 211 Mass. 60, 39 L.R.A.(N.S.) 472, 97 N. E. 619; *Wilson v. B. S. Ferguson Co.* 214 Mass. 265, 101 N. E. 381.

Consequential damages for loss of consortium cannot be recovered in either case. *Feneff v. New York O. & H. R. R. Co.* 203

Mass. 278, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291, 89 N. E. 436; *Bolger v. Boston Elev. R. Co.* 205 Mass. 420, 91 N. E. 389; *Whitcomb v. New York, N. H. & H. R. Co.* 215 Mass. 442, 102 N. E. 663. See 16 Columbia L. Rev. 122.

In the case of Percy A. Gearing the order of judgment for the plaintiff must be affirmed; and in the case of Katherine Gearing, the order of the Appellate Division must be reversed, and judgment entered for the defendant.

So ordered.

WASHINGTON SUPREME COURT. (Department No. 1.)

H. L. KETLER, Respt.,
v.

M. E. MURREY et al., Appts.

(— Wash. —, 154 Pac. 1084.)

Intoxicating liquor — disposing of stock — necessity of license.

A statute requiring a license to sell or dispose of intoxicating liquors does not apply to a sale of a stock of such liquors as part of a hotel, restaurant, and saloon business.

For other cases, see *Intoxicating Liquors, I. a*, in *Dig. 1-52 N. S.*

(February 9, 1916.)

APPEAL by defendants from a judgment the Superior Court for Pierce County in plaintiff's favor in an action to recover possession of a hotel, restaurant, and saloon alleged to have been purchased from defendants. Affirmed.

The facts are stated in the opinion.

Mr. J. W. A. Nichols, for appellants:

Equitable construction of statutes, while tolerated in remedial statutes, with great caution, should not be extended to regulations of public policy; and if the language is plain and free from ambiguity, inconvenience in its enforcement can have no weight in its construction.

Walker v. Spokane, 62 Wash. 312, 113 Pac. 775, Ann. Cas. 1912C, 994; 23 Cyc. 334, 335, B, 1 & 2.

Where language is clear, there is no room for construction.

Swarts v. Siegel, 54 C. C. A. 399, 117 Fed. 13.

Messrs. Gordon & Easterday, for respondent:

It is the traffic in intoxicating liquors to which the license laws apply, not to the mere transfer of property in liquors.

Note. — As to sale of stock of intoxicating liquors, see annotation following this case, post, 1010.
L.R.A.1916D.

23 Cyc. 117, 118; *Smith v. Heineman*, 118 Ala. 195, 72 Am. St. Rep. 150, 24 So. 364; *Hagerty v. Tuxbury*, 181 Mass. 126, 63 N. E. 333; *Wildermuth v. Cole*, 77 Mich. 483, 43 N. W. 889; *Joyce, Intoxicating Liquors*, §§ 302-307; *Black, Intoxicating Liquors*, §§ 139, 204, 205.

Interpretation may expand the meaning of a statute beyond the mere signification of its words, and "statutes are to be construed so as to not work an absurdity."

Bishop, Statutory Crimes, § 200; *Palmer v. Laberee*, 23 Wash. 409, 63 Pac. 216.

Chadwick, J., delivered the opinion of the court:

Respondent purchased a hotel, restaurant, and saloon from the defendants. They refused to make delivery upon the ground that the stock of goods consisted, in part, of two kegs of beer, a barrel of whisky, containing some 7 or 8 gallons, and several bottles of liquors and wines. Appellants rely upon the statute (*Rem. & Bal. Code*, §§ 2962, 6268):

"Any person who shall sell or dispose of any spirituous, malt, or other intoxicating liquors without having first obtained a license from the proper authorities shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding \$1,000, or imprisoned in the county jail not to exceed six months, or by both fine and imprisonment, for each offense."

"Nothing in this act shall be held or construed to allow any person, firm, or corporation to barter, sell, or otherwise dispose of any spirituous, malt, fermented, or other intoxicating liquors without having first obtained a license therefor, as required by the provisions of this chapter, except as provided in § 6275, *infra*."

The court below held that a license to sell a quantity was not necessary where the seller was closing out his business as a dealer in intoxicating liquor. The holding was correct. Statutes such as our own are directed to the regulation of traffic in in-

toxicating liquor, and not to the transfer of property in it. *Black, Intoxicating Liquors*, p. 139.

In *Wildermuth v. Cole*, 77 Mich. 483, 43 N. W. 889, under a statute as broad as our own, the supreme court of Michigan held that a sheriff holding intoxicating liquors under a writ of attachment did not need a license to sell on execution sale; that his act did not fall within either the letter or the spirit of the statute, which was directed only to those engaged in the business of selling intoxicating liquors. We note this case because appellants contend that all the cases cited by respondent are to be distinguished as covering sales made by public officers in the performance of their duty. If appellants' reasoning be good, it would not be possible so to distinguish the cases; for the statute uses the words "any person," and a sheriff or other officer would fall within the letter of the law. If it were admitted that the sale by a sheriff could be so distinguished, it would not follow that a sale by an assignee of a debtor or an administrator was a sale under the compulsory process of a court, and yet it is held that a sale by either of these agents does not fall within the meaning and intent of the law.

In *Williams v. Troop*, 17 Wis. 463, the court said: "He [an administrator], is a person whose plain legal duty it is to sell property, collect and pay the debts, and settle up the estate committed to his charge.

In performing this duty and disposing of the spirituous liquors belonging to the estate, it is no more necessary for him to obtain a license than it would be for a sheriff to obtain one before he could sell liquors taken upon an execution."

And the like rule was applied to an assignee in *Gignoux v. Bilbruck*, 63 N. H. 22.

In *Forwood v. State*, 49 Md. 531, in discussing the law of the case it is said: If the vendor "had disposed of them [stock of liquors] at private sale by wholesale, and at one time in good faith, solely for the purpose of closing his business, and not in the continued prosecution of his business, this would not have been, in our judgment, any infraction of the license laws."

In *Hagerty v. Tuxbury*, 181 Mass. 126, 63 N. E. 333, the holding is epitomized in the syllabus: "One owning an interest in a liquor saloon and its stock in trade, but having no license to sell intoxicating liquors, lawfully may sell to his partner his interest in the saloon and the intoxicating liquors it contains."

We find the judgment of the lower court well founded in reason and sustained by ample authority.

Affirmed.

Morris, Ch. J., and Mount, Ellis, and Fullerton, JJ., concur.

Petition for rehearing denied.

Annotation—Intoxicating liquors; sale of stock of liquors.

The sale of a stock of liquors under legal process is excluded from this note. For cases upon that point, the reader is referred to the note to *Hines v. Stahl*, 20 L.R.A.(N.S.) 1118.

The question as to what amounts to retail sales, as distinguished from wholesale, is treated in the notes to *Re Metz Bros. Brewing Co.* 32 L.R.A.(N.S.) 622, and *State v. Cunningham*, L.R.A. 1915B, 389.

Although there is some conflict, the weight of authority and better reasoning seem to sustain the position taken in *KETLER v. MURREY*, ante, 1009, that the sale of a stock of liquor, not in the ordinary course of business, is not within the statutes regulating, but not absolutely prohibiting, the sale of intoxicating liquor.

Sale in gross, generally.

The owner of a saloon may lawfully sell the stock and fixtures and quit the business. *Lawlor v. State* (1912) 53 Ind. App. 24, 99 N. E. 487. L.R.A.1916D.

So, a note given in part payment of the purchase price of a saloon business, including liquors and other stock in hand, is based upon a lawful consideration. *Lackaff v. Hinz* (1913) 73 Wash. 21, 131 Pac. 207.

And in *Strahn v. Hamilton* (1871) 38 Ind. 57, it was held that a note for the price of a saloon, liquors, fixtures, etc., including the license, was without valid consideration only to the extent that the transfer of the license entered into the consideration.

The sale of a stock of liquors in gross to close out a saloon is not rendered illegal by the fact that the seller has not paid his tax to the state as a wholesale dealer. *Overall v. Bezeau* (1877) 37 Mich. 506.

An option contract for the sale of a retail liquor business with the fixtures, stock, and license is not illegal because the purchaser is not authorized by law to engage in the business, where the law provides for the sale and transfer of a

retail liquor license. *Strebel v. Bligh* (1915) — *Ind.* —, 109 N. E. 45.

A druggist, in selling out his entire business, does not violate the law prohibiting the sale of liquors except at a dispensary, because his stock of drugs contains some liquor. *Long v. Holley* (1912) 177 *Ala.* 508, 58 *So.* 254.

Ex Parte Aitkin (1900) 1 *N. S. W.* St. Rep. 214, 18 *N. S. W. W. N. Cas.* 279, is stated in 2 *Woollen & Thornton on Intoxicating Liquors*, § 691, as holding that an auctioneer selling out at auction the stock of the owner, who sends the liquor to the former's premises, does not carry on the business of a spirit merchant, and cannot be convicted because he has not the license required of such merchants.

But a sale of a stock of goods, including intoxicating liquors, by one not licensed to sell such liquors, was held illegal in *Kidder v. Blake* (1864) 45 *N. H.* 530, and in *Ladd v. Dillingham* (1851) 34 *Me.* 316.

And in *Gerlach v. Skinner* (1885) 34 *Kan.* 86, 55 *Am. Rep.* 240, 8 *Pac.* 257, an indivisible contract for the sale of a building with its contents was held wholly void because it included a stock of liquors which neither of the parties had any permit to sell, and whose sale was in violation of the prohibitory liquor law, which prohibited the sale of liquors, directly or indirectly, except for medical, scientific, or mechanical purposes.

And in *McGuinness v. Bligh* (1874) 11 *R. I.* 94, it is held that, under a statute providing that all payments for liquors sold in violation of law shall be considered, as between the parties to such sale, to have been received without consideration, a person who purchases a half interest in a business, the stock of which he knows consists in part of liquor illegally kept for sale, can recover back so much of the amount paid as may be considered to have been received for the liquor, but the illegality does not taint the whole of the sale, and therefore he cannot recover the whole of his payment.

The sale of a saloon and its contents to a minor is illegal under a statute prohibiting the sale of liquor to minors, and where the law provides that no person holding a license shall sell any liquors to any unlicensed dealer, having reason to believe that the same are to be resold, and that all compensation for liquors sold in violation of law shall be held to have been received without consideration, and that no action shall be maintained for the value of liquors sold

contrary to law, such minor can recover back the purchase price of the saloon, nor is he prevented from disaffirming the contract of sale by the rule that a minor may bind himself by a contract beneficial to him, the business purchased being a profitable one, since the contract cannot be beneficial to him, because he is disqualified by law from obtaining the necessary license. *Chabot v. Paulhus* (1911) 32 *R. I.* 471, 79 *Atl.* 1103.

Sale by retail to close out stock.

It is stated in *Forwood v. State* (1878) 49 *Md.* 531, that where a trader or keeper of an ordinary, whose license has expired, discontinues his business, he may, without renewing his license, lawfully sell his stock of liquors remaining on hand, if he does so in good faith, and not in the prosecution of a regular business, but it was held in that case that a hotel keeper who, for six months after the expiration of his license, continued in the occupation of the same premises, selling his liquor on hand to any and all persons who called for it in quantities of half a pint and upwards, did not come within the exception of the statute, although he sold at cost and not by the glass, the court saying that if he had sold at public auction, or at private sale, by wholesale and at one time, it would not have been any infraction of the license law.

And a retail liquor dealer who continued to sell after the expiration of his license was held to have thereby violated the law, although he sold only the stock he had on hand at that time. *United States v. Angell* (1881) 11 *Fed.* 34.

Sale by one partner to another.

Statutes prohibiting the sale of liquor without a license have no application to a sale by one partner to another, of his interest in the firm's saloons. *Smith v. Heineman* (1897) 118 *Ala.* 195, 72 *Am. St. Rep.* 150, 24 *So.* 364.

A contract of sale by one partner to the other of his interest in the furniture, fixtures, and stock in their saloon, and of his license, is not invalid because the transfer of the license is illegal, the other part of the contract being legal, and its consideration separable from the illegal consideration. *Pierce v. Pierce* (1897) 17 *Ind. App.* 107, 46 *N. E.* 480.

The sale by a distiller to his partner of his share of the product of the distillery is not a violation of a local-option law which allows distillers to sell their product by wholesale at the place of distillation, when not to be drunk on the

premises. *Stamper v. Com.* (1907) 31 Ky. L. Rep. 707, 103 S. W. 286.

Hagerty v. Tuxbury (1902) 181 Mass. 126, 63 N. E. 333, is sufficiently set out in *KETLER v. MURREY*, ante, 1009.

Sale by representative of estate to close out business.

An assignee for the benefit of creditors can sell a stock of liquors belonging to the debtor, although their sale by the latter is prohibited by law. *Gignoux v. Bilbruck* (1884) 63 N. H. 22. In the foregoing case the assignee recovered the price of intoxicating liquors sold by him at private sale and at different times, against the contention of the defendant that by so doing the assignee was carrying on a retail liquor business, and that such unlawful sale was unnecessary because it was possible for him to sell the liquors in another state where a sale would be lawful.

KETLER v. MURREY, ante, 1009, sufficiently sets forth the holding on this point in *Williams v. Troop* (1863) 17 Wis. 463, involving a sale of liquors by an administrator.

Mortgage of stock of liquors.

A mortgage of a stock of liquors, to secure the payment of a note, violates a law prohibiting the sale of intoxicating liquors, except for medical, scientific, or mechanical purposes. *Korman v. Henry* (1884) 32 Kan. 49, 3 Pac. 764. A motion for a rehearing in this case was overruled in (1884) 32 Kan. 343, 4 Pac. 262.

A sale by way of mortgage of a stock of goods consisting in part of intoxicating liquors is illegal under a statute prohibiting the sale of liquors directly or indirectly by one not licensed. *Hay v. Parker* (1867) 55 Me. 355.

A mortgage of a stock of drugs, which includes a quantity of intoxicating liquors, is void in toto. *First Nat. Bank v. Gerson* (1893) 50 Kan. 582, 32 Pac. 905.

The same holding was made in *Fler-sheim v. Cary* (1888) 39 Kan. 178, 17 Pac. 825, as to a mortgage of saloon fixtures and liquors.

The right of a druggist, who has no permit to sell intoxicating liquors, to lawfully use them for the purpose of compounding medicines for sale, does not justify a mortgage of such liquors for the purpose of securing a debt due to a creditor who has no permit to engage in their sale. *C. D. Smith Drug Co. v. First Nat. Bank* (1899) 63 Kan. 184, 55 Pac. 851.

But it was held in *Cobb v. Farr* (1860) L.R.A.1916D.

16 Gray (Mass.) 597, that a mortgage of intoxicating liquors, though it may be a sale such as a statute, regulating the sale of liquors, prohibits, passes the title to the mortgagee, who may maintain an action against one wrongfully taking the liquors. The court said: "A sale, even when made under such circumstances as the law forbids, yet passes the property to the purchaser. The seller commits an offense for which he is punishable, but he does not retain his property in the article sold. It has never been held, under any of the statutes regulating the sale of spirituous or intoxicating liquors in this commonwealth, that the purchaser was guilty of any offense, or was *particeps criminis*. . . . As it is not criminal in the buyer to take an absolute title, we cannot see that it is criminal in him to take a defeasible title, or that he will fail to acquire all the rights of property which such a title usually gives."

Where possession is given under a mortgage executed in violation of an act prohibiting the manufacture or sale of intoxicating liquors by any person, title passes to the mortgagee, and the mortgage is good as against the mortgagor, and also as against his creditors, if not made for the purpose of defrauding them, under the principle that, if an illegal contract is executed, the law will not undo what the parties themselves have done. *Bagg v. Jerome* (1859) 7 Mich. 145.

Under the same principle, it was held that an assignee in insolvency of a mortgagor of a stock of drugs, including intoxicating liquors, could not recover the value of such stock from the mortgagee in possession, assuming that the presence of the liquors in the stock tainted the mortgage with illegality as to both the mortgagor and mortgagee. *Conley v. Murdock* (1909) 106 Me. 266, 76 Atl. 682.

And in *Korman v. Henry* (Kan.) set out supra, where the mortgagee attempted to replevin the mortgaged liquors from a constable who held them under a writ of attachment against the mortgagor, the court, said: "If the plaintiff, at any time before the writ of attachment was levied upon the property, had taken possession of the same under his mortgage, a different question would have been raised in this case. Under such circumstances, the plaintiff would hold the property, not only by virtue of his chattel mortgage, but also by virtue of his possession; and if his chattel mortgage should be held to be void,

he might still claim the property as against any mere wrongdoer, by virtue of his possession. His possession would undoubtedly give him such a right to the property that he could maintain replevin against any mere wrongdoer who might disturb his possession."

The fact that a stock of drugs contains intoxicating liquors does not make a mortgage thereof illegal as to the mortgagee, where he is ignorant of such fact. *Conley v. Murdock (Mo.) supra.*

And when the validity of such a mort-

gage is challenged upon the ground that it covers liquors, and was taken by a person who did not have a permit to sell them, to secure a debt due to him, and the description of the mortgaged goods is general and does not specifically mention intoxicating liquors, it is competent for the mortgagee to testify that he did not know or understand that they were included in the stock. *C. D. Smith Drug Co. v. First Nat. Bank (Kan.) supra.*
G. V. I.

WEST VIRGINIA SUPREME COURT OF APPEALS.

CLARA A. ARCHIBALD, Appt.,

v.

LEE OTT, State Compensation Commissioner.

(— W. Va. —, 87 S. E. 791.)

Master and servant — workmen's compensation — quenching thirst.

1. Acts of ministration by a servant unto himself, such as quenching his thirst, relieving his hunger, protecting himself from excessive cold, and numerous others, readily conceivable, performance of which while at work are reasonably necessary to his health and comfort, are incidents of his employment and acts of service therein, within the meaning of the workmen's compensation act, though, in a sense, they are personal to himself, and only remotely and indirectly conducive to the object of the employment; and an accidental injury sustained in the performance of such an act is compensable under said statute, as one incurred in the course of the employment and resulting therefrom.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Same — drinking poison.

2. Death of a servant by poison, occasioned by his drinking from a bottle a poisonous fluid having the appearance of water, under the impression that it was drinking water, while at work on premises on which the workmen supplied themselves with drinking water from a neighboring well, by means of buckets and bottles, on account of the unsatisfactory condition of

of the city water furnished in the building by means of pipes, is an injury which arose in the course of his employment and resulted therefrom, within the meaning of the workmen's compensation act.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

Same — negligence of employee.

3. Mere negligence or carelessness of an employee, causing his death or injury, does not preclude right of compensation under said statute.

For other cases, see Master and Servant, II. a, 1, in Dig. 1-52 N. S.

(January 18, 1916.)

APPEAL by applicant from a decision of the State Compensation Commissioner denying compensation for the death of her husband, in a proceeding by her under the workmen's compensation act to recover for his death. Compensation awarded.

The facts are stated in the opinion.

Messrs. Conley & Johnson and Blackford, Bradshaw, & Beans, for appellant: George Archibald received the injuries causing his death in the course of and resulting from his employment.

Burns's Case, 218 Mass. 8, 105 N. E. 601, 5 N. C. C. A. 636, Ann. Cas. 1916A, 787; *Industrial Commission v. Brown* (1915) 60 Ohio L. J. 57; *Johnson's Case*, 217 Mass. 388, 104 N. E. 735, 4 N. C. C. A. 843; *Hurle's Case*, 217 Mass. 223, L.R.A.1916A, 279, 104 N. E. 336, 4 N. C. C. A. 527, Ann. Cas. 1915C, 919; *Bryant v. Fissell*, 84 N. J. L. 72, 86 Atl. 460, 3 N. C. C. A. 585; *Bennen v. New Dells Lumber Co.* 161 Wis. 370, L.R.A.1916A, 273, 154 N. W. 640; *Zabriskie v. Erie R. Co.* 85 N. J. L. 157, 88 Atl. 824, 4 N. C. C. A. 778; *Keenan v. Flemington Coal Co.* 40 Scot. L. R. 144, 5 Sc. Sess. Cas. 5th series, 164, 10 Scot. L. T. 409; *Parker v. Hambrook*, Ann. Cas. 1913C, 24, note; *Clem v. Chalmers Motor Co.* 178 Mich. 340, L.R.A.1916A, 352, 144 N. W. 848, 4 N. C. C. A. 876; *Terlecki v. Straus*, 85 N. J. L. 454, 89 Atl. 1023, 4 N. C. C. A. 584.

Headnotes by POFFENBARGER, J.

Note. — As to the construction and effect of the workmen's compensation act generally, see annotation in L.R.A.1916A, 23.

As to injuries received while procuring refreshments, as arising out of and in the course of the employment, see annotation following *Sundine v. Dunne*, L.R.A.1916A, 320; and see also *Mann v. Glastonbury Knitting Co.* ante, 86, and references in footnote to that case.
L.R.A.1916D.

Messrs. A. A. Lilly, Attorney General, and Frank Lively, Assistant Attorney General, for State Compensation Commissioner:

The injury did not "arise out of and in the course of the employment."

Fitzgerald v. Clarke [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; Moore v. Manchester Liners [1910] A. C. 498, 79 L. J. K. B. N. S. 1175, 103 L. T. N. S. 226, 26 Times L. R. 26, 54 Sol. Jo. 703, 3 B. W. C. C. 527; Bradbury, Workmen's Compensation, 2d ed. 398; McNicol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522; DeConstantin v. Public Service Commission, — W. Va. —, L.R.A.1916A, 329, 83 S. E. 88.

Poffenbarger, J., delivered the opinion of the court:

George Archibald, a husband and the father of three children, while working as a plumber for the Schofield-Cowl Company, at Wheeling, West Virginia, died in consequence of accidental poisoning. That the accident occurred in the course of his employment seems not to be controverted, but that the injury arose out of the employment, or resulted from it, in the legal sense of the terms, is denied; and compensation to the widow was refused, upon the theory that it did not.

The poisoning was not an occupational disease, such as lead poison. Archibald drank a poisonous fluid commercially known as lapidolith, and used for hardening concrete, believing it to be drinking water. His employers were installing the plumbing in the Wheeling High School building. The Fetzer-Winger Company were doing the concrete work in the same building. All of the employees supplied themselves with drinking water from a neighboring well by means of buckets and bottles, the city water piped into the building being unsatisfactory, or less desirable than the well water. Bottles of different sizes and kinds were used. Having occasion to be on the third floor of the building in the course of his work, and becoming thirsty, Archibald discovered what he took to be a large bottle of water in a bucket and drank from it, thinking it had been brought up and left there by some other workman. It proved to be the lapidolith with which a servant of the Fetzer-Winger Company had been treating the concrete floors. Having made one or more applications of it, this servant had set the bottle in a bucket he had used in applying the fluid, and left it there until he should need it for another application. On the bucket he set a broom and placed a card bearing the word "Poison." At

Archibald's shop or workbench in another part of the building he had a water bottle of his own. Why he did not notice the warning on the card is not definitely shown. The fluid was clear, and looked like water, and knowledge of the common use of such bottles by the workmen, no doubt, induced the hasty and thoughtless act.

Right of compensation under the statute does not depend upon negligence or fault of the employer, and is not precluded by mere negligence on the part of the employee, causing the injury. It gives compensation for injuries received "in the course of and resulting from" the employment. It specifically denies compensation for injuries self-inflicted or occasioned by the wilful misconduct of the employee, his disobedience of rules and regulations adopted by the employer and approved by the Compensation Commissioner, or his intoxication. Its provisions are based upon the principles of the English compensation act, which has been construed as giving compensation for accidental injuries, though occasioned by negligence of the injured party. In his disposition of the application, the Commissioner does not depart from this construction, nor does he deny right of participation, on the ground of Archibald's negligence or carelessness. The specification of certain grounds of exclusion impliedly limits and confines it to them, and relieves from other circumstances which might be deemed sufficient to exclude, in the absence of an expression of contrary legislative intent. Exclusion on certain grounds argues intent not to exclude on others. "Expressio unius est exclusio alterius."

As Archibald's negligence or carelessness is immaterial, and the injury was incurred manifestly in the course of his employment, it remains only to determine whether it resulted from the employment. To give right of compensation, an injury must result from, or arise out of, the employment. The two phrases "in the course of employment" and "resulting from employment" are not synonymous. The former relates to the time, place, and circumstances of the injury, and the latter to its origin. Fitzgerald v. Clarke [1908] 2 K. B. 796, 77 L. J. K. B. N. S. 1018, 99 L. T. N. S. 101, 1 B. W. C. C. 197; McNicol's Case, 215 Mass. 497, L.R.A.1916A, 306, 102 N. E. 697, 4 N. C. C. A. 522. It is not enough to say the accident would not have happened if the servant had not been engaged in the work at the time, or had not been in that place. It must appear that it resulted from something he was doing in the course of his work, or from some peculiar danger to which the work exposed him. *Amy v. Barton* [1912] 1 K. B. 40, 81 L. J. K. B.

N. S. 65, 105 L. T. N. S. 619, 28 Times L. R. 29, 5 B. W. C. C. 117.

Instances of injuries deemed not to have arisen out of the employment, although sustained in the course thereof, are found in the reported cases. An injury intentionally inflicted upon one workman by another, by a blow from a piece of iron thrown in anger, or by an assault and battery, is of that kind. Such also is the character of an injury resulting from an assault upon a workman by a stranger, and of one sustained in the course of recreation or diversion at the place of work. In some of these cases an agency wholly independent of the work, foreign to it and unanticipated, intervenes, or there is a turning aside from the employment, for the time being, to engage in a transaction on the workman's own account and for his own purposes. It is quite easy to perceive that violence of a fellow workman or a stranger arises, not out of the work, but out of the vicious or irritable disposition of the assailant, and that play or diversion on the premises is a step outside of the employment, and a thing done for the employee himself, and not for the employer. In none of these instances is the occasion of the injury an incident of the work.

If there is an incidental or causal connection between the employment and the accident, the injury is deemed to have arisen out of the former, even when the connection is somewhat remote, and when the direct and immediate agency of injury is foreign. Murder of a paymaster, incident to his robbery, is an accident arising out of the employment (*Nisbet v. Rayne* [1910] 2 K. B. 689, 80 L. J. K. B. N. S. 84, 103 L. T. N. S. 178, 26 Times L. R. 632, 54 Sol. Jo. 719, 3 B. W. C. C. 507, 3 N. C. C. A. 268), because the habitual carrying of large sums of money in the course of the employment and as an act of service therein is an exposure to the risk of an attack by robbers. An injury to a railroad engine driver, occasioned by a stone thrown from a bridge by a boy while the engine was passing under it was held to be an accident arising out of the employment (*Challis v. London & S. W. R. Co.* [1905] 2 K. B. 154, 74 L. J. K. B. N. S. 569, 53 Week. Rep. 613, 93 L. T. N. S. 330, 21 Times L. R. 486, 7 W. C. C. 23, because such a danger is a matter of common knowledge, and is accordingly deemed to have been within the contemplation of both master and servant. In each of these cases the independent criminal agency of injury was held to be immaterial, because the danger of injury by such means was an incident of the performance of the work, as well as of the time and place of performance.
L.R.A.1916D.

Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water while at work. In these and other conceivable instances he ministers unto himself, but in a remote sense these acts contribute to the furtherance of the work. *Vennen v. New Dells Lumber Co.* 161 Wis. 370, L.R.A.1916A, 273, 154 N. W. 640; *Zabriskie v. Erie R. Co.* 85 N. J. L. 157, 88 Atl. 824, 4 N. C. C. A. 778. That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers. At the same time injuries occasioned by them are accidents resulting from the employment.

Here the unfit, unsatisfactory, or undesirable water supply in the building was one of the generally recognized conditions of the place of service. In consequence thereof all of the workmen supplied themselves from the well by means of buckets and bottles, which were left at their respective places of work, and, as may well be supposed, in view of the spirit of comradeship usually prevalent among men working together, it was not unusual for a thirsty workman to take a drink, by tacit permission, from any bucket or bottle that happened to be convenient. Among the bottles in the building there was one that contained a deadly poison having the appearance of water. Its presence there was an incident of the prosecution of the work. It was a substance used therein, and not a thing left on the premises by a stranger, meddler, or miscreant. In the performance of an act attendant upon and incident to all sorts of employment, Archibald, by mistake, drank this fluid for water. That his death was thus accidentally occasioned, in the course of his employment, is admitted, and, in our opinion, the fatal accident arose out of his employment. The case is analogous to several found in the reports. A woolsorter became infected through a bacillus in the wool he was assorting, and died of anthrax. It was held the accident had occurred in the course of his employment and arisen out of it. *Brinton v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137. Through an accident a workman in a coal mine was compelled to stand in cold water until he became thoroughly chilled, and in consequence took pneumonia and died. The in-

jury was held to be legally attributable to accident in the course of employment and arising out of it. *Alloa Coal Co. v. Drylie* [1913] W. C. & Ins. Rep. 213, [1913] s. c. 549, 50 Scot. L. R. 350, 1 Scot. L. T. 167, 6 B. W. C. C. 398, 4 N. C. C. A. 899. Death of a servant from typhoid fever contracted from infected water furnished by the master was held to be an accidental injury within the meaning of the compensation act. *Vennen v. New Della Lumber Co.* 161 Wis. 370, L.R.A.1916A, 273, 154 N. W. 640. A workman was injured while descending from the roof of a building for lunch, and it was held the injury had arisen in the course of employment. *Clem v. Chalmers Motor Co.* 178 Mich. 340, L.R.A.1916A, 352, 144 N. W. 848, 4 N. C. C. A. 876. A ship's engineer in an intensely cold place rigged up a temporary stove to warm his cabin, and was asphyxiated. Though he was thus ministering unto himself, the accident was compensable. *Edmunds v. The Peterson*, 28 Times L. R. 18, 5 B. W. C. C. 157. The following cases, involving personal, incidental service, are to the same effect: *Morris v. Lambeth*, 22 Times L. R. 22, 8 W. C. C. 1; *Leach v. Oakley Street & Co.* [1911] 1 K. B. 523, 80 L. J. K. B. N. S. 613, 103 L. T. N. S. 778, 27 Times L. R.

124, 55 Sol. Jo. 124, 4 B. W. C. C. 91. If the quenching of a workman's thirst while at work is an act within his employment, then undoubtedly an injurious mistake in the performance of that act is the same in its legal nature and character as a misstep in the performance of any other duty, resulting in injury. A fall from a scaffold, an accidental cutting or mashing of a hand or foot, sustained in the course of work, though negligent, would be a compensable accident. The drinking of water in the course of service is obviously a necessary incident of the work, and, as is disclosed by the facts in this and other cases, is attended by some danger. Such attendant danger as is commonly known was within the contemplation of the parties. Hence, Archibald's fatal mistake in that incident of his service was legally the same as any injurious mistake he might have made in any act of direct service. The only perceptible difference lies in the fact that the drinking of water was a remote, incidental, or indirect, not a direct, act of service to the master, and authorities cited treat this as immaterial.

Our conclusion is that the widow is entitled to compensation, and payment thereof will be ordered.

OKLAHOMA SUPREME COURT.

BILLINGS HOTEL COMPANY et al.

v.

CITY OF ENID et al.

(— Okla. —, 154 Pac. 557.)

Municipal corporation — abating nuisance — aid of court.

A municipal corporation, in the exercise of a power granted in the charter " . . . to define what shall be a nuisance in the city, . . . and to abate such nuisance by summary proceedings, and to punish the authors by penalties, fines, and imprisonment," may not invoke the aid of a court of equity to abate a nuisance consisting of a rooming house where intoxicating liquors are sold, contrary to § 13, chap. 70, Session Laws 1911, and the city charter, and defined by both to be a nuisance.

For other cases, see *Nuisance*, II. c, in *Dig.* 1-52 N. S.

(January 11, 1916.)

ORIGINAL action for a writ to prohibit further proceedings in an action filed

Headnote by TURNER, J.

Note. — For right of municipality to maintain suit to enjoin or abate a public nuisance, see annotation following this case, post, 1020.
L.R.A.1916D.

by defendants against plaintiffs in the District Court for Garfield County to restrain an alleged nuisance. Writ issued.

The facts are stated in the opinion.

Messrs. Hills & Manatt and John F. Curren, for plaintiffs:

There is no ordinance of the city which provides for the abatement of a nuisance, or authorizes the bringing of an action of injunction against those maintaining a nuisance.

Weaver v. Kuchler, 17 Okla. 189, 87 Pac. 600; Clinton Cemetery Asso. v. McAtee, 27 Okla. 160, 31 L.R.A.(N.S.) 945, 111 Pac. 392; Territory ex rel. Oklahoma v. Robertson, 19 Okla. 149, 92 Pac. 144; Territory v. Long-Bell Lumber Co. 22 Okla. 890, 99 Pac. 911; Ottumwa v. Chinn, 75 Iowa, 405, 39 N. W. 670; State ex rel. Hartung v. Milwaukee, 102 Wis. 509, 78 N. W. 756; Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Georgetown v. Alexandria Canal Co. 12 Pet. 96, 9 L. ed. 1015; State ex rel. Haskell v. Houston, 21 Okla. 782, 97 Pac. 982; State v. Stark, 63 Kan. 529, 54 L.R.A. 910, 88 Am. St. Rep. 251, 66 Pac. 243; Jones v. Chanute, 63 Kan. 243, 65 Pac. 243.

Mr. Harry O. Glasser, for defendants:

Where a city has power to determine what constitutes a nuisance, and the same is declared to be a nuisance, such determination is conclusive of the question.

Green v. Savannah, 6 Ga. 1; *Goddard v. Jacksonville*, 15 Ill. 588, 60 Am. Dec. 773; *State v. Heidenhain*, 42 La. Ann. 483, 21 Am. St. Rep. 388, 7 So. 621; *St. Louis v. Schnuckelberg*, 7 Mo. App. 536; *Van Wormer v. Albany*, 15 Wend. 262; *Kennedy v. Board of Health*, 2 Pa. St. 366; *Crosby v. Warren*, 1 Rich. L. 385.

A municipal corporation may maintain an action by injunction to abate a public nuisance within its corporate limits.

Pine City v. Munch, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197; *Huron v. Bank of Volga*, 8 S. D. 449, 59 Am. St. Rep. 769, 66 N. W. 815; *Houlton v. Titcomb*, 102 Me. 272, 10 L.R.A. (N.S.) 580, 120 Am. St. Rep. 492, 66 Atl. 733; *Coast Co. v. Spring Lake*, 58 N. J. Eq. 586, 51 L.R.A. 657, 47 Atl. 1131; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Board of Health v. Copcutt*, 140 N. Y. 12, 23 L.R.A. 485, 35 N. E. 443; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Block v. Jacksonville*, 36 Ill. 301; *Coulterville v. Gillen*, 72 Ill. 599; *Red Wing v. Guptil*, 72 Minn. 259, 41 L.R.A. 321, 71 Am. St. Rep. 485, 75 N. W. 234; *Green v. Lake*, 60 Miss. 451; *State, Rodwell, Prosecutor, v. Newark*, 34 N. J. L. 264; *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735; *Harvey v. De-woody*, 18 Ark. 252; *Baker v. Boston*, 12 Pick. 183, 22 Am. Dec. 421; *Hickory v. Southern R. Co.* 141 N. C. 716, 53 S. E. 955; *Stamford v. Stamford Horse R. Co.* 56 Conn. 381, 1 L.R.A. 375, 15 Atl. 749; *San Francisco v. Buckman*, 111 Cal. 25, 43 Pac. 396; *Hutchinson Twp. v. Filk*, 44 Minn. 536, 47 N. W. 255; *Pine City v. Munch*, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197; *Huron v. Bank of Volga*, 8 S. D. 449, 59 Am. St. Rep. 769, 66 N. W. 815; *Moyamensing Twp. v. Long*, 1 Pars. Sel. Eq. Cas. 143; *Llano v. Llano County*, 5 Tex. Civ. App. 132, 23 S. W. 1008; *Yates v. Warrentown*, 84 Va. 337, 10 Am. St. Rep. 860, 4 S. E. 818; *Moore v. Walla Walla*, 2 Wash. Terr. 184, 2 Pac. 187.

Turner, J., delivered the opinion of the court:

This is an original proceeding for a writ of prohibition. The record discloses that on October 22, 1915, the city of Enid, a municipal corporation, as plaintiff, and on the relation of its city attorney, filed in the district court of Garfield county a petition alleging that the Billings Hotel Company, Walter Billings, manager, and seven others, petitioners here, were maintaining a place within the corporate limits of the city, and were there selling intoxicating liquors contrary to law; that the place was

known as the Billings Hotel, but, in fact, was a mere rooming house; that the same was a nuisance as defined by an ordinance of the city; and prayed for a temporary injunction restraining petitioners from operating the same, and that the sheriff of Garfield county take possession and lock it up. All of which the court did, without notice or bond to petitioners, on October —, 1915, and in said order set November 10, 1915, at Cherokee, as the time and place when and where said temporary injunction would come on for final hearing. On November 4, 1915, came petitioners and moved the court to dissolve the temporary injunction, for certain reasons stated in the motion, and when the court in chambers heard the same and refused so to do, and overruled the motion, this proceeding was commenced.

Assuming the things were done as charged in the city's petition, and that the place where done was a public nuisance within the contemplation of § 13, chap. 70, Sess. Laws 1911, yet, as the act further provides: "The attorney general, county attorney, or any officer charged with the enforcement of any of the provisions of this act, of the county where such nuisance exists, or is kept, or is maintained, may maintain an action in the name of the state to abate and perpetually enjoin the same."

It is contended that the court was without jurisdiction to entertain the city's suit, for the reason that the same was not brought in the name of the state on relation of the attorney general, as required by the act, but was brought by the city on relation of its city attorney. On the other hand, the city attorney disclaims any intention of proceeding under said act. Instead he says the city relies on its right to maintain the action, "as a body politic, under the authority conferred by law upon the municipal corporation through the charter granted to the city of Enid by the state of Oklahoma." Quoting his entire contention, it is:

"That the city of Enid has the power under the authority delegated to the city by the state to proceed in equity, by way of injunction, to abate a public nuisance. It will be contended that this authority is to be found in the city charter, wherein authority is delegated to the city, by § 28 of article 3 of the Enid city charter, 'to define what shall be nuisances in the city, and within 3,000 feet of the corporation lines, outside of the city limits, and to abate such nuisances by summary proceedings, and to punish the authors thereof by penalties, fines, and imprisonment,' together with the further grant of power in § 3, of article 3 of said charter 'to prohibit dram-

shops, drinking saloons, and other places where intoxicating liquors are sold.'

"That, pursuant to this authority, the city of Enid has, by § 4 of ordinance 677, art. 84, re-enacted a transcript of the state law relative to nuisances resulting from the wrongful acts of any person who may engage in the manufacture, sale, barter, giving away, or otherwise furnishing of intoxicating liquors contrary to law in a given place. There is no method provided in the city ordinance for the summary abatement of any such nuisances existing within the city of Enid, and neither is there any state law authorizing the summary abatement of this class of nuisances by any state officer. By the laws of Oklahoma (§ 4257, Harris-Day Code) the remedies against a public nuisance are: (1) Indictment or information; (2) a civil action; (3) abatement. And by § 4260, Harris-Day Code, a public nuisance may be abated by any public body or officer authorized thereby by law. Therefore it must appear that the city of Enid, being a body politic, and having the authority conferred upon it by the state of Oklahoma, through its charter, to abate, by summary proceedings, any nuisance within the city of Enid, would have the right to appeal to the courts of equity in its corporate name to abate, by injunction (a summary proceeding) any nuisance wholly within the city and particularly offensive to the citizens thereof, and this authority seems clear without any discussion of any state laws relative to the liquor question."

In other words, if we catch the point, it is the contention of the city attorney that the city, pursuant to § 28, art. 3, of its charter, by § 4 of ordinance 677, re-enacted the state law defining a nuisance as contained in § 13, supra, that the place in question falls within its terms, and that, having so declared it to be, the city has the right to abate it by injunction, pursuant to its grant of power contained in said § 28, authorizing the city, " . . . to define what shall be nuisances in the city, . . . and to abate such nuisances by summary proceedings, and to punish the authors thereof by penalties, fines, and imprisonment." Not so. A grant of power to abate a nuisance by summary proceedings confers no power on the city to proceed to abate it by injunction in a court of equity. This for the reason that a suit in equity is not a summary proceeding.

A summary proceeding is defined by Bouvier to be: "A form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury, and, in the case of the heavier crimes, presentment by a grand L.R.A.1916D.

jury. In no case can a party be tried summarily, unless when such proceedings are authorized by legislative authority, except, perhaps, in cases of contempts; for the common law is a stranger to such a mode of trial."

27 Am. & Eng. Enc. Law, 2d ed. at page 375, says: "A common use of summary proceedings is in the enforcement of city ordinances. Both in England and the United States statutes have been enacted conferring the power upon municipal tribunals sitting within the bounds of the municipal corporation of enforcing the ordinances or by-laws of the corporation in summary proceedings. These proceedings for the punishment of offenders against the ordinances, which are made in virtue of the implied or incidental power of the corporation, or in the exercise of its legitimate police authority, for the preservation of peace, good order, safety, and health, and which relate to minor acts and matters, are not usually or properly regarded as criminal, and hence are not in contravention of the constitutional guaranty of trial by jury in criminal cases."

From all of which we learn that the city, under its charter, can abate the alleged nuisance within its borders by proceeding against its authors in its municipal courts in a summary way, and, when convicted for a violation of its ordinance defining a nuisance, may impose on them the penalty prescribed thereby. By authorizing the city thus to proceed, such grant of power excludes the idea that the city is empowered to proceed in any other manner, to wit, by a suit in equity, to restrain a nuisance, as is here attempted. Besides, the grant of power contained in § 3, art. 3, of the charter, "to prohibit dramshops, drinking saloons, and other places wherein other intoxicating liquors are sold, and to close variety theaters when necessary, expedient, or advisable," containing, as it does, a grant of power to close variety theaters, would seem to exclude the idea of a grant of power to the city to close a nuisance such as this is alleged to be, or to deal with it at all except in the manner stated. And, when we note that Rev. Laws 1910, § 4260, declares that "a public nuisance may be abated by any public body or officer authorized thereto by law," and Rev. Laws 1910, § 4881, says: "An injunction may be granted in the name of the state to enjoin and suppress the keeping and maintaining of a common nuisance. The petition therefor shall be verified by the county attorney of the proper county, or by the attorney general, upon information and belief, and no bond shall be required, but the county shall, in all other respects, be liable as other

plaintiffs,"—we are more than ever satisfied that the idea that the city may maintain this suit is excluded. In *State ex rel. Haskell v. Huston*, 21 Okla. 782, 97 Pac. 982, we said: "When one person or class of persons is named in a power of attorney, or in act of the lawmaking power, as being authorized to do a certain thing therein named, all other persons are thereby excluded from doing the same thing as affectually as if they were positively forbidden."

Ottumwa v. Chinn, 75 Iowa, 405, 39 N. W. 670, was a suit in equity by the city to enjoin a public nuisance. The suit was based upon Iowa Code, § 456, which authorized cities and towns "to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated;" and § 482, which authorized them to pass ordinances for carrying into effect the powers conferred by § 456 and other sections, and in which it was held that a civil action in equity could not be maintained under the powers granted in those sections in the name of the city for the abatement of a nuisance; "the method contemplated by the statute being by ordinance and criminal prosecution." In the opinion it is said: "It is insisted by appellant that § 456 of the Code confers the right to maintain this action. That section gives to cities and towns organized under the general law of the state 'power to prevent injury or annoyance from anything dangerous, offensive, or unhealthy, and to cause any nuisance to be abated.' It is claimed by appellant that this power may be exercised in any manner which the corporation may think best, and that, since it may sue and be sued, it can accomplish the purpose of the statute by means of an action in court. . . . It is a general proposition of law that municipal corporations have and can exercise only those powers granted in express words; those necessarily implied or incident to the powers expressly granted; and those essential to the purposes of the corporation. *Clark v. Davenport*, 14 Iowa, 500; 1 Dill. Mun. Corp. § 55; *Hanger v. Des Moines*, 52 Iowa, 194, 35 Am. Rep. 266, 2 N. W. 1105. Section 482 of the Code authorizes cities and towns to make and publish ordinances not inconsistent with the laws of the state, for carrying into effect or discharging the powers conferred by § 456 and other sections of the same chapter. The ordinary method of abating a public nuisance and punishing its author is by criminal proceedings. *Georgetown v. Alexandria Canal Co.* 12 Pet. 90, 9 L. ed. 1015. 'Though the jurisdiction of equity in restraint of public nuisances is well established, it will not be exercised where the object sought can be as well at-

tained in the ordinary tribunals, unless upon the application of one who suffers a personal injury aside from the injury to the public.' 1 High, Inj. § 761. The petition in this case charges a nuisance within the meaning of § 4089 of the Code. The remainder of the chapter in which that section appears provides for the abatement of the nuisance and the punishment of the one who caused it. So far as the petition shows, the rights of the general public may be fully protected by ordinary criminal proceedings. The plaintiff does not appear to be especially affected by the nuisance, but bases its demand for relief upon the alleged fact that it is injurious to its citizens. These, however, constitute a part of the general public. Plaintiff is not authorized to bring an action for the benefit of the public, and has failed to bring itself within the provision of § 3331 of the Code. In view of the general provisions of the statute, relating to public nuisances, we conclude that the abatement contemplated by § 456 of the Code was to be effected by the direct action of the corporation itself, as through the medium of an ordinance, rather than by equitable proceedings in court."

None of the cases cited by the city are in conflict with the Iowa case and what we have said. *Pine City v. Munch*, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197, cited by the city in support of its contention, was a suit in equity brought by the village to restrain defendants from draining off a pond within the village limits in the hot months of summer, thereby converting the overflowed land into a marshy swamp, and causing the decayed vegetable matter on the bottom of the pond to create sickness. The village secured the relief, and the case was affirmed by the supreme court of Minnesota, for the reason that the charter of the village expressly conferred the power to bring the suit. Stating the general rule, the court said: "It is undoubted law that, except in the case of a private person sustaining injury special in kind, a bill to restrain an existing or threatening public nuisance by injunction will only lie at the suit of the state, or of some proper officer or body, as the authorized representative of the state. It must also be conceded that a municipal corporation has no control over nuisances within its corporate limits, except such as is conferred upon it by its charter or general laws."

After which the court proceeded to draw from the charter a grant of power sufficient to maintain the suit, thus: "But these propositions are not, in our judgment, decisive of this case. The plaintiff is a village incorporated under Special Laws 1381, chap. 38. Chapter 4 of this act, which de-

finer the general powers of the common council of the village, provides that they shall have authority, by ordinances, resolutions, or by-laws: '(25) To remove and abate any nuisance injurious to the public health;' '(27) To do all acts and make all regulations which may be necessary and expedient for the preservation of health or the suppression of disease.' And § 5 of chapter 4 of the act provides that 'the powers conferred upon the common council to provide for the abatement of any nuisance shall not bar or hinder suits, prosecutions or proceedings in court according to law.' Under these grants of power undoubtedly the common council could pass an ordinance prohibiting or abating the nuisance complained of, and provide for its enforcement by appropriate penalties. In fact, they did pass an ordinance prohibiting drawing off the water in the pond below a certain depth, which, however, the defendants have disobeyed. Is the plaintiff, in the matter of remedies for the abatement of a nuisance in such cases, limited to the enforcement of the penalties prescribed by ordinance, or may it resort to a court of equity to restrain or abate it?"

Whereupon the court held that a resort to a court of equity was granted to the city in the charter, and affirmed the case. It is clear that, had the charter in that case failed to contain a sufficient grant of power to enable the village to bring the suit, such relief would have been denied.

Neither is *Huron v. Bank of Volga*, 8 S. D. 449, 59 Am. St. Rep. 769, 66 N. W. 815, cited by the city, in conflict with what we have said, but rather in line. That was a suit by the city in a court of equity,

against a private corporation, to abate a public nuisance within the confines of the city. It consisted of a large wooden structure owned by the defendant, situated conspicuously upon a public business street, and which had been partially destroyed by fire. The city prevailed, but did so in virtue of a grant of power contained in its charter. After stating the general rule to be: "While a private person is not authorized to maintain the action unless specially injured, a city council, being the governmental agency to whom the inhabitants of a municipality have a right to look in a proper case for protection from the evil effects of a public nuisance, may, when authorized so to do, resort to an indictment, a civil action, or abatement, according to the exigencies of the particular case,"—the court went on to say: "But, in our opinion, § 4688 of the Compiled Laws, when considered with respondent's city charter, reasonably construed, authorizes the corporate authorities to apply, in cases like the present, to a court of equity for aid in the enforcement of its granted power 'to restrain, prohibit, and suppress nuisances at common law.'" For how could the court hold otherwise when the grant of power to restrain implied the power to invoke the power of a court of equity so to do?

We are therefore of the opinion that, as the city's charter contains no grant of power authorizing the city to restrain a nuisance within its borders, the city may not invoke the powers of a court of equity so to do, and that the writ should run.

It is so ordered.

All the Justices concur.

Annotation—Right of municipality to maintain suit to enjoin or abate a public nuisance.

This note is supplementary to note to *Coast Co. v. Spring Lake*, 51 L.R.A. 657.

The state as a proper party to maintain a bill to abate or enjoin a public nuisance in a city street is the subject of a note to *Alabama Western R. Co. v. State*, 19 L.R.A. (N.S.) 1173.

Upon the question of municipal power over nuisances affecting public morals, decency, peace, and good order, see note to *State v. Karstendiek*, 39 L.R.A. 520, where reference is made to analogous notes.

As to injunction by municipal corporations against nuisances affecting public morals, peace, good order, health, and safety, see note to *Red Wing v. Guptil*, 41 L.R.A. 321.

This note, like the earlier note, which L.R.A. 1816D.

it supplements, is confined strictly to the capacity of the municipality to maintain the suit, assuming that the condition complained of amounts to a nuisance. It is not concerned with cases dealing merely with the merits, even though the suit was in fact brought by the municipality, nor with cases which merely deal with the question whether injunction is the proper remedy, unless, as in *BILLINGS HOTEL CO. v. ENID*, ante, 1016, that question was affected by the existence of another remedy, peculiar to municipalities, and not available to other suitors.

As shown in the earlier note, if a municipality owns property which is specially damaged, there can be no question as to its right to maintain the suit, upon the same principles that an indi-

vidual suffering similar damage might maintain it; at least, in the absence of any other special remedies available to the municipality that would not be available to the private owner. In such a situation the suit might be maintained as one to enjoin or abate a private nuisance. Again, as shown in the earlier note, a municipality, in some cases by reason of the liability for injuries to which it might be subjected in consequence of the nuisance, may maintain the bill. Here again, the bill may be regarded as one to enjoin or abate a private nuisance; and it is not necessary in such cases to refer the result to the principle that a municipality may, as the representative *pro hac vice* of the public, maintain a bill to enjoin or abate a public nuisance.

Although there is some conflict among the cases, the weight of authority disclosed by the earlier note and the present note is to the effect that the municipality may, at least, in the absence of any other special remedy available to it, maintain a suit to enjoin or abate a nuisance which affects matters that have been confided to it as a governmental agency, even though it suffers no such special damage as is necessary to sustain a suit on the theory of a private nuisance. If this principle had to rest for its support on cases involving nuisances in respect of highways, it might be difficult to sustain it, for the reason that when the control of the highway is confided to the municipality, it is generally subject to liability for injuries which may be caused thereby, and hence, the conditions exist which make the nuisance a special injury to the municipality. In many of the highway cases, however, the power of the municipality to maintain the suit seems to be placed upon the broad principle just stated, and not upon the narrower ground of a special injury. With respect to nuisances which do not affect matters confided to the municipality, the weight of authority is to the effect that the right of the municipality to maintain the bill depends upon the same conditions as the right of an individual or a private corporation; that is, it must, as a separate entity, have sustained some special damage. The vindication of the rights of the public in respect of such matters by a resort to equity seems to be the exclusive province of the attorney general or other law officer of the state, though doubtless he may act upon the relation of the municipality.

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Other remedies; summary process.

It is held in *American Furniture Co. v. Batesville* (1894) 139 Ind. 77, 38 N. E. 408, that the summary method conferred by statute upon a town for the abatement of a nuisance, being the same as that possessed at common law, does not preclude a resort to the courts. It is insisted in this case that the summary remedy possessed by the town is exclusive of the remedy adopted, and precludes a resort to the courts. In support of this point, counsel cites *Storms v. Stevens* (1885) 104 Ind. 46, 3 N. E. 401, where it is held that a statute creating a new right, and prescribing the mode of its enforcement, excludes all other remedies. The court stated, however, that the summary abatement of a nuisance was a right which existed at common law in favor of the individual sustaining special injury from such nuisance, and the statute in question but confers that right upon the municipal corporation. It is not a new right. It should be remembered, also, that it is by proceedings *ad rem*, and not in personam, for herein lies a distinction in the proceeding here in review. "The power extended to towns does not permit proceedings in personam and in the nature of civil actions, which affect particular persons, but, like other corporate powers, must be exercised by and through ordinances general in their character, and affecting alike all the property or all the business of all the citizens under like conditions, occupying like situations, and conducted in like manner. *Plymouth v. Schultheis* (1893) 135 Ind. 339, 35 N. E. 12."

In *Cheek v. Aurora* (1883) 92 Ind. 107, the city threatened to abate an obstruction of a street as a nuisance, and the owner of the obstruction instituted suit to enjoin the city from its threatened action; the city, by cross complaint, sought to declare the obstruction a nuisance, and prayed that as such it be abated and the owner enjoined. Upon such cross complaint the city succeeded, and objection was made that the remedy afforded by the statute enabled the city to abate the nuisance, and excluded any remedy by the court. The court stated that where, by its charter or constituent act, a municipality has the usual control and supervision of the streets and public places, it may, in its corporate name, institute judicial proceedings to prevent or remove obstructions thereon. And it is further said that the city might have resorted in the first instance to an independent action, seeking the

relief obtained in this suit; and the facts which, in such independent action, would have entitled the city to such relief, constituted proper ground of counterclaim in this action. See *BILLINGS HOTEL CO. v. ENID*, ante, 1016.

A city may, in behalf of the public, maintain a suit in equity to compel the removal of structures, namely, steps, coping, and area constructed on a public street in violation of an ordinance, and constituting a public nuisance, although the ordinance provides for a penalty for its violation. *New York v. Knickerbocker Trust Co.* (1905) 104 App. Div. 223, 93 N. Y. Supp. 937, 16 N. Y. Anno. Cas. 347, the question not being discussed in later hearings. (1906) 52 Misc. 222, 102 N. Y. Supp. 900, and (1907) 121 App. Div. 740, 106 N. Y. Supp. 506.

So, a municipality may maintain an action in equity to abate a public nuisance consisting of an open areaway extending into a public street, although the municipal ordinances provide a penalty for such encroachment, and the city may have an action at law for the penalty, the rule being that where there is an obstruction or encroachment of a permanent nature upon a public highway, and particularly where it is of long standing and a right to maintain it is asserted, a court of equity will entertain jurisdiction, and that is the more orderly way for the municipality to proceed. *New York v. De Peyster* (1907) 120 App. Div. 762, 105 N. Y. Supp. 612, affirmed without opinion in (1907) 190 N. Y. 547, 83 N. E. 1123.

So it is held in *Elkins v. Donohoe* (1914) 74 W. Va. 335, 81 S. E. 1130, that although a city has by charter plenary power to control its streets and alleys, to keep them clean and free from obstruction, to declare and abate nuisances thereon, and for this purpose to pass and enforce all necessary ordinances and resolutions, it may maintain a suit in equity to enjoin and abate as a nuisance a fence inclosing a portion of its principal streets, and the projection of an outhouse beyond the street line.

Highways.

As intimated at the beginning of the note, it is not always possible to determine whether the cases which uphold the right of the municipality to maintain a suit to enjoin or abate a nuisance affecting a street or highway rest upon the broad ground that the municipality is the representative pro hac vice of the public with respect to matters confided to it, or upon the narrower ground that the L.R.A.1916D.

municipality may be held liable for the injuries caused by the nuisance, and so suffers a special damage which enables it to maintain the bill on principles applicable to a private nuisance. For cases adopting the first theory, see note in 51 L.R.A. 657-661; also the following cases.

Thus, a municipality, under a statute which empowers any municipality to enforce within its limits, "local, police, sanitary, and other regulations," may maintain a suit to require the owner of a ditch constituting a public nuisance in a street to change its construction so as not to endanger the public safety, or to interfere with the free and unobstructed use of the street, the easement for the ditch being subordinate to the public easement. *Santa Ana v. Santa Ana Valley Irrig. Co.* (1912) 163 Cal. 211, 124 Pac. 847.

So it is held in *Sierra County v. Butler* (1902) 136 Cal. 547, 69 Pac. 418, that a county may maintain a suit in equity to enjoin as a public nuisance the running of water from a mine over a highway, the obstruction which the statute provides the road overseer shall bring an action to abate being an obstruction by some physical object such as a building, fence, or the like. The court said: "The county is a body politic whose powers are exercised by the board of supervisors, and among the duties of the board is that of laying out, maintaining, controlling and managing public highways, and an injury to a public highway is an injury to the county in its corporate capacity. The county has a special interest in the preservation of county roads, which authorizes it to resort to such remedial measures as will preserve these highways to the free and unobstructed use of the public."

It is stated in *Pana v. Central Washed Coal Co.* (1913) 260 Ill. 111, 48 L.R.A. (N.S.) 244, 102 N. E. 992, that a municipal corporation, in the exercise of power granted to it by the state to abate nuisances, may, under proper circumstances, call upon a court of equity for assistance. In this case, however, an injunction was denied on the merits.

The decision in *Kansas City v. Burke* (1914) 92 Kan. 531, 141 Pac. 562, rehearing denied in (1914) 93 Kan. 236, 144 Pac. 193, is to the effect that a city may maintain an action to permanently enjoin the obstruction of a public street. As to the contention that injunction was not the proper remedy, because the sole issue involved was the legality of the road, the court said that the defendants

were attempting to erect a building in a traveled street, and injunction has repeatedly been held a proper remedy to prevent such an obstruction. The city rests under statutory obligations to keep its streets unobstructed.

It is stated in *Pickrell v. Carlisle* (1909) 135 Ky. 126, 24 L.R.A.(N.S.) 193, 121 S. W. 1029, that it is old and familiar law that the streets, including the pavements of a town, belong to the municipality for the use of the public traveling upon them, for their whole length and width; likewise, that any permanent structure built upon any part of the public streets so as to interfere with their use by the public for travel may be per se a nuisance, and may be abated by the municipality or by the court, at the instance of the town. This was a case, however, restraining by injunction a town from interfering with steps placed upon the sidewalk by a particular individual to afford necessary access to his abutting building.

A township, under the police power given over public highways, may, independent of any charter provision, enjoin a plank road company from using, in the construction of its roadbed, material which will make the roadbed dangerous, unsafe, and impassable with loaded teams. *Detroit & E. Pl. Road Co. v. Maccomb Circuit Judge* (1896) 109 Mich. 371, 67 N. W. 531. The above decision seems to rest upon the theory that the township and its authorities, upon whom is charged the duty of seeing that the road is kept safe for the traveling public, have such an interest in the matter as makes them proper complainants to the bill, and that the remedy provided by statute is not at all adequate.

A village whose streets and public grounds have been by law placed under the control of its authorities, who are given power to prevent the encumbering or obstructing of the same, may maintain an action to enjoin the erection of a building for private use on public ground. *Buffalo v. Harling* (1892) 50 Minn. 551, 52 N. W. 931. In the above case the court observed that if the village had no authority save such as is to be implied from the fact of its incorporation as a village, it is probable that it would have no right to maintain an action of this kind. But if the village was organized under the general village law, or under a special charter, which, as does the Law of 1885, places the street and public grounds under the control of the village authorities, and authorizes them to prevent the encumbering or ob-

structing of the same, such an action would be maintainable to prevent the public nuisance. Citing *Pine City v. Munch* (1890) 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197, cited in earlier note in 51 L.R.A. 660.

So, a municipality whose public streets and grounds have been placed under the control of its common council or other officers may maintain an action to abate a nuisance therein and to enjoin its maintenance (inclosure of portion of public street and highway by fence). *Jordan v. Leonard* (1912) 119 Minn. 162, 137 N. W. 740.

The mayor and common council of a city, being charged with the duty of keeping the streets of a city in a condition fit for safe and convenient use, are the proper persons to file a bill to prevent either the obstruction or destruction of a street. *Newark v. Delaware, L. & W. R. Co.* (1886) 42 N. J. Eq. 196, 7 Atl. 123 (application for injunction to restrain railroad company from using four railroad tracks in a certain city street).

It is held in *Oxford v. Willoughby* (1905) 181 N. Y. 155, 73 N. E. 677, affirming (1903) 87 App. Div. 609, 83 N. Y. Supp. 1118, that a village may maintain an action to enjoin an encroachment on a public street, under a statute conferring on highway commissioners the right to maintain such an action in the name of the town. In this case an addition to a building encroached on a public street and constituted a public nuisance.

It is held in *Hempstead v. Ball Electric Light Co.* (1896) 9 App. Div. 48, 75 N. Y. S. R. 582, 41 N. Y. Supp. 124, that the highway and village laws, taken together, authorize the trustees of a village in its name to maintain an action to compel the removal of electric light lamps, poles, and wires constituting an unlawful obstruction in a highway, and amounting to a public nuisance.

Lamoure v. Lasell (1914) 26 N. D. 638, 145 N. W. 577, holds that a municipality is regarded as the representative of the public for the purpose of maintaining suits in equity or at law for the vindication of public rights; hence, the city is a proper party plaintiff in an action to cancel an attempted vacation of a part of the plat of an addition to the city, and to enjoin the fencing and obstruction of streets therein by the party so attempting to vacate by declaration of vacation.

A municipal corporation may maintain a bill to restrain a purpresture with-

out joinder of the commonwealth. *Philadelphia v. Crump* (1866) 1 Brewst. (Pa.) 320 (wall of building encroaching upon street). In the above case the court quotes the words of Woodward, Ch. J. in *Philadelphia v. Lombard & S. Streets Pass. R. Co.* (1863) 3 Grant. Cas. (Pa.) 404, as follows: "One of the most obvious purposes for which the city was chartered was the police of the streets. To maintain and preserve them as public highways, the power of taxation was conferred upon the municipality, and it has been largely exercised. Every property holder has a direct and vested interest in the maintenance of this municipal authority over the streets."

In *Cheraw v. Seaboard Air Line R. Co.* (1911) 88 S. C. 480, 71 S. E. 40, an action by a town to enjoin a railway company from obstructing a certain street by a sidetrack across the same, the court says that the obstruction of a public street is a public nuisance, and the remedy is by indictment unless the person instituting proceedings on the civil side of the court can show special or peculiar damages, differing in kind from those to which all others in common with him are exposed. But a municipality, because of its peculiar duties and liabilities in reference to the maintenance of its streets for public use, may bring a civil action to prevent or remove a threatened or continued obstruction constituting a nuisance.

So, while a municipality does not own the highways within its limits, the duties and liabilities imposed upon it in respect to highways are such as to make it a proper party to maintain an action in equity to restrain the obstruction of a street by the construction of a piazza. *Montpelier v. McMahon* (1911) 85 Vt. 275, 81 Atl. 977.

A village may maintain an action to enjoin the unlawful excavation of trenches and laying of water pipes in its streets. *Waukesha Hygeia Mineral Spring Co. v. Waukesha* (1892) 83 Wis. 475, 53 N. W. 675. In the above case the court states that the reason is that such unlawful interference with the streets puts them out of repair and almost necessarily increases for the time being the liability of injury to persons and property of travelers thereon because of such defective condition. The village, being responsible for injuries caused by defects in the streets, and being charged by law with the duty of keeping them in repair, has such an interest in the streets that it may maintain

actions to prevent any unlawful injury to them.

So, a town may bring an action in equity for an injunction restraining the obstruction of a public highway, with logs, timbers, trees, etc. *Neshkoro v. Nest* (1893) 85 Wis. 126, 55 N. W. 176.

So, a city may maintain an action in equity to obtain a mandatory injunction compelling a lot owner to remove certain buildings which encroach upon a public street and obstruct a public alley. *Eau Claire v. Matzke* (1893) 86 Wis. 291, 39 Am. St. Rep. 900, 56 N. W. 874.

It is held, in *Selkirk v. Selkirk Electric Light Co.* (1910) 20 Manitoba, L. R. 461, that a town is entitled to maintain a suit in equity for the removal of poles and wires without making the attorney general a party thereto, the court saying that, taking into consideration the duties of the municipalities with respect to their streets and highways, and the responsibilities cast upon them, it is within their power, without the intervention of the attorney general, to protect their streets, and guard against the liabilities which they might incur through improper and irregular use of them. Citing *Saugeen v. Church Soc.* (1858) 6 Grant, Ch. (N. C.) 538; *Vespra Twp. v. Cook* (1876) 26 U. C. C. P. 189; *Fenelon Falls v. Victoria R. Co.* (1881) 29 Grant Ch. (U. C.) 4.

In *British Columbia* however, a municipality is not entitled to bring an action to redress the public wrong done by obstructing a highway; such an action can be brought only by the attorney general. *Delta v. Vancouver, V. & E. R. & Nav. Co.* (1908) 14 B. C. 83; *Hope v. Surrey* (1914) 29 West. L. R. (Can.) 525, 20 D. L. R. 540, 7 W. W. R. 175.

So, in *Delta v. Vancouver, V. & E. R. & Nav. Co.* (B. C.) supra, an action for injunction to restrain a railway company from closing up or interfering with a road, the trial judge, in denying the right of the municipality to maintain the action, said: "I do not overlook the line of authority of which *Atty. Gen. v. Logan* [1891] 2 Q. B. (Eng.) 100, 65 L. T. N. S. 162, 55 J. P. 615, and *Wednesbury v. Lodge Hole Colliery Co.* [1907] 1 K. B. (Eng.) 78, 76 L. J. K. B. N. S. 68, 71 J. P. 73, 95 L. T. N. S. 815, 23 Times, L. R. 880, 5 L. G. R. 43, may be noted, that for an injury done to a proprietary right vested in a municipality or local board, the municipality or local board may seek redress in its own name; nor the argument of counsel for the plaintiff municipality that the 'possession' of the highway in question here, which, by

§ 242 of the municipal clauses act (B. C. Stat. 1906 chap. 32), is 'vested in the municipality,' is a proprietary right within the meaning of the cases, for an invasion of which right the plaintiff municipality can sue. One short answer to this argument is that this action is avowedly for a public wrong, and not for an invasion of the plaintiff municipality's possession. It is, perhaps, unnecessary for the determination of this case to attempt to define what is covered by the word 'possession' in the section in question. Does it mean more than the expression 'control and management,' found in other similar acts? Suffice it to say that, in my opinion, it is a 'possession' subject to the public right to pass and repass (see *Hickman v. Maissey* [1900] 1 Q. B. (Eng.) 752, 69 L. J. Q. B. N. S. 511, 48 Week. Rep. 385, 82 L. T. N. S. 321, 16 Times, L. R. 274; and it is for an obstruction to this public right that this action is, as I have said, avowedly brought. I take it to be settled law that, for an obstruction to a public highway, the only remedy open to the public is by indictment or information at the suit of the attorney general, the recognized embodiment, in that behalf, of the public. To radically change this law so as to substitute another person or body for the attorney general in such cases would, I think, require clearer language than is to be found in § 242, above mentioned. If, indeed, the obstruction works to some particular person a special, peculiar injury, different in kind, and not merely in degree, from that suffered by the general public, such particular person may seek redress in his own name, alleging and proving the special, peculiar injury. See *Harvey v. British Columbia Boat & Engine Co.* (1908) 14 B. C. 121. No such exceptional case is put forward here."

Waters.

It is stated in *Yolo County v. Sacramento* (1868) 36 Cal. 193, that if a dam is an obstruction to navigation, it is so far a public nuisance, for which a county cannot have a private action; it is otherwise, however, where it obstructs the reclamation of swamp lands, since it then becomes a private nuisance, doing special damage to the county. See also cases in note in 51 L.R.A. 658 and 659.

So it is held in *Yuba County v. Kate Hayes Min. Co.* (1903) 141 Cal. 360, 74 Pac. 1049, that a county may enjoin the deposit of mining debris into a river and its tributary, the public nuisance becoming to the county, as a property

owner, a private nuisance. The county is not suing to protect the rights of others, but purely in its proprietary capacity, as the owner of certain real property.

It was held in *Sioux City v. Simmons Hardware Co.* (1911) 151 Iowa, 334, 129 N. W. 978 (rehearing denied and judgment modified in (1911) 151 Iowa, 344, 131 N. W. 17), that a city is the proper party plaintiff to complain of the improper obstruction of a stream by a building; the court observing that the city has the right, not merely as a private property owner, but in behalf of the public, to cause the abatement of the obstruction in a stream, the consequence of which is to damage or reasonably threaten injury to neighboring property. See also *Waterloo v. Waterloo, C. F. & N. R. Co.* (1910) 149 Iowa, 129, 125 N. W. 819, where an obstruction of a division of a river, constituting a public nuisance, is held abatable at the suit of the city.

It is held in *Madison v. Mayers* (1897) 97 Wis. 399, 40 L.R.A. 635, 65 Am. St. Rep. 127, 73 N. W. 43, that the charter power to make general police regulations for the benefit of trade and commerce, and to provide for the abatement and removal of nuisances, will not authorize the city to maintain a suit to enjoin the filling up of a lake shore along, but outside, the limits of a public street. We are clearly of the opinion, observes the court, that the city has no such interest or right in the lake or the waters thereof outside of the limits of the street as to enjoin the defendant from the act complained of. In such a case the right of the city to remove such a purpresture or public nuisance is no greater than that of an individual, and this court has expressly held that an individual could not remove the same.

In *Exeter v. Devon* (1870) L. R. 10 Eq. (Eng.) 232, 23 L. T. N. S. 382, 18 Week. Rep. 879, involving the right of a city to file a bill in equity to restrain the erection of a pier in a river, it is stated that when a public nuisance is made, it may be abated by a suit, but it must be by the attorney general as informant, either ex officio or at the relation of some person; the court observing, however, that the pier was not complained of as a public nuisance, but solely as being a private injury to the corporation.

Nuisance affecting health.

A municipal corporation, through its proper officers, is a proper party and has the right, in a court of chancery, to seek

the abatement of that which is a public nuisance. *Lonoke v. Chicago*, R. I. & P. R. Co. (1909) 92 Ark. 546, 135 Am. St. Rep. 200, 123 S. W. 395 (freight depot, platform, and other structures found not to be a public nuisance, as being injurious to health, as increasing the hazard by fire, and as making a crossing dangerous to people using it). See also cases in note in 51 L.R.A. 662.

So, under the corporate and general powers conferred by statute upon cities of the second class and villages, it is held in *Kenesaw v. Chicago*, B. & Q. R. Co. (1912) 91 Neb. 619, 136 N. W. 990, that a village has a right to maintain an action in equity to enjoin the maintenance and continuance of a public nuisance (maintenance of stock yards). It is contended in this case that the village is given express authority to deal with the subject of nuisances by ordinances, and is not given any right to sue, and the case of *Ottumwa v. Chinn*, set out in the earlier note on page 658, is cited as upholding this argument. The court, however, observed that it was not impressed with the doctrine announced in that case, and was of the opinion that, under the corporate and general powers conferred by statute, it was entirely proper to obtain the judgment of a court of equity as to whether or not a public nuisance existed, and its aid to abate the same if one existed. The court went on to say that the supreme court of Minnesota, in holding, in the case of *Red Wing v. Guptil*, also set out in the earlier note, that "a city authorized by its charter to abate or compel the abatement of public nuisances has power to compel the abatement of a nuisance affecting the comfort or convenience of the public, . . . and therefore it may maintain an equitable action to aid in compelling an abatement of such nuisance," announces a sounder and better rule.

It has been held, however, that a town cannot enjoin an establishment as a public nuisance without showing that it, in its corporate capacity, has suffered damage of a special nature. *Winthrop v. New England Chocolate Co.* (1902) 180 Mass. 464, 62 N. E. 969 (offensive trade). See also cases in note in 51 L.R.A. 658 and 659.

So, it is held in *Belleville Twp. v. Orange* (1905) 70 N. J. Eq. 244, 62 Atl. 331, affirmed without opinion in (1907) 71 N. J. Eq. 775, 65 Atl. 1117, that a township not charged with duties relating to public health, and not suffering any injury to its property rights, cannot enjoin a public nuisance on the ground

of a breach of contract, unless the legislature has authorized the township to make a contract for that purpose, such power to protect public rights being vested in the attorney general; that where a township contracted with a city, without legislative authority, that the city, as a part of the construction of a sewer to tide water, through the streets of the township, should maintain in another municipality a tidal collection chamber to be operated in a certain manner, the township did not thereby acquire the right to compel specific performance of that portion of the contract regulating the use of such chamber, for the sole purpose of the protection of the common public rights against public nuisances.

Moving picture show.

Under statute conferring express power upon the commissioner of public safety of cities of the second class to maintain actions to restrain nuisances, it was held in *Hamlin v. Bender* (1915) 92 Misc. 16, 155 N. Y. Supp. 963, that the commissioner could bring an action to enjoin as a public nuisance the operation of a moving picture theater on Sunday, near a church, the court stating that the commissioner represents the people for the purpose of such an action, and may bring and prosecute any action that could otherwise be maintained in their name.

Liquor nuisance.

A city, acting for the welfare of the people, may bring an action in equity to restrain the carrying on of a liquor business, which is a public nuisance under the statute. *Kirkland v. Ferry* (1907) 45 Wash. 663, 88 Pac. 1123.

So, it is held in *American Falls v. West* (1914) 26 Idaho, 301, 142 Pac. 42, that a village may bring suit in the district court to secure the removal and abatement of a public nuisance causing special injury to the rights, morals, or interest of such village, although such nuisance, namely, the running of a saloon, is outside of the village limits. A village, observed the court, is a corporate entity, with a right to sue in a proper court, if necessary, to protect or secure its rights. Such a village is a municipal corporation created to assist in the civil government of its people and the territory within its limits. It has the power and duty of preserving the health and protecting the personal rights, morals, and property of its inhabitants, and, as an effective means of doing so, such village may bring an action in the district court in order to secure the re-

removal and abatement of a public nuisance causing special injury to the rights, morals, or interests to such village. If the people within a village, in their aggregate capacity, are specially injured by a public nuisance, such village is directly interested in having such nuisance abated. And while a village itself might abate a nuisance within its limits, in order to abate a public nuisance outside its boundaries it is probably necessary and undoubtedly proper for it to apply to a court of equity for aid in protecting it from such harmful influence.

BILLINGS HOTEL CO. v. ENID, ante, 1016, is distinguishable from these cases because of the provisions for abatement of such nuisance by summary process.

Fires.

The court in *Houlton v. Titecomb*

(1906) 102 Ma. 272, 10 L.R.A. (N.S.) 580, 120 Am. St. Rep. 492, 66 Atl. 733, holds that since the prevention of fire is a matter which the state has confided to towns, a town may maintain a bill in equity to enjoin the violation of an ordinance forbidding the construction of wooden buildings within the fire limits. See also 51 L.R.A. 663.

In holding, however, that an injunction would not lie to restrain the building of a wooden house within the fire limits of a village, in violation of a village ordinance, the court, in *New Rochelle v. Lang* (1894) 75 Hun, 608, 27 N. Y. Supp. 600, said that even if the act were a nuisance, the remedy would be by indictment or in equity only at the suit of the people, or of some private person who alleged special damages.

J. D. C.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

ÆTNA LIFE INSURANCE COMPANY,
Plff. in Err.,
v.

PORTLAND GAS & COKE COMPANY.

(229 Fed. 552.)

Insurance — Indemnity — Injury from typhoid fever.

Damages which an employer is compelled to pay because of typhoid fever contracted by his employees from water furnished them to drink arise out of bodily injuries, accidentally inflicted, within the meaning of a policy insuring the employer against liability for such damages.

For other cases, see *Insurance*, VIII. in Dig. 1-52 N. S.

(February 7, 1916.)

ERROR to the District Court of the United States for the District of Oregon, Robert S. Bean, Judge, to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on an employers' indemnity policy. Affirmed.

The facts are stated in the opinion.

Argued before Gilbert and Ross, Circuit Judges, and Rudkin, District Judge.

Messrs. Senn, Ekwall, & Recken, for plaintiff in error:

Note.—For injuries covered by employers' indemnity policy, see notes to *H. P. Hood & Sons v. Maryland Casualty Co.* 30 L.R.A. (N.S.) 1192, and *May Creek Logging Co. v. Pacific Coast Casualty Co.* L.R.A. 1915C, 155. L.R.A. 1916D.

Typhoid fever contracted from drinking water is not a bodily injury accidentally suffered.

1 *Bradbury, Workmen's Compensation*, pp. 339, 358; *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, L.R.A. 1916A, 283, 148 N. W. 485, 6 N. C. C. A. 482; *McCoy v. Michigan Screw Co.* 180 Mich. 454, L.R.A. 1916A, 323, 147 N. W. 572, 5 N. C. C. A. 455; *Lickleider v. Iowa State Traveling Men's Assn.* — Iowa, —, 151 N. W. 479; *Wright v. Order of United Commercial Travelers*, 188 Mo. App. 457, 174 S. W. 833; *Lehman v. Great Western Acci. Assn.* 155 Iowa, 737, 42 L.R.A. (N.S.) 562, 133 N. W. 752; *Shanberg v. Fidelity & C. Co.* 19 L.R.A. (N.S.) 1206, 85 C. C. A. 343, 158 Fed. 1; *Bacon v. United States Mut. Acci. Assn.* (Stedman v. United States Mut. Acci. Assn.) 123 N. Y. 304, 9 L.R.A. 617, 20 Am. St. Rep. 748, 25 N. E. 399; *Standard Life & Acci. Ins. Co. v. McNulty*, 85 C. C. A. 22, 157 Fed. 224; *Dozier v. Fidelity & C. Co.* 13 L.R.A. 114, 46 Fed. 446; *Smith v. Travelers' Ins. Co.* 219 Mass. 147, L.R.A. 1915B, 872, 106 N. E. 607; *Appel v. Ætna L. Ins. Co.* 86 App. Div. 83, 83 N. Y. Supp. 238.

Messrs. **John A. Laing and H. W. Strong**, for defendant in error:

The expenses incurred by plaintiff were within the scope of its indemnity policy with defendant, and the judgment of the district court should be affirmed.

Fuller, Acci. & Employers' Liability Ins. 1913, 445; *Brintons v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137; *Western Commercial Travelers' Assn. v. Smith*, 40 L.R.A.

653, 29 C. C. A. 223, 56 U. S. App. 393, 85 Fed. 401; United States Mut. Acci. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, 9 Sup. Ct. Rep. 755; Columbia Paper Stock Co. v. Fidelity & C. Co. 104 Mo. App. 157, 78 S. W. 320; H. B. Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 30 L.R.A. (N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329; Fenton v. Fidelity & C. Co. 36 Or. 283, 48 L.R.A. 770, 56 Pac. 1096; Tillamook Lumbering Co. v. Liverpool & L. & G. Ins. Co. 175 Fed. 508, affirmed in 101 C. C. A. 481, 178 Fed. 161, 21 Ann. Cas. 844; Railway Mail Asso. v. Dent, L.R.A. 1915A, 314, 130 C.C.A. 387, 213 Fed. 981.

Ross, Circuit Judge, delivered the opinion of the court:

The defendant in error, gas & coke company, being engaged in the construction of a gas plant on its property adjoining the government moorings in Multnomah county, Oregon, and having employed in the work a large number of men, secured from the plaintiff in error, insurance company, a policy entitled by the latter "Contractor's Employers' Liability Policy," by which, in consideration of certain premiums which the case shows the defendant in error paid, it agreed to indemnify the assured (within certain amounts within which the present case falls) against loss and expense arising or resulting from claims upon the assured for damages on account of bodily injuries or death accidentally suffered, or alleged to have been suffered, by an employee or employees of the assured by reason of the business as described and conducted at the locations named in the policy, with certain exceptions not applicable here. In the course of the work certain of the employees of the gas & coke company contracted typhoid fever from the water furnished them by the latter, on account of which that company was compelled to pay damages to such injured employees, to recover the aggregate amount of which from the insurance company the present action was brought. And the sole point here presented is whether the harm so done to the workmen constituted a bodily injury accidentally received or suffered by them, within the meaning of the policy in question.

Of course it is not and cannot be doubted that the workmen were bodily injured by the drinking of the water in the course of the work, for it contained typhoid germs which gave them typhoid fever; but it is insisted on the part of the plaintiff in error that in drinking the water they were but satisfying a natural want, and that in doing so there was no accident about it. It is readily conceded, of course, that there could be no accident in merely drinking water:

but it is just as certain that the men would not have drunk it, had they known that the water contained typhoid germs. The accident consists in that unexpected happening. Among the definitions of the word "accidental," in most, if not in all, of the dictionaries, is the happening of "something unexpectedly, unintentionally." Suppose, instead of containing typhoid germs, as in the present case, the water that the employees of the assured consumed had contained some of the most virulent poisons, would anyone contend that the injuries resulting therefrom could not be properly held to have been accidentally inflicted? We think not, and yet, in our opinion, there is no substantial distinction between the case supposed and the case at bar.

The policy involved in the case of H. P. Hood & Sons v. Maryland Casualty Co. 206 Mass. 223, 30 L.R.A. (N.S.) 1192, 138 Am. St. Rep. 379, 92 N. E. 329, was similar to that involved in the present case. There one Barry, who was employed by the plaintiff in that action as a hostler in its stables, had the care of horses which were afterwards found to have been suffering from glanders, and Barry was directed to assist in clearing up the stalls; no notice being given him that the horses had suffered from glanders. Subsequently he was attacked by that disease, and recovered judgment against the assured in that case for damages, which the assured paid, and sued the insurance company to recover the amount so paid, with costs and expenses of suit. In the course of its opinion the court said, among other things: "The policy is entitled 'Manufacturer's Employers' Liability Policy.' The contract which it contains is one of indemnity, in which the defendant engages to make good to the plaintiff any loss or damage which it may sustain by reason of its liability to its employees for bodily injuries accidentally suffered by them while engaged in doing the work which they were employed to do. It is a kind of insurance that has grown out of modern industrial and business conditions, and it is intended to afford full protection to employers in all cases where their employees have accidentally received bodily injuries for which they are liable. It also accomplishes the economic result, with which, however, we have nothing to do, of distributing more or less widely some of the loss or damage which falls on those engaged in industrial occupations. It is to be noted that the policy does not contain the words 'violent and external,' in addition to the word 'accidental,' as is the case in many, if not most, accident policies. The insurance is liability insurance, so called, and not insurance against accidents. The lia-

bility insured against is that 'imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered . . . by any employee.' Although the policy contains many conditions, there is no limitation or exception in regard to the kind or nature or cause of the accidents out of which the liability insured against may arise. The fact that the accident may have been occasioned through negligence on the part of the insured is therefore immaterial."

After alluding to the fact that Barry suffered bodily injury in consequence of becoming infected with glanders, as much so as if he had had a leg or an arm broken by a kick from a vicious horse, the court further said: "Was the injury brought about accidentally, within the fair scope and meaning of the policy, or was it the result of disease contracted while in the employ of the plaintiff, but for which the defendant is not liable? It is clear, we think, that the infection which caused the disease from which Barry suffered was due to accident. It was in the nature of an accident that he was set to work upon or cleaning up after horses that had glanders, and it was in the nature of an accident that he became infected with the disease. The language used by Mathew, L. J., in *Higgins v. Campbell & Harrison and Turvey v. Brintons* [1904] 1 K. B. 328, 337, where the judgment of the court of appeal was sustained by the House of Lords (*Brintons v. Turvey* [1905] A. C. 230, 74 L. J. K. B. N. S. 474, 53 Week. Rep. 641, 92 L. T. N. S. 578, 21 Times L. R. 444, 2 Ann. Cas. 137),

though there was a vigorous dissent by Lord Robertson, is appropriate here: 'It was an accident that the workman, in dealing with the wool, was brought in contact with that which might infect him with this disease of anthrax, and it was a further accident that the disease attacked him.' If the disease was the result of an accident, then we do not see why it does not follow that the bodily injury which Barry suffered as the result of the disease was not accidentally suffered, nor why the case does not come within the terms of the policy. The language is 'bodily injuries accidentally suffered.' It hardly could be broader. The intention is, as has been said, to afford full protection and indemnity to the assured. Any accident that causes bodily injury in any way is included. Bodily injury is more commonly associated, perhaps, with physical force of some sort, but in the absence of anything in the policy limiting it to that we do not see how or why it can or should be so restricted. A liability growing out of an accident which results in infecting the workman with a loathsome and dangerous disease, and thereby causes him great and perhaps lasting physical injury, would seem to be as much within the spirit and intent of the contract as if the injury had been caused by a blow or some other equally obvious manifestation of force."

Numerous other cases will be found cited by the supreme judicial court of Massachusetts in the case referred to, in support of its ruling, which we think, as did that court, rest upon sound principles.

The judgment is affirmed.

KANSAS SUPREME COURT.

JOEL S. NICHOLSON, Appt.,
v.

ATCHISON, TOPEKA, & SANTA FÉ HOSPITAL ASSOCIATION.

(97 Kan. 480, 155 Pac. 920.)

Charity — negligence — liability.

1. Charitable associations conducting hospitals are not liable for the negligence of their physicians and attendants resulting in injury to patients, unless it is shown that the association maintaining the hos-

Headnotes by PORTER, J.

Note. — The liability for negligence of attendants furnished by relief department toward which employees contribute is discussed in the notes to *Phillips v. St. Louis & S. F. R. Co.* 17 L.R.A. (N.S.) 1167; *Texas C. R. Co. v. Zumwalt*, 30 L.R.A. (N.S.) 1207; and *Nations v. Ludington, W. & V. S. Lumber Co.* 48 L.R.A. (N.S.) 531.

Generally, as to duty and liability of one

pital has not exercised reasonable care in the employment of its physicians and attendants.

For other cases, see *Charities, II. c.*, in *Dig.* 1-52 N. S.

Same — hospital — absence of care.

2. The foregoing rule is applied in an action by the father of a deceased employee of a railroad company against a hospital association for the neglect of its physicians and attendants in failing to give the son suitable care and attention, where it appears that the defendant is an association maintained by the railroad company for the treatment of its employees while sick, and is supported by the monthly contributions of all its employees, who, so long as they

other than a physician or surgeon, who contracts to provide medical or surgical attention to another, see note to *Youngstown Park & F. Street R. Co. v. Kessler*, 36 L.R.A. (N.S.) 50.

As to liability of master for negligence of physician or surgeon furnished at the master's expense to attend servant, see note in 4 L.R.A. (N.S.) 66 et seq., and supplemental

remain in the service of the railroad company and contribute to the fund, are entitled to the benefits of the hospital free of charge.

For other cases, see Charities, II. c, in Dig. 1-52 N. S.

Pleading — absence of allegation.

3. In such an action, a petition which fails to allege that the defendant did not exercise reasonable care in the selection of its physicians and attendants is subject to demurrer.

For other cases, see Pleading, II. j; VII. c, in Dig. 1-52 N. S.

(March 11, 1916.)

APPEAL by plaintiff from a judgment of the District Court for Shawnee County in defendant's favor in an action brought to recover damages for the alleged negligent failure of the physicians and attendants of the defendant association to give plaintiff's son proper medical care and attention. Affirmed.

The facts are stated in the opinion.

Messrs. R. B. Forrest and Edwin L. O'Neil, for appellant:

Institutions and corporations conducted for profit are liable for negligence and torts under the principles and rules of law generally applicable to such conditions.

Babb v. Reed, 5 Rawle, 151, 28 Am. Dec. 650; *Donnelly v. Boston Catholic Cemetery Asso.* 146 Mass. 163, 15 N. E. 505; *Chapin v. Holyoke Y. M. C. A.* 165 Mass. 280, 42 N. E. 1130; *Coe v. Washington Mills*, 149 Mass. 543, 21 N. E. 966; *Brown v. La Societe Francaise*, 138 Cal. 475, 71 Pac. 516, 13 Am. Neg. Rep. 251.

Messrs. William R. Smith, Owen J. Wood, and Alfred A. Scott, for appellee:

There being no allegation in the petition that the defendant was negligent in the employment of the physicians or nurses who attended the deceased, there can be no recovery.

Atchison, T. & S. F. R. Co. v. Zeiler, 54 Kan. 340, 38 Pac. 282; *Duncan v. Nebraska Sanitarium & Benev. Asso.* 92 Neb. 162, 41 L.R.A.(N.S.) 973, 137 N. W. 1120, Ann. Cas. 1913E, 1127; *Laubheim v. De Koninglyke Nederlandsche S. B. Maatschappij*, 107 N. Y. 228, 1 Am. St. Rep. 815, 13 N. E. 781; *Quinn v. Kansas City, M. & B. R. Co.* 94 Tenn. 713, 28 L.R.A. 552, 45 Am. St. Rep. 767, 30 S. W. 1036.

note to *Jones v. Tri-State Teleph. & Teleg. Co.* 40 L.R.A.(N.S.) 486.

Generally, as to the liability of charitable institutions, including hospitals, for personal injuries, see notes to *Farrigan v. Pevear*, 7 L.R.A.(N.S.) 481; *Bruce v. Central M. E. Church*, 10 L.R.A.(N.S.) 74; *Thornton v. Franklin Square House*, 22 L.R.A.(N.S.) L.R.A.1916D.

Porter, J., delivered the opinion of the court:

In this case the father of a deceased employee of a railroad company is suing a hospital association for neglect of its physicians and attendants in not giving to the son suitable care and attention. The defendant is an association maintained by the railroad company for the treatment of its employees while sick, and is supported by the monthly contributions of all its employees; and, so long as they continue in the employ of the railroad company, contributors to the fund are entitled to medical aid, surgical attendance, and medicines free of charge. The petition alleges that plaintiff's son became ill at his boarding house in Topeka while in the employ of the railroad company, and was being cared for and treated there by competent physicians; that while in that condition he was removed, against his protest, to the hospital by the agent of the company; that they carried him from a warm, comfortable room into the outer air, and failed to protect his person from the cold; that he became chilled and suffered an attack of pneumonia from the effects of which he died. It is further alleged that after his removal to the hospital the defendant wholly failed to give him medical treatment and professional care during his illness: that he was taken to what is known as the convalescent ward of the hospital, where the windows were kept open, subjecting him to drafts of cold air without sufficient bed covering; that no stethoscope was used to discover the condition of his lungs, and no effort was made by any of the physicians, servants, or attendants of defendant to determine his condition until a few hours before his death. It is alleged that his death was the result of these acts of negligence on the part of the association by its physicians and attendants. The trial court sustained a demurrer to the petition. Plaintiff elected to stand upon his petition, and appeals.

All contributors to the fund by which the association is maintained are entitled, so long as they remain in the employ of the railroad company, to the benefits of the hospital. They may, in case of accident, sickness, or disease of any kind, be taken to the hospital, where they are given, free of all expense, such medical or surgical

486; *Hordern v. Salvation Army*, 32 L.R.A.(N.S.) 62; *Basabo v. Salvation Army*, 42 L.R.A.(N.S.) 1144; and *Schloendorff v. Society of New York Hospital*, 52 L.R.A.(N.S.) 505; and see also later case, *Tucker v. Mobile Infirmary Asso.* L.R.A.1915D, 1167.

care and attention as may be necessary. The institution is maintained for the mutual benefit of the contributors to the fund, and in no sense is it maintained for profit. Its liability to a patient for injuries resulting from negligent failure of the physicians and attendants in its employ properly to care for the patient must be determined upon the same principles of law which govern similar actions against eleemosynary or charitable associations conducting hospitals. The rule seems fairly well established that charitable associations conducting hospitals are not liable for the negligence of their physicians and attendants resulting in injury to patients unless it is shown that the association maintaining the hospital has not exercised reasonable care in the employment of its servants and physicians. This rule has been applied to a case where the patient who claimed to have been injured occupied a room in a building maintained in part by donations, notwithstanding she paid full compensation for her own care and treatment. *Duncan v. Nebraska Sanitarium & Benev. Asso.* 92 Neb. 182, 41 L.R.A. (N.S.) 973, 137 N. W. 1120, Ann. Cas. 1913E, 1127.

On the other hand it was held that where a railroad company maintained a hospital under the same plan as in the present case, but made each year a profit of several thousand dollars, which went to the credit of the railroad company, it was liable for the negligence of its hospital employees. *Texas & P. Coal Co. v. Connaughten*, 20 Tex. Civ. App. 642, 50 S. W. 173.

A case more directly in point is *Union P. R. Co. v. Artist*, 23 L.R.A. 581, 9 C. C. A. 14, 19 U. S. App. 612, 60 Fed. 365. The action there was sought to be maintained against the railroad company. It was held that if the company had used reasonable care in the selection of its physicians and attendants, that was all the law required of it. This court in *Atchison, T. & S. F. R. Co. v. Zeiler*, 54 Kan. 340, 38 Pac. 282, approved the doctrine of the *Artist Case*, supra, so far as it applies to the duties and liabilities of a railroad company in calling a physician or surgeon to care for an injured employee or passenger. In the opinion the court said: "The law is well settled that a railroad company, having used reasonable care in his selection, is not chargeable with the want of skill in a physician or surgeon whom it calls for a passenger or injured employee, and this is so even where the law requires a steamship company transporting immigrant passengers to carry a physician. *O'Brien v. Cunard S. S. Co.* 154 Mass. 272, 13 L.R.A. 329, 28 N. E. 206; *Laubheim v. De Koninglyke Nederlandsche S. B. Maatschappij*, 107 L.R.A. 1916D.

N. Y. 228, 1 Am. St. Rep. 815, 13 N. E. 781; *Secord v. St. Paul, M. & M. R. Co.* (C. C.) 5 McCrary, 515, 18 Fed. 221; *Union P. R. Co. v. Artist*, supra." (p. 350)

In the present case the petition does not state that the hospital association failed to use reasonable care in this respect. Plaintiff attempts to avoid the necessity of such an allegation by insisting that it makes no difference how skilled or efficient the servants and physicians of defendant may have been, for the reason that he seeks only to recover for the failure of the physicians and servants to give his son treatment of any kind. But this is a narrow contention, in view of all that is said in the petition. The names of several physicians in the employ of the association are given in the petition. It is said that plaintiff's son was taken there while sick, that the physicians and attendants in the employ of the defendant neglected him, and that from the neglect his death resulted. There is a complaint that a stethoscope was not used to determine the nature of the disease or the condition of the patient's lungs. The whole petition, taken together, shows that plaintiff is attempting to recover damages for the negligence of the physicians and attendants who are said to be employees of the defendant, in their failure to give to his son proper medical care and attention. Of course it is not claimed that the physicians neglected the patient intentionally or maliciously; all that is claimed is that the physicians and attendants at the hospital neglected to give him proper medical attention in time to prevent his death.

Under the authorities cited, as well as by the weight of reason, the plaintiff is not entitled to recover on the facts stated. Suits of this nature against associations not established for profit, but for the purpose of mutual benefit, ought not, for reasons of sound public policy, to be encouraged. Employers of large numbers of workmen should be encouraged to establish institutions of this kind for the mutual benefit of their employees. It is well known that the employees of the railroad company are entitled to medical and surgical care in the hospital, regardless of the nature of their employment or the cause or occasion of their sickness. Doubtless in many instances employees are enabled to avail themselves of these benefits when otherwise, because of their financial condition, they would be unable to obtain necessary medical care and attention.

The judgment, sustaining the demurrer to the petition, is affirmed.

OKLAHOMA SUPREME COURT.

U. S. TUBBS, Plff. in Err.,

v.

JAMES H. SHEARS.

(— Okla. —, 155 Pac. 549.)

Animals — right to keep vicious dog.

1. The law recognizes a right in the owner of a vicious dog to keep it for the necessary protection of life and property, but one exercising this right does so at his own risk, and is held strictly accountable for any harm resulting to another.

For other cases, see Animals, I. c. 2, in Dig. 1-52 N. S.

Same — owner's knowledge — necessity.

2. While the owner of a dog is not liable, in the absence of statutory provision, for any injury it may inflict upon another, unless he has notice of its inclination to commit such injury, the modern and more reasonable doctrine is that he need not have actual notice thereof in order to make him liable.

For other cases, see Animals, I. c. 2, in Dig. 1-52 N. S.

Same — notice.

3. Such notice may be either actual or constructive. Knowledge of one attack by a dog is sufficient to charge the owner with liability for all its subsequent acts.

For other cases, see Animals, I. c. 2, in Dig. 1-52 N. S.

Same — negligence.

4. Negligence in the ordinary sense is not the ground for liability in an action for damages by a ferocious dog, but the keeping of the dog, with either actual or constructive knowledge of its vicious disposition, fixes liability for injuries which it may inflict.

For other cases, see Animals, I. c. 2, in Dig. 1-52 N. S.

(February 15, 1916.)

ERROR to the District Court for Cleveland County to review a judgment in plaintiff's favor in an action brought to recover damages for injuries inflicted on plaintiff by defendant's dog. Affirmed.

The facts are stated in the Commissioner's opinion.

Messrs. Williams & Luttrell, for plaintiff in error:

It was error to admit incompetent evidence in behalf of plaintiff, over the objection of defendant.

Abbott v. Dingus, 44 Okla. 567, 145 Pac. 365; 6 Enc. Ev. 927; 29 Cyc. 1115; 2 Jones,

Headnotes by GALBRAITH, C.

Note. — As to scienter necessary to charge owner with liability for injuries inflicted by dog upon person or property of another, see note to Warrick v. Farley, 51 L.R.A.(N.S.) 45. L.R.A.1916D.

Ev. § 297 (a); Larzelere v. Starkweather, 38 Mich. 96; Maul v. Rider, 59 Pa. 167; Welch v. Norton, 73 Iowa, 721, 36 N. W. 758.

The owner and keeper of a dog is not charged with the knowledge of the dangerous character of the dog if he, the owner, had knowledge that said dog had bitten or attempted to bite one or more persons.

1 Am. & Eng. Enc. Law, 584; Cooley, Torts, p. 344; State, Evans, Prosecutor, v. McDermott, 49 N. J. L. 163, 60 Am. Rep. 602, 6 Atl. 653, 1 Am. Neg. Cas. 164; Fake v. Addicks, 45 Minn. 37, 22 Am. St. Rep. 716, 47 N. W. 450, 1 Am. Neg. Cas. 150; Warner v. Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638; St. Louis & S. F. R. Co. v. Wilson, 32 Okla. 752, 124 Pac. 326.

In a suit to recover for injuries caused by the bite of a dog, the owner's liability depends upon his knowledge of the animal's vicious propensities, and his negligence in failing to take proper care to prevent it from doing mischief.

Norris v. Warner, 59 Ill. App. 300; Partlow v. Haggarty, 35 Ind. 178.

Messrs. J. B. Dudley, N. E. Sharp, and H. E. Cunningham, for defendant in error:

Defendant had knowledge of the dangerous character of the dog.

Ayers v. Macoughtry, 29 Okla. 399, 37 L.R.A.(N.S.) 865, 117 Pac. 1088; Emmons v. Stevane, 77 N. J. L. 570, 24 L.R.A.(N.S.) 458, 73 Atl. 544, 18 Ann. Cas. 812; Grissom v. Hofius, 39 Wash. 51, 80 Pac. 1002, 4 Ann. Cas. 125; Robinson v. Marino, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752, 1 Am. Neg. Cas. 253; King v. Muldoon, 131 App. Div. 847, 116 N. Y. Supp. 308; Warner v. Chamberlain, 7 Houst. (Del.) 18, 30 Atl. 638; Brice v. Bauer, 108 N. Y. 428, 2 Am. St. Rep. 454, 15 N. E. 695, 1 Am. Neg. Cas. 184; Smith v. Pelah, 2 Strange, 1264; Partlow v. Haggarty, 35 Ind. 178; Robinson v. Marino, 3 Wash. 434, 28 Am. St. Rep. 50, 28 Pac. 752, 1 Am. Neg. Cas. 253; Wilkinson v. Parrott, 32 Cal. 102, 1 Am. Neg. Cas. 58.

A person who allows his animals to be at large where they have no right to be, or who permits them to run in a highway, in violation of a statute prohibiting them from running at large therein, is liable in damages for injuries committed by them while so running at large, without reference to the question of the animals' viciousness.

3 C. J. p. 94; Healey v. P. Ballantine & Sons, 66 N. J. L. 339, 49 Atl. 511, 10 Am. Neg. Rep. 155; Grinnell v. Taylor, 85 Hun, 85, 32 N. Y. Supp. 684; Goodman v. Gay, 15 Pa. 188, 53 Am. Dec. 589, 1 Am. Neg. Cas. 341; Decker v. McSorley, 111 Wis. 91,

86 N. W. 554; *Marsland v. Murray*, 148 Mass. 91, 12 Am. St. Rep. 520, 18 N. E. 680; *Meier v. Shrunk*, 79 Iowa, 17, 44 N. W. 209, 1 Am. Neg. Cas. 13.

Galbraith, C., filed the following opinion:

This action was commenced by James H. Shears against U. S. Tubbs, to recover damages for personal injuries charged to have been sustained by the plaintiff on the 9th day of April, 1912, on account of being bitten by the defendant's dog. The petition alleged that the defendant, Tubbs, was the owner and keeper of a vicious dog, that was accustomed to attack and bite mankind, and that he carelessly and wilfully permitted this dog to run at large in the streets of the city of Norman a considerable portion of the time, with knowledge of the vicious and savage disposition and habit of the dog; that on the 9th day of April, 1912, on the public streets of the city of Norman, this dog attacked the plaintiff and bit him, and that the dog, at that time, was affected with rabies or hydrophobia, and that this fact was well known to the defendant; that the plaintiff, by reason of the bite of the dog, suffered great bodily pain and mental anguish, and, on the advice of his physician, traveled to Oklahoma City and took the Pasteur treatment to prevent rabies or hydrophobia, and incurred an expense of \$2 railroad fare, \$33 for lodging, and \$50 for physician fees, and \$5 additional for his physician at Norman, making a total of \$90; and that he suffered great pain in body and mind, and was thereby damaged in the sum of \$1,000. The answer of the defendant admitted the ownership of the dog, but denied that he was of a ferocious and savage disposition, and accustomed to attack and bite mankind, and that if the dog had such disposition, the defendant had no knowledge of it, and that the dog was of kind and peaceful disposition, and of a good character. He also denied that he permitted the dog to run at large on the public streets of the city of Norman, and if the dog did appear on the public streets at any time, it was without the knowledge of the defendant. It is also denied that the dog was affected with rabies or hydrophobia, or any other disease, so far as the defendant had knowledge thereof, and further denied that the plaintiff was damaged as he claimed, and further alleged that "defendant, further answering, alleges that on the 9th day of April, 1912, the date of plaintiff's alleged injury, plaintiff wantonly and maliciously attacked and kicked said dog; and that by reason of said assault upon said dog, the said dog snapped the plaintiff; and, L.R.A.1916D.

if the said plaintiff sustained any injury it was because of his wilful and wanton attack on said dog, and by reason thereof plaintiff is not entitled to recover in this action."

Upon the issues thus formed the cause was submitted to the court and jury for trial, and a verdict rendered for the plaintiff, assessing his damages at \$190, as follows: "Hospital fees, \$50; board and lodging, \$33; railroad fare, \$2; damages, \$100."

From the judgment rendered upon this verdict an appeal has been prosecuted to this court.

Errors are assigned: First, in the admission of incompetent evidence; second, in the court's instructions to the jury; third, in the refusal of the court to give defendant's instruction No. 3; fourth, that the verdict of the jury is not sustained by sufficient evidence; fifth, error in denying the motion for a new trial.

It will be observed that under the issues raised by the pleadings the plaintiff's claim for damages was based upon two grounds: First, that he was bitten by a vicious dog; second, that this dog was a mad dog; and that defendant owned and harbored the dog with knowledge of his vicious character, and of his affliction.

During the trial evidence was admitted on behalf of the plaintiff, over the objection of the defendant: First, of a conversation of the witness with the defendant in October, 1911, which tended to charge him with knowledge that his dog was afflicted with rabies; and, again, the expert who made the examination of the brain of a dog which it was contended was the defendant's dog, and the one that injured the plaintiff, was permitted to testify as to the examination of the brain of a dog, and this dog had been afflicted with rabies or hydrophobia. It is contended on behalf of the plaintiff in error that it was error to admit the evidence of the conversation, inasmuch as it occurred several months prior to April, 1912, and that if the dog was afflicted, as contended, in October, 1911, it would not be proof that he was so afflicted in April, 1912. And, again, it is contended that the testimony of the doctor who made the examination of the dog's brain was incompetent for the reason that the brain of the dog which was examined by the doctor was not sufficiently identified as that of the brain of the defendant's dog. Evidence was introduced to the effect that immediately after the dog bit the plaintiff it was killed, and that soon thereafter its body was hauled to the office of the doctor, and there the head was severed from the body, and the head was taken into the doctor's office, and that the doctor found the dog's head in his office when he returned,

and made the analysis of the brain and found that it "was positive for rabies." The doctor further testified that he only examined one dog's head on that day. It is contended on behalf of the defendant that the identity of the dog's head examined by the doctor was not sufficient to show that it was the head of the defendant's dog, and therefore the testimony was incompetent, and its admission prejudicial error, inasmuch as one of the controverted issues in the case was as to whether or not the defendant's dog was affected with rabies. It seems to us that the testimony of the witness as to the conversation with the defendant relative to his dog "acting queer" was relevant and competent to go to the jury on the question of the defendant's knowledge of the affliction of his dog, and the time between the conversation and the plaintiff's injury was not so remote as to render the testimony incompetent on that ground. It likewise appears that the testimony of the doctor as to the result of his examination of the dog's brain was competent and relevant. It is true that the evidence to this point might have been more explicit, but it was sufficient to justify the conclusion that the dog's head examined by the doctor was the head of the dog that bit the complainant. The jury evidently had no doubt that the head examined by the doctor, about which he testified, was the head of the defendant's dog. We are impelled to the conclusion that the admission of this testimony was not prejudicial error.

Again, it is complained that the court erred in instruction No. 10, which reads as follows: "You are instructed that if the defendant was the owner of and kept the dog in controversy and had knowledge brought to him that said dog had bitten, or attempted to bite one or more persons prior to the attack upon the plaintiff, then that the defendant had knowledge of the dangerous character of the dog."

This instruction may be too brief a statement of the facts that are usually considered sufficient to charge the owner of a dog with knowledge of its vicious character. The rule is stated as follows: "While the owner of a dog is not liable, in the absence of statutory provision, for any injury it may inflict on others, unless he has notice of its inclination to commit such an injury, the modern and more reasonable doctrine is that he need not have had actual notice thereof to make him chargeable. According to this doctrine notice that the disposition of the animal is such that it would be likely to commit an injury similar to the one complained of is sufficient; but knowledge that a dog is ferociously disposed toward cattle

is ordinarily not notice that it will attack persons. Knowledge of one attack by a dog is generally held sufficient to charge the owner with all its subsequent acts, but there need be no notice of injury actually committed, and therefore it is unnecessary to prove that a dog had ever before bitten any person, if the owner had seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit injuries of the class complained of." 1 R. C. L. ¶ 60.

It is said in the brief of the plaintiff in error: "It was admitted that the defendant knew that the dog in controversy had bitten the witness Hunt prior to the alleged injury of the plaintiff, but it was a disputed question as to whether the dog was justified in its attack upon the said Hunt; and it was further contended by the defendant that the circumstances surrounding the biting of the witness Hunt by defendant's dog were not sufficient, even though known to the defendant, to put a prudent man on his guard. Under the instruction the question of the dog's right to bite the witness Hunt was taken away from the jury, as was also the question whether the circumstances of the dog's biting the witness Hunt, admitted to be known by the defendant, was sufficient to put a prudent man on his guard as to the vicious character of the dog."

Under the law it was not a question for the jury to determine as to whether the dog was justified in biting Hunt, since self-defense is not justification for a dog bite, but the fact that the defendant knew that this dog had bitten Hunt was sufficient to charge him with notice of the vicious character of the dog, and to render him liable to anyone suffering harm on account of the dog. The rule is announced as follows: "The law clearly recognizes a right in the owner of a vicious dog to keep it for the necessary protection of life and property. But as such a creature is inherently dangerous, one assuming to exercise the right to keep it does so at his own risk, and is held strictly liable for any harm resulting to another." 1 R. C. L. ¶ 59.

Complaint is also made of instruction No. 11, given by the court to the jury, wherein the jury was advised that if they found that the defendant kept the dog tied, or otherwise confined, they might infer from such fact that the defendant had knowledge of the dangerous character of the dog. This instruction may be open to the criticism urged against it, that it invades the province of the jury, and directs them as to the weight of the evidence, and is faulty under the doctrine of the case of *St. Louis & S. F. R. Co. v. Wilson*, 32 Okla. 752, 124

Pac. 326; but still this instruction, in the light of the verdict and the evidence, cannot be said to be prejudicial error, and under § 6005, Rev. Laws 1910, is not ground for a reversal of the judgment.

The plaintiff in error also complains of the refusal of the court to give requested instruction No. 3, which reads as follows: "You are further instructed that if defendant restrained his dog and tied it up and that by accident it got loose without the knowledge or consent of defendant, then in that case, defendant has been guilty of no negligence, and plaintiff cannot recover."

The refusal to give this instruction was not prejudicial error, for the reason that the same is not a correct statement of the law. "As negligence, in the ordinary sense, is not the ground for liability in an action for injuries occasioned by a ferocious dog, so contributory negligence, in its ordinary meaning, is not a defense. Therefore these terms, when employed in this class of actions, may be deemed to be used, not in a strictly legal sense, but for convenience. Thus, slight negligence, or the want of ordinary care, as the unintentional treading on the toes of a vicious dog, will not relieve its owner from injuries thereby occasioned; and, even where warnings to beware of the dog are posted about the owner's premises, it seems that he will not be exempted from liability to one who is rightfully there, or to one who is unable to read." 1 R. C. L. ¶ 65.

It is said by this court in *Ayers v. McCoughtry*, 29 Okla. 409, 37 L.R.A.(N.S.) 865, 117 Pac. 1088: "It is the keeping of the animal, with knowledge, either actual or constructive, of its dangerous or vicious

propensities, which creates the liability. . . . Nor is it necessary that the dog's disposition or peculiarity be such as to render it liable to or inclined to bite all with whom it comes in contact; it being held in a number of cases that, if the dog had bitten one person prior to the injuries sued for, knowledge thereof is sufficient notice of his character to bind the owner. . . . In the old case of *Smith v. Pelah*, 2 Strange, 1264, which has never been departed from, Lee, Ch. J., 'ruled that if a dog has once bit a man, and the owner having notice thereof keeps the dog, and lets him go about or lie at his door, an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes; for it was owing to his not hanging the dog on the first notice. And the safety of the King's subjects ought not afterwards to be endangered.'"

See also *Humphrey v. Morgan*, 30 Okla. 343, 120 Pac. 577.

It appears from the verdict of the jury that the defendant only recovered \$100 damages and for his necessary traveling expenses and for medical attendance. Under the evidence there can be no doubt that the plaintiff in error had knowledge of the vicious character of the dog, and under the law he was liable for the injury sustained by the complainant. The evidence is sufficient to sustain the verdict on account of keeping a vicious dog alone, even if the other elements of damages were eliminated from the case entirely.

We therefore recommend that the judgment appealed from be affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

FRANK ST. MARTIN

v.

NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, Appt.

(89 Conn. 405, 94 Atl. 279.)

Damages — physical injury — mental anguish — inability to attend sick wife.

1. Damages for injury to a passenger cannot include an allowance for mental anguish because he was prevented from being with his wife in her last illness, was distressed about her condition and that of

Note.—For mental anguish over collateral consequences of injury as element of damages for personal injury, see annotation following this case, post, 1038. L.R.A. 1916D.

their children, and worried because he did not know where she was buried.

For other cases; see Damages, III. o, 1, in Dig. 1-52 N. S.

Appeal — reversible error — erroneous evidence.

2. The admission of evidence in an action to recover damages for personal injury, of mental distress because of plaintiff's inability to attend his wife in her last illness because of the injury, is reversible error.

For other cases, see Appeal and Error, VII. m, 3, a, in Dig. 1-52 N. S.

(June 10, 1915.)

A PPEAL by defendant from a judgment of the Superior Court for Windham County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. William L. Barnett for appellant.
Mr. Charles A. Capen for appellee.

Roraback, J., delivered the opinion of the court:

The complaint stated this case: The defendant company owns and operates a steam railroad extending from Willimantic to New Haven. While in the exercise of due care the plaintiff was injured when riding as a passenger on one of the defendant's trains from Willimantic to New Haven. His injuries were caused by a collision between the train on which he was riding and an engine standing on the defendant's tracks. This collision occurred by reason of the negligence of the employees of the defendant. In describing the nature of his injuries the plaintiff alleges that he "has suffered great physical and mental pain and anguish; been to great expense for medicine and medical care; was confined a long time in the Saint Joseph's Hospital in the said city of Willimantic; has been unable since the time of said accident to do any labor or attend to his usual vocation and duties of life, and is permanently disabled from ever again performing the same."

Upon the trial of the case to the jury all the allegations of the plaintiff were admitted except the one relating to the plaintiff's injuries. This was denied.

The errors of which the defendant complains are based upon evidence received and the instructions of the court relative to mental pain and suffering.

Against the objections and exceptions of counsel for the defendant the following questions and answers are found in the record, touching the plaintiff's mental condition after he was injured:

Q. You go ahead, Mr. St. Martin, and tell what you worried about in the hospital.

A. Well, when I was there I worried about myself, that is about my pain, that I couldn't get out; and of course I was thinking all the time about my wife being sick in Liberty Hill, and here I was laid up in Willimantic, and because I knowed when I left her she was very sick. . . .

A. Well, I knowed that she was very sick; she couldn't never get better; she had to die. She was sick with consumption, and I had two young ones there, which was young, and I was the only support for them. So that left my wife and two young ones with my folks. My old mother took care of them. Otherwise I didn't have my mother, I didn't know who would take care of them. And I worried about them more than I did about myself, because it is natural for anybody to worry about his L.R.A.1916D.

own family. And the only way that I can speak with her, my father was coming to see me at the time, and she used to send messages to me, and I would send back a message.

The Court: Send what?

A. Send a message to me, a few words. And when she was so bad that she thought that she was going to die, she sent through my father if I wanted to forgive her whatever we shall happen to have during the ten years that we were married; and the only way that I could answer to her was the same way, to tell my father to ask her for me. But I had a secret that I wanted to tell my wife, and I couldn't tell. I couldn't tell nobody of it, and I daren't tell even my father. I wanted to tell her that secret. I never had a chance to tell, and I have got it in my mind yet. I should like to tell it then. I was expecting to tell her that same night when I was hurt. I was intending to tell her that night.

Q. Tell the circumstances when you saw her.

A. Well, when I came out of the hospital my first thing was to find out where my wife was.

Q. Excuse me, you knew she was dead?

A. I knowed she was dead, for they came and told me the next day after she was dead—my father came and told me she was dead.

Q. What you did?

A. Well, after I got the number of the grave I went to the cemetery. That was about a month or so after I was out of the hospital, for when I first come out I couldn't get—I wasn't so that I could go, and I wanted to find the grave. So I went to Mr. Arnold, here, the stone cutter, and I ordered a headstone for her, which I had my name and her name and her age, and I had it set on the grave where it was designed; and two of my family, my father-in-law in particular, kept telling me that he knows where she was buried. Of course, I couldn't go and see where she was buried, only go by what people tell me, that's all. My father told me that he knows where she was buried.

In addition; against the objection of the defendant, the plaintiff was also allowed to testify:

Q. Never mind. What are you worrying about?

A. Well, my worry most is about I don't know but I shall be, or when I shall be, put in some—well, I might be termed a pauper and my young ones be parted from me. Any father will think of it. Anybody that raises a family will think that it is very hard to be parted from his young ones. I used to support my young ones once.

The doctrine allowing damages for mental anguish is subject to certain well-settled rules which to some extent restrict its operation. The rule which is most important is that no recovery can be had for consequences which are not the natural and proximate result of the act complained of.

While the precise question now presented has never been directly passed upon by this court, yet we find it stated in the case of *Gibney v. Lewis*, 68 Conn. 392, 36 Atl. 799: "It is true, as a general rule, that mental suffering . . . may be an element of damages when it is a natural and proximate consequence of some recognized cause of action."

In describing what damages are recoverable for mental anguish, Sedgwick, in his work on *Damages*, 9th ed. vol. 1, § 43g, says: "One cannot recover for mental anguish caused by thought of the extraneous suffering or inconvenience which might be entailed on members of his family."

Another statement of the rule appears in *Shearman & Redfield on Negligence*, 6th ed. vol. 3, § 761: "The mental suffering which may be allowed for includes such as arises from the plaintiff's reflections upon what he personally has to endure or anxiety for his escape. But his distress, in view of the consequences which his disability may bring upon others, even of his own family, is too remote a consequence of the injury to be compensated for in damages."

In *Maynard v. Oregon R. & Nav. Co.* 46 Or. 15, 68 L.R.A. 477, 78 Pac. 983, it was held that mental anguish or distress resulting from the realization of physical inability, because of the injury, to properly care for those dependent on the plaintiff for support and education, is not an element of consequential damages to be recovered in an action for personal injuries.

It is stated in *Linn v. Duquesne*, 204 Pa. 551, 93 Am. St. Rep. 800, 54 Atl. 341: "Mental suffering has not generally been recognized as an element of damages for which compensation can be allowed, unless it is directly connected with a physical injury, or is the direct and natural result of a wanton and intentional wrong."

In *Atchison, T. & S. F. R. Co. v. Chance*, 57 Kan. 40, 45 Pac. 60, the court said: "The court erred in refusing to strike out the testimony to the effect that Finnegan was troubled by the sickness and confinement of his wife, and the fear that he would leave her and the child in a dependent and helpless condition. Under the decisions of this court, a recovery may be had for mental suffering or anguish of mind resulting from physical pain and suffering endured by the injured party; but it is L.R.A.1916D.

improper to admit evidence as to mental suffering on account of the circumstances or condition of others."

In *Bahr v. Northern P. R. Co.* 101 Minn. 314, 112 N. W. 267, the court held that in an action for personal injuries, "the mental anguish or suffering which can be proved is such only as is endured by the plaintiff as the direct consequence of injury to himself."

The case of *Sullivan v. Old Colony Street R. Co.* 197 Mass. 512, 125 Am. St. Rep. 378, 83 N. E. 1091, was an action by a married woman for personal injuries resulting in an extremely nervous condition on her part which might cause the premature birth of a child. It was held in this case that the plaintiff could not recover damages for her mental suffering on account of the death of a child who was conceived by her seven months after her injuries and was born prematurely seven months later. In this case this doctrine was enunciated (p. 515): "The connection between the tortious act of a person sought to be charged for the consequences of an injury, as the cause, and the injury sustained, as the effect, must be established by a fair preponderance of the evidence before a plaintiff can be permitted to recover. Such causal connection cannot be left to conjecture, surmise, or speculation, but must rest upon a firm foundation of proof."

It was also stated (p. 516): "The mental suffering for which damages can be recovered, therefore, is limited to that which results to the person injured as the necessary or natural consequence of the physical injury. But sentiments of grief, sorrow, and mourning, which are aroused by extraneous causes, thoughts, or reflections, are excluded. The contemplation of the suffering and death of a child begotten long after the event complained of is too remote from the original physical injury to the parent, and too intangible and ethereal, to be connected with the original wrong of the defendant as a result to be reasonably apprehended from such a cause. The law cannot enter the realm of pure sentiment in this class of cases, and award pecuniary compensation for those injured feelings which spring from sympathy and the severance of ties of love and affection."

It follows, therefore, that a portion of the evidence relating to the plaintiff's mental distress was improperly admitted. This evidence should have been confined to such sorrow and anguish as were the legal and natural consequences of the act complained of. The features of this class of testimony which consist of the plaintiff's distress about the condition of his wife and children, his inability to be with his wife when she was sick and dying, and further as to

his feelings and experiences about a month after he came out of the hospital when he was in the cemetery where his wife was buried, should not have been admitted as testimony. These statements of his meditations were wholly aside from and independent of any suffering caused by the accident, and were too remote, speculative, and uncertain to form any proper basis upon which to estimate damages.

It cannot be said that this testimony was harmless and that the jury were not misled by it. Any improper evidence that may have a tendency to excite the passions, awaken the sympathy, or influence the judgment of the jury cannot be considered as harmless. In the present case the sole question for the determination of the jury was as to the amount of damages. It is quite obvious from the amount of the verdict (\$4,000) and the character of this testimony that it may in some degree have improperly prejudiced the defendant upon the only issue in the case.

The instructions of the court as to the elements of damage that the jury might consider because of the plaintiff's mental pain and suffering were inadequate and inaccurate. Upon this subject they were told

that "continual mental worry as a result of not being able to work and earn a living for self and family is continual mental pain and suffering. Now that would be correct, and I say it to you as correct, but of course I should also say that the mental worry . . . must be as a result of course,—the worry as a result of the injuries, the injury that is complained of and that he received. If he had the mental worry and anxiety lest he couldn't earn a living, or any other mental worry that the plaintiff had as a result of the injury that he received and complained of that would be proper for you to consider as an element of damage."

This portion of the charge would naturally have led the jury to believe that the evidence upon this phase of the case, which we have already held to be inadmissible, might properly be taken into consideration by them in estimating damages. If this evidence were inadmissible, certainly the remarks of the court upon this same subject cannot be sustained.

There is error, and a new trial is ordered.

The other Judges concur.

Annotation—Mental anguish over collateral consequences of injury as element of damages for personal injury.

The present note is concerned with cases like *ST. MARTIN v. NEW YORK, N. H. & H. R. Co.* ante, 1035, where the mental anguish upon account of which damages are claimed arises from the collateral consequences of the injury complained of, and is not intended to include cases of mental suffering arising from contemplation of disfigurement or mutilation, or from apprehension of injury to health, which are treated respectively in notes to *Diamond Rubber Co. v. Harryman*, 15 L.R.A.(N.S.) 775, and *St. Louis, I. M. & S. R. Co. v. Buckner*, 20 L.R.A.(N.S.) 458. Other important notes in this series dealing with various phases of the question of mental anguish as an element of damages are:

Recovery of damages for mental anguish in telegraph cases, note to *Western U. Teleg. Co. v. Chouteau*, 49 L.R.A.(N.S.) 206;

Parent's mental anguish as element of damages, at common law, for personal tort to minor child, note to *Sperier v. Ott*, 7 L.R.A.(N.S.) 518;

Mental anguish, etc., from injury by dog, note to *Ayers v. Macoughtry*, 37 L.R.A.(N.S.) 866;

Mental suffering as element of dam-

ages in action against physician or surgeon, note to *Adams v. Brosius*, 51 L.R.A.(N.S.) 36;

Mental anguish as an element of damages for personal injuries to pregnant woman, note to *Prescott v. Robinson*, 17 L.R.A.(N.S.) 594; *Tunnicliffe v. Bay Cities Consol. R. Co.* 32 L.R.A. 142; and

Right to recover for mental suffering on account of another's mental or physical suffering, note to *Gulf, C & S. F. Co. v. Overton*, 19 L.R.A.(N.S.) 500.

While only a few cases regarded as within the scope of this note have been found, these are of one accord in holding that mental anguish arising from collateral consequences of the injury, like probable dependency of the injured person's family, is too remote to constitute an element of damages in personal injury actions.

It is undoubtedly true, it has been said, that one suffering from injuries to his person, due to the negligence of another, may recover for mental distress and anguish resulting from the same cause. Such mental distress or anguish, however, as is not the natural result of the accident, but is produced by the operation of the mind in the contemplation

of the physical condition to which the injured party is reduced, or in contemplation of any extraneous suffering or inconvenience that such condition might entail, whether it respects the person himself or others dependent upon him, is not regarded as matter proper to form the basis of consequential damages. *Maynard v. Oregon R. & Nav. Co.* (1904) 46 Or. 15, 68 L.R.A. 477, 78 Pac. 983.

So, mental anguish because of inability to work and properly to support his child is not a proper element of damages to be allowed one injured in a railroad accident. (Or.) *Ibid.* The fact, the court said, that plaintiff was rendered incapable of pursuing his labors was a condition entirely legitimate for swelling the damages, but his meditation upon that fact, and the mental distress and anguish produced from such meditation, were wholly aside from and independent of any suffering caused by the accident or the physical infliction received, and were too remote, speculative, and uncertain upon which to base an estimate of damages.

And, likewise, the allowance of damages for personal injury cannot include mental suffering which the injured person endures because, on account of his accident, his family has no means of support and his children no way of procuring an education. *Ferebee v. Norfolk Southern R. Co.* (1913) 163 N. C. 351, 52 L.R.A.(N.S.) 1114, 79 S. E. 685.

In *Texas Mexican R. Co. v. Douglass* (1888) 69 Tex. 694, 7 S. W. 77, holding that damages could not be recovered for mental suffering resulting from apprehension that the injured person would not be able to support his wife and children, the court said: "We think the mental suffering arising from apprehension as to the future of one's family is not a natural result of the injury, but depends upon the pecuniary condition and social relations of the sufferer, and would require the submission of elements of damage to the jury in cases where the complainant was a married man and had a family dependent on his exertions for a support, that could not arise where there was no family, or where the injured party was possessed of sufficient means for the maintenance of his family; so that a person with a large and dependent family would be entitled to larger damages than a person not so situated. Aside from the irregularity of the rule, nothing is better calculated to excite the sympathy of a jury than the idea of a poor and dependent family caused by the wrongful act or omission

of another, and we are of opinion that there was error in admitting the testimony."

And mental anguish resulting from apprehension as to the lack of support of one's family as the probable result of his injuries, and the fact that rent would soon be due, cannot properly be considered in estimating damages. It is not the natural result of the injury. *Planters' Oil Co. v. Mansell* (1897) — Tex. Civ. App. —, 43 S. W. 913.

In *Achison, T. & S. F. Co. v. Chance* (1896) 57 Kan. 40, 45 Pac. 60, the admission of testimony to the effect that the injured person was troubled by the sickness and confinement of his wife, and the fear that he would leave her and the child in a dependent and helpless condition, was held to be a prejudicial error. The court said: "Under the decisions of this court, a recovery may be had for mental suffering or anguish of mind resulting from physical pain and suffering endured by the injured party; but it is improper to admit evidence as to mental suffering on account of the circumstances or condition of others."

One injured through the negligence of another is not entitled to compensation for mental pain and anguish from worry over her financial condition and inability to pay her expenses. *Boatright v. Portland R. Light & P. Co.* (1913) 68 Or. 26, 135 Pac. 771.

In *Keyes v. Minneapolis & St. L. R. Co.* (1886) 36 Minn. 290, 30 N. W. 888, it was decided that anxiety on the part of an injured person for the safety of members of his family who may be in danger of injury from the same cause cannot be considered as a basis for damages. But the admission of evidence of such anxiety was not considered prejudicial in that case. W. W. A.

GEORGIA SUPREME COURT.

EDGAR ALEXANDER, Plff. in Err.,

v.

MRS. C. M. COYNE.

(143 Ga. 696, 85 S. E. 831.)

Money received — action — officer of corporation.

An action for money had and received is

Headnote by EVANS, P. J.

Note. — As to right of third person to recover from agent money paid him for his principal, see annotation following this case, post, 1041.

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maintainable against one who, as a president and general manager of a corporation, received money to which the plaintiff was entitled, and to which the corporation had no right, where the officer knew of the plaintiff's right to the money.

For other cases, see Assumpsit, II. b, in Dig. 1-52 N. S.

(July 13, 1915.)

ERROR to the Superior Court for Fulton County to review a judgment overruling a demurrer to a petition filed to recover the amount of a loan as money had and received by defendant for plaintiff's use. Affirmed.

Statement by Evans, P. J.:

Mrs. C. M. Coyne brought a petition against Edgar Alexander to recover the sum of \$606 as money had and received by the defendant for the plaintiff's use. As amended, the petition alleged that on May 2, 1911, petitioner loaned to the Electric Construction Company, a corporation, \$606, and to secure the loan the Electric Construction Company in writing assigned to her an open account for \$861.95 due that company by the S. H. Kress Company, another corporation. That transfer was signed, "Electric Construction Company, by Edgar Alexander, President." At the time of making the assignment, the construction company was insolvent, and this fact was known by the defendant. After the assignment the defendant, who was the president and general manager of the construction company, continued to act as such until about May 20, 1911, and was interested in receiving a salary therefor, when a check was received from the Kress company for the amount of the open account. The check was delivered in the mail box to the Electric Construction Company, and was received and cashed by the defendant. Petitioner has never seen the check, but is informed that the same was payable to the Electric Construction Company, was signed by the Kress company, and was for the full amount of the open account; that the check was "cashed by the act and deed of the defendant, and by that of no other person; he then signed himself, Electric Construction Company, by Edgar Alexander, Its President." At that time Alexander had the exclusive control and management of the Electric Construction Company; and in order to further the interests of that corporation, and of himself, he thereafter passed the amount of the account to the credit of the corporation, of which he was president and general manager. At the time the defendant knew that the chose in action was the property of the plaintiff,

and that the check he received in payment of the same, and the money he received in cashing the check, and the money he gave to the Electric Construction Company, was also the property of the plaintiff; and at the time the defendant gave the money to the Electric Construction Company he knew it was insolvent, and knew that by his act he was depriving the plaintiff of her right to the account. The act of the defendant in depriving the plaintiff of her property was a conversion on his part, which she has never ratified or approved. The construction company has been adjudicated a bankrupt, and she is unable to obtain her money from it. "Petitioner waives the tort, and sues for money had and received in the sum of \$606 principal and interest from May 21, 1911." The defendant's general demurrer was overruled, and he excepted.

Messrs. Little, Powell, Smith, & Goldstein, for plaintiff in error:

Plaintiff, resorting to the action of money had and received, can maintain it only against that one of the wrongdoers to whose own use and benefit the money was had and received.

Cowart v. Fender, 137 Ga. 586, 73 S. E. 822, Ann. Cas. 1913A, 932.

Plaintiff cannot maintain this action unless the defendant himself received the use and benefit of the money.

Lary v. Hart, 12 Ga. 422.

There is no basis for the action, unless there is both loss to plaintiff and enrichment of the defendant with plaintiff's money.

Limited Invest. Asso. v. Glendale Invest. Asso. 99 Wis. 54, 74 N. W. 633; Osborn v. Bell, 5 Denio, 370, 49 Am. Dec. 276.

Messrs. Dillon & Burress, for defendant in error, relied on the following cases:

Jones v. Kimbrough, B. & Co. 137 Ga. 638, 74 S. E. 59; Miller v. Wilson, 98 Ga. 569, 58 Am. St. Rep. 319, 26 S. E. 578; Flannery v. Harley, 117 Ga. 485, 43 S. E. 765; Sweet v. Montpelier Sav. Bank & T. Co. 69 Kan. 649, 77 Pac. 538; 27 Cyc. 869; Garland v. Salem Bank, 9 Mass. 408, 6 Am. Dec. 88; Houston v. Frazier, 8 Ala. 84; Haines v. Chappell, 1 Ga. App. 483, 58 S. E. 220; Porter v. Thomas, 23 Ga. 471; Farmers' & M. Bank v. Bennett, 120 Ga. 1014, 48 S. E. 398; Hawley v. Screven, 62 Ga. 347, 35 Am. Rep. 126; Cragg v. Arendale, 113 Ga. 181, 38 S. E. 399; Rushin v. Tharpe, 88 Ga. 781, 15 S. E. 830; Civil Code, §§ 3784, 4407; Tribble v. Laird, 92 Ga. 686, 19 S. E. 26; Messer-Moore Ins. & Real Estate Co. v. Trotwood Park Land Co. 170 Ala. 473, 54 So. 228, Ann. Cas. 1912D, 719.

L.R.A.1916D.

Evans, P. J., delivered the opinion of the court:

The difficulty in the question presented by this record arises out of the form of action which the plaintiff has elected to pursue. It is well settled that whoever meddles with another's property, whether as principal or agent, does so at his peril. If an agent takes the property of another without his consent, and delivers it to his principal, it is a conversion, and both the principal and the agent will be liable in damages. *Miller v. Wilson*, 98 Ga. 567, 58 Am. St. Rep. 319, 25 S. E. 578. The plaintiff could have prosecuted her action for damages for the unlawful conversion of her property, both against the Electric Construction Company and its president, who aided in the diversion of her funds. An owner of money which has been tortiously converted by a person acting for his own benefit may waive the tort and bring assumpsit for the money received. This is upon the equitable principle that an action for money received lies when money received by one person equitably belongs to another. In order that the doctrine of waiver of tort may apply, the defendant must have unjustly enriched himself thereby. *Keener*, Quasi Contr. 160. If the action be in tort, everyone who participated in the tort is liable as a joint tortfeasor, on the principle that the act of one is the act of all. But where the plaintiff waives the tort, and does not sue for damages, but sues in assumpsit to recover the money, such action can only be maintained against the person who has actually received the money. *Cowart v. Fender*, 137 Ga. 586, 73 S. E. 822, Ann. Oas. 1913A, 932. The action of assumpsit for money had and received will not lie, unless the money was actually received by the defendant or his agent. *Lary v. Hart*, 12 Ga. 422. Where one receives money to which a third person,

whose agent he professes to be, has no right, and he has notice not to pay it over to him, an action for money had and received lies against such agent. *Garland v. Salem Bank*, 9 Mass. 408, 6 Am. Dec. 86; *Houston v. Frazier*, 8 Ala. 81; *Hearsey v. Pruyn*, 7 Johns. 179. In the latter case *Spencer, J.*, observes that "the law is, I believe, well settled that an action may be sustained against an agent who has received money to which the principal had no right, if the agent has had notice not to pay it over."

In the case at bar the chose in action of the Kress company was assigned to the plaintiff by the Electric Construction Company. The written assignment was made by the defendant as the president of that corporation, and hence he knew, when the check from the Kress company came into his possession, that it belonged to the plaintiff. If, instead of receiving a check, the defendant, as agent or an officer of the construction company, had collected the money from the Kress company, and not accounted to the plaintiff for her interest in the same, clearly he would have been liable to her, at her election, in an action for money had and received to her use. Do the pleaded facts present a case equivalent to that supposed? It is alleged that the defendant cashed the draft and received the money and gave it to the construction company. This is a distinct averment that the defendant had the physical possession of money belonging to the plaintiff. Having the plaintiff's money in his possession, he was under a duty to account to her for it, and, under the cited authorities, the law implies a debt, and gives to the plaintiff an action in assumpsit to recover so much as would be sufficient to discharge her debt.

Judgment affirmed.

All the Justices concur.

Annotation—Right of third person to recover from agent money paid him for his principal.

This note supplements a note on the same subject appended to *Simmonds v. Long*, 23 L.R.A.(N.S.) 553.

As to the liability of an agent to the true owner for selling or disposing of property intrusted to him by his principal, see note appended to *J. T. Fargason Co. v. Ball*, 50 L.R.A.(N.S.) 51. And upon the question as to liability of a servant or agent for conversion, trespass, or other positive act of wrongdoing against third parties under orders of his employer, see note in 50 L.R.A. 644; and as to the right of a bailee to

assert against his bailor the hostile, adverse, paramount title of a third person, see note in 33 L.R.A.(N.S.) 681.

As pointed out in the earlier note, the rule is well settled that an agent receiving money for his principal, to which the latter is not entitled, is liable to the true owner in an action for money had and received if he still retains the money, or where he has paid it over to the principal after notice or knowledge of a paramount right in a third person.

ALEXANDER v. COYNE, ante, 1040.

And this is also the doctrine of *Gray*

v. Ellis (1913) 164 Cal. 481, 129 Pac. 791, holding that an agent receiving money for stock in a designated corporation who used it to buy stock in another corporation is liable to the original subscriber for the money received, and may be held in an action for money had and received, the action being based upon the implication of law raised by his receipt and diversion of money.

And the doctrine was applied in Tillman v. Bungenstock (1914) 185 Mo. App. 66, 171 S. W. 938, holding that where a subagent paid to the principal agent money collected by him for the principal, with notice that the money belonged to a third person, he was liable to the latter for the money thus received and paid.

And see also Newburyport v. Spear (1910) 204 Mass. 146, 131 Am. St. Rep. 652, 90 N. E. 522, holding that where brokers receive money from the treasurer of a municipality which he had embezzled from it, and the money was paid under such circumstances as to charge them with knowledge of the title of the municipality thereto, they are liable to it for the money thus received in an action for money had and received, although they had paid the amount less their commission over to the principal.

Applying the same doctrine in Blizard v. Brown (1913) 152 Wis. 160, 139 N. W. 737, it is held that where an attorney at law collected a judgment and turned it over to his client, with knowledge that the latter was not entitled to it, the judgment having been reversed on appeal, he was liable to the true owner for the amount collected. It does not appear in the foregoing case that the action was for money had and received. In an action of this character in Marine Co. v. Milwaukee (1912) 151 Wis. 239, 138 N. W. 640, it was held that where a city treasurer had paid over to the person entitled thereto money collected on a special assessment, an action for money had and received could not be maintained by the taxpayer against the city to recover the money. This holding was based on the ground that the common-law action for money had and received was based on a loss occasioned the plaintiff on account of payment of the money and also the consequent enrichment of the defendant, and it cannot be maintained where the defendant derived no benefit therefrom.

It has been held that the liability of an agent receiving for his principal money paid through mistake depends upon whether or not he had possession

of the money at the time he was notified of the mistake. If he turned the money over to his principal or disbursed it under the latter's direction without knowledge of the mistake, he cannot be held. Rogers v. Durrence (1913) 10 Ga. App. 657, 73 S. E. 1083. And an action for money had and received cannot be maintained against an agent to recover money paid him for his principal which he in good faith duly turned over to the latter. Crafts v. Trafford (1913) — R. I. —, 85 Atl. 673. Nor is an agent liable to answer for money voluntarily paid to him as agent for his principal, to whom he paid the money without notice of any claim thereto by the party from whom he received it. Lang v. Friedman (1912) 166 Mo. App. 354, 148 S. W. 992.

Where a purchaser dealt with an agent and paid him as agent for the principal a portion of the purchase price of the subject-matter of the sale, although the contract of sale provides for the return under certain conditions of the money thus paid, and the purchaser becomes entitled to a return of the money under these conditions, he cannot hold the agent therefor where the latter turned the money over to his principal before the conditions existed entitling the purchaser to its return. Levine v. Field (1909) 114 N. Y. Supp. 819. But an agent is liable in an action for money had and received to the person from whom he received money for his principal under a contract to be performed by the latter, where the principal fails to perform and the agent retains possession of the money. Pancoast v. Dinsmore (1909) 105 Me. 471, 134 Am. St. Rep. 582, 75 Atl. 43. A. G. S.

KANSAS SUPREME COURT.

HARVEY G. KARNS
v.

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY, Appt.

(87 Kan. 154, 123 Pac. 758.)

Master — inspection — rule — interpretation.

1. A rule of a railway company, requiring all brakemen to inspect carefully at

Headnotes by PORTER, J.

Note. — As to servant's assumption of risk of dangers created by the master's negligence which might have been discovered by the exercise of ordinary care on the part of

every stop the coupling apparatus and other appliances, and to report to the conductor anything found out of order, is subject to a reasonable interpretation, measured in degree by the opportunity to examine and the character of the existing defect.

For other cases, see Master and Servant, II. a, 3, in Dig. 1-52 N. S.

Trial — jury — negligence — injury.

2. Where such a rule is in force, and a brakeman is injured by a defect in an appliance of which he is ignorant, but which he might have discovered by inspection, the question of his contributory negligence is generally for the jury to determine, taking into consideration the rule and the circumstances shown by the evidence.

For other cases, see Trial, II. c, 8, in Dig. 1-52 N. S.

Master — rule — measure of duty.

3. Under the facts in this case, the defendant could not, by adopting such a rule, thereby relieve itself from liability for a failure to furnish plaintiff with reasonably safe appliances; the jury having found, upon sufficient evidence, that it was not practicable for plaintiff, by inspection, to discover the defect.

For other cases, see Master and Servant, II. a, in Dig. 1-52 N. S.

Evidence — sufficiency.

4. The evidence is held sufficient to warrant a finding that plaintiff was not guilty of contributory negligence.

For other cases, see Evidence, XII. d. in Dig. 1-52 N. S.

Master — assumption of risk — injury.

5. The plaintiff is held not to have assumed the risk of injury from a defect in a coupling and drawbar of which he was ignorant, and which he had no reasonable opportunity to discover by inspection.

For other cases, see Master and Servant, II. b, in Dig. 1-52 N. S.

(May 11, 1912.)

APPEAL by defendant from a judgment of the District Court for Harvey County in plaintiff's favor in an action brought to recover damages for injury to plaintiff's hand while in defendant's employ as a brakeman. Affirmed. The facts are stated in the opinion.

Messrs. William R. Smith, Owen J. Wood, and Alfred A. Scott, for appellant:

The plaintiff failed to prove any negligence on the part of the defendant. On the contrary the evidence and findings of the jury conclusively show that the proximate cause of the plaintiff's injury was his own negligence.

the servant, see note to St. Louis, I. M. & S. R. Co. v. Birch, 28 L.R.A. (N.S.) 1250; and generally as to assumption of risk of dangers created by the master's negligence, see note to Scheurer v. Banner Rubber Co. 28 L.R.A. (N.S.) 1207.
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Atchison, T. & S. F. R. Co. v. Roth, 80 Kan. 752, 104 Pac. 849; Brown v. Chicago, R. I. & P. R. Co. 59 Kan. 70, 52 Pac. 65; Yeaton v. Boston & L. R. Corp. 135 Mass. 418; Southern R. Co. v. Lyons, 25 L.R.A. (N.S.) 335, 95 C. O. A. 55, 169 Fed. 567; Gulf, C. & S. F. R. Co. v. Mayo, 14 Tex. Civ. App. 253, 37 S. W. 659; Watson v. Houston & T. C. R. Co. 58 Tex. 434; Arnold v. Delaware & H. Canal Co. 125 N. Y. 15, 25 N. E. 1064; Kelley v. Chicago, St. P. M. & O. R. Co. 35 Minn. 490, 29 N. W. 173; Chicago & N. W. R. Co. v. Ward, 61 Ill. 130; Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 307, 96 Fed. 713; Marshall v. St. Louis, I. M. & S. R. Co. 78 Ark. 213, 115 Am. St. Rep. 27, 94 S. W. 58, 8 Ann. Cas. 420; Norman v. Southern R. Co. 119 Tenn. 401, 104 S. W. 88; Flanagan v. Chicago & N. W. R. Co. 45 Wis. 98, 50 Wis. 462, 7 N. W. 337; Brooks v. Northern P. R. Co. 47 Fed. 687; Clyde v. Richmond & D. R. Co. 18 C. C. A. 467, 25 U. S. App. 642, 72 Fed. 121; Louisville & N. R. Co. v. Pearson, 97 Ala. 211, 12 So. 176; Ft. Wayne, C. & L. R. Co. v. Gruff, 132 Ind. 13, 31 N. E. 460; Alexander v. Louisville & N. R. Co. 83 Ky. 589; Shields v. New York C. & H. R. R. Co. 133 N. Y. 557, 30 N. E. 596, reversing 60 Hun, 586, 39 N. Y. S. R. 750, 15 N. Y. Supp. 613; Richmond & D. R. Co. v. Dudley, 90 Va. 304, 18 S. E. 274; Beall v. Pittsburgh, O. & St. L. R. Co. 38 W. Va. 525, 18 S. E. 729; Norfolk & W. R. Co. v. Emmert, 83 Va. 640, 3 S. E. 145; Scott v. Oregon R. & Nav. Co. 14 Or. 211, 13 Pac. 98; Matchett v. Cincinnati, W. & M. R. Co. 132 Ind. 334, 31 N. E. 792; Chicago & A. R. Co. v. Bragonier, 119 Ill. 51, 7 N. E. 686; La Croy v. New York, L. E. & W. R. Co. 132 N. Y. 570, 30 N. E. 391; Bennett v. Northern P. R. Co. 2 N. D. 112, 13 L.R.A. 465, 49 N. W. 408; Karrer v. Detroit, G. H. & M. R. Co. 76 Mich. 400, 43 N. W. 370; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 So. 360; Union P. R. Co. v. Fray, 31 Kan. 739, 3 Pac. 550.

Messrs. J. D. Houston and Bowman & Bowman also for appellant.

Messrs. R. R. Vermillion, Earle W. Evans, and Joseph G. Carey, with Messrs. Ezra Branine and Harry W. Hart, for appellee:

If plaintiff was required by defendant to use dangerous and defective appliances and instrumentalities, before requiring him to do so, it was in duty bound to notify plaintiff of their defective condition and thereby warn him of the extra hazards incident to their use, to the end that plaintiff might be on his guard to use a degree of care commensurate with the extra hazards attending the use of such dangerous and defective appliances and instrumentalities.

Missouri, R. & T. R. Co. v. Quinlan, 77 Kan. 136, 93 Pac. 632; Linker v. Union P. R. Co. 82 Kan. 580, 109 Pac. 678; Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455; Chicago, I. & L. R. Co. v. Barker, 169 Ind. 670, 17 L.R.A. (N.S.) 542, 83 N. E. 369, 14 Ann. Cas. 375; Illinois Steel Co. v. Ostrowski, 194 Ill. 376, 62 N. E. 822; Taylor v. Felsing, 161 Ill. 331, 45 N. E. 161; Adams Exp. Co. v. Aldridge, 20 Colo. App. 74, 77 Pac. 6; East v. Amburn, 47 Ind. App. 530, 94 N. E. 895; Atchison, T. & S. F. R. Co. v. Penfold, 57 Kan. 148, 45 Pac. 574; Atchison, T. & S. F. R. Co. v. Holt, 29 Kan. 150; Solomon R. Co. v. Jones, 30 Kan. 601, 2 Pac. 657; Atchison, T. & S. F. R. Co. v. Napole, 55 Kan. 401, 40 Pac. 669; St. Louis & S. F. R. Co. v. Morris, 76 Kan. 836, 13 L.R.A. (N.S.) 1100, 93 Pac. 153; 1 Shearm. & Redf. Neg. § 203; 1 Labatt, Mast. & S. § 117.

The defendant failed in the performance of its personal and unassignable duty to the plaintiff, and negligently required him to handle dangerous and defective cars.

Missouri, K. & T. R. Co. v. Quinlan, 77 Kan. 126, 93 Pac. 632; Kansas City, M. & O. R. Co. v. Loosley, 76 Kan. 103, 90 Pac. 990.

Porter, J., delivered the opinion of the court:

This is an appeal from a judgment recovered by the plaintiff for \$1,000 damages for an injury to his hand, incurred while in defendant's employ as a brakeman. At the time of the injury, he was head brakeman, twenty-four years old, with eight months' experience in the service. The accident happened about 10 o'clock in the forenoon. An engine and three cars were detached from a train, for the purpose of picking up four cars on a spur track. The last two of these four were foreign cars, and the rear one was in bad order; the drawbar and timbers of the coupling having been pulled out, and the car fastened to the next car by a chain. After the conductor had coupled the string of four cars to the others, the engine started towards the switch. The conductor directed the plaintiff to get upon top of the cars and release the brake on the rear car. Plaintiff climbed up the side ladder on the third or fourth car from the engine, walked on top of the train to the rear car, and released the brake. He then walked forward to the end of that car, and climbed down the ladder between that and the next car. These were the foreign cars. When he was at the bottom of the ladder, the engine stopped, the slack ran up, the two cars came together, and, because of the absence on the rear car

of the drawbar and timbers, his hand was caught and crushed.

The defense was contributory negligence and assumed risk. The plaintiff testified that when the cars were coupled to the others he was about three car lengths from them, and did not know until he was injured that there was a defective coupling.

The jury returned answers to a number of special questions, including the following:

Q. 3. Had plaintiff paused a moment and made use of his eyesight and looked down in front of him, between the cars in question, before he descended, would he have observed a dangerous and defective condition in and about the coupling apparatus between said cars?

A. 3. Possible, yes; but not practicable.

Q. 4. What, if anything, would have prevented plaintiff from seeing the character and condition of the coupling apparatus between the cars in question, if he had looked at them before he descended from the top of the cars?

A. 4. Not anything.

Q. 5. To one observing the condition of the coupling apparatus between the cars in question, would it appear obviously dangerous for one to go in between said cars and climb up or down the ladder while the cars were in motion, and liable to stop at any moment?

A. 5. Yes.

Q. 6. In the book of rules furnished to and in use by plaintiff and other employees of defendant at and prior to the time in question, was it provided by rule 417 that "brakemen should inspect carefully at every stop, the condition of journals, hand holds, stirrups, ladders, and coupling apparatus, and if anything in connection therewith is out of order it must be immediately reported to the conductor. This rule will apply to cars in their train as well as those handled at stations in switching?"

A. 6. Yes.

The evidence justified the finding that plaintiff was in the exercise of reasonable care. It seems unreasonable to say that he should have discovered the defective condition of the drawbar and coupling by looking down between the cars, as he walked over them on his way to the rear, or that, before passing down the ladder, he should have stepped to the edge of the roof of the car and looked down. The jury evidently meant by their answers that it was possible, but impracticable, for him to have discovered the dangerous conditions in either manner. His testimony was that he went down the ladder with his face to the rear

of the train, and that he was obliged to turn around in order to use the ladder; and common observation shows that this was the natural and the only practicable manner of getting down the ladder.

Under the facts shown in this case, the defendant could not, by adopting a rule requiring all brakemen to inspect couplings and drawbars, thereby relieve itself from the responsibility for a failure to furnish its employee with reasonably safe appliances. The evidence shows that the employee had no reasonable opportunity to make the inspection required by the rule. Cases cited, therefore, holding that employees whose duties require them to inspect cars cannot recover for injuries caused by their failure to inspect, are not applicable. A similar rule was said to be "subject to a reasonable interpretation, measured in degree by the opportunity to examine and the character of the existing defect." *Myers v. Erie R. Co.* 44 App. Div. 11, 60 N. Y. Supp. 422, 423. In that case, notwithstanding the rule, a brakeman was allowed to recover for an injury caused by a defective appliance of which he was ignorant, where he had no opportunity to examine the appliance before he used it. In *McKnight v. Brooklyn Heights R. Co.* 23 Misc. 527, 51 N. Y. Supp. 738, it was held that the examination contemplated by a similar rule was not a thorough inspection, but such a general one as the time given for the purpose allowed; and that the question of contributory negligence was for the jury to determine, taking into consideration the rule and all the circumstances in evidence. In *Chicago, St. L. & P. R. Co. v. Fry*, 131 Ind. 319, 28 N. E. 989, the Indiana court used this language: "We are of the opinion that the duties put upon the brakeman by the rule in question adds very little to the duties placed upon him by the rules of law. Something more than the mere making of a rule requiring brakemen to make inspection of the implements and machinery used by them is necessary, in order to shield the master from the consequences of a failure to perform the duties of furnishing safe implements and machinery imposed by law upon him. He must have the appliances and opportunity for making such inspection. The duty imposed by law upon railway companies of furnishing reasonably safe cars and appliances for the use of brakemen in its employ is for the protection of life and limb, both of which are sacred in the eye of the law; and public policy forbids that the master should be, in any manner, relieved of that duty, without providing for the performance of the same by some other agency as fully as required of the master." p. 329.

In reference to a rule of the same kind, it L.R.A.1916D.

was said by the supreme court of California: "If the rule was utterly impracticable, or rendered so by the mode and the conditions under which service was required, and the servant is injured because not following an impracticable rule, and cannot therefore maintain an action for damages, then the rule is plainly not for the protection of the servant, but of the employer. It is a provision relieving the employer from the obligations imposed upon him by law to use ordinary diligence in furnishing safe appliances with which to work and safe conditions for the performance of the service. So far as the rule has that effect, it is against public policy and void." *Holmes v. Southern P. Co.* 120 Cal. 357, 362, 363, 52 Pac. 652, 654, 4 Am. Neg. Cas. 120. See also *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 227, 21 S. W. 866.

A rule or special order of which the servant has notice may put upon him the duty of inspection, provided he is given reasonable opportunity to comply with it, but only to the extent to which such investigation is within the reasonable capacity. *Chicago & A. R. R. Co. v. Merriman*, 95 Ill. App. 628; 1 *Shearm. & Redf. Neg.* 5th ed. § 217; 20 *Am. & Eng. Enc. Law*, 104. The only opportunity the plaintiff had for inspecting the drawbar was when the string of cars passed him three or four car lengths away, or while he walked over the cars to get to the rear, or when he passed down the ladder. The jury have said that, while it was possible, it was not practicable, for him to have made the discovery at these times; and the evidence seems to justify the finding. Applying the principle stated in the cases cited, there was no error in the instruction respecting plaintiff's duty under rule 417.

In *1 Labatt, Master v. Servant*, § 417, the author says that "such rules should receive a reasonable interpretation, and that the obligations of the servants should be determined with reference both to the character of the defect and to his ability to make an examination." The Alabama court has declared that such rules are inoperative, so far as they contravene the principle which requires an employer to furnish and maintain suitable appliances, and the right of the employee to presume that this has been done. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176. We approve this doctrine, and think it may be stated, as a general rule, that whether the failure of the servant to make the examination in compliance with the rules was negligence is for the jury to determine. *Myers v. Erie R. Co.* 44 App. Div. 11, 60 N. Y. Supp. 422; *Galveston, H. & S. A. R. Co. v. Nicholson*, — Tex. Civ. App. —, 57 S. W. 693.

It is claimed that the court enlarged the issues by an instruction that, if defective cars were required to be handled, it was defendant's duty to warn its employees thereof; that the petition contained no averment of negligence in failing to notify plaintiff of the defective condition of the car; and that there is no finding that it was the company's duty to give such notice. We think the law imposed the duty, and no finding of such fact was necessary, in view of the other findings; and that, since the duty was cast upon the defendant by the relation of master and servant, it was not necessary to allege in the petition that such was its duty. Negligence always springs from some neglect of duty. To allege that defendant was negligent in failing to furnish plaintiff reasonably safe appliances, and that by reason of his ignorance of the defect he was injured, assumes that the defendant was also negligent in failing to warn plaintiff of the defect. There is no claim that plaintiff was warned of the danger; and we fail to discover how the defendant could have been prejudiced by the instruction, stating the duty of the defendant to warn its employees, in case they were required to handle cars found, upon inspection, to be defective.

The findings and evidence, to the effect that it was not practicable for plaintiff, in the situation in which he was at the time, to discover the defect which occasioned the injury, dispose of the defense of assumed risk, as well as that of contributory negligence. *Smith v. Chicago, R. I. & P. R. Co.* 82 Kan. 136, 28 L.R.A.(N.S.) 1255, 107 Pac. 635; *Southern Kansas R. Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938; *Atchison, T. & S. F. R. Co. v. Bancord*, 66 Kan. 81, 71 Pac. 253.

Finding 23 was as follows:

Q. 23. If you find for plaintiff, then state in what the negligence of defendant on which you base your verdict consisted.

A. 23. On a bad order car.

There was no request to have this answer made more definite; and, in view of the evidence and the other findings, it is apparent that the answer means that defendant was negligent in failing to furnish the plaintiff reasonably safe appliances with which to work.

Finding 27 was as follows:

Q. 27. Was it obviously safer for plaintiff to go down on the side ladders of one of the cars in his train, than to go down on the ladders on the end of the cars where the defective appliances were?

A. 27. Yes; in this case.

The general verdict and the other special findings preclude the idea that the jury intended by this answer to find that it was obviously safer to the plaintiff for him to go down the side ladder, instead of using the end ladder on the defective car. It is the duty of the court to harmonize the special findings, if that can be done, with the purpose of upholding the general verdict. The other special findings and the general verdict clearly show that the jury found that plaintiff did not know of the defective condition of the car. If this were true, he could not be negligent in using the first ladder he came to, or any other which appeared to be convenient. The defendant's motion for judgment upon the findings was properly overruled.

Considering the entire charge, the instruction respecting the proof of contributory negligence is free from the error which required a reversal in the *Merrill Case*. *Missouri, R. & T. R. Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819. The first instruction given required the plaintiff to prove his case by a preponderance of the evidence, and expressly charged that "he must do this without it appearing that he was guilty of negligence which contributed directly or materially to his injuries." No error appears in the admission of evidence or in the instructions.

The judgment is affirmed.

KANSAS SUPREME COURT.

D. D. RAY et al.

v.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Appt.

(96 Kan. 8, 149 Pac. 397.)

Carrier — time for action — reasonableness.

1. A contract for an interstate shipment

Headnotes by JOHNSTON, Ch. J.
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of cattle contained, among other things, a stipulation that an action by the shipper to recover damages because of injuries and delays occurring during the transportation must be commenced within ninety-one days after the happening of the injuries and delays. Held, that the provision is not unreasonable nor invalid.

For other cases, see *Carriers*, III. g, 4, in Dig. 1-52 N. 8.

Note. — As to waiver or extension of time stipulated in carrier's contract for claim or suit against carrier, see annotation following this case, post, 1049.

Same — negotiations for settlement — effect.

2. Mere negotiations between the parties as to settlement or compromise of the claim did not waive the contract limitations, nor estop the carrier from insisting that the right to sue had been lost by the lapse of time.

For other cases, see *Carriers*, III. g, 4, in Dig. 1-52 N. S.

(June 12, 1915.)

APPEAL by defendant from a judgment of the District Court for Labette County in plaintiffs' favor in an action brought to recover damages for injuries to and delays in transportation of stock, because of defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. W. W. Brown and James W. Reid, for appellant:

The period of limitation provided in the contracts had expired.

Watt v. Missouri, K. & T. R. Co. 90 Kan. 466, 135 Pac. 600; Missouri, K. & T. R. Co. v. Harriman, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397.

The defendant could not under the law waive the stipulations of the shipping contract if it so desired.

Re Bills of Lading, 29 Inters. Com. Rep. 417.

The burden was upon the plaintiff to show a compliance with the terms of the contract.

Scandinavian Coal & Min. Co. v. Whitaker, 40 Kan. 124, 19 Pac. 330; Felix v. Walker, 60 Kan. 467, 57 Pac. 123; Meeh v. Missouri P. R. Co. 61 Kan. 631, 60 Pac. 319, 7 Am. Neg. Rep. 629.

Mr. Archie D. Neale, for appellees:

Provisions as to time in which to institute action may be waived.

Watt v. Missouri, K. & T. R. Co. 90 Kan. 466, 135 Pac. 600.

As against its own negligence the defendant cannot contract.

Missouri, K. & T. R. Co. v. Frogley, 75 Kan. 440, 89 Pac. 903.

There were no written contracts in law, and plaintiffs have the right to avoid the written contracts.

St. Louis & S. F. R. Co. v. Gorman, 79 Kan. 643, 28 L.R.A.(N.S.) 637, 100 Pac. 647.

No defense can be based upon the written contracts offered in evidence by defendant, for the reason that they were obtained by compulsion.

Chicago, R. I. & P. R. Co. v. Cotton, 87 Ark. 339, 112 S. W. 742; Cleveland, C. C. & St. L. R. Co. v. Hollowell, 172 Ind. 466, 88 N. E. 680.
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Johnston, Ch. J., delivered the opinion of the court:

This action was before this court on a previous appeal. Ray v. Missouri, K. & T. R. Co. 90 Kan. 244, 133 Pac. 847. Two actions were originally brought in justice court by plaintiffs to recover damages on two shipments of live stock from Electra, Texas, to St. Louis, Missouri. The actions were consolidated in an appeal to the district court, where the plaintiffs were successful, and on an appeal to this court the judgment of that court was reversed, and a new trial ordered. On the second trial the plaintiffs again prevailed, and the railway company appeals.

It appears that on or about October 22, 1910, plaintiff shipped seven cars of cattle from Electra, Texas, to National Stock Yards at East St. Louis, Illinois, or St. Louis, Missouri, as the destination is spoken of. Four of the cars, containing 102 head of cattle, were consigned to one commission firm, and the other three cars, containing 74 head of cattle, were consigned to another firm. Contracts covering the shipment provided for the filing of a verified claim for any damages caused by injury or delay within thirty days after the happening, and that any suit for damages should be begun within ninety-one days after the happening. It appears that with ordinary handling the cattle should have arrived at destination in time to have been marketed on October 25, 1910, but for some reason did not arrive until about 7 P. M. of that day, causing them to be marketed on October 26, 1910, when, it is claimed, the market price had fallen 10 cents a hundred, and the cattle had shrunken. Claims were presented to the railway company by the commission firms in behalf of plaintiffs on October 31 and October 26, 1910, respectively, for the loss on the shipments: On the four-car shipment, \$226.63, comprising \$123.67 for "25 lbs. per head excessive shrink on 102 steers, 2,550 lbs., at \$4.85 per cwt.," \$98.71 for "10¢ per cwt. decline on 98,710 lbs.," and \$4.25 for extra feed rendered necessary; on the three-car shipment, \$163.13, comprising \$87.87 for "25 lbs. shrink on 74 steers, 1,850 lbs., at \$4.75," \$71.01 for "10¢ depreciation in value of cattle account appearance," and \$4.25 for additional feed. The railway company, after investigating the claims for some time, offered to pay in settlement of the former \$76.92, and of the latter \$92.47. This was not acceptable, it appears, to plaintiffs, and this action was begun. Defendant's demurrer to plaintiffs' reply was overruled, and on the trial the jury returned a verdict for plaintiffs in the sum of \$305.51. Defendant's motion for a

new trial was overruled, and it now appeals from the judgment rendered against it.

The principal complaint of the defendant is that a recovery was permitted, although the shipping contracts expressly provided that any action for damages would be waived unless it was begun within ninety-one days after the injury was sustained; that the alleged damage was sustained on October 26, 1910; but that the action was not commenced until September 11, 1911. The cattle were loaded at Electra, Texas, where there is no railroad agent, and when they reached Wichita Falls, Texas, which has the necessary facilities, the contracts were signed in behalf of the plaintiffs by the parties in charge of the cattle and who accompanied them to St. Louis. While a witness stated that someone at Wichita Falls told the representatives of plaintiffs to sign the contracts, and that they must be signed before the train went out, there is nothing in the record showing duress in the execution of the contracts, and it is expressly stated that fraud is not charged or relied on by the plaintiffs. The parties used the contracts as transportation on the trip to St. Louis, and nothing is found in the testimony inconsistent with their validity. The contracts being valid, and the shipment being interstate, the Federal law controls, and under numerous decisions limitations in shipping contracts like those in question are held to be reasonable and valid. *Watt v. Missouri, K. & T. R. Co.* 90 Kan. 466, 135 Pac. 600; *Ray v. Missouri, K. & T. R. Co.* 90 Kan. 244, 133 Pac. 847; *Missouri K. & T. R. Co. v. Harriman*, 227 U. S. 657, 57 L. ed. 690, 33 Sup. Ct. Rep. 397; *Adams Exp. Co. v. Croninger*, 226 U. S. 491, 57 L. ed. 314, 44 L.R.A.(N.S.) 257, 33 Sup. Ct. Rep. 148; *Kansas City Southern R. Co. v. Carl*, 227 U. S. 639, 57 L. ed. 683, 33 Sup. Ct. Rep. 391; *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 57 L. ed. 417, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176. The action, as we have seen, was not brought within ninety-one days after the loss was sustained, nor until 320 days after that time.

It is insisted by plaintiffs that compliance with the condition limiting the time for bringing the action was waived by the defendant. No attempt was made to prove an agreement to waive the limitation nor of any intention of the defendant to relinquish any right it had under the shipping contract. Waiver is largely a question of intention. There is no waiver unless so intended by one party and so accepted by the other. 40 Cyc. 261. It is claimed, however, that defendant's statements and acts are such as to estop it to insist on the application of the limitation. A number of letters

were exchanged between the parties, and the contention is that the statements therein contained were such as to lead the plaintiffs to the belief that the requirement that an action upon the claims must be brought, if at all, within ninety-one days, had been abandoned, and that a strict compliance with it would not be insisted on. It may be assumed that the condition can be waived, and also that one party may so act as to mislead another, and so as to be estopped to say that noncompliance with the condition is a bar to the maintenance of the action. Here, however, the letters on which estoppel is rested were not written until long after the stipulated period of limitation had expired. The time began to run on October 26, 1910, and the first letter of the defendant touching the subject and upon which a claim of estoppel is rested was written near the end of the following April, and at that time the bar was complete, and the right to bring the action had long since been lost. The subsequent correspondence disclosed a disposition on the part of the defendant to investigate the merits of the claims, and to settle and compromise so much of them as were deemed to be just, but nothing indicating an intentional relinquishment of any of the rights and advantages stipulated under the contract. The first communication from defendant was a letter written on November 5, 1910, to one of the commission firms who had transmitted a claim to it, but it is no more than an acknowledgment of the receipt of a claim which was made in behalf of the plaintiffs. The purport of subsequent letters will be stated. On April 29, 1911, a letter was written by the auditor of the company in response to one by the representative of the plaintiffs, stating that the defendant had taken up the claims with the legal department, and would be in a position in a few days to advise as to settlement. On May 20th, in response to another inquiry in which it was stated that the claims had been turned over to an attorney, the auditor wrote that they were receiving attention, and would not be unnecessarily delayed, and that the matter had been referred to their attorney in Kansas, and as soon as his report was made they would advise plaintiffs of what disposition would be made of the claims. On June 23, 1911, the plaintiffs' attorney wrote to the auditor of the defendant that the claims were in his hands for adjustment, and that unless adjustment was soon made suit would be brought thereon. It was further stated that he would only wait a few days to know the purpose of the defendant. On June 29, 1911, the attorney for the plaintiffs again wrote with respect to the claims, stating that the defendant

had had them under consideration since the 26th day of last October, long enough to have ascertained the facts and determined what they proposed to do. He also added that he expected to leave his office about the 7th day of July for a time, and that he must know about the claims, and, if settlement was not made before that time, he expected to institute suits on them. In July the auditor of the defendant wrote the attorney for plaintiffs in respect to the claim for \$163.13, saying that their investigation showed the claim to be excessive, both as to the shrinkage of the cattle and also as to depreciation in value, and he added: "We are willing in order to dispose of this claim and avoid any further controversy to allow \$92.47 in full settlement. Kindly advise if we shall issue voucher in favor for that amount."

On July 3, 1911, the defendant answered the attorney with respect to the claim for \$226.63, stating that investigation had not been completed as to that shipment, but that they were handling the matter by wire, and would advise something definite as to the disposition of the claim in the near future. On July 18th the auditor of the defendant wrote in respect to the claim for \$226.63, saying that the bill submitted was not justified, that the company was willing, in order to dispose of the claim, to allow a reasonable shrink, together with extra feed, and stating: "We are willing to allow \$76.92 in full settlement of this claim."

The statements of defendant in its correspondence with the plaintiffs indicate a desire to compromise and settle the claims even after the right to sue on them had been lost, but the statements and negotiations about settlement at that time cannot be regarded as the surrender of any right by the defendant or the waiver of a bar which had already fallen. In a case of con-

tract limitation as to the time in which an action may be brought and where the time had not yet expired, it has been held that negotiations for a settlement will not have the effect to waive the time limit nor estop a party from asserting that the right to maintain an action has been lost. *Gooden v. Amoskeag F. Ins. Co.* 20 N. H. 73; *Blanks v. Hibernia Ins. Co.* 36 La. Ann. 599; *McFarland v. Peabody Ins. Co.* 6 W. Va. 425; *Phoenix Ins. Co. v. Lebcher*, 20 Ill. App. 450; *Metropolitan Acci. Assn. v. Clifton*, 63 Ill. App. 162.

There is no basis for a claim that the plaintiffs were induced to postpone the commencement of an action within the stipulated time by anything said or done by the defendant, as none of the letters touching the subject were written until long after the limitation had expired. The last letter of defendant relating to the compromise and settlement was written on July 18, 1911, and the suit was not brought until fifty-four days after that time. If the letters had been written before the time limit had expired, and had been such as to have induced plaintiffs to delay bringing suit until after the stipulated time, and because of that the plaintiffs had become entitled to a reasonable time after the final offer made by defendant to begin an action, it could hardly be contended that the action was brought in a reasonable time after July 18, 1911. However, the limitation, as we have seen, was not waived, and the right to sue was lost to the plaintiffs in ninety-one days after the damages were sustained.

Because the right to sue had been lost long before the action was brought, the judgment must be reversed, and the cause remanded, with directions to enter judgment in favor of defendant.

Petition for rehearing denied.

Annotation—Waiver or extension of time stipulated in carrier's contract for claim or suit against carrier.

This note has for its purpose the investigation of the question of the waiver or extension of the time prescribed by a shipping contract for the giving of notice of claim for loss or damage, and for the bringing of suit on such claim. It is not intended, therefore, to include cases other than those involving the carriage of freight, so that cases considering similar stipulations in communication contracts are not in point here.

Stipulations as to the time within which notice of claims for loss or damage must be given, and suit thereon commenced, are not unfrequent in ship-

ping contracts, and since the validity of such requirements, especially those as to notice, is generally sustained if reasonable, the questions whether the carrier can waive these contract rights, and, if so, what amounts to a waiver or extension of the time stipulation, are of considerable importance to the shipping public.

Stipulations as to notice of claim.

Stipulations in shipping contracts requiring notice of claims for loss or damage to be given within a prescribed time are for the protection and benefit of the carrier. They are intended to prevent

fraud by giving the carrier an opportunity to investigate the claim while the best evidence thereof is still easily obtainable. Being thus for the benefit of the carrier, such stipulations—apart from the effect of statutory provisions designed to prevent discrimination among shippers—may, according to the rule sustained by substantially all the cases passing on this question, be either expressly or impliedly waived by the carrier.

Implied waiver by conduct, however, is the one most frequently relied on in the cases. Among the many authorities that might be cited here in support of these views are *St. Louis, I. M. & S. R. Co. v. Shepherd* (1914) 113 Ark. 248, 168 S. W. 137; *St. Louis Southwestern R. Co. v. Grayson* (1909) 89 Ark. 154, 115 S. W. 933; *St. Louis, I. M. & S. R. Co. v. Jacobs* (1902) 70 Ark. 401, 68 S. W. 248; *Klair v. Philadelphia, B. & W. R. Co.* (1910) 2 Boyce (Del.) 274, 78 Atl. 1085; *Post v. Atlantic Coast Line R. Co.* (1912) 138 Ga. 763, 76 S. E. 45; *Arnold v. Louisville & N. R. Co.* (1908) 4 Ga. App. 519, 61 S. E. 1050; *Banks v. Pennsylvania R. Co.* (1910) 111 Minn. 48, 126 N. W. 410; *Frankfurt v. Weir* (1903) 40 Misc. 683, 83 N. Y. Supp. 112; *St. Louis & S. F. R. Co. v. James* (1912) 36 Okla. 196, 128 Pac. 279; *St. Louis & S. F. R. Co. v. Ladd* (1912) 33 Okla. 160, 124 Pac. 461; *Eckert v. Pennsylvania R. Co.* (1905) 211 Pa. 267, 107 Am. St. Rep. 571, 60 Atl. 781, 18 Am. Neg. Rep. 594; *Crawford v. Southern R. Co.* (1915) 101 S. C. 522, 86 S. E. 19.

It should be observed, however, that the foregoing cases were decided upon principles applicable as between the carrier and the particular shipper whose claim was involved, and apparently did not consider the effect of statutory provisions, like those in the interstate commerce act and in many of the state statutes, against discrimination as between shippers. In this connection attention is called to the case of *A. J. Phillips Co. v. Grand Trunk Western R. Co.* (1914) 236 U. S. 663, 59 L. ed. 774, 35 Sup. Ct. Rep. 444, though it is not strictly within the scope of this note. In holding in that case that the failure to file a complaint for reparation of an overcharge within the two years allowed by the Hepburn amendment (34 Stat. at L. 590, chap. 3591, Comp. Stat. 1913, § 8584) not only barred the remedy, but destroyed the liability, and that any rule of state practice which precluded defendant from taking advantage of the statute of limitations by general demurrer was inap-

plicable, the court said: "The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier. The railroad company, therefore, was bound to claim the benefit of the statute here, and could do so here by general demurrer."

The phraseology of the statutory provision, "All complaints shall be filed . . . within two years from the time the cause of action accrues, and not after," sustained the view that the lapse of time not only barred the remedy, but destroyed the liability; and the question before the court might perhaps be distinguished from that now under consideration as to waiver of a contractual stipulation limiting the time for the presentation of claims; but the language above quoted seems to be applicable to the latter as well as to the former question. Upon the strength of that language the Railroad Commission of California has decided (*James Mills Sacramento Valley Orchard & Citrus Fruit Co. v. Southern P. Co.* P.U.R. 1916B, 734), that the Commission cannot permit the carrier to waive in one case and hold up in another the provision of § 71 of public utility act that all complaints concerning excessive or discriminatory charges shall be filed with the Commission within two years from the time the cause of action accrues.

This view is also sustained by the decision in *Olivit Bros. v. Pennsylvania R. Co.* (1916) — N. J. —, 96 Atl. 582, where it is stated that to permit the waiver of the time limited for making claims would

open the door to preferences. No act of the carrier prior to the expiration of the time limited is relied upon as a waiver, which was sought to be predicated upon the fact that the carrier rejected the claim for other reasons that that it was presented out of time. The Phillips Case, *supra*, is cited as authority, the court stating that although the Phillips Case dealt with the waiver of a limitation provided for by statute, and in the case at bar the limitation arose out of contract, in either case the liability was at an end. The court expressly refrains from passing upon the question whether by conduct misleading the shipper prior to the expiration of the time limit for filing claims, the carrier might estop itself from such defense.

This view is further supported by the case of Georgia, F. & A. R. Co. v. Blish Mill Co. (1916) 241 U. S. 190, 60 L. ed. —, 36 Sup. Ct. Rep. 541, where, in an action in trover by an interstate shipper for a misdelivery of flour, on the theory that the carrier in making the misdelivery converted the flour and thus abandoned the contract, it is stated that the effect of a stipulation in the bill of lading requiring claims for damages or misdelivery to be presented in four months after a reasonable time for delivery had elapsed could not be escaped by the mere form of the action; that the parties could not waive the terms of the contract under which the shipment was made pursuant to the act of Feb. 4, 1887 (24 Stat. at L. 379, chap. 104), as amended by the act of June 29, 1906 (34 Stat. at L. 593, chap. 3591, Comp. Stat. 1913, § 8592), commonly known as the Carmack amendment of the Hepburn bill. The court further states that the carrier could not by its conduct give the shipper the right to ignore these terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.

On the contrary it has been held that to permit the carrier to waive a stipulation that written notice shall be given before stock is removed from the place of destination, and before it is mingled with other animals, does not have the effect of granting a preference contrary to the interstate commerce act and the amendments thereto. *Mewborn v. Louisville & N. R. Co.* (1915) — N. O. —, 87 S. E. 37. L.R.A.1916D.

And in *Clingan v. Cleveland, C. C. & St. L. R. Co.* (1913) 184 Ill. App. 202, it is held that the power of the carrier to extend the time for presenting claims for loss or damage by making an indorsement on a receipted freight bill delivered to the shipper is not a violation of the rules and regulations of the Interstate Commerce Commission.

In *A. C. Cheney Piano Action Co. v. New York C. & H. R. R. Co.* (1915) 166 App. Div. 706, 152 N. Y. Supp. 285, a waiver of the stipulation as to the time for presenting claims contained in a uniform bill of lading adopted by a number of carriers under authority from the Interstate Commerce Commission was sustained under subsequent authority from the Commission to waive the stipulation for a certain period, and deal with all claims on their merits without discrimination with respect to this rule.

In view of the decisions above referred to, and of the obvious impossibility of preserving the policy of the interstate commerce act and similar state statutes to prevent discrimination among shippers if the carriers may waive or enforce these stipulations as they see fit, the matter would seem to deserve more attention than it has received. The extent to which the courts have made the principles of contract as between the parties yield to the policy of these statutes is illustrated by *Louisville & N. R. Co. v. Maxwell* (1914) 237 U. S. 94, 59 L. ed. 853, L.R.A. 1915E, 665, P.U.R. 1915C, 300, 35 Sup. Ct. Rep. 494, holding that a carrier that has exacted less than the published rate for an interstate round-trip passenger ticket may recover from the purchaser the difference between the amount paid and the amount that should have been charged, although he could have taken the trip over other routes at the rate which he paid.

Apart from the considerations just adverted to,—which, it will be observed, rest upon the interests of shippers as a class, and not upon principles governing the rights of parties to a contract inter se,—an express waiver of the stipulation in question does not appear to offer much room for litigation, and no cases involving such waivers have been found. An implied waiver, on the other hand, however, depends for the most part upon the circumstances of the particular case, and the question whether the carrier by his conduct, as evidenced by such circumstances, has waived its right to rely upon the time stipulation of the carriage contract as a defense,

has been before the courts quite frequently.

Concerning the matter of waiver of a stipulation of the kind under consideration here, the court in *Hamble-Robinson Commission Co. v. Northern P. R. Co.* (1912) 119 Minn. 40, 137 N. W. 19, said: "In determining what acts or conduct on the part of a person entitled to notice of claim, under a contract stipulation like that here in question, will constitute a waiver of the notice, a distinction is to be observed between those cases where the alleged waiver occurred before the expiration of the time fixed by the contract for the service of the notice, and those cases where the acts and conduct relied upon occurred after that date. Acts and conduct occurring at a time when the notice could properly be served, having a tendency to lead to the belief that formal notice will not be insisted upon, or which are inconsistent with an intention to rely upon a compliance with the contract in that respect, constitute a waiver which, on the theory of equitable estoppel, the party will not be permitted to repudiate. But where, as in the case at bar, the conduct relied upon as a waiver occurs after the expiration of the time limited for the notice, the situation is entirely different. The failure to give the required notice vests in the party entitled to it a complete defense to an action upon the asserted claim, and the conduct relied upon as a waiver of the defense should with reasonable certainty justify the conclusion that it was intentionally waived, or be so inconsistent with an intention to insist upon the defense that the conclusion of waiver would follow as a matter of law. A waiver might arise as a matter of implication, depending upon the facts in a particular case, where the party entitled to notice, subsequently to the time when it should have been given, voluntarily enters into negotiations for the settlement of the claim, makes an offer of compromise, or from other conduct clearly recognizing the existence of the claim on its merits."

So, a waiver of notice of claim for injury or damage within the stipulated time cannot be predicated upon a mere denial of liability when the claim is presented after the lapse of the time specified. (Minn.) *Ibid.*

And in *Atlantic Coast Line R. Co. v. Bryan* (1909) 109 Va. 523, 65 S. E. 30, it is decided that an attempt by a carrier to find a lost shipment after its exemption from liability has attached and become a vested right by reason of

the failure of the shipper to present a claim therefor within the time and at the place stipulated for in the shipping contract does not constitute a waiver of its right to claim such exemption, if the goods should not be located. And in the same case it was also held that a letter from the carrier's agent, after exemption from liability has attached, requesting "the affidavit of the packer of the case, also invoice showing the original cost of the articles," and stating that promptly upon the receipt of these documents, the matter will receive attention, did not constitute a waiver of the carrier's exemption from liability, nor estop it from relying on its exemption as a defense." The court said: "A waiver, to operate as such, must arise in one of two ways,—either by contract or by estoppel. If by contract, it must be supported by a valuable consideration; that is, such consideration as will support any other contract. . . . In order for there to be an estoppel by conduct, the party sought to be estopped must have caused the other party to occupy a more disadvantageous position than that which he would have occupied except for that conduct. . . . No one can be bound by a waiver of his rights, unless it be distinctly made with full knowledge of the rights he intends to waive, and the fact that he intends to waive them must be made to plainly appear."

Old Dominion S. S. Co. v. Flanary (1911) 111 Va. 816, 69 S. E. 1107, is to the same effect, as is also *Virginia-Carolina Chemical Co. v. Southern Exp. Co.* (1910) 110 Va. 666, 66 S. E. 838.

But, on the other hand, it has also been held that a carrier by undertaking, at the shipper's suggestion after the expiration of the prescribed time, to trace lost goods, and by inviting the presentation of a claim for loss, waives a stipulation in the shipping contract for notice within that time. *A. C. Cheney Piano Co. v. New York C. & H. R. R. Co.* (1914) 85 Misc. 157, 148 N. Y. Supp. 108, affirmed in (1915) 166 App. Div. 706, 152 N. Y. Supp. 285. The court said: "It [the carrier] claims that there was no waiver in its action in sending out the tracers and in inviting the plaintiff to file its claim. It relies on *Atlantic Coast Line R. Co. v. Bryan* (Va.) *supra*, which says: 'A waiver, to operate as such, must arise . . . either by contract or estoppel; if by contract, it must be supported, like any other contract, by a valuable consideration. . . . If estoppel by conduct is relied on, the party sought to be estopped must have

caused the other party to occupy a more disadvantageous position than he would have occupied but for that conduct. . . . And that an attempt by a carrier to find a lost shipment after its exemption from liability has attached and become a vested right by reason of the failure to present a claim therefor within the time and at the place stipulated for in the bill of lading does not constitute a waiver of its right to claim such exemption, if the goods should not be located.' The facts, as far as the court has found them, are that the four months had expired before July 11, 1910. Then the defendant had the right to say: You have not presented your claim in time. You have forfeited your right to make a claim against us for the actions. If it had taken that position there might have been an end to its trouble depending upon what should be held a reasonable time 'for delivery.' But a more prudent way suggested itself to the company. It sought to find the goods, in recognition of its obligation to the shipper, by sending out several tracers and by inviting the filing of a claim. If it had traced the goods to discovery or delivery, it would have freed itself from claim and loss. It is inconsistent with the claim of immunity from liability that it should recognize any obligation to the plaintiff after the expiration of the four months. From the conduct of the defendant we think the intention to waive the four months' provision of the bill of lading is fairly inferable. The lapse of time does not pay the debt, perform the contract, nor deliver the goods. The moral obligation survives the limitation. The courts of our state seem to be at variance with the authorities relied upon by the defendant. Waiver may rest in a donative purpose and be without consideration. It need not be based upon a new agreement or estoppel. Waiver may be claimed after knowledge of the forfeiture if in any negotiations or transactions between parties the claimant recognizes the continued validity of the contract, does any act based thereon, or requires the other party to do some act or incur some trouble or expense."

A provision in the shipping contract of the kind in question is generally deemed to have been waived by the carrier's entertaining and proceeding to consider and negotiate with reference to the claim after the expiration of the stipulated time, without objecting to the delay in the filing thereof. Thus, such L.R.A.1916D.

a stipulation was held to have been waived—

—where the carrier turned the claim over to its claim department, put the shipper to the trouble and expense of making proof of damages, and led him to believe that the claim would be settled on the merits, *St. Louis Southwestern R. Co. v. Grayson* (1909) 89 Ark. 154, 115 S. W. 933;

—where the carrier referred the claim to its claim department and subsequently requested that a bill of the alleged damages be made out, and, after it was made out, offered to pay certain items thereof, *Hudson v. Northern P. R. Co.* (1894) 92 Iowa, 231, 54 Am. St. Rep. 550, 60 N. W. 608. The court in substance said: Such forfeitures are not favored in law, and courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action on the part of him who is to be benefited by the contract, which leads the other party to believe that, by conforming thereto, the forfeiture will not be incurred, will and ought to estop the promisee from insisting on the forfeiture. Waiver is where one in possession of any right, whether conferred by law or contract, and of full knowledge of all the material facts, does, or forbears the doing of, something inconsistent with the existence of the right, and of his intention to rely upon it; and thereupon he is said to have waived it, and he is precluded from claiming anything by reason of it afterward. The provision in the contract in question was for the benefit of the carrier, and it might elect to rely on it or not, as it saw fit. If it so conducted itself as to evince an intention not to rely thereon, and induced the shipper to go to the trouble and expense of making out his claim for damage, in accordance with the suggestion of its general freight agent, it is now estopped from insisting on the forfeiture. The fact that the waiver was not made until after the time had expired for giving notice is not controlling, for the carrier's general agent treated the liability of the company as still existing, and directed the shipper to go to the trouble and expense of filing his statement and claim for damages. The claim agent, in refusing the claim, did not put it on the ground that no notice had been given, but denied liability for the loss;

—where, after the lapse of the prescribed time for so doing, the shipper

made a written claim upon the agent at the point of delivery, on account of the property shipped, and the agent informed him that the proper procedure was for him to substantiate the claim and allow the carrier to make the necessary investigation to ascertain whether there was liability; and after the receipt of the papers in connection with the claim the carrier conducted an investigation and corresponded with the attorney of the shipper, finally declining payment on the ground that the carrier was not liable because the injury to the property did not result from its conduct, but from the bad condition in which the property was received for transportation, and at no time raising any question as to the failure to present a claim in the time provided in the bill of lading, *Post v. Atlantic Coast Line R. Co.* (1912) 138 Ga. 763, 76 S. E. 45;

—where the carrier's general agent, upon receiving written notice from the shipper of the demand, answered that the claim was being investigated and would be settled upon the merits, *Harned v. Missouri P. R. Co.* (1892) 51 Mo. App. 482;

—where the carrier, upon receiving the delayed notice, deliberated upon a claim for three months and placed its refusal to pay on the merits, and not upon the failure to give the notice in season, *Isham v. Erie R. Co.* (1906) 112 App. Div. 612, 98 N. Y. Supp. 609, affirmed without opinion in (1908) 191 N. Y. 547, 85 N. E. 1111;

—where the required notice was started to the general agent of the carrier within the prescribed time, but was not received by him until after the expiration of such time, and he, without objecting to the delay, proceeded to investigate the claim, and denied liability on other grounds than the delay in giving notice, *Ingwersen v. St. Louis & H. R. Co.* (1906) 116 Mo. App. 139, 92 S. W. 357;

—where the carrier, having accepted informal notice within the prescribed time, did not place its refusal to pay on the ground that the formal notice was filed too late, but on the contrary offered to pay a certain sum before suit was brought, *Frankfurt v. Weir* (1903) 40 Misc. 683, 83 N. Y. Supp. 112;

—where the carrier, with full knowledge, did not raise objection to the time of presentation, but rejected the claim on the ground of proper delivery of the goods, *Peninsula Produce Exch. v. New York, P. & N. R. Co.* (1914) 122 Md. 231, 89 Atl. 437, following *Merchants' L.R.A.* 1916D.

& *M. Transp. Co. v. Eichberg* (1909) 109 Md. 211, 130 Am. St. Rep. 524, 71 Atl. 993, which is to the same effect;

—where the carrier refused payment of the claim because it was not responsible for the damage caused to the property by the temperature, and not because the claim was not filed within the proper time, *Banks v. Pennsylvania R. Co.* (1910) 111 Minn. 48, 126 N. W. 410;

—where the carrier returned the claim to the shipper to have the freight bill attached, which was done, whereupon the carrier, after examination and further correspondence, declined payment, but not upon the ground that the claim had been filed too late, *Wallace v. Lake Shore & M. S. R. Co.* (1903) 133 Mich. 633, 95 N. W. 750;

—where the carrier was negligent in sending goods to the wrong destination, and failed until five months after the date of shipment to notify the shipper, and contended in none of its correspondence that the shipper could make a claim only within sixty days from the date of shipment, *Magnus v. Platt* (1909) 62 Misc. 499, 115 N. Y. Supp. 824;

—where, upon the giving of notice, an answer was sent from the carrier's general freight agent's office acknowledging receipt of the notice, expressing the sorrow of the agent for the detention of the shipment, and denying liability therefor not because of the delayed notice, but on the ground that such detention arose through causes over which the carrier had no control, namely, the strike of railway employees in Chicago, *Jennings v. Grand Trunk R. Co.* (1889) 52 Hun, 227, 5 N. Y. Supp. 140. But this case was affirmed on the theory that the stipulation was unreasonable and therefore failure to give the notice was no bar to the remedy. 127 N. Y. 438, 28 N. E. 394;

—where the carrier's agent had notice of the loss within the prescribed time, and the carrier, replying to the claim for loss filed after the expiration of such time, stated that if the claimant would reduce his claim to invoice cost he would be paid, and the record showed that the amount claimed corresponded with the invoice cost, *Sauls-Baker Co. v. Atlantic Coast Line R. Co.* (1914) 98 S. C. 300, 82 S. E. 418;

—where the carrier had actual notice of the loss and attendant facts within the stipulated time, and did not raise any question as to want of notice until the time of the trial, a year and a half after the loss, *Eckert v. Pennsylvania*.

R. Co. (1905) 211 Pa. 267, 107 Am. St. Rep. 571, 60 Atl. 781, 18 Am. Neg. Rep. 594. And see *L. A. Watkins Merchandise Co. v. Missouri, K. & T. R. Co.* (1910) 82 Kan. 308, 108 Pac. 116, holding that "the failure to instruct the jury as to a stipulation in a bill of lading providing that a shipper shall present any claim for loss or damages to the . . . [carrier] within thirty days after it has been sustained is not a ground for reversal where it appears that the . . . [carrier] had acquired full knowledge of the loss within a few minutes after it occurred, and upon learning of the cause of the loss had instituted negotiations to provide for the payment of the same, and where it denied liability for the loss upon other grounds than a lack of demand;"

—where it did not appear that the claim for damage to live stock was not fully investigated, or that, prior to the institution of suit on the claim, the carrier refused payment of the claim because notice was not given within the specified time, or made any objection to the form or contents of the notice given to a connecting carrier, *Chicago, R. I. & G. R. Co. v. Linger* (1913) — *Tex. Civ. App.* —, 156 S. W. 298;

—where the correspondence between the shipper's attorney and the general freight agent of the carrier, which is not disclosed in the report of the case, clearly justified the jury in finding that the provision in the contract of shipment requiring the shipper to file his claim within ten days after the horses were removed from the train had been waived by the carrier, *Wabash R. Co. v. Foster* (1906) 127 Ill. App. 201;

—where the belated notice was accepted as one given in time, and the claim was held for investigation until after the expiration of the time also stipulated in the contract for the commencement of the shipper's suit, *Sims v. Missouri P. R. Co.* (1914) 177 Mo. App. 18, 163 S. W. 275. And see *infra*, "Stipulations as to commencement of suit," *Pacific Coast Co. v. Yukon Independent Transp. Co.* (1907) 83 C. C. A. 625, 155 Fed. 29;

—where the shipper mailed a notice of claim for damages to the carrier within the time prescribed for such notice, and a letter from the carrier's general freight agent acknowledged receipt of the notice, but did not mention the fact that it had not been received within the prescribed time, *Vencill v. Quincy, O. & K. C. R. Co.* (1908) 132 Mo. App. 722, 112 S. W. 1030.
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Where there is evidence tending to show that the freight claim agent of a common carrier receives a claim for damages to a shipment of live stock after the time limited by a provision of the shipping contract requiring notice has expired, and treats it as a pending claim, and rejects it on other grounds, the question of whether it is the intention of the carrier to waive the notice clause as a defense is one of fact to be submitted to the jury. *St. Louis & S. F. R. Co. v. James* (1912) 36 Okla. 196, 128 S. W. 279; *St. Louis & S. F. R. Co. v. Ladd* (1912) 33 Okla. 160, 124 Pac. 461.

But the mere fact that the carrier's veterinary surgeon examined the stock after the expiration of the prescribed time, and reported the result of his examination to one of the carrier's officers, was not enough to warrant a reasonable inference of a waiver of the stipulation. *Crawford v. Southern R. Co.* (1915) 101 S. C. 522, 86 S. E. 19.

And that the carrier agreed to pay for loss on account of a decline in market, to which the requirement of notice did not apply, and refused to pay for loss on account of shrinkage, because no notice was given within the time required by contract, was no evidence by waiver. *Riddler v. Missouri P. R. Co.* (1914) 184 Mo. App. 709, 171 S. W. 632.

The conduct of the carrier, or of its duly authorized agents, prior to the expiration of the prescribed time for notice, may be such as to constitute a waiver of the notice within that time. Thus, a carrier sued for the misdelivery of goods is estopped to plead a time stipulation in the bill of lading by the false representation of the carrier just prior to the expiration of the time limit that the goods were still in its possession and would be returned at once. Where a party who may require the performance of certain conditions precedent to a right of recovery has by his own acts rendered performance impossible, the other party is relieved from the consequence of nonperformance. So here the defendant, retracting, only after the lapse of the time limit, the representation that the goods were in its possession and that therefore there was neither loss nor damage, is estopped from insisting on a compliance with the time condition. *Marrus v. New Haven S. B. Co.* (1900) 30 Misc. 421, 62 N. Y. Supp. 474.

And where the carrier's agent, after examination and ascertainment of the injury, directs the disposition of the goods, or promises to adjust the claim,

a stipulation in the carriage contract for notice of loss or damage within a prescribed time is waiver. *Kelly v. Southern R. Co.* (1909) 84 S. C. 249, 137 Am. St. Rep. 842, 66 S. E. 198.

And a carrier, by entering into an agreement with the shipper that damaged property is to be sold to reduce the amount of the loss, consents to the suspension of, or waives, a condition in the shipping contract for notice within a prescribed time until such sale is completed. *Peoria Packing Co. v. Nashville C. & St. L. R. Co.* (1911) 164 Ill. App. 646.

And a stipulation for written notice within one day of the delivery of the property at destination was waived where the shipper within one day gave verbal notice, and was told by the agent of the carrier to sell the property and put in a claim for damages, and on the second day the shipper gave the written notice. *Clubb v. St. Louis & S. F. R. Co.* (1909) 136 Mo. App. 1, 117 S. W. 110.

And a stipulation in a shipping contract that the carrier should not be liable for loss or damage unless demand for payment therefor in writing was made within thirty days from the date of the contract was waived by the carrier stating, in answer to the shipper's demand for the return of the goods, that the company was searching for them, and, when found, by the carrier accepting the shipper's instruction to sell them. *United States Watch Case Co. v. Southern Exp. Co.* (1897) 120 N. C. 351, 27 S. E. 74.

In *Rice v. Kansas P. R. Co.* (1876) 63 Mo. 314, the contract of carriage of live stock required notice of claim of loss or damage to be made in writing before or at the time the stock was unloaded. The owner, before receiving the damaged stock, orally notified the company's yard master and agent that he would receive the stock only under protest. It was late at night and the agent assured him that it was unnecessary to proceed to the company's office that night, and, as the stock pens were in bad repair, he permitted him to remove the cattle to the owner's farm 16 miles distant, where their examination by the carrier was not difficult. Three days later the owner gave written notice of his claim to an officer of the company, who refused to pay the same because the stock was not damaged, and made no objection to the delay in the notice. It was decided that the conduct of the company amounted to L.R.A.1916D.

a waiver of the delay in giving the notice.

And in *Robinson v. Great Northern R. Co.* (1913) 123 Minn. 495, 144 N. W. 220, the court said: "The shipping contract provided that notice of loss should be given within fifteen days and that suit must be brought within three months. On November 15, 1911, the plaintiffs wrote the defendant more in the way of complaint than of claim. Correspondence continued to March 28, 1912, when the plaintiffs wrote to the defendant, pursuant to its request of February 26 and March 20, inclosing an itemized statement of loss. The defendant asked this under a promise to give the loss further attention. Eight or ten letters passed from first to last. The last letter sent by the plaintiffs and the last letter sent by the defendant were in aid of an investigation of the claim. We think the court properly held that the defendant waived the delay."

Where the shipping contract, providing for notice of loss within a prescribed time after removal of the stock from the car, was signed by the mark of the shipper's agent, who could neither read nor write, and the shipper had no knowledge of the limitation as to notice until after he had received the property and paid the freight bill, an extension of the time within which to file the claim was effected by an indorsement by the carrier's agent on the receipted freight bill delivered to the shipper granting four months within which to file claim. *Clingan v. Cleveland, C. C. & St. L. R. Co.* (1913) 184 Ill. App. 202. And see *The Nicet* (1905) 134 Fed. 655, where the contract required notice within forty-eight hours after the landing of, or failure to deliver, the goods, and the carrier put the goods in storage at the landing and took receipts therefor, and the notice was given by the consignee as soon as the shortage came to his attention.

Where verbal notice was given an express company a few days after the discovery of the loss, and the express agent sent a tracer after the goods, and after about ninety days reported that he could not find them, and then a written demand was made upon the company for their value, this was held to be all the notice necessary, although the receipt for the goods stipulated that the company would not be liable for loss or damage unless the claim therefor was made in writing within thirty days. *Southern Exp. Co. v. Stevenson* (1906) 89 Miss. 233, 42 So. 670.

And in *Ghormley v. Dinsmore* (1885) 19 Jones & S. (N. Y.) 196, as soon as the shipper was apprised of the loss of the goods, he called upon the defendant for an explanation. Time was taken by defendant in searching and tracing the package. It supposed that it had been delivered, but in the end stated that it could not be found. When informed of this the shipper presented his claim. It was decided that time taken by the defendant in searching for the goods under these circumstances, in the expectation of finding them, excused the earlier presentation of plaintiff's demands. And see *Gulf, C. & S. F. R. Co. v. Gatewood* (1890) 79 Tex. 89, 10 L.R.A. 419, 14 S. W. 913; *Smith v. Dinsmore* (1880) 9 Daly (N. Y.) 188.

But deviation by the carrier from the contract of shipment, by transporting live stock by freight instead of by passenger service, does not relieve the shipper from notifying the company of his claim for damages within the time stipulated in the contract for notice of claims for damages. *Pavitt v. Lehigh Valley R. Co.* (1893) 153 Pa. 302, 25 Atl. 1107.

And that the carrier has failed to insist upon the stipulation in the shipping contract requiring notice of claim within a prescribed time in other cases does not constitute a waiver in favor of another shipper, where it is not shown that he knew the fact and was misled by it. *The Westminster* (1904) 62 C. C. A. 406, 127 Fed. 680.

And mere knowledge on the part of a claim agent of the carrier, who is not shown to be a proper person to receive notice, that the shipper claims damages for injury to his shipment, unaccompanied by any act upon the part of such agent looking to an adjustment of the loss, is not sufficient to constitute a waiver of a stipulation requiring the claim to be made in writing within a prescribed time. *St. Louis, I. M. & S. R. Co. v. Shepherd* (1914) 113 Ark. 248, 168 S. W. 137.

It is a question for the determination of the jury whether the carrier, by refusing to allow the shipper to accompany his shipment of stock, and by unloading the same into his agent's pens before he had time to inspect them, did not waive, or render unreasonable in the particular case, a clause of the shipping contract requiring notice in writing of the claim before the animals were removed from the place of destination and mingled with other animals. *Arnold v. L.R.A.* 1916D.

Louisville & N. R. Co. (1908) 4 Ga. App. 519, 61 S. E. 1050.

And in determining the question whether the acts and conduct of the carrier, or its duly authorized agents, constitute a waiver of the stipulation in question, the jury may take into consideration alleged complaints made by the shipper's agent to the several local freight agents of the carrier, and all that was said and done by and between these persons at the time the shipments were delivered at the different points of destination, as well as the subsequent letters written by the shippers to the division freight agent or other officer of the carrier, and also any reply made thereto. *Klair v. Philadelphia, B. & W. R. Co.* (1910) 2 Boyce (Del.) 274, 78 Atl. 1085.

An agent has no authority to waive a stipulation in a live stock shipper's contract, that notice in writing of any claim shall be given before such stock is mingled with other stock, such written notification to be served within one day after the delivering of the stock at the point of destination, where the contract contains a stipulation against waiver by an agent of any provision of the contract. *Clegg v. St. Louis & S. F. R. Co.* (1913) 122 C. C. A. 273, 203 Fed. 971 (general freight claim agent); *McElvain v. St. Louis & S. F. R. Co.* (1915) — Mo. App. —, 180 S. W. 1018 (station agent). Consequently, the action of the general freight claim agent of the carrier in simply negotiating with the shipper is not a waiver. *Clegg v. St. Louis & S. F. R. Co.*

Stipulations as to commencement of suit.

The carrier may waive the provisions of a contract limiting the time within which an action may be brought for damages on account of delay in transportation or loss or injury to live stock. *Naumen v. Great Northern R. Co.* (1915) — Minn. —, 154 N. W. 1076.

A carrier waives a provision in a carriage contract limiting the time in which suit may be brought for its breach (or is estopped) by consuming more than the specified time in investigating the claim, and promising, before the expiration of such period, that it would not take advantage of the limitation if the claim was rejected. *Adams v. Colorado & S. R. Co.* (1911) 49 Colo. 475, 36 L.R.A.(N.S.) 412, 113 Pac. 1010. This, however, is not in conflict with the decision in *RAY v. MISSOURI, K. & T. R. Co.*, that mere negotiations as to settlement or compromise of the claim do not waive

the contract limitations, nor estop the carrier from insisting that the right to sue has been lost by the lapse of time.

If the carrier's agent by his declarations that the claim will be paid causes the shipper to postpone the institution of suit on the claim until after the expiration of the time stipulated in the shipping contract, this will constitute a waiver of the stipulation. The rule in such cases is that if the course of conduct pursued by the carrier was such as to induce the shipper that his claim would be paid without suit, and for this reason suit was not brought within the time prescribed, then the action can be maintained after the expiration of the time. *Galveston, H. & S. A. R. Co. v. Kelley* (1894) — *Tex. Civ. App.* —, 26 S. W. 470; *Gulf, C. & S. F. R. Co. v. Trawick* (1891) 80 *Tex.* 270, 15 S. W. 568, 18 S. W. 948, and *Galveston, H. & S. A. R. Co. v. Silegman* (1893) — *Tex. Civ. App.* —, 23 S. W. 298, are to the same effect.

But statements made by an agent who has no authority in the matter, and expressly warns the shipper to that effect, are insufficient to operate as an estoppel. *Gulf, C. & S. F. R. Co. v. Trawick* (1891) 80 *Tex.* 270, 15 S. W. 568, 18 S. W. 948.

And a station agent at the destination of a shipment of stock, who is not shown to have any authority to adjust and settle claims for damages, and who does not represent that he has such authority, has no power to waive a provision of the shipping contract requiring suit to be brought within ninety days after the happening of the injuries, by advising the shipper not to sue, as the company always prefers to settle that class of claims, where the contract further provides that no agent of the carrier shall have any authority to modify or waive any provision thereof. *Missouri, K. & T. R. Co. v. Davis* (1909) 24 *Okla.* 677, 24 *L.R.A.(N.S.)* 866, 104 *Pac.* 34.

And where the undisputed evidence showed that the carrier's agent, having received and sent the shipper's claim in to the general office for investigation, told the shipper before the stipulated time for bringing suit expired that he (the agent) had word from headquarters requesting the shipper not to sue, but to be patient, and the claim would be settled, it was not error to refuse a special charge that "if the evidence shows that the defendant's agent received the plaintiffs' claim, to be forwarded to the general office for investigation, this would not be sufficient evidence to constitute a waiver or estoppel on defendant's L.R.A.1916D.

part. You must find from the evidence that plaintiffs were deprived of their right to sue and their position changed by the wilful acts and promises of defendant." *Galveston, H. & S. A. R. Co. v. Silegman* (1893) — *Tex. Civ. App.* —, 23 S. W. 298.

By accepting a belated notice as one given in time, and holding the claim for investigation until after the expiration of the agreed time for the shipper to sue, the carrier waives the benefit of stipulations in the shipping contract requiring notice of loss to be given and suit to be brought within a specified time. *Sims v. Missouri P. R. Co.* (1914) 177 *Mo. App.* 18, 163 S. W. 275.

And, likewise, the carrier waives a provision in the shipping contract requiring suits for injuries to the shipment or the person accompanying the same to be brought within a prescribed time, by attempting to settle a suit for such injuries brought after the expiration of such time. *St. Louis & S. F. R. Co. v. Dysart* (1910) — *Tex. Civ. App.* —, 130 S. W. 1047.

And a stipulation in the shipping contract requiring suit to be brought within a specified time after the accrual of the cause of action is waived by the carrier, where, after receiving the shipper's demand from the delivering carrier, it remained silent for more than four months before advising the delivering carrier that it rejected the demand, and thereafter neglected for six days to own receipt of a letter from the shipper's attorney concerning the claim, and then answered only that the demand had been returned to the delivering carrier. *Howze v. New Orleans & N. E. R. Co.* (1907) 91 *Miss.* 695, 45 *So.* 837.

In *Pacific Coast Co. v. Yukon Independent Transp. Co.* (1907) 83 *C. C. A.* 625, 155 *Fed.* 29, goods were received by the carrier at Seattle to be delivered at an Alaskan port on the first trip of the vessel in the spring, or as soon as the ice was out of the harbor. Upon finding the harbor still closed by the ice, the vessel, after tendering delivery at another Alaskan port, proceeded back to Seattle with the cargo, and delivered it on the next voyage. The shipping contract required all claims for damages to be presented to the carrier within ten days from notice thereof, and that no action should be brought after sixty days. When the vessel decided to return to Seattle with the property aboard, the claimant's agent gave notice that a claim would be made for such damages as might result, and when the goods were

finally delivered at their destination, he served as specific a claim for damages as could then be made; and later a more specific claim was presented in Seattle and taken under consideration by the carrier, after which negotiations for settlement continued for about a year before suit was brought, the carrier objecting only that the amount of the claim was unreasonable. It was decided that the requirement as to the presentation of the claim and the institution of the suit within the prescribed time had been waived.

A shipper who has sent affidavits and proofs of claims for injury and damage to live stock, and has been assured by the carrier that the claim is under active investigation, and that he will be informed of the carrier's decision, is justified in waiting until the carrier's active investigation is completed and the result thereof communicated to him. *Naumen v. Great Northern R. Co.* (1915) — Minn. —, 154 N. W. 1077.

W. W. A.

KENTUCKY COURT OF APPEALS.

MARY LIMBACH et al., Appts.,
v.

ALTA BOLIN et al.

(— Ky. —, 183 S. W. 495.)

Will — attestation before signature — effect.

An unsubscribed will is not properly acknowledged by requesting a witness to attest it with his signature, which is done, so as to make it valid when subsequently signed by the testator out of the presence of the witness, if the signature is never acknowledged to the witness, under a statute providing that the subscription shall be made or the will acknowledged by the testator in the presence of the witness.

For other cases, see Wills, l. b, in Dig. 1-52 N. S.

(March 15, 1916.)

APPEAL by contestants from a judgment of the Circuit Court for Daviess County approving the judgment of the County Court admitting to probate a paper as the last will and testament of Louis A. Miller, deceased. Reversed.

The facts are stated in the opinion.

Messrs. Louis I. Igleheart and Leo H. Fisher, for appellants:

A testator must acknowledge his signature as well as his will to the subscribing witnesses.

Swift v. Wiley, 1 B. Mon. 114; *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Upchurch v. Upchurch*, 16 B. Mon. 113; *Shanks v. Christopher*, 3 A. K. Marsh. 144; *Denton v. Franklin*, 9 B. Mon. 28; *Garnett v. Foston*, 122 Ky. 195, 121 Am. St. Rep. 456, 91 S. W. 668; *Baldwin v. Barber*, 151 Ky. 168, 151 S. W. 686, Ann. Cas. 1915A, 14, modifying opinion on rehearing in 148 Ky. 370, 146 S. W. 1124.

Note.—As to signature of witness to will before testator signs it, see annotation following this case, post, 1063.
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The signature of the testator must be affixed to the will before he can acknowledge it. If it is not signed, there is no will to attest or acknowledge.

Re Dougherty, 168 Mich. 281, 134 N. W. 24, Ann. Cas. 1913B, 1300, reported and annotated in 38 L.R.A.(N.S.) 161; *Griffith v. Griffith*, 5 B. Mon. 511; *Chisholm v. Ben*, 7 B. Mon. 408; *Reed v. Watson*, 27 Ind. 443; *Turner v. Cook*, 36 Ind. 129; *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758; *Ludlow v. Ludlow*, 35 N. J. Eq. 480; *Re Coles*, — N. J. —, 47 Atl. 385; *Lewis v. Lewis*, 11 N. Y. 220; *Sisters of Charity v. Kelly*, 67 N. Y. 409, reversing 7 Hun, 290; *Re Mackay*, 110 N. Y. 611, 1 L.R.A. 491, 6 Am. St. Rep. 409, 18 N. E. 433; *Vogel v. Lehnritter*, 139 N. Y. 223, 34 N. E. 914; *Re Laudy*, 148 N. Y. 403, 42 N. E. 1061, modifying 78 Hun, 479, 29 N. Y. Supp. 136, affirmed in 147 N. Y. 699, 42 N. E. 724, reargument granted in 147 N. Y. 721, 42 N. E. 724; *Re Eakins*, 13 Misc. 557, 35 N. Y. Supp. 489; *Re Rogers*, 52 Misc. 412, 103 N. Y. Supp. 423; *Re Abercrombie*, 24 App. Div. 407, 48 N. Y. Supp. 414; *Re Hitchler*, 25 Misc. 365, 55 N. Y. Supp. 642; *Mitchell v. Mitchell*, 16 Hun, 97, affirmed in 77 N. Y. 596; *Rutherford v. Rutherford*, 1 Denio, 33, 43 Am. Dec. 644; *Re Baldwin*, 146 N. C. 25, 125 Am. St. Rep. 466, 59 S. E. 163; *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579; *Keyl v. Feuchter*, 56 Ohio St. 424, 47 N. E. 140; *Richardson v. Orth*, 40 Or. 252, 66 Pac. 925, rehearing denied in 40 Or. 267, 69 Pac. 455; *Luper v. Werts*, 19 Or. 122, 23 Pac. 850; *Irvine's Estate*, 206 Pa. 1, 55 Atl. 795; *Tucker v. Oxner*, 12 Rich. L. 141; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *Roberts v. Welch*, 46 Vt. 165; *Gould v. Chicago Theological Seminary*, 189 Ill. 282, 59 N. E. 536; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Re Barry*, 219 Ill. 391, 76 N. E. 577; *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367; *Ela v. Edwards*, 16 Gray, 91; *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687.

Thomas, J., delivered the opinion of the court:

Louis A. Miller died on July 4, 1913, being at the time a resident of and domiciled in Daviess county. On February 26, 1912, he attempted to execute his will. After his death, and on August 18, 1913, the devisees therein (appellees here) presented the paper to the county court of Daviess county for probate, and their motion for that purpose was sustained and the paper probated as the last will and testament of Louis A. Miller. From that judgment an appeal was prosecuted to the circuit court, and it, after hearing, approved the judgment of the county court in probating the paper as such will. From the judgment of the circuit court, appellants, who are the collateral heirs and next of kin to L. A. Miller, prosecute this appeal.

The contentions of appellants which were presented for the first time in the circuit court are: That the paper was not executed in substantial compliance with our statute regulating the making of wills, and that the testator was unduly influenced to execute it. On the trial in the circuit court, the second one was abandoned, and there was an agreed stipulation of facts filed by the parties as to how the paper was executed; it constituting all the evidence heard by the circuit court. Upon this point the stipulation shows that the testator went to the Daviess County Planing Mills, carrying with him the paper claimed to be his will, it not being in the handwriting of Miller, and he there requested W. R. Jagoe to witness it as his will, whereupon Jagoe signed his name to the paper. Miller did not subscribe his name to it in the presence of this witness, nor was his name subscribed to it at the time the witness attested it with his signature. The testator took the paper in this condition, without his name being subscribed to it, to another place in Owensboro, where H. N. Robertson was requested by him to witness or attest the paper as his will, which was done by Robertson, and in the presence of this witness the testator subscribed his name to the paper. After this subscription by the testator, no acknowledgment of it was ever made to the witness Jagoe, and he at no time saw the paper with the name of the testator subscribed to it. The question is, Do these acts constitute a substantial compliance with our statute upon the subject, it being § 4828, Ky. Stat. and in language as follows: "No will shall be valid unless it is in writing with the name of the testator subscribed thereto by himself, or by some other person in his presence and by his direction; and, moreover, if not wholly

written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses, who shall subscribe the will with their names in the presence of the testator."

This supposed will is not holographic, and, if vitalized at all, it must be by that portion of the section saying, "moreover, if not wholly written by the testator, the subscription shall be made or the will acknowledged by him in the presence of at least two credible witnesses," etc. As the testator did not subscribe the paper in the presence of two witnesses, it becomes necessary to still further narrow the inquiry to the meaning of the clause, "or the will acknowledged by him in the presence of at least two credible witnesses."

When the will is not a holographic one, it may receive legal vitality under the statute in one of two ways: One by the testator subscribing it in the presence of the two witnesses, and they attesting it by subscribing their names in his presence; and the other by the testator acknowledging the will in the presence of the two witnesses, who shall attest it by their signatures in his presence. The first one was not followed in this case, and the inquiry is whether the second one was. It will be observed that the paper which the statute requires shall be acknowledged by the testator before the witnesses is "the will."

Great assistance in the solution of the question before us will be rendered by ascertaining the true meaning of the word "will" (the thing to be acknowledged) as used in the statute. Blackstone, in his Commentaries (vol. 2, p. 499), defines it as "the legal declaration of a man's intentions which he wills to be performed after his death." The definition is adopted with approval by the author of 30 Am. & Eng. Enc. Law, 2d ed. 550, and also by the court in the following cases: *Smith v. Bell*, 6 Pet. 68, 8 L. ed. 322; *Colton v. Colton*, 127 U. S. 309, 32 L. ed. 142, 8 Sup. Ct. Rep. 1164; *Hardenbergh v. Ray*, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305; *Jackson v. Culpepper*, 3 Ga. 569; *Robinson v. King*, 6 Ga. 547; *Langdon v. Astor*, 16 N. Y. 49; *Clayton v. Liverman*, 19 N. C. (2 Dev. & B. L.) 558; *Price v. Johnson*, 90 N. C. 592; *Frew v. Clarke*, 80 Pa. 178. And by this court in the precise words of Blackstone in the case of *Ward v. Ward*, 104 Ky. 857, 48 S. W. 411. The definition given by Swinburne is, "A last will is a lawful disposing of that which anyone would have done after death." Swinb. Wills, pt. 1, §§ 3 and 4. These definitions meet with our approval, as well as having been adopted by this court in the *Ward Case*, supra.

It will be noticed that a paper, in order

to be brought to the full development of a will, must, according to Blackstone, "be a legal declaration," and by Swinburne's definition, "a lawful disposing," etc., and any paper not possessing the requisites to make it a legal declaration or a lawful disposition would fall short of the definition of a will. All statutes upon the subject of wills, both English and American, require them to be either signed or subscribed by the testator in order to render them valid and effectual for the purpose of disposing of property after death. Under all of them, a paper which is not signed or not subscribed by the testator is wholly ineffectual for any purpose and would not be probated as a will by any court, because it would not be a will.

How, then, may we ask, could it be a will when not subscribed or signed by the maker for the purpose of attestation or acknowledgment before the witnesses, and yet not be a will unless signed or subscribed by him for the purpose of probate? If the paper constituting the will is a legal declaration or a lawful disposition by the testator, it must be an executed one, which, according to some of the statutes, must be a subscribed one, and, according to others, a signed one. The acknowledgment required by the statute is the recognition by the testator before the attesting witnesses of his subscribed or executed will. Without this execution of the will by the testator's subsequent consent, the paper which the witnesses attest contains only the testator's consent or wish that what is written therein shall control the disposition of his property after his death, and without such consent or wish having the verity required by law, which would not be legal declaration of such consent. It is the legalized consent verified by subscribing his will which the testator acknowledges before the witnesses and which they attest by subscribing their names. In other words, the paper which the testator must acknowledge to the attesting witnesses must, at the time of such acknowledgment, be a completed or finished will so far as the requirement which the statute imposes upon the testator is concerned. This is not done, under our present statutes, until he has subscribed it. The direct question involved here, although determined as herein held by courts from other jurisdictions (*Lane v. Lane*, 125 Ga. 386, 54 S. E. 90, 114 Am. St. Rep. 207, and notes on page 213, 5 Ann. Cas. 462; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875, 18 S. W. 280; *Chase v. Kittredge*, 11 Allen, 49, 87 Am. Dec. 687; *Reed v. Watson*, 27 Ind. 448; *Lewis v. Lewis*, 11 N. Y. 220; *Jauncey v. Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 432; *Tilden v. Tilden*, 13 L.R.A.1916D.

Gray, 110), has not been directly passed on by this court. It has, however, been inferentially upheld in the following cases: *Shanks v. Christopher*, 3 A. K. Marsh. 144; *Miles's Will*, 4 Dana, 1; *Swift v. Wiley*, 1 B. Mon. 114; *Chisholm v. Ben*, 7 B. Mon. 408; *Griffith v. Griffith*, 5 B. Mon. 511; *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Allen v. Everett*, 12 B. Mon. 371; *Soward v. Soward*, 1 Duv. 126; *Grubbs v. Marshall*, 11 Ky. L. Rep. 870, 13 S. W. 447; *Savage v. Bulger*, 25 Ky. L. Rep. 763, 76 S. W. 361; *McKee v. McKee*, 155 Ky. 738, 160 S. W. 261.

The requirements of the statute in force at the time of the execution of the wills under consideration by this court in these cases were not in each instance the same. In some of them the law required the will to be signed by the testator, and, as this requirement was the same as that required by the earlier English statutes on the subject, the construction of the English courts as to what constituted a signing of the will was followed by this court when similar statutes were under consideration. This construction was to the effect that the will need not be signed by the testator at the bottom thereof, but the requirement would be fulfilled if the name of the testator appeared anywhere in the body of the will. This was held to be a sufficient signing, and accordingly it was held in the *Miles's Will Case*, 4 Dana, 1, that the attesting witnesses need not see the testator sign his name at the foot of the will, or see the name already signed at that place, when the body of the will contained the name of the testator at the time the witnesses attested it, inferentially holding that if there was no name of the testator signed at the end of the will, and his name did not appear in the body of the will when the witness attested it, it would be invalid; the language used being: "Mrs. Miles, the testatrix, fell a victim to the cholera, in July, 1833. Before she had been attacked with the fatal disease, she requested an intelligent neighbor to write her will, and instructed him how to write it. He wrote it accordingly, and commencing with, 'In the name of God, amen, I, Sarah Miles,' etc., ended with, 'in ratification of which, I have hereunto set my hand and affixed my seal,' etc., adding a seal without the name. Thus prepared, it was read to her and approved by her, but was not then either subscribed by her, or attested. However, when afterwards published, being unable to subscribe her name, she acknowledged the paper as her will, in the presence of two witnesses, who attested it in her presence and at her request. From these facts, we infer that her acknowledgment was full,

unconditional, and final, without any intention to subscribe her name then or afterwards; but with the wish that the document thus acknowledged should, as acknowledged, be established as her last will; and therefore, according to a long and unbroken series of adjudged cases, although we may presume that, when the will was written, her name in the beginning was not intended to be her signature, nevertheless, as it was so designed and understood at the time of publication, we feel bound to decide that it is a sufficient signing of the will within the constructive operation of the statute, and is as effectual as it would have been had it been subscribed by a stranger and acknowledged by her."

Appellees rely on the case of *Allen v. Everett*, 12 B. Mon. 371. The law governing the execution of wills when the testator's will involved in that case was executed was the same as to the signing by the testator as the one governing the execution of wills in the *Miles's Case*, i. e., the testator should only sign the will, and this requirement under the adjudged cases was fulfilled when his name appeared anywhere in the will. Consequently, this court, in the *Everett Case*, said: "The name of the testatrix is inserted in the body of this will, and her signature is also affixed to the bottom thereof; and if acknowledged by her to be her will to Chilton Duff before she signed it, but with the intention at the time of publication to give complete effect to it as her last will and testament without her signature, it is valid, notwithstanding she may have afterward, at a different time, signed the will, and then acknowledged it before another subscribing witness."

It will be noticed that, in the cases referred to, the thing which the statute required the testator to do (sign the will) was done either before or at the time the witness attested it, although the testator may have subsequently, in the absence of the witness, performed the nonrequired or nonessential act of signing his name at the bottom of the will. So that these cases and others of their class do not conflict with, but rather uphold, the views which we have hereinbefore expressed. It will furthermore be seen that the facts in the *Sechrest Case*, 4 Met. (Ky.) 163, show that, at the time the witnesses were called upon to and did attest the will, all of the acts which the then law required the testator to do, including the attaching of his name to the will, had been done. In holding that the will therein involved was legally executed and entitled to probate, this court said: "It may be assumed that the name of *Sechrest*, had been written to the paper before *Henderson* ever saw it, and certainly

before he attested it; his name is written out in full upon the paper as copied in this record, and the mark is placed between the Christian and surname. *Henderson* proves the mark was made after he subscribed it as a witness, but does not prove the name was written afterwards; he only proves that his name and *Carter's* were written after he saw it. So that *Sechrest's* name must have been subscribed to the paper before he saw it; and, after his name had thus been subscribed to the paper, he acknowledged it to be his will, in the presence of the two witnesses, who subscribed it as such,—which was a compliance with the requisitions of the statute,—and the placing of the mark to it, whether by *Sechrest* or *Carter*, was wholly unnecessary."

This court, in the case of *Grubbs v. Marshall*, 11 Ky. L. Rep. 870, 13 S. W. 447, upon the question under consideration, said: "However, it does not seem to us material whether he did actually make his mark in presence of the first witness or not, for it is shown his name was then subscribed by another in his presence and by his direction, which the statute makes equivalent to an actual subscription by the testator himself. And, although the second witness could not, nor did, testify he saw the name subscribed by such other person, he stated the testator made or retraced his mark. And as both of them testified the testator acknowledged the will, respectively, in their presence, we think the law was substantially complied with as to the manner of its execution, for it is not required nor do we see why it should be treated indispensable for subscribing witnesses to be present at the same time and place when the will is acknowledged, if it be, in fact, done in the presence of each of them. *Maupin v. Woods*, 1 Duv. 223."

And the case of *Savage v. Bulger*, 25 Ky. L. Rep. 763, 76 S. W. 361, quoted with approval from the *Sechrest Case* as follows: "It is not even material whether the names of the attesting witnesses, or that of the testator, be first subscribed, if the witnesses were present when the testator either wrote his name or acknowledged it as his signature."

In the very recent case of *McKee v. McKee*, 155 Ky. 738, 160 S. W. 261, this court said: "Clearly it was the purpose of the statute to so provide for the execution and attestation as to eliminate all possible danger of fraud or deception; in other words, to so require the execution and attestation as that the testator might certainly know that the paper which he signed was the selfsame paper which was attested, and to enable the attesting witnesses to know that

the paper they attested was the same paper signed by the testator."

And to the same effect is this court's opinion in the case of *Garnett v. Foston*, 122 Ky. 195, 121 Am. St. Rep. 456, 91 S. W. 688, wherein this language is used: "Its [the statute] requisitions being similar in import and substance, if not so in phraseology, there is not much difficulty in determining that the acknowledgment of a will by the testator in the presence of the witnesses, though written and his name subscribed by another at another time, was a sufficient publication."

This language is taken from the case of *Upchurch v. Upchurch*, 16 B. Mon. 102.

It must not be forgotten that the requirement of the statute that the will, when not holographic, shall be attested by the required number of witnesses, and in the manner specified, is no part of the legal execution of the will by the testator. It is only for probative purposes; the statute confining the means of proving the will after testator's death to this method only, as our statute on conveyances requires a deed to be proven either by an acknowledgment before an officer authorized to take it, or before two subscribing witnesses. Ky. Stat. § 501. These formalities may appear upon the deed, still it will convey no title from the grantor, nor will it be admitted to record unless it bears the signature of the grantor. This is the holding of this court in the case of *Helton v. Asher*, 103 Ky. 730, 82 Am. St. Rep. 601, 46 S. W. 22, wherein it is said: "The instrument in question was invalid. The certificate of the clerk could not impart any validity to it. It was essential to its validity that it should have been signed by Helton. Had it been signed by him and acknowledged before the clerk, then it would have been a recordable instrument."

This section of the statute as to the ac-

knowledge of deeds is no more specific as to what shall be embraced in the acknowledgment by the maker than is the statute with reference to the execution of wills. The rule as to what constitutes the act of acknowledgment by the makers, in each, is analogous. If, then, the signature of the maker must be attached to the deed and it shall constitute a part of the deed to be acknowledged, we fail to see why the signature of the testator should not also constitute a part of the paper to be acknowledged as his will.

We conclude, then, that while the direct question involved here was not presented in any of the cases to which we have referred from this court, yet the language employed in the opinions at least inferentially holds that the paper which the witness must attest, and which the testator must acknowledge, shall have been executed by the testator as prescribed by the statute in existence at the time. We are aware of the rule in this state to the effect that a substantial compliance with the statute is all that is required (*Flood v. Pragoff*, 79 Ky. 607, and cases herein cited), but this rule cannot be extended so as to dispense with an essential requirement of the statute made for the purpose of preventing fraud either upon the testator or those upon whom the law casts his property after his death. The paper in contest herein not having been executed before two witnesses in accordance with the statute as herein interpreted, it should not be admitted to probate as the will of Louis A. Miller.

It results, therefore, that the judgment of the Circuit Court manifesting a different view should be, and it is, reversed, with directions to refuse the probate of the paper as the last will and testament of Louis A. Miller, and for proceedings consistent with this opinion.

Annotation—Signature of witness to will before testator signs it.

The earlier cases on this question are discussed in the note to *Brooks v. Woodson*, 14 L.R.A. 160, and that to *Re Horn*, 26 L.R.A. (N.S.) 1126.

The rule followed in *LIMBACH v. BOLIN*, that a signing by the witnesses before the signing by the testator is not good, has been followed in *Barnes v. Chase* (1911) 208 Mass. 490, 94 N. E. 694; *Bioren v. Nesler* (1910) 77 N. J. Eq. 560, 78 Atl. 201 (obiter); *Re Mannion*, (1915) — N. J. —, 95 Atl. 988 (obiter).

In *Re Kunkler* (1914) 147 N. Y. Supp. 1094, it is stated that a testator must L.R.A.1916D.

sign his name to the will before the witnesses are requested to sign, as otherwise they have no signature or will to attest. The New York cases discussed in the earlier notes are cited to the proposition that the signing by the witnesses before the testator is not a compliance with the statute or a due execution of the will.

The will must be complete by signature at the time of attestation. *Chisholm v. Ben*, (1847) 7 B. Mon. (Ky.) 408.

It is the theory of *Simmons v. Leonard* (1891) 91 Tenn. 183, 30 Am. Rep.

875, 18 S. W. 280, that it is the signature of the testator that must be attested. A signing by the witnesses prior to the signing by the testator is therefore insufficient.

It has been held that if the testator and witnesses sign their names as part of the same transaction, it is immaterial whether the testator signs his name before or after the witnesses sign. *Re Silva*, (1915) 169 Cal. 116, 145 Pac. 1015.

A subsequent acknowledgment or adoption by an attesting witness of his

signature cannot be held sufficient or equivalent to attestation at that time where his signature was before that of the testator. Note in 14 L.R.A. 160.

This is especially true if the witnesses did not sign in testator's presence. Note in 14 L.R.A. 160.

As to whether it is necessary that witnesses see testator sign, or that they see his signature, see note to *Dougherty v. Crandall*, 38 L.R.A.(N.S.) 161, and supplemental note to *Nunn v. Ehlert*, L.R.A.1915B, 87. W. A. E.

LOUISIANA SUPREME COURT.

PAUL BORELL

v.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY et al.

(133 La. 630, 63 So. 247.)

Master and servant — electricity — trouble man — assumption of risk.

1. Where, neither by reason of the duty nor the place to which a person is assigned, is there any danger to him, save such as may arise from a particular act of his own, against which the knowledge that he possesses and the instructions which he has received should be sufficient to warn him, his commission of the act must be regarded as the sole, approximate cause of the injury which results therefrom. Thus where, by reason of a storm, the high voltage wires of an electric light company are brought into contact with the wires of a telephone company, and a well-informed trouble man, employed by the telephone company, is sent, with instructions, to locate the trouble and to report thereon, but not to attempt to clear the wires, his knowledge and instructions should be sufficient to warn him against touching the wires; and his taking hold of a telephone wire to find out whether it was in contact with an electric light wire is held to have been the sole, proximate cause of the injury that he sustained by reason of the fact that the telephone wire was in contact, direct or indirect, with the electric light wire and was carrying its voltage; and he has no action in damages against the corporation operating the

electric light plant, any more than against the telephone company.

For other cases, see Proximate Cause, V.; also II. c, in Dig. 1-52 N. S.

Same — wires blown down — negligence.

2. In order to hold a corporation operating an electric light plant liable in damages for injuries inflicted by its high voltage wires blown down at night in a storm and brought in contact with telephone wires, it should be shown either that the poles were rotten, or the installation otherwise defective, or that the company was guilty of laches in the matter of finding out that the wires were down or in the matter of shutting off the electricity after obtaining that information.

For other cases, see Electricity, III. a, in Dig. 1-52 N. S.

Negligence — contribution — effect.

3. Whether a person's own negligence is the sole proximate cause of an injury that he receives or is a cause contributing directly thereto, the result is the same. He has no action for the recovery of damages in either case.

For other cases, see Negligence, II. a, in Dig. 1-52 N. S.

(Provosty, J., dissents.)

(March 31, 1913.)

CROSS APPEALS from the judgment of the Judicial District Court for the Parish of Acadia in an action brought to recover damages for personal injuries; defendant telephone company appealing from a judgment in favor of plaintiff against it; and plaintiff appealing from a judgment rejecting his claim against the defendant

Headnotes by MONROE, J.

Note. — As to the duty of the master in respect to defective appliances which a servant is employed to repair, see note to *Reed v. Moore*, 25 L.R.A.(N.S.) 331; and as to the applicability of the rule as to safe place, where servants are engaged in the work of removing dangerous conditions, see note to *Neagle v. Syracuse, B. & N. Y. R. Co.* 25 L.R.A.(N.S.) 321.

As to injury to lineman through defect in L.R.A.1916D.

a pole or its appurtenances, see notes to *Lynch v. Saginaw Valley Traction Co.* 21 L.R.A.(N.S.) 774, and *Consolidated Gas, E. L. & P. Co. v. Chambers*, 26 L.R.A.(N.S.) 509.

Upon the general question of a duty to prevent contact of wires carrying electric current, see note to *Paducah Light & P. Co. v. Parkman*, 52 L.R.A.(N.S.) 587.

city. Reversed on defendant's appeal. Affirmed on plaintiff's appeal.

The facts are stated in the opinions.

Mr. J. C. Henriques for appellant Cumberland Telephone & Telegraph Company.

Messrs. Kitchell & Bailey and Story & Pugh, for appellant Borell:

An employer must furnish his servant the means and appliances which the service requires for its efficient and safe performance, and if he fail in that respect, and an injury results, he is liable to the servant.

Clairain v. Western U. Tele. Co. 40 La. Ann. 178, 3 So. 625; Moses v. Giant Lumber Co. 114 La. 938, 38 So. 684; Foreman v. Eagle Rice Mill Co. 117 La. 227, 41 So. 555; Wilkinson, Personal Injuries, p. 32.

That a servant fully appreciates a danger incident to his employment does not relieve the master from every reasonable care and precaution to guard against every possible danger to him.

Lynch v. American Linseed Co. 194 N. Y. 574, 88 N. E. 1124.

In all occupations attended with great and unusual danger, there must be used all appliances readily attainable known to science, for the prevention of accidents, and the neglect to provide such readily attainable appliances is proof of culpable negligence.

Mather v. Rillston, 156 U. S. 391, 39 L. ed. 464, 15 Sup. Ct. Rep. 464, 18 Mor. Min. Rep. 165.

A warning which only consists of the instruction by the master to his servant, "Be careful," constitutes no warning at all in contemplation of law, as such a warning enables no one to foresee danger; nor does such warning enlighten one how to avoid danger.

Powers v. Calcasieu Sugar Co. 48 La. Ann. 483, 19 So. 455.

The situation should be explained, the danger pointed out and unequivocally warned against.

Daly v. Kiel, 106 La. 174, 30 So. 254, 10 Am. Neg. Rep. 281.

It is actionable negligence not to warn an inexperienced servant of the dangers of the employment, and instruct him how to avoid them.

Parker v. Crowell & S. Lumber Co. 115 La. 464, 39 So. 445.

The employer is presumed to know the danger to which the employee will be subjected in the discharge of the duty to which he is assigned, and, if the latter be inexperienced, is bound to warn him of such danger.

Carter v. Fred W. Dubach Lumber Co. 113 La. 240, 36 So. 952; Burns v. Ruddock-Orleans Cypress Co. 114 La. 247, 38 So. 157.

L.R.A.1916D.

Where the employee is young and inexperienced, or the risk is latent or unusual and there is more than ordinary danger of getting hurt, the employee should be especially warned.

Northern P. R. Co. v. Blake, 11 C. C. A. 93, 27 U. S. App. 190, 63 Fed. 45; Berry v. Louisiana Saw Mill Co. 129 La. 688, 56 So. 639.

A servant is relieved of the imputation of contributory negligence from obeying an order of his master which exposes him to danger, unless the risk is so great, or the danger so obvious, that no prudent person would undertake it, even though ordered to do so by his master.

Lee v. Powell Bros. & S. Co. 126 La. 51, 52 So. 214.

Plea of contributory negligence will not avail if, by ordinary care on the part of defendant, the accident could have been avoided.

Inland & S. Coasting Co. v. Tolson, 139 U. S. 551-560; 35 L. ed. 270-273, 11 Sup. Ct. Rep. 653; Grand Trunk R. Co. v. Ives, 144 U. S. 408-434, 36 L. ed. 485-494, 12 Sup. Ct. Rep. 679, 12 Am. Neg. Cas. 659; McGuire v. Vicksburg, S. & P. R. Co. 46 La. Ann. 1543, 16 So. 457; Stucke v. Orleans R. Co. 50 La. Ann. 172, 23 So. 342; Lampkin v. McCormick, 105 La. 418, 83 Am. St. Rep. 245, 29 So. 952.

It would be both unjust and impolitic to allow the master to avoid the penalty for his misconduct in neglecting to provide properly for the securing of his servants from injury.

Hunn v. Michigan C. R. Co. 78 Mich. 513, 7 L.R.A. 506, 44 N. W. 502; Troxler v. Southern R. Co. 124 N. C. 189, 44 L.R.A. 313, 70 Am. St. Rep. 580, 32 S. E. 550; Lutz v. Atlantic & P. R. Co. 16 L.R.A. 819, and note, 6 N. M. 496, 30 Pac. 912; Faren v. Sellers, 39 La. Ann. 1011, 4 Am. St. Rep. 256, 3 So. 363.

The servant is only bound to see patent, not latent, defects.

Faren v. Sellers, supra; Myhan v. Louisiana Electric Light & P. Co. 41 La. Ann. 964, 7 L.R.A. 172, 17 Am. St. Rep. 436, 6 So. 799; McGinn v. McCormick, 109 La. 396, 33 So. 382.

The servant has a right to assume superior knowledge in his employer, to rely on his judgment, and to believe that he will not unnecessarily jeopardize his person and life by avoidable risks. And the employer is presumed to know the danger to which the employee will be subjected in the discharge of the duty to which he is assigned.

Myhan v. Louisiana Electric Light & P. Co.; Carter v. Fred W. Dubach Lumber Co.; and Burns v. Ruddock-Orleans Cypress Co.,

supra; *Stucke v. Orleans R. Co.* 50 La. Ann. 172, 30 So. 342.

Failure to have in operation a ground detector is gross and culpable negligence on the part of the city, and it will be held responsible for all damages resulting from injuries received by the plaintiff on account of the accident.

Kremer v. New York Edison Co. 186 N. Y. 557, 79 N. E. 1109.

Where injury results from the combined fault or negligence of two persons or corporations, both will be held liable in solido for the full amount of the damages sustained by the injured party.

Simmons v. Shreveport Gas, E. L. & P. Co. 116 La. 1034, 41 So. 248.

Mr. Percy T. Ogden, with Mr. Harry W. Gueno, for appellee City:

Even though the city of Crowley may be charged with a legal knowledge of the situation, the gross contributory negligence upon the part of the plaintiff Borell was certainly a concurring cause or the proximate and efficient cause of his own injury, and the city is not liable.

Ryan v. Louisville N. O. & T. R. Co. 44 La. Ann. 806, 11 So. 30; *Dixon v. Louisiana Electric Light & P. Co.* 47 La. Ann. 1147, 17 So. 696; 2 *Thomp. Neg. pp.* 946 et seq; *McCarthy v. Whitney Iron Works Co.* 48 La. Ann. 978, 20 So. 171; 1 *Thomp. Neg. p.* 216; *Pennebaker v. San Joaquin Light & P. Co.* 158 Cal. 579, 31 L.R.A.(N.S.) 1099, 139 Am. St. Rep. 202, 112 Pac. 459, 1 N. C. C. A. 349; *Consolidated Gas, E. L. & P. Co. v. Chambers*, 112 Md. 324, 26 L.R.A.(N.S.) 509, 75 Atl. 241; *Fickeisen v. Wheeling Electrical Co.* 67 W. Va. 335, 27 L.R.A.(N.S.) 893, 67 S. E. 788; *Bergin v. Southern New England Teleph. Co.* 70 Conn. 54, 39 L.R.A. 192, 38 Atl. 888.

Provosty, J., delivered the opinion of the court:

The Pizzini Hotel and the Mitchell store in the town of Crowley stand within about 6 feet of each other. The roof of the front porch of the Mitchell store and the floor of the second-story gallery of the Pizzini Hotel are on the same level, and both extend over the sidewalk. The roof is flat and extends laterally across the narrow space between the two buildings, so that one may step upon it from the adjoining gallery. And anyone doing so finds himself opposite the space between the two buildings and near the telephone and electric light wires of the Mitchell building, which are attached to the side of the Pizzini building at and near the front corner of it.

During a wind and rain storm in the night two or more of the cable or lead L.R.A.1916D.

wires of the electric light plant had broken in front of the Pizzini Hotel. One of the ends had fallen to the street pavement and lay there "spitting fire." Two others had dropped upon the roof of the front porch of the Mitchell store, and, this roof being of metal, had communicated to it the heavy electric current they carried.

Early in the morning complaints began coming to the office of the defendant company of telephones out of order. The trouble consisted of a buzzing sound upon the lines. The persons in the office knew that this was caused by the telephone and electric light wires being in close proximity to each other, though not in actual contact. Some twenty different complaints of this kind had already been registered at the defendant company's office by a quarter past 7 in the morning, when plaintiff, who was a trouble and line man of the defendant company, reached there for his day's work. The Pizzini Hotel and the Mitchell store were among the complainants, and plaintiff was sent at once to ascertain at what point the lines serving these two buildings were in proximity. When he came to the end of cable on the street pavement "spitting fire," he prudently picked it up and put it in the gutter. He then went into the Pizzini Hotel and up to the second-story front gallery, and stepped upon the iron roof of the Mitchell store opposite the space between the buildings. By simply looking at the wires he could then have ascertained whether they were in too close proximity or not. There was no necessity of his touching them. In fact, on being sent on this mission, he had been warned not to touch any wires. Thoughtlessly, for some reason he cannot explain, if for any, he took hold of the telephone wire. The telephone wire was grounded, so that by thus taking hold of it he completed the circuit between it and the electrically charged iron roof upon which he stood, and the result was that he received a shock that at once made him unconscious and caused him to topple over upon the iron roof. Fortunately just at that moment the power was shut off at the plant; information having reached there of the cables having been broken. He would else inevitably have been killed. As it was, his right hand and the back of his head were badly burnt.

For these injuries and for his sufferings he sues the defendant company and the town of Crowley in damages. The town of Crowley owns and operates the electric light plant.

The negligence alleged against the telephone company is that it did not furnish him with rubber boots and gloves with which to do his work, and that it sent him

to this dangerous place without having sufficiently warned him of the danger.

The evidence shows, that linemen and trouble men of telephone companies do not need and do not use rubber boots and gloves in doing their work; and it shows that plaintiff was not sent to do any dangerous work nor into any dangerous place, but simply to ascertain by ocular inspection at what point the wires had come in too close proximity to each other; and it shows, furthermore, that plaintiff was an experienced lineman whom the defendant company could not have had any reason to suspect of being as ignorant of the dangers from electricity as he now pretends that he was.

We fail to discover any negligence whatever on the part of the defendant company.

But the case stands differently with the town of Crowley.

"A municipal corporation has a dual character,—the one public and the other private. . . . In the former case its functions are political and governmental. . . . In its second character . . . that is, in the exercise of its purely municipal functions or the doing of those things which relate to special or private corporate purposes, the corporation stands upon the same footing with a private corporation, and will be held to the same responsibility with a private corporation for injuries resulting from its negligence." 28 Cyc. 1267.

See *Pontchartrain R. Co. v. New Orleans*, 27 La. Ann. 162; *Stewart v. New Orleans*, 9 La. Ann. 461, 61 Am. Dec. 218; *Bennett v. New Orleans*, 14 La. Ann. 120; *New Orleans v. Kerr*, 50 La. Ann. 413, 69 Am. St. Rep. 442, 23 So. 384; 28 Cyc. 1268; 20 Am. & Eng. Enc. Law, 2d ed. 1196.

"It is held, as a rule, that a city in supplying water or light to its inhabitants acts as a private corporation and is subject to the same duties and liabilities." 20 Am. & Eng. Enc. Law, 2d ed. 1197.

Now plaintiff alleges that the defendant town was negligent in that it well knew the dangerous condition in which its electric wires were and yet took no steps to rectify the situation until after he had been injured.

There can be no question that to have left these broken ends of highly charged wire in the position in which plaintiff found them, would have been the grossest kind of negligence, making the defendant town responsible for all consequences, if the agents of the defendant town knew of this dangerous condition of things. The sole question must therefore be as to whether the agents of the town had such knowledge. The evidence shows that they had no knowledge of it; but if this condi-

tion of things had existed so long that it was their legal duty to have had knowledge of it, or if by the use of means which it was the legal duty of the defendant town to have provided, but which were not provided, they would have had knowledge of it, then the legal situation is as if they had such actual knowledge; or, in other words, the failure to have had such knowledge would then in itself constitute actionable negligence. *Mitchell v. Charleston Light & P. Co.* 45 S. C. 158, 31 L.R.A. 577, 22 S. E. 767; *District of Columbia v. Woodbury*, 136 U. S. 463, 34 L. ed. 477, 10 Sup. Ct. Rep. 990.

The evidence shows that there had been a storm during the night which might well have, as it actually did, caused the wires to fall, and that at so late an hour as that at which plaintiff was injured, when the telephone company was already sending its repair men on their ground, no steps had yet been taken by the agents of the defendant town to ascertain whether the storm had not disturbed the electric light wires and brought about a dangerous condition of things; the evidence also shows that, by means of an instrument known as a "ground detector," the person in charge of an electric light plant is enabled to know when a break has occurred in the wire of any circuit, and that the plant of the defendant was provided with such an instrument, but that it was out of order.

Pretermittting the point of whether enough time had not elapsed since the breaking of these wires for the defendant town to have been charged with legal knowledge of their condition, even apart from the facility afforded by such an instrument as the "ground detector" above mentioned (that is to say, even on the assumption of the agents of the town having had no other means than ordinary inspection for discovering such a break in the wires), we think that the clear legal duty rested upon the defendant town to have had this instrument at its plant, and to have kept it in good order, and to have shut off the current from any circuit the wires of which were shown by this instrument to be broken.

"Persons using dangerous agencies are required to use the utmost care to prevent injuries, and to adopt every known safeguard." 29 Cyc. 460; *Potts v. Shreveport Belt R. Co.* 110 La. 1, 98 Am. St. Rep. 452, 34 So. 103, and cases there cited.

Electrical companies are required to "have due regard to the existing state of science and of the art in question." 15 Cyc. 472. Had this instrument been in good order, the fact of these wires being broken would have been known, and the persons in

charge of the plant would have cut off the circuit to which these wires belonged long before the accident to plaintiff.

Three of the fingers of plaintiff's right hand (the middle and the little finger and that between) were so badly burnt that they have become rigid and bent in, so as to be of no use; in fact, worse than if amputated. After about a year the skin had grown back over the burnt place on plaintiff's scalp; and the disfigurement resulting therefrom is now but slight, if any. Plaintiff's sufferings in the healing process were great and long protracted. The judge dismissed the suit as against the town, and gave judgment against the telephone company for \$5,000. We have taken a different view in regard to which one of the defendants is liable, but are not disposed to disagree with the view thus taken by the judge as to the proper amount of damages to be allowed in the case. In the case of *Smullins v. Shreveport Gas, E. L. & P. Co.* 116 La. 1034, 41 So. 248, where the injuries were very similar, a verdict of \$8,000 was approved.

The judgment appealed from is set aside, and it is now ordered, adjudged, and decreed that the suit of plaintiff be dismissed as against the Cumberland Telephone & Telegraph Company, and that as against the town of Crowley the plaintiff Paul Borell have judgment in the sum of \$5,000, with legal interest from this date, and the costs of suit.

A rehearing having been granted, Monroe, J., on October 20, 1913, handed down the following supplementary opinion:

This court predicated its judgment rejecting plaintiff's demand against the telephone company upon certain findings of fact, and plaintiff has not complained of that judgment. Those findings were in substance as follows, to wit: That, by reason of a storm during the night, certain heavily charged wires of the electric company had been thrown down, thereby interfering with the operation of the wires of the telephone company; that plaintiff, an experienced lineman, whom the telephone company "could not have had any reason to suspect of being as ignorant of the dangers from electricity as he now pretends," was sent at 7:30 o'clock on the morning of February 11th simply to ascertain by ocular inspection at what point the wires had come in too close proximity to each other, and was warned not to touch the wires; that for the purposes of his mission, and in view of his experience and of the special warning so given, neither the work nor the place to which he was thus assigned was dangerous, but that "thoughtlessly, and for

some reason he cannot explain, if for any, he took hold of the telephone wire," though two of the wires of the electric company were lying across the metal roof on which he was standing, and another, the broken end of which was "spitting fire," had been "prudently" picked up by him from the sidewalk and thrown into the gutter. Our reconsideration of the case strengthens the conviction that, though plaintiff, perhaps, lacked that realizing sense of the action and effect of electricity which one can imagine would be derived from witnessing a tragedy or being the victim of a near tragedy caused by it, he nevertheless knew, from precept and example, that, in the situation in which he was placed, all wires were to be dealt with as "hot" wires and left untouched, besides which he had been instructed that he was merely to locate the trouble, which, he admits, is done, and could have been done on that occasion, by ocular inspection, and was not to attempt to clear the wires. Under such circumstances, there being no danger to him, either in the duty or the place to which he was assigned, save such as might arise from a particular act of his own, against which the knowledge that he possessed and the instruction which he had received should have been sufficient to warn him, his commission of the act was as surely the sole, proximate cause of the injury that he received as the picking up of a newly made horseshoe, which the visitor in a blacksmith's shop knows is likely to be hot, is the cause of a burned hand. The poles, wires, and attachments, etc., of the defendant were in good order, and the temporary derangement of the wires had been caused by a wind and rain storm of some violence. The witnesses speak of it as having occurred during the preceding night, and those who testify at all as to the time express the opinion that the storm was probably most violent towards morning. W. C. Rose, city electrician, in charge of the lighting plant, says: "The wind was blowing very high and there was quite a bit of electricity, and in the early hours of the morning there was quite a heavy rainfall; . . . it was after midnight that the hardest part came up."

John McIlhinney, superintendent of the plant, says: "There was a storm some time early in the morning. . . . To the best of my knowledge, it was just before daylight."

Neither of the witnesses speaks more definitely or from positive knowledge as to the time (though it is conceded that the derangement of the wires was attributable to the storm), and we are not just now advised of the time at which day breaks in the parish of Acadia upon the 11th of Feb-

ruary. We imagine, however, that it is not very long before 7 o'clock, and it was about that time that Mr. Rose, being informed that some of the electric light wires had been blown down near the Pizzini Hotel and the Mitchell store, directed a messenger to hurry to the plant and tell the engineer to "shut down," which was done immediately and just in time to save the life of the defendant, who was then lying senseless on the roof of Mitchell's gallery with the telephone wire grasped in his hands, 1,100 volts of electricity passing through his body, and the metal of the roof burning the scalp from the back of his head. Although, therefore, we do not know whether the interval between the blowing down of the wires and the accident was one of minutes or hours, we do know that, after learning that the wires were down, the officers of the plant lost no time in cutting off the electricity from them, and, we may add, lost no time in replacing the wires in position. Upon the former hearing of the case, the view was adopted that the city of Crowley should be held liable because it has and should have in its plant an instrument called a "ground indicator," by means of which the person in charge should have been enabled to know of the grounding of the wires, but that the instrument was not then in good order, and that the city was to blame for its condition. The conclusion thus reached leaves out the factor of the plaintiff's negligence; and, moreover, it appears that the "ground detector" does not, like a clock or a steam gauge, impart its information automatically, but does so only when specially called on. In other words, the instrument is one whereby certain tests may be applied, at the will of the operator, and certain results obtained; and, as it is

hardly to be expected that it will be kept in operation continuously, the question to be here considered is: Assuming that it had been in good order, and that tests had been made at reasonable intervals, or that a test had been made without unreasonable delay after the storm whereby defendant's electric light wires were blown down, would the derangement of the wires have been ascertained any sooner than it was ascertained? To answer that question it would be necessary for us to know at what time, with reference to that at which the officers of the plant were informed of it, the wires were blown down, and the transcript does not furnish that information; hence the alleged negligence of the city of Crowley, so far as it might affect this case, is not established. Finally, if negligence on the part of the city were established, and we should hold that the negligence of the plaintiff were not the sole, proximate cause of the accident, there can be no doubt that he was negligent, and no doubt that his negligence, directly and immediately, contributed to the accident, and he could not recover for that reason. The judgment heretofore handed down having become final in so far as plaintiff's demand against the telephone company is concerned, it is ordered, adjudged, and decreed that said judgment, in so far as it condemns the city of Crowley, be set aside, and that the judgment appealed from be now in that respect annulled, avoided, and reversed, the demand of the plaintiff against said city rejected, and this suit dismissed, at plaintiff's cost in both courts.

Provosty, J., dissents, adhering to the original opinion.

NEW YORK COURT OF APPEALS.

B. F. STURTEVANT COMPANY, Resp't.,
v.
FIREPROOF FILM COMPANY, Appt.

(216 N. Y. 199, 110 N. E. 440.)

Contract — effect of statement on margin of paper.

The mere fact that a proposal for contract on behalf of a corporation by one having authority to bind the corporation is written upon stationery containing a statement on the margin in small type that all proposals are subject to approval of the

executive office, which is not referred to in or made part of the proposal, does not make approval by the executive office and notification of the other contracting party necessary to bind him to his written acceptance of the proposal.

For other cases, see Contracts, II. a, in Dig. 1-52 N. S.

(Willard Bartlett, Ch. J., and Chase, J., dissent.)

(November 16, 1915.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County in plaintiff's favor, and from an order denying a motion for a new trial, in an action brought to recover damages for

Note. — For matter in letterhead, bill-head, or on margin of paper on which contract is written as part of contract or as notice affecting the rights of the parties, see annotation following this case, post, 1072. L.R.A 1916D.

breach of an alleged executory contract. Affirmed.

The facts are stated in the opinion.

Messrs. Adolph J. Rodenbeck and Charles F. Lauer, for appellant:

The alleged transaction did not create a contract between the parties.

Moulton v. Kershaw, 59 Wis. 316, 48 Am. Rep. 516, 18 N. W. 172; Booth v. Milliken, 127 App. Div. 522, 111 N. Y. Supp. 791, affirmed in 194 N. Y. 553, 87 N. E. 1115; Quick v. Wheeler, 78 N. Y. 300; Chicago & G. E. R. Co. v. Dane, 43 N. Y. 240; Commercial Wood & Cement Co. v. Northampton Portland Cement Co. 115 App. Div. 388, 100 N. Y. Supp. 960, affirmed in 190 N. Y. 1, 123 Am. St. Rep. 529, 82 N. E. 730; Jackson v. Alpha Portland Cement Co. 122 App. Div. 345, 106 N. Y. Supp. 1062; Automatic Vending Co. v. Heins, 39 Misc. 788, 81 N. Y. Supp. 301; Rafolovitz v. American Tobacco Co. 73 Hun, 87, 25 N. Y. Supp. 1036; White v. Allen Kingston Motor Car Co. 69 Misc. 627, 126 N. Y. Supp. 150; Velie Motor Car Co. v. Kopmeier Motor Car Co. 114 C. C. A. 284, 194 Fed. 324; McFarlane v. York, 90 Ark. 89, 117 S. W. 775; 9 Cyc. 248; 7 Am. & Eng. Enc. Law, 139; Smyth v. Greacen, 100 App. Div. 276, 91 N. Y. Supp. 450; Blum v. Daly, 22 Misc. 342, 49 N. Y. Supp. 136; Page, Contr. § 17; Wilenshik v. Messler, 48 Misc. 362, 95 N. Y. Supp. 500; Durkee v. Schultz, 122 Iowa, 410, 98 N. W. 149; Howell v. Maine, 127 Ga. 574, 56 S. E. 771; Reid v. Northwestern Implement & Wagon Co. 79 Minn. 369, 82 N. W. 672; Robinson & Co. v. Ralph, 74 Neb. 55, 103 N. W. 1044; Minneapolis Threshing Mach. Co. v. Evans, 139 Fed. 860; Harvey v. Duffey, 99 Cal. 401, 33 Pac. 897; Bauman v. McManus, 75 Kan. 106, 10 L.R.A.(N.S.) 1138, 89 Pac. 15; Cable Co. v. Hancock, 2 Ga. App. 73, 58 S. E. 319; Cary v. Appo, 84 N. Y. Supp. 569; Challenge Wind & Feed Mill Co. v. Kerr, 93 Mich. 328, 53 N. W. 555; Peck v. Freese, 101 Mich. 321, 59 N. W. 600; Toledo Computing Scale Co. v. Stephens, 96 Ark. 606, 132 S. W. 926; Cedar Rapids Nat. Bank v. McCord, 98 Ark. 81, 135 S. W. 365; L. A. Becker Co. v. Alvey, 27 Ky. L. Rep. 832, 86 S. W. 974; Atlanta Buggy Co. v. Hess Spring & Axle Co. 124 Ga. 338, 4 L.R.A.(N.S.) 431, 52 S. E. 613; Martin v. Wilms, 61 Ill. App. 108.

Kuhn had no authority to act for defendant in the acceptance of the proposal.

Wilson v. Kings County Elev. R. Co. 114 N. Y. 491, 21 N. E. 1015; Coney Islands Automobile Race Co. v. Boyton, 87 App. Div. 251, 84 N. Y. Supp. 347; Commercial Wood & Cement Co. v. Northampton Portland Cement Co. 190 N. Y. 1, 123 Am. St. Rep. 529, 82 N. E. 730; First Nat. Bank v. L.R.A.1916D.

Council Bluffs City Waterworks Co. 56 Hun, 412, 9 N. Y. Supp. 859; Schuykil. & D. Improv. Co. v. Munson, 14 Wall. 442, 20 L. ed. 867; Linkauf v. Lombard, 137 N. Y. 417, 20 L.R.A. 48, 33 Am. St. Rep. 743, 33 N. E. 472; Fealey v. Bull, 163 N. Y. 397, 57 N. E. 631; Alexander v. Cauldwell, 83 N. Y. 480, 5 Mor. Min. Rep. 650; Risley v. Indianapolis, B. & W. R. Co. 1 Hun, 202; Jemison v. Citizens' Sav. Bank, 122 N. Y. 135, 9 L.R.A. 708, 19 Am. St. Rep. 482, 25 N. E. 264; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181; Mathias v. White Sulphur Springs Asso. 19 Mont. 359, 48 Pac. 624.

Mr. Harry Otis Poole, for respondent:

There was no error of law as to the power of Kuhn to bind the defendant.

21 Am. & Eng. Enc. Law, 852, 854; Cone v. Empire Plaid Mills, 12 App. Div. 314, 42 N. Y. Supp. 160; Phillips v. Campbell, 43 N. Y. 271; Olcott v. Tioga R. Co. 27 N. Y. 559, 84 Am. Dec. 298; Pratt v. Hudson River R. Co. 21 N. Y. 305; Rathbun v. Snow, 123 N. Y. 343, 10 L.R.A. 355, 25 N. E. 379; De Groff v. American Linen Thread Co. 21 N. Y. 124; Cook, Corp. 6th ed. 2353, 2356; Martin v. Niagara Falls Paper Mfg. Co. 122 N. Y. 165, 25 N. E. 303; Hastings v. Brooklyn L. Ins. Co. 138 N. Y. 479, 34 N. E. 289; Oakes v. Cattaraugus Water Co. 143 N. Y. 436, 26 L.R.A. 544, 38 N. E. 461.

The rule of the damages laid down by the trial court was proper.

Masterton v. Brooklyn, 7 Hill, 61, 42 Am. Dec. 38; United States v. Behan, 110 U. S. 338, 344, 28 L. ed. 168, 170, 4 Sup. Ct. Rep. 81; Long Island Contracting & Supply Co. v. New York, 204 N. Y. 73, 97 N. E. 483; Wakeman v. Wheeler & W. Mfg. Co. 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; Taylor v. Bradley, 39 N. Y. 129, 100 Am. Dec. 415; Thomas Gordon Malting Co. v. Bartels Brewing Co. 206 N. Y. 529, 100 N. E. 457, 461; Todd v. Gamble, 148 N. Y. 382, 52 L.R.A. 225, 42 N. E. 982; Dillon v. Anderson, 43 N. Y. 231.

The points made by defendant that the contract was only a quotation, and not binding because not approved by plaintiff's executive office, are not well taken.

French v. Carhart, 1 N. Y. 96; Nicoll v. Sands, 131 N. Y. 24, 29 N. E. 818; Woolsey v. Funke, 121 N. Y. 87, 24 N. E. 191; Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 273, 24 L. ed. 410, 411; Seymour v. Warren, 179 N. Y. 6, 71 N. E. 260; Tracy v. Albany Exch. Co. 7 N. Y. 474, 57 Am. Dec. 583.

Seabury, J., delivered the opinion of the court:

This action is brought to recover damages

for the breach of an alleged contract. The plaintiff and defendant are foreign corporations. The plaintiff is a designer and builder of heating and ventilating and drying apparatus. The defendant was engaged in building a factory for the manufacture and sale of motion picture films. On December 29, 1911, the plaintiff submitted to the defendant an elaborate "proposal and specifications," which had been prepared after consultation with a representative of the defendant for the performance by the plaintiff of the work therein specified. The "proposal and specifications" was in the form of a letter addressed to the defendant, and stated that: "Supplementing our quotation of December 6th, we beg to quote you upon the following apparatus," etc.

The letter was typewritten, and describes in detail the apparatus, and specifies the terms, price, and time of delivery. The specifications that are attached to the letter are printed, although the "dimensions and data" relating to the apparatus are supplemented by typewritten statements. The letter is signed, "B. F. Sturtevant Company, by J. L. Williamson." Upon the letter is indorsed the following:

"Accepted: The Fireproof Film Company. H. Kuhn, Vice President and Treasurer. Date, December 30, 1911."

The plaintiff actually commenced work under this alleged contract on January 1, 1912. On January 5, 1912, the defendant sent a letter to the plaintiff, which was received several days later, stating that "the contract for fans that was signed by me was to be submitted to the board of directors for their approval. This is what I omitted to tell you. So please hold off with same until I send it on to St. Louis to our president and board of directors. I have no doubt that they will accept the same, but, if not, I shall have to cancel the contract. "Yours very truly, Fireproof Film Company, H. Kuhn, Treasurer."

Several letters passed between the parties, and on February 10, 1912, the defendant wrote to the plaintiff:

"We notify you herewith that we will have to cancel the contract for fans for the Fireproof Film Company."

In its answer interposed in this action the defendant denied that it entered into any contract with the plaintiff, and alleged "that on December 30, 1911, plaintiff and defendant's vice president and treasurer executed a paper purporting to be a contract between the plaintiff and the defendant, which paper and alleged contract was executed by the vice president and treasurer of the defendant without the express or implied authority of defendant, its board of directors, or its building committee, and L.R.A.1916D.

said paper and alleged contract was subject to approval by defendant, and plaintiff was so notified January 5, 1912, and said paper, purporting to be an alleged contract between the plaintiff and defendant, was finally disapproved and canceled on February 10, 1912, by defendant, and never was in force and binding upon the defendant, and never constituted a contract between the plaintiff and defendant."

Upon the trial the defendant sought to defend upon the ground that Kuhn, its vice president and treasurer, was without authority to sign the contract. Satisfactory proof of Kuhn's authority to act for the defendant was presented, and the court submitted to the jury the question as to whether Kuhn was authorized to act for the defendant. It appears from the letters quoted above and the allegations of the defendant's answer that the defendant disputed its liability upon the ground that Kuhn was not its authorized agent. Upon this appeal it still adheres to this contention, but the principal ground urged for the reversal of the judgment is that there was no contract between the parties, because at the bottom of the first page of the plaintiff's office stationery, upon which the proposal was written, appear the words: "All agreements are contingent upon strikes, fire, accidents, or delays beyond our control. All prices are subject to change without notice, and all contracts and orders taken are subject to the approval of the executive office at Hyde Park, Massachusetts."

These sentences are printed in very small type, and the first typewritten numeral that indicates the page number is typewritten over this printed matter. The appellant claims that the proposal was given "subject to the approval of the executive office at Hyde Park, Massachusetts," and that, as there was no proof that this approval was given and communicated to it, there was no contract. It appears clearly that Williamson had authority to make the contract, and that his action in so doing was ratified by the executive office of the plaintiff at Hyde Park, Massachusetts. The plaintiff actually commenced to perform the work, and continued working under the contract until it received the notice of the defendant that it had canceled the contract. The point now earnestly insisted upon was not litigated upon the trial, and seems to be an afterthought that occurred to the defendant when it failed to defeat the plaintiff's claim on the ground that its vice president and treasurer, Kuhn, was not authorized to make the contract in its behalf. The claim that is now urged rests entirely upon the contention that the clause,

"all contracts or orders taken are subject to the approval of the executive office at Hyde Park, Massachusetts," is to be deemed a part of the proposal. If this provision was a part of the proposal, there could be no proof of a contract in the absence of evidence that the order was approved, and that the defendant had been notified of that fact. In view of the manner in which this provision is printed upon the stationery of the plaintiff, it cannot be held, as a matter of law, that it was incorporated in and a part of the proposal. The language of the proposal is clear and explicit, and this provision, which is printed in small type, cannot be allowed to change, alter, or modify it, unless it was a part of the proposal. It was not incorporated in the body of the proposal or referred to in it. No suggestion was made, either in the pleadings or the proof, that it was a part of the proposal. If an issue had been raised upon the trial whether it was a part of the proposal, that issue would have presented a question of fact to be determined by the jury. As no such question was raised upon the trial, and as it does not appear from an inspection of the proposal that this provision was a part of it, the defendant is not now in a position to secure the reversal of this judgment upon this ground. When an offer, proposal, or contract is expressed in clear and explicit terms, matter printed in small type at the top or bottom of the office stationery of the writer, where it is not easily seen, which is not in the body of the instrument or referred to therein, is not necessarily to be considered as a part of such offer, proposal,

or contract. In *Sturm v. Boker*, 150 U. S. 312, 327, 37 L. ed. 1093, 1099, 14 Sup. Ct. Rep. 99, 103, it was said that "the contract being clearly expressed in writing, the printed billhead of the invoice can, upon no well-settled rule, control, modify, or alter it."

In *Summers v. Hibbard*, 153 Ill. 102, 109, 46 Am. St. Rep. 872, 38 N. E. 899, the court said: "The printed words were not in the body of the letter or referred to therein. The fact that they were printed at the head of their letterheads would not have the effect of preventing appellants from entering into an unconditional contract of sale."

In *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* 58 Wash. 223, 229, 28 L.R.A. (N.S.) 1007, 108 Pac. 621, it was said that "the printed matter on the letterheads was not referred to in either the order or the acceptance, and is not a part of the contract. . . . The construction contended for by the respondent would make that which is an absolute, unqualified acceptance upon its face a conditional one by reference to a letterhead which was not referred to by either parties."

The other grounds upon which the appellant asks a reversal of the judgment are not such as to warrant discussion.

I advise that the judgment be affirmed, with costs.

Cuddeback, Cardozo, and Pound, JJ., concur. Collin, J., concurs in result.

Willard Bartlett, Ch. J., and Chase, J., dissent.

Annotation—Matter in letterhead, billhead, or on margin of paper on which contract is written as part of contract or as notice affecting the rights of the parties.

This note is, of course, not concerned with the comparative weight and effect of written or printed matter which appears as a formal part of the contract; but is concerned only with cases where the matter in question is not a formal part of the contract.

It is a well-settled rule of law that where part of a contract is written and part is printed, and the written and printed parts are apparently inconsistent or there is reasonable doubt as to the sense and meaning of the whole, the words in writing will control the construction of the contract. The reason why greater effect is given to the written than to the printed part of a contract if they are inconsistent is that the written words are the immediate

language and terms selected by the parties themselves for the expression of their meaning, while the printed form is intended for general use without reference to particular objects and aims. It would seem that there is more reason and occasion for applying this rule in a case where the words in print are separate and apart from the writing that appears upon the paper, and in a place where one would not be likely to look for limitations upon that which is written. Accordingly, a printed billhead or letterhead can have little or no influence in changing the clear and explicit language of a contract written on such form. 6 R. C. L. p. 847, § 237.

The following cases support *B. F. STURTEVANT CO. v. FIREPROOF FILM CO.*

ante, 1069, in holding that the marginal statement there involved is not a part of the contract:

Thus, as stated in *Sturm v. Boker* (1893) 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99: "The words, 'Mr. H. Sturm in joint account with Hermann Boker & Co.,' or 'bought of Hermann Boker & Co. in joint account' in the bill-head, cannot be allowed to control the express written terms contained in the contract as set forth in the letters. A printed billhead can have little or no influence in changing the clear and explicit language of the letters, and it in no way controls, modifies, or alters the terms of the contract. The purpose and object of the bill was to give a description and valuation of the articles to which the contract as embraced in the letters had reference, their description being important if the articles had to be returned, and their price or valuation necessary if they were sold and profits were made for division. The contract being clearly expressed in writing, the printed billhead of the invoice can, upon no well-settled rule, control, modify, or alter it."

So, the words, "quotations not binding until orders are accepted, and are then subject to all contingencies beyond our control, advances in mining or rates of transportation; invoice weights at point of shipment to govern settlements,"—printed upon a letter have been held not competent to vary the explicit terms contained in the letter itself. *Olson v. Wabash Coal Co.* (1906) 126 Ill. App. 253.

So, it was held in *Summers v. Hibbard* (1894) 153 Ill. 102, 46 Am. St. Rep. 872, 38 N. E. 899, affirming (1893) 50 Ill. App. 381, that the words, "all sales subject to strikes and accidents," printed on the caption of the paper on which was written the unqualified acceptance of a contract of purchase, did not have the effect of reading them into the agreement thereby consummated. The court said: "The mere fact that appellants wrote their acceptance on a blank form for letters at the top of which were printed the words, 'all sales subject to strikes and accidents,' no more made those words a part of the contract than they made the other words there printed, 'Summers Bros. & Co. Manufacturers of box-annealed common and refined sheet-iron,' a part of the contract. The offer was absolute. The written acceptance which they themselves wrote was just as absolute. The printed words were not in the body of

the letter or referred to therein. The fact that they were printed at the head of their letterheads would not have the effect of preventing appellants from entering into an unconditional contract of sale."

So, in *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* (1910) 58 Wash. 223, 28 L.R.A. (N.S.) 1007, 108 Pac. 621, it is held that printed matter in the heads of letters upon which a contract is written, which is not referred to in the writing, is not a part of the contract.

So, it is held in *Amherst Invest. Co. v. Meacham* (1912) 69 Wash. 284, 124 Pac. 682, that the marginal words "listed by Tilton," being a memorandum of the subject-matter of the contract for the convenience of one of the parties thereto, was inadmissible to aid in the construction of the contract, where the contract was complete in itself, did not refer to the memorandum or any other writing, and the two writings were obviously independent of each other.

Where it was urged that because certain of the terms of the original contract were notified to the subcontractor by printing them on the back of his contract, the latter was deemed to have assumed them, the court in *Lawton v. Waite* (*Lawton v. Chilton*) (1899) 103 Wis. 244, 45 L.R.A. 616, 79 N. W. 321, 6 Am. Neg. Rep. 403, stated that this position was not tenable, observing that the terms were not printed as a part of the subcontract, but merely as information of the terms of the original; and they were assumed by the subcontractor only to the extent specified over his signature, and that was only so far as they regulated his undertaking to carry the mails.

In *Patch v. Smith* (1905) 105 App. Div. 208, 94 N. Y. Supp. 692, it was held that a memorandum of sale of lumber written on the face of a printed blank, used by the seller when customers ordered lumber from him, but which was not appropriate for use when he ordered lumber from another, was complete in itself; and the matter, "this order is subject to acceptance at the main office," printed at the bottom of the blank over the seller's name constituted no part of the contract of sale evidenced by the memorandum.

In *Yorston v. Brown* (1901) 178 Mass. 103, 59 N. E. 654, it was held competent for the defendant to refer to the heading on the blank furnished by the plaintiff, used in giving an order for an engraving and for its publication in the "Portrait Gallery and Biographical His

tory volume of the above-named work," in order to show that the order was given to plaintiff as the publisher of "Gould's History of Free Masonry," the engraving having in fact been published in a volume which plaintiff claimed was the Portrait Gallery and Biographical History volume of that work, but the title of which made no reference to that work. It was also held that the heading, in connection with other evidence in the case, established the defendant's contention in this respect. The case was distinguished from *Schenck v. Saunders*, 13 Gray (Mass.) 37, and *Sturm v. Boker*, 150 U. S. 320, 37 L. ed. 1098, 14 Sup. Ct. Rep. 99, upon the ground that in those cases one of the parties sought to add to the terms of a contract, which was clearly set forth in writing by a statement in his own billhead under which he had made out an invoice of the goods covered by the contract.

It will be observed that the matter in *B. F. STURTEVANT CO. v. FIREPROOF FILM CO.* ante, 1069, deemed not to have been a part of the contract, is printed on the margin in very small type.

But in *Poel v. Brunswick-Balke-Collender Co.* (1915) 216 N. Y. 310, 110 N. E. 619, where certain conditional clauses printed on an order for goods were held to form a part of the contract, the matter being in clear type and plainly visible, the court said: "In the present case the printed clauses are to the left of the signature of the defendant. They are printed in clear type under a caption printed in type larger than the other type, which caption plainly reads: 'Conditions on which the above order is given.' The printed clauses are at least as plain and as prominently displayed upon the face of the order as the written matter contained therein. They are not in conflict with that which is written. Under these circumstances they must be deemed to be a part of the order, and cannot be eliminated therefrom by the court upon an inference as to the intention of the parties which is not reflected in the order or in any evidence that was received upon the trial. The clause requiring a prompt acknowledgment by the plaintiffs of the defendant's offer as a condition to its acceptance was not in conflict with any of the provisions expressed in that offer, either written or printed, and must, therefore, be given effect." The court citing *B. F. STURTEVANT CO. v. FIREPROOF FILM CO.*; *Sturm v. Boker* (U. S.) supra; *Summers v. Hibbard* (1894) 153 Ill. 102, 46 Am. St. L.R.A.1916D.

Rep. 872, 38 N. E. 899, affirming (1893) 50 Ill. App. 381; and *R. J. Menz Lumber Co. v. E. J. McNeeley & Co.* (1910) 58 Wash. 223, 28 L.R.A.(N.S.) 1007, 108 Pac. 621,—recognizes that printed matter has been accorded little influence in changing the clear and explicit language of a contract, where it was obscure in type, or placed where it would not be likely to be seen, or where it was evidently not intended to be incorporated in the contract.

Where the words, "guarantee as per cat." were penciled on the margin of a written contract, it was held in *Craig v. Chicago Coach & Carriage Co.* (1912) 172 Ill. App. 564,—an action for breach of warranty of an automobile,—that, in explanation of the word "guarantee," evidence tending to prove that the words, "as per cat.," referred to the catalogue, and were added without plaintiff's knowledge after the contract was signed, was admissible. The court said: "If it be true, as the evidence of plaintiff's witnesses tended to prove, that the words, 'as per cat.,' were inserted in the contract after the sale, and that at the time of the sale the only statement of warranty or guarantee thereon was merely the word 'guarantee,' then it was competent for the plaintiff to show, if he could, the terms of such guarantee."

This note is not concerned with such cases as *Dickson v. Conde* (1897) 148 Ind. 279, 46 N. E. 998, wherein it is stated to be well settled that the parties to a written agreement may make a writing on another paper, or on the same paper, a part of the agreement, by so providing in the agreement signed. In this case an unsigned provision following the signatures of the parties to a written contract was held to be a part of the contract, where the words, "this agreement is further continued below," appeared in the body of the contract above the signatures. J. D. C.

NORTH CAROLINA SUPREME COURT.

J. A. BENNETT et al.

WINSTON-SALEM SOUTH-BOUND RAILWAY COMPANY, Impleaded, etc., Appt.

(170 N. C. 389, 87 S. E. 133.)

Eminent domain — raising grade of street — liability of railroad.

1. A railroad company which, for its own purposes, raises the grade of a street

to carry it over its tracks, is, although it acts under authority of the municipality, liable in damages for the interference thereby caused to the abutting owner's access to the street.

For other cases, see *Eminent Domain*, III. c, 1, in *Dig. 1-52 N. S.*

Witness — cross-examination — testing value of opinion.

2. A witness who has placed the value of a lot alleged to have been injured by an exercise of the right of eminent domain very low may, on cross-examination, be asked what he realized from the sale of his own property, for the purpose of testing the value of his opinion, if there is evidence of similarity in the conditions, surroundings, and value of the two lots.

For other cases, see *Witnesses*, II. b, in *Dig. 1-52 N. S.*

(December 8, 1915.)

APPEAL by the defendant railway company from a judgment of the Superior Court for Forsyth County in plaintiffs' favor in an action brought to recover damages for injury to their property, caused by the alleged negligent construction of a bridge and its approaches. Affirmed.

Statement by Walker, J.:

This action was brought by the plaintiffs against the appealing defendant and the city of Winston-Salem to recover damages for injury to their lot in said city, caused by the construction of a bridge or a viaduct, and the approaches thereto, along Bank street, in said city, and between Liberty and Elm streets. It appears in the case that the defendant railroad company had laid a part of its track across Elm street at grade, and desiring to raise the grade of the street, and for that purpose to build the bridge in question and construct the approaches thereto, it obtained permission from the city to do so, upon giving a bond to indemnify it against the damages. The railroad company then proceeded with the work, constructed the bridge, and raised the level of the street in such a way that ingress and egress to the plaintiffs' lot was so obstructed as to greatly impair the value of the property. This was the allegation of the plaintiffs, and there was proof to sustain it, though it was denied by the defendant, which alleged that the work was done by the permission of the city and under its authority, and was also carefully performed according to a correct plan. The case was submitted to the jury

Note. — For liability of railroad company to abutting owner for damages from change of grade of highway, necessary to carry it across tracks, see annotation following this case, post, 1078.
L.R.A.1916D.

upon the following issue: "Has the plaintiffs' property been damaged by the erection of the bridge along Bank street as alleged, and, if so, in what amount? A. Yes; \$2,250."

Judgment was rendered upon the verdict and the defendant railway company appealed, and reserved several exceptions to the rulings and judgment of the court.

Messrs. Watson, Buxton, & Watson for appellant.

Mr. Louis M. Swink for appellees:

Anyone injured by means of the construction of the bridge would have the right to sue on this contract, as a contract made for his benefit.

Gastonia v. McEntee-Peterson Engineering Co. 131 N. C. 363; 42 S. E. 858; *Gorell v. Greensboro Water Supply Co.* 124 N. C. 328, 46 L.R.A. 513, 70 Am. St. Rep. 598, 32 S. E. 720; *Shoaf v. Palatine Ins. Co.* 127 N. C. 308, 80 Am. St. Rep. 804, 37 S. E. 451.

Defendant was liable for the damages caused to plaintiff.

Reining v. New York, L. & W. R. Co. 128 N. Y. 168, 14 L.R.A. 133, 28 N. E. 640; *Brown v. Asheville Electric Co.* 138 N. C. 536, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62; *Walters v. Baltimore & O. R. Co.* 120 Md. 644, 46 L.R.A.(N.S.) 1128, 88 Atl. 47; *Egerer v. New York C. & H. R. R. Co.* 14 L.R.A. 381, and note, 130 N. Y. 108, 29 N. E. 95; *Muhlker v. New York & H. R. Co.* 197 U. S. 565, 567, 49 L. ed. 876, 877, 25 Sup. Ct. Rep. 522; *Vanderlip v. Grand Rapids*, 16 Am. St. Rep. 607, and note, 73 Mich. 522, 3 L.R.A. 247, 41 N. W. 677; *White v. Northwestern North Carolina R. Co.* 113 N. C. 611, 22 L.R.A. 627, 37 Am. St. Rep. 639, 18 S. E. 330; *Royster Guano Co. v. Lumber Co.* 168 N. C. 337, 84 S. E. 346; *Butler v. Penn Tobacco Co.* 152 N. C. 416, 136 Am. St. Rep. 831, 68 S. E. 12; *Hester v. Durham Traction Co.* 138 N. C. 293, 1 L.R.A.(N.S.) 981, 50 S. E. 711; *Stratford v. Greensboro*, 124 N. C. 133, 32 S. E. 394; *Merrick v. Intramontaine R. Co.* 118 N. C. 1081, 24 S. E. 667.

The question asked the witness on cross-examination for the purpose of testing his knowledge, or the truth of the statements about which he was testifying, was within the rule laid down in *Lloyd v. Venable*, 168 N. C. 531, 84 S. E. 855, and *Raleigh, C. & S. R. Co. v. Mecklenburg Mfg. Co.* 169 N. C. 156, 85 S. E. 395.

Walker, J., delivered the opinion of the court:

It is apparent, from the entire record in this case, that the railway company, in constructing the bridge and its approaches,

was acting in its own behalf and for its own use and benefit, although it had obtained the permission of the city to do the work, and the same was done with its consent, but the work was not done by the city in the exercise of its governmental function, through the defendant, so as to protect the latter from liability except for negligence. It is well settled with us, and it is very generally held in other jurisdictions, that, unless otherwise provided by the Constitution or statute, the owner of property abutting on a street cannot recover for any damage to his property caused by a change in the grade of the street under proper municipal authority, where there is no negligence in the method or manner of doing the work. *Meares v. Wilmington*, 31 N. C. (9 Ired. L.) 73, 49 Am. Dec. 412; *Wolfe v. Pearson*, 114 N. C. 621, 19 S. E. 264; *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894; *Dorsey v. Henderson*, 148 N. C. 423, 62 S. E. 547; *Harper v. Lenoir*, 152 N. C. 723, 68 S. E. 228; *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394; *Jeffress v. Greenville*, 154 N. C. 500, 70 S. E. 919; *Hoyle v. Hickory*, 164 N. C. 82, 80 S. E. 254; *Hoyle v. Hickory*, 167 N. C. 621, 83 S. E. 738; *McQuillin, Mun. Corp.* § 1975; 2 Dill. Mun. Corp. § 1040. In *Hoyle v. Hickory*, 167 N. C. 620, 83 S. E. 738, this court said: "It was decided in the former appeal that, while plaintiffs could not recover for any detriment to their property which was the result merely of the proper grading of the street, which had been done in the due exercise of the discretionary power of the city to make needed improvements, it being *damnum absque injuria*, yet they could recover for any damage done thereto which was caused by a negligent grading of the street, following the principle as adopted in numerous decisions of this court"—citing many authorities.

This principle, we state in the same case, has been recognized and enforced since the days of Chief Justice Kenyon and Justice Buller. *British Cast Plate Mfrs. v. Meredith*, 4 T. R. 794, 796; *Sutton v. Clark*, 6 Taunt. 28, 1 Marsh. 429, 16 Revised Rep. 563; *Bolton v. Crowther*, 2 Barn. & C. 703, 4 Dowl. & R. 195, 2 L. J. K. B. 139. The doctrine is almost universally accepted by the state courts of this country. *Cooley, Const. Lim.* p. 542, and notes. It was affirmed in *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *Smith v. Washington*, 20 How. 135, 15 L. ed. 858; and *Mead v. Portland*, 200 U. S. 148, 50 L. ed. 413, 26 Sup. Ct. Rep. 171. As stated by the court in the case last cited, it may be thus summarized: The doctrine, however it may at times appear to be at variance with

natural justice, rests upon the soundest legal reason. The state holds its highways in trust for the public. Improvements made by its direction or by its authority are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the state to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it did not protect the agents for improving highways, which the state is compelled to employ. This principle of the law is usually made to rest upon the theory that any and all changes of this character in the streets of the town are supposed to have been contemplated, and therefore provided for in advance of the improvement and at the time of the original dedication of the street, and any abutting owner acquires and improves his property with full notice that such changes may be made from time to time. *Nichols, Em. Dom.* §§ 81, 82 and 83; *Lewis, Em. Dom.* 3d ed. § 134. *Nichols, Em. Dom. supra*, says: "When a highway is raised or lowered in grade, so that it may be made safer or more convenient for travel, the abutting owner is not entitled to compensation. . . . The true reason for the rule . . . is that, when a highway is laid out, the easement taken includes the right to grade and construct . . . then or at any future time, in such a manner as the public authorities may deem conducive to safe and convenient traveling."

And *Lewis, Em. Dom. supra*, says that "when a street or highway is laid out, compensation is given once for all, not only for the land taken, but for damages which may, at any time, be occasioned by adapting the surface of the street to the public needs."

This power to further grade and improve the streets of the town is a continuing one, and may be exercised, in the legal discretion of the municipal government, whenever the public may require it, as will appear from the above-cited authorities, and also 1 *Elliott on Streets & Roads*, 3d ed. § 551. This discretion, although it may be a legal one, cannot be interfered with by the courts, except in case of manifest and gross abuse, or when it would be arbitrary and oppressive. *Brodnax v. Groom*, 64 N. C. 244; *Small v. Edenton*, 146 N. C. 527, 20 L.R.A. (N.S.) 145, 60 S. E. 413; *Luther v. Buncombe County*, 164 N. C. 241, 80 S. E. 386; and other cases above cited. This power of the municipal corporation may, of course, be exercised by it through its own agents, who are commissioned or appointed to do the work which may be required in order to make the improvement in the street. And

when the work is done carefully, either by the corporation itself or by it when acting through its agents, the abutting owner has no legal right to redress, and any damage to his property or loss to him by reason of the improvement is considered by the law as *damnum absque injuria*,—a loss without injury; the last word being used in the sense of an actionable wrong. These principles have been very recently discussed by us in the case of *Wood v. Duke Land & Improv. Co.* 165 N. C. 367, 81 S. E. 422, where the authorities are collected.

But the defendant in this case, the railway company, can take no advantage of them upon the facts as they appear in this record. The city of Winston-Salem was not acting in its corporate capacity, and in the exercise of its municipal authority, in raising the grade of Bank street, solely for the public's use and convenience. On the contrary, the defendant was acting for itself and in furtherance of its own interests, and the mere fact that it had obtained the permission of the city to do the work does not vary the case or take it out of the principle, so well settled, that private property should not be taken except for a public use, and then only upon just compensation. We presume the railroad company had the right to condemn the plaintiffs' property under its charter, and, for the sake of the argument, we will assume this to be true, it being a public service corporation; but if it has, in a legal sense, taken or appropriated the plaintiffs' property, it is liable to them to the extent that the value of the property has been diminished thereby, and if it has done the work unskillfully and negligently it would be liable to the plaintiffs also for any damage resulting therefrom. The city could not transfer to an individual, or to the quasi public corporation, for its own service and profit, this superior and sovereign right which is allowed to be used only for the public benefit. *Brown v. Asheville Electric Co.* 138 N. C. 533, 69 L.R.A. 631, 107 Am. St. Rep. 554, 51 S. E. 62; *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394. The legislature has no power itself to authorize corporations to take or use private property without compensation, and of course could not confer such a power upon the city. *Chesapeake & P. Teleph. Co. v. McKenzie*, 74 Md. 36, 28 Am. St. Rep. 219, 21 Atl. 690; *Walters v. Baltimore & O. R. Co.* 120 Md. 644, 46 L.R.A.(N.S.) 1128, 88 Atl. 47; *Eger v. New York C. & H. R. R. Co.* 14 L.R.A. 381, and note (130 N. Y. 108, 29 N. E. 95); *Muhlker v. New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; *Vanderlip v. Grand Rapids*, 73 Mich. 522, L.R.A.1916D.

41 N. W. 677, 3 L.R.A. 247, 16 Am. St. Rep. 607, and note; *White v. Northwestern North Carolina R. Co.* 113 N. C. 611, 22 L.R.A. 627, 37 Am. St. Rep. 639, 18 S. E. 330; *Royster Guano Co. v. Lumber Co.* 168 N. C. 337, 84 S. E. 346; *Hester v. Durham Traction Co.* 138 N. C. 293, 1 L.R.A.(N.S.) 981, 50 S. E. 711. The principle is well expressed in *Reining v. New York, L. & W. R. Co.* 128 N. Y. 168, 14 L.R.A. 133, 28 N. E. 640, where it is said: "We think it cannot, under the guise of exercising this power, appropriate a part of a street to the exclusive, or practically to the exclusive, use of a railroad company, or so as to cut off abutting owners from the use of any part of the street, . . . without making compensation for the injury sustained."

In this particular case, as is shown in the record, the object of making this improvement was to subserve the railroad use, so that it might better control its track and appurtenances, and facilitate the movement of its trains over it. The street, therefore, was subjected to a new burden in favor of this defendant, and this may be done in the exercise of the power of eminent domain, which belongs not only to the sovereign, but may be imparted to a public service corporation by legislative enactment, provided adequate provision is made for the compensation of any private owner of property which will be damaged by the exercise of the power. It would be useless to pursue this subject any further, as this power has been so fully considered heretofore by the court, and its scope and extent clearly defined. We will call special attention, though, to the cases of *Brown v. Asheville Electric Co.* and *Stratford v. Greensboro*, supra; and *Moore v. Carolina Power & Light Co.* 163 N. C. 300, 79 S. E. 596, where a full discussion of the matter will be found, as well as in several of the other cases cited.

It will be observed that in this case there was but one issue submitted to the jury, and that related only to the question of damages and the amount which plaintiffs were entitled to recover. There was no issue involving the question as to the authority of the railroad company to do this work and be immune from liability for damages, unless it was done negligently; but even if such an issue had been submitted, it is so very clear that it possessed no such right as to practically eliminate that question from the case, and upon the issue as to damages the charge of the court was entirely free from error. The plaintiffs were entitled to recover the diminution in value of property which was caused by the defendant's wrongful act, or by the ap-

propriation of their property to its use, and in respect to works of this kind, which are of a lasting nature, the plaintiffs were entitled to recover permanent damages. *Lloyd v. Venable*, 168 N. C. 531, 84 S. E. 855; *South Atlantic Waste Co. v. Raleigh, C. & S. R. Co.* 167 N. C. 340, 83 S. E. 618, and *Raleigh, C. & S. R. Co. v. Mecklenburg Mfg. Co.* 169 N. C. 160, 85 S. E. 390.

There is a question of evidence in the case, but we think his Honor ruled correctly in regard to it. The plaintiffs did not attempt to show substantively by the cross-examination of the witness what was the value of their lot as compared with his, but the question was asked as to what he had realized from the sale of his property, for the purpose of testing the value of his opinion, which had been before elicited by the defendant as to the value of the plaintiffs' lot, which he had estimated at a very low figure; there being "in our opinion" some evidence as to the similarity of the two lots, and their condition, surroundings,

and value, and at least enough to permit a cross-examination of the witness upon the subject. We do not think that the ruling of the court violated the principle as stated in *Warren v. Makely*, 85 N. C. 12; *Bruner v. Threadgill*, 88 N. C. 361; and *State Bd. of Edu. v. Makely*, 139 N. C. 31, 51 S. E. 784.

The other exceptions are sufficiently covered by our discussion of those which we deem the important and controlling ones in the case. Before closing this opinion we will call attention to the case of *State Atlantic Waste Co. v. Raleigh, C. & S. R. Co.* 167 N. C. 340, 83 S. E. 618, as containing a very full discussion of the leading questions in this case, as applied to a state of facts very similar to those which are presented in this record.

After a careful analysis of the case, and a thorough consideration of the points presented by the learned counsel for the defendant, we are convinced that there has been no error committed during the trial.

Annotation—Liability of railroad company to abutting owner for damages from change of grade of highway, necessary to carry it across tracks.

This annotation is supplementary to the note to *Shrader v. Cleveland, C. C. & St. L. R. Co.* 26 L.R.A.(N.S.) 226.

Generally as to an abutter's right to compensation for railroad in street, see note to *Rasch v. Nassau Electric R. Co.* 36 L.R.A.(N.S.) 673, and specifically as to right to compensation where railroad changes grade of street, see pages 796 et seq., of that note.

As to the right of an abutting owner to damages for special injuries where a street railway is not considered an additional burden, see note to *Slaughter v. Meridian Light & R. Co.* 25 L.R.A.(N.S.) 1265.

As to the right of a landowner to damages for the obstruction of a street or highway by a railroad not adjacent to his property, see notes to *Scrutchfield v. Choctaw, O. & W. R. Co.* 9 L.R.A.(N.S.) 496, and *Powell v. Houston & T. C. R. Co.* 46 L.R.A.(N.S.) 615.

Generally, as to liability of municipality for damages to abutting property from change of grade of street, see notes in 23 L.R.A. 658; 7 L.R.A.(N.S.) 108; 36 L.R.A.(N.S.) 1194, and L.R.A.1915A, 382.

Among the more recent decisions, it has been held, in accord with the better reasoned cases cited in the earlier note, that the construction of a bridge approach in a public street for the purpose of abolishing a grade crossing of rail-

road tracks, in such a manner as to cut off the access of an abutting owner from the lower portion of his building to the street, and to shut off the light and air therefrom, is a taking within the meaning of a constitutional provision requiring compensation to be made for property taken for public use; and a municipality and a railroad company which jointly effect such taking are both liable. *Walters v. Baltimore & O. R. Co.* (1913) 120 Md. 644, 46 L.R.A.(N.S.) 1128, 88 Atl. 47.

And a railroad company which, in raising the grade of its roadbed to improve the road or increase its efficiency, goes outside of its right of way and builds approaches upon a highway crossed thereby, which are rendered necessary by reason of the raising of the roadbed at the crossing, is liable for the damages resulting to an owner of property abutting on the highway, notwithstanding it acts under and by virtue of an ordinance establishing the grade of the portion of the highway which is crossed by its right of way, and on which the approaches to the crossing are built, which ordinance was adopted to accommodate the railroad company rather than the public. *Pittsburgh, C. C. & St. L. R. Co. v. Atkinson* (1912) 51 Ind. App. 315, 97 N. E. 353.

So, a railroad company which voluntarily accepts municipal authority to

change the grade of a highway to abolish a grade crossing of its tracks, and does the work necessary to effect such change, for its own interest, is liable for injury inflicted upon an abutting property owner by the obstruction of the access to his property from the street, although the interest of the public is also subserved by the improvement. *Baltimore & O. R. Co. v. Kane* (1914) 124 Md. 231, L.R.A.1916C, 433, 92 Atl. 532; *Baltimore & O. R. Co. v. Kahl* (1914) 124 Md. 299, 92 Atl. 770.

And a railroad company which, having constructed its roadbed across a highway on an embankment, builds approaches thereto in the highway, is liable to an abutting owner whose access to his property over the highway is thereby interfered with, although the company had received authority from the county court to locate and build its track across the highway, with the requirement that it also construct the necessary approaches at crossings; the unrestricted use of the highway being a property right which was taken from the abutting owner by the construction of the approach in front of his property. *Robinson v. Springfield Southwestern R. Co.* (1910) 143 Mo. App. 270, 126 S. W. 994.

And see also *BENNETT v. WINSTON-SALEM SOUTH-BOUND R. Co.* ante, 1074.

But a railroad company cannot be held liable for injury to the access of an abutting owner by the change of the grade of a street to abolish a grade crossing of its tracks, although it is greatly benefited by the improvement, if the work was done by the municipality. *Baltimore & O. R. Co. v. Kane* (Md.) supra.

And a railroad company which, in rebuilding and enlarging a bridge carrying a street over its tracks, changes the grade of the street, acting for the municipality, and not for its own benefit, is not liable, at common law, for the damages resulting to an abutting owner. *Rigney v. New York C. & H. R. R. Co.* (1916) 217 N. Y. 31, 111 N. E. 226.

And a railroad company which, in constructing its railroad through a portion of a city, in a cut, was required by the city to erect an overhead crossing at the intersection of two streets with its right of way, and to grade the approaches thereto in accordance with original grades then established by the city for the streets, is not liable to an abutting owner for damages resulting from the grading of the streets as thus required. *Muller v. Great Northern R. Co.* (1913) 75 Wash. 631, 135 Pac. 631.

But, under a provision of a contract between a city and a railroad company, for the reconstruction and enlargement by the latter of a bridge carrying a street over its tracks, that it will pay any damage resulting from the work, including damage resulting from change of grade of the street for approaches to the bridge, the railroad company is liable for damages resulting to an abutting owner from its changing the grade of the street, although, in making the change, it was acting for the common council of the city, and not for its own benefit. *Rigney v. New York C. & H. R. R. Co.* (1916) 217 N. Y. 31, 111 N. E. 226, affirming (1914) 161 App. Div. 187, 146 N. Y. Supp. 395.

And where a city sought to open a public street across a railroad right of way, and the railroad company, by agreement with the city, and mainly for its own convenience, erected a bridge and approaches thereto for the purpose of carrying the street over its tracks, and the city changed the grade of the street for that purpose, but failed to apply to the Public Service Commission, as required by statute, to determine how the street should be carried over the tracks, the structure is an illegal obstruction, and the railroad company is liable to an owner of property on the street, opposite the approach, for the damages sustained by reason thereof. *Brush v. New York, N. H. & H. R. Co.* (1914) 162 App. Div. 731, 148 N. Y. Supp. 195. A. C. W.

NORTH DAKOTA SUPREME COURT.

P. P. PERSONS, Appt.,

v.

CITY OF VALLEY CITY, Resp't.

(26 N. D. 342, 144 N. W. 675.)

Municipal corporation — presentation of claims — trespass to real property.

1. Sections 2703 and 2704, Rev. Codes L.R.A.1916D.

1905, requiring verified claims for damages resulting from certain injuries to person or property to be presented to the city council

Headnotes by FISK, J.

Note. — As to liability of municipal corporation for trespass on private property where committed in connection with streets, see annotation following this case, post, 1086.

as a prerequisite to the institution and maintenance of a suit against a city, are construed, and held not to apply to a claim based upon a trespass to plaintiff's real property.

For other cases, see Municipal Corporations, III. g, 5, in Dig. 1-52 N. S.

Same — erroneous destruction of building.

2. Where a city council, acting in its official capacity, authorizes the city's agents and officers to construct a sidewalk adjacent to plaintiff's property, and, through a mistaken belief that a portion of plaintiff's building extends into the street, and is an unlawful obstruction thereon, authorizes such agents or officers to remove the same by going upon such private property and cutting off the portion of the building claimed to thus form an obstruction, and committing other acts of trespass thereon, the municipality is liable, and must respond in damages for such wrongful trespass.

For other cases, see Municipal Corporations, III. g, 2, in Dig. 1-52 N. S.

(December 6, 1913.)

APPEAL by plaintiff from an order of the District Court for Barnes County sustaining a demurrer to a complaint filed to recover damages for an alleged trespass upon and injury to plaintiff's property. Reversed.

The facts are stated in the opinion.

Messrs. Herman Winterer and David S. Ritchie, for appellant:

The acts complained of were such as rendered the defendant liable therefor.

Naumburg v. Milwaukee, 77 C. C. A. 67, 146 Fed. 641; Durkee v. Kenosha, 59 Wis. 123, 48 Am. Rep. 480, 17 N. W. 677; Alberts v. Muskegon, 146 Mich. 210, 6 L.R.A.(N.S.) 1094, 117 Am. St. Rep. 633, 109 N. W. 262; Sheldon v. Kalamazoo, 24 Mich. 383; Bunker v. Hudson, 122 Wis. 43, 99 N. W. 448; Adams v. Milwaukee, 144 Wis. 371, 43 L.R.A.(N.S.) 1066, 129 N. W. 518; Potter v. Spokane, 63 Wash. 267, 115 Pac. 176; Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407; Johnson v. Somerville, 195 Mass. 370, 10 L.R.A.(N.S.) 715, 81 N. E. 268; East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103; Gerst v. St. Louis, 185 Mo. 191, 105 Am. St. Rep. 580, 84 S. W. 34; Hathaway v. Osborne, 25 R. I. 249, 55 Atl. 700; Hunt v. Boston, 183 Mass. 303, 67 N. E. 244; Chicago v. Selz, S. & Co. 202 Ill. 545, 67 N. E. 386, 14 Am. Neg. Rep. 23; Tegeler v. Kansas City, 95 Mo. App. 162, 68 S. W. 953; Chicago v. Spoor, 190 Ill. 340, 60 N. E. 540; Butman v. Newton, 179 Mass. 1, 88 Am. St. Rep. 349, 60 N. E. 401; Brown v. Webster City, 115 Iowa, 511, 88 N. W. 1070; Millard v. Webster City, 113 Iowa, 220, 84 N. W. 1044; O'Donnell v. White, 23 R. I. 318, 50 Atl. 333; Larrabee v. Clover-L.R.A.1916D.

dale, 131 Cal. 96, 63 Pac. 143; Ludlow v. MacKintosh, 21 Ky. L. Rep. 924, 53 S. W. 524; Norman v. Ince, 8 Okla. 412, 58 Pac. 632, 6 Am. Neg. Rep. 681; Kane v. Indianapolis, 82 Fed. 770; Powell v. Wytheville, 95 Va. 73, 27 S. E. 805; Scott v. New York, 27 App. Div. 240, 50 N. Y. Supp. 191, 4 Am. Neg. Rep. 534; Donahoe v. Kansas City, 130 Mo. 657, 38 S. W. 571, 1 Am. Neg. Rep. 105; Oklahoma City v. Hill, 6 Okla. 114, 50 Pac. 242; D'Amico v. Boston, 176 Mass. 599, 58 N. E. 158; Larson v. Grand Forks, 3 Dak. 307, 19 N. W. 414.

The acts and resulting injury complained of are not within the provisions of §§ 2703 and 2704 of the Revised Codes, which have reference to personal injuries resulting from the use of said streets, etc., for the purpose of travel, and do not include injuries to adjacent property, caused by trespass.

28 Cyc. 1447, 1460; Giuricevic v. Tacoma, 57 Wash. 329, 28 L.R.A.(N.S.) 533, 106 Pac. 908; Tattan v. Detroit, 128 Mich. 650, 87 N. W. 894; MacDonald v. New York, 42 App. Div. 263, 29 N. Y. Supp. 16; Warren v. Davis, 43 Ohio St. 447, 3 N. E. 301; Sommers v. Marshfield, 90 Wis. 59, 62 N. W. 937; Bradley v. Eau Claire, 56 Wis. 168, 14 N. W. 10; Jung v. Stevens Point, 74 Wis. 547, 43 N. W. 513; Dawes v. Great Falls, 31 Mont. 9, 77 Pac. 309; Gallamore v. Olympia, 34 Wash. 379, 75 Pac. 978; Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407; Moran v. St. Paul, 54 Minn. 279, 56 N. W. 80; Pye v. Mankato, 38 Minn. 536, 38 N. W. 621; Dovey v. Plattsmouth, 52 Neb. 642, 73 N. W. 11; Fugere v. Cook, 27 R. I. 134, 60 Atl. 1067; Megins v. Duluth, 97 Minn. 23, 106 N. W. 89; McIntee v. Middletown, 80 App. Div. 434, 81 N. Y. Supp. 124; Kelly v. Faribault, 95 Minn. 293, 104 N. W. 231; Postal v. Seattle, 41 Wash. 432, 83 Pac. 1025.

Messrs. Lee Combs, L. S. B. Ritchie, and M. J. Englert, for respondent:

When the statute requires the making and filing of a claim or the giving of a notice before action is brought, failure to comply with the mandate of its provision is fatal to the plaintiff's cause of action.

3 Abbott, Mun. Corp. pp. 2369 et seq.; 28 Cyc. 1470; Sharp v. Mauston, 92 Wis. 629, 66 N. W. 803; Flieth v. Wausau, 93 Wis. 446, 67 N. W. 731; Daniels v. Racine, 98 Wis. 649, 74 N. W. 553; Ziegler v. West Bend, 102 Wis. 17, 78 N. W. 164; Sterling v. Bedford, 94 Iowa, 194, 62 N. W. 674; O'Donnell v. New London, 113 Wis. 292, 89 N. W. 511; McCue v. Waupun, 96 Wis. 625, 71 N. W. 1054; Adams v. Modesto, 6 Cal. Unrep. 486, 61 Pac. 957; Van Frachen v. Ft. Howard, 88 Wis. 570, 60 N. W. 1062; Pollard v. Cadillac, 133 Mich. 503, 95 N. W.

536; *Trost v. Casselton*, 8 N. D. 534, 79 N. W. 1071; *Coleman v. Fargo*, 8 N. D. 69, 76 N. W. 1051; *Barrett v. Mobile*, 129 Ala. 179, 87 Am. St. Rep. 54, 30 So. 36; *Bancroft v. San Diego*, 120 Cal. 432, 52 Pac. 712.

Fisk, J., delivered the opinion of the court:

This is an appeal from an order of the district court of Barnes county sustaining a demurrer to the plaintiff's complaint. The plaintiff seeks to recover damages from the defendant city for the alleged trespass by it, through its authorized agents and servants, upon his property, and committing injuries thereto.

It will not be necessary to set out the complaint in full, and we merely state the substance thereof, except as to the important paragraphs which we copy in full. Plaintiff first alleges his ownership and possession of lots 6 to 12, inclusive, of block 16 of the original plat of the city of Valley City; also, the fact that defendant is and was a municipal corporation duly organized and existing under and by virtue of the laws of this state. It is next alleged that at all times herein mentioned there was situated upon lots 10, 11, and 12, aforesaid, a grain elevator owned and used by the plaintiff and his tenants for the purpose of buying and storing grain. Then follow paragraphs 4 to 6, inclusive, which we quote in full, as follows: "(4) That on the 11th day of May, A. D. 1908, at a meeting of the city council of the said defendant city, held at its council rooms in said city, the said city council of said city of Valley City, for and on behalf of said defendant, did authorize its agents and officers to construct a sidewalk along the south line of the above-described premises, and thereafter and on the 2d day of August, A. D. 1909, the said council did authorize its agents and officers to remove a part of the premises of said plaintiff herein, claiming and setting forth that the same was an obstruction and was constructed upon the street of said defendant. (5) That on or about the 15th day of October, A. D. 1909, defendant, through its duly appointed agent, unlawfully and wrongfully entered upon the premises of the said plaintiff and did then and there destroy the property of the said plaintiff, to wit, the said grain elevator, in this, that the defendant then and there caused to have torn down, cut off, detached, and removed from the said building a part thereof, and did cut off, remove, detach, and take away from the said building a part thereof; that said action on the part of the said defendant was without due authority of law, and to this L.R.A.1916D.

plaintiff's damage, in this, that it destroyed the said building situated upon the said premises for all uses and purposes, and destroyed the same as a structure, to his damage in the sum of \$1,000. (6) Plaintiff further alleges that said defendant entered upon his said premises and committed the said damage to his said building solely upon the premises of this plaintiff, and that the building of the said plaintiff was built, constructed, erected, and maintained solely upon the premises of the plaintiff, but that, notwithstanding this, the defendant wrongfully and unlawfully entered upon his said premises and committed the damage hereinbefore set forth." Paragraphs 7, 8, and 9 relate to special damages alleged to have been suffered on account of such alleged unlawful acts, and need not be set out herein. Paragraph 10 is as follows: "Plaintiff further alleges that all of said acts have been committed by the defendant through its authorized agents and officials by reason of the express authority given to the said agents and officials by the city council of the said city, and that the said agents and officials did act in full conformity to, and not in excess of, the said instructions given; and alleges that, by reason of the said acts so authorized, that this plaintiff has been damaged as hereinbefore set forth; and in this behalf the plaintiff further alleges that all of the acts and steps were so taken by the said city without notice to said plaintiff." In his prayer for judgment plaintiff demands the sum of \$5,790 and costs.

The ground of the demurrer is that it fails to state facts sufficient to constitute a cause of action in the following particulars: "(a) Because it appears upon the face of said complaint that the acts complained of were and are ultra vires and beyond and without the authority and power of said defendant city, a municipal corporation, to do or commit. (b) Because it appears upon the face of said complaint that the acts complained of, if they were within the corporate power, and might have been lawfully accomplished by the said city, through its municipal authorities, were nevertheless committed by the alleged agents of said city without proceedings according to law, and that no ratification of such unauthorized acts was had or made by said city, and because it appears from the face of said complaint that the acts and omissions complained of were done and suffered by said alleged agents and servants without the scope of their employment, and not on behalf of said city. (c) Because said complaint failed to show or allege that the claim or claims set forth in plaintiff's complaint for

injury and damages alleged to have arisen by reason of the acts and omissions set forth in said complaint on the part of the city authorities and servants, and in respect to its said streets, referred to in said complaint, were filed in the office of the city auditor and signed by the plaintiff as claimant, or by someone on his behalf, duly verified by him, within thirty days from the happening of such injury or damage, or that said claim or claims, upon which said plaintiff's action is brought, as shown by his complaint, were in no manner or at any time filed in the office of the city auditor of said city, or considered or acted upon by said city's mayor or council, as provided and required by §§ 2703 and 2704 of the Revised Codes of the state of North Dakota for the year 1905, §§ 3627, 3628, Comp. Laws 1913. (d) Because there is another action pending between the same parties, for the same cause."

We are clear that none of the grounds of the demurrer are tenable, and that the order sustaining such demurrer was therefore erroneous.

Respondent's counsel rely chiefly upon the ground stated under subdivision "c" of the demurrer. They state in their brief that they do not waive the other grounds, but their entire printed brief and argument is directed to the ground stated in subdivision "c" and, in view of this, we will first dispose of this ground.

The action being one to recover damages for injuries to plaintiff's real property, is it necessary, in order to state a cause of action, that the complaint should allege the presentation by him to the city council, prior to the commencement of his action, of a verified claim for such damages, pursuant to §§ 2703 and 2704 of the Revised Codes of 1905? Respondent's counsel earnestly contend for an affirmative answer to the above question. These sections are as follows:

"Section 2703. All claims against cities for damages or injuries alleged to have arisen from the defective, unsafe, dangerous or obstructed condition of any street, crosswalk, sidewalk, culvert or bridge of any city, or from the negligence of the city authorities in respect to any such street, crosswalk, sidewalk, culvert or bridge shall, within thirty days from the happening of such injury, be filed in the office of the city auditor, signed and properly verified by the claimant, describing the time, place, cause and extent of the damages or injury, and the amount of damages claimed therefor, and upon the trial of an action for the recovery of damages by reason of such injury, the claimant shall not be permitted to prove any different time, place, cause or manner

or extent of the injury complained of, or any greater amount of damages. In case it appears by the affidavit of a reputable physician which shall be prima facie evidence of the fact that the person injured was, by the injury complained of, rendered mentally incapable of making such statement during the time herein provided, such statement may be made within thirty days after such complainant becomes competent to make the same, but such affidavit may be controverted on the trial of an action for such damages, and in case of the death of the person injured prior to his becoming competent to make such statement, the same may be made within thirty days after his death, by any person having knowledge of the facts, and the person making such statement shall set forth therein specifically the facts relating to such injury as aforesaid, of which he has personal knowledge, and shall positively verify such statement and shall verify the facts therein stated of which he has no personal knowledge, to the best of his knowledge, information and belief.

"Section 2704. No action shall be maintained against any city as aforesaid for injury to person or property, unless it appears that the claim for which the action was brought was filed in the office of the city auditor as aforesaid, with an abstract of the facts out of which the cause of action arose, duly verified by the claimant, and that the city council did not, within sixty days thereafter audit and allow the same, and such abstract of facts must be signed and verified as provided in the preceding section; and all provisions of such section with reference to such verification shall be applicable to such abstract of facts, and no action shall be maintained unless the plaintiff therein shall plead and prove the filing of such claim and abstract as hereinbefore provided."

In commenting upon these sections, respondent's counsel say: "To our minds this language is clear and unmistakable. No one can doubt that when the legislature adopted the words 'for injury to person or property' it meant just what it said, and that such language includes property injured, or alleged to have been injured, which abuts a city street, when the injury was the result of an act or omission, with respect to such street, which, as we have seen, is exactly the claim of the plaintiff in the case at bar." Counsel then devote considerable space in an attempt to differentiate certain authorities cited and relied upon by appellant's counsel, upon the ground that they were decided under statutes differing radically from those of this state, above quoted.

We find it unnecessary to examine these authorities, for the question is set at rest in this state by the recent decision of this court in the case of *Gaustad v. Enderlin*, 23 N. D. 526, 137 N. W. 613. While respondent's counsel challenge the correctness of such decision and urge a reversal of the construction there placed upon said statutes, we are entirely satisfied with the correctness of the holding there made, as well as with the reasoning contained in the opinion. The language employed in §§ 2703 and 2704 is so clear in limiting the operation thereof to claims for damages or injuries founded upon alleged defective, unsafe, dangerous, or obstructed condition of a street, sidewalk, crosswalk, culvert, or bridge, or from the negligence of the city authorities in respect thereto, as to leave no room for doubt as to the legislative intent; such intention clearly being to require only those claims to be presented which are based upon injuries to person or property arising from the actual or implied negligence of the city in constructing or maintaining its streets, sidewalks, crosswalks, culverts, or bridges. The damages sought to be recovered in the case at bar are clearly not founded upon claims thus arising, and the authorities cited and relied upon by respondent's counsel may, we think, be easily differentiated from the case at bar on account of a difference in the statutes. It would serve no useful purpose, however, to review these cases in this opinion, and we shall not take the time nor the space necessary to do so.

The other grounds of the demurrer will now be considered. As we understand the contention of respondent's counsel, made in oral argument before this court, they assert that the defendant, being a municipal corporation, cannot be held liable to respond in damages for the alleged wrongful acts charged against it for the reason that such acts, if authorized by it, were and are *ultra vires*, and that plaintiff's sole redress for such acts is a proceeding against the individuals who were instrumental in behalf of the city in doing or causing to be done the acts aforesaid. In other words, that the city, under the law, could not and did not in any way authorize or ratify the said acts of its officers and servants.

Does the doctrine of respondeat superior apply to a municipal corporation under the facts alleged in the complaint? We are compelled to answer in the affirmative, for reasons hereinafter stated.

There can be no doubt regarding the full authority and control of a municipality over its streets, and its power to remove any obstructions or encroachments thereon, for it is expressly so provided by statute. L.R.A.1916D.

See § 2678, Rev. Codes 1905, subdiv. 7—10, inclusive, § 3599, Comp. Laws 1913. The defendant city, through its officers, no doubt in good faith, but mistakenly, believed that a portion of plaintiff's elevator extended over the property line, into the street, thereby constituting an unlawful encroachment thereon, and the acts complained of were no doubt done for the purpose of removing what was deemed such an unlawful encroachment upon the street. In thus attempting to exercise a lawful power expressly conferred by statute, can the city escape liability when it happens that its officers in fact were mistaken as to the existence of the encroachment? We think not. The acts complained of were expressly authorized by the city council, and to hold the city exempt from all liability under the facts pleaded in the complaint would, we think, be manifestly unjust. Such a rule might, in many cases, work a rank injustice to persons whose property rights have been flagrantly invaded. The doctrine contended for by respondent's counsel is, under the facts pleaded, clearly untenable on principle, and, as we shall show, is opposed to the adjudicated cases.

The leading case on this subject is *Thayer v. Boston*, 19 Pick. 511, 31 Am. Dec. 157. The facts there were that the officers of the defendant city had obstructed plaintiff's access to the street by the erection therein of stalls along the front of his premises. He brought his action on the case against the city, and in behalf of the defendant it was argued that if the officers of the corporation, within their respective spheres, act lawfully and within the scope of their authority, their acts are justifiable and nobody is liable for damages, and if an individual sustains loss by the exercise of such lawful authority it is *damnum absque injuria*. But if they do not act within the scope of their authority, they act in a manner which the corporation has not authorized, and in such case the officers are personally liable for such unauthorized acts. In replying to such argument, Chief Justice Shaw said: "But the court are of opinion that this argument, if pressed to all its consequences and made the foundation of an inflexible practical rule, would often lead to very unjust results. There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known, at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by

express vote of the city government, or by the nature of the duties and functions with which they are charged, by their officers, to act upon the general subject-matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done. It would be equally injurious to the individual sustaining damage, and to the agents and persons employed by the city government, to leave the party injured no means of redress, except against agents employed, and, by what at the time appeared to be competent authority, to do the acts complained of, but which are proved to be unauthorized by law. And it may be added that it would be injurious to the city itself, in its corporate capacity, by paralyzing the energies of those charged with the duty of taking care of its most important rights, inasmuch as all agents, officers, and subordinate persons might well refuse to act under the direction of its government in all cases where the act should be merely complained of and resisted by any individual as unlawful, on whatever weak pretense; and, conformably to the principle relied on, no obligation of indemnity could avail them. The court are therefore of opinion that the city of Boston may be liable in an action of the case, where acts are done by its authority which would warrant a like action against an individual, provided such act is done by the authority and order of the city government, or of those branches of the city government invested with jurisdiction to act for the corporation upon the subject to which the particular act relates, or, where, after the act has been done, it has been ratified, by the corporation, by any similar act of its officers."

Another leading case holding to the same effect is *Lee v. Sandy Hill*, 40 N. Y. 442. There the municipality was sued for trespass to land in unlawfully, wrongfully, and forcibly entering upon plaintiff's premises and removing fences, and digging up soil, etc., preparatory to the making of a highway over plaintiff's premises. It will thus be seen that the case is directly in point in the case at bar. The court, among other things, there said: "The doctrine is too well settled in this court to admit of discussion that municipal corporations, like the defendant, are liable in trespass for the illegal acts of its officers,"—citing numerous authorities, and among them the case of *Thayer v. Boston*, *supra*. The distinction is there clearly drawn between acts

performed in a governmental capacity, for which the municipality is not liable, and acts performed for the municipality as such.

Another case directly in point is that of *Weed v. Greenwich*, 45 Conn. 170. In the opinion which was written by Pardee, J., we find the following language: "The court of warden and burgesses constitutes the borough legislature. To this court the accepted charter granted power to take action for the corporation upon the general subject of encroachments, to which the particular act complained of relates. They exercised all the powers of the borough in this behalf, and in respect to all external relations must be considered as identical with the corporation. Although the grant is in form to the warden and burgesses, it is in reality to the borough, to be exercised for its benefit. Acting at their pleasure, presumably they acted only when the special interests of the borough were to be promoted. They were not elected by the corporation in obedience to any statute, for the purpose of performing a governmental duty. Thus representing and acting for the borough, they ordered the removal of the fence, and the borough should redress the wrong occasioned by the performance of an act in its particular interest, for municipal immunity does not reach beyond governmental duty. It is contrary to all principles of natural justice that the residents within certain territorial limits should seek for and obtain corporate powers for the more ready accomplishment of undertakings specially advantageous to themselves, but not at all necessary for the public, and in such powers find relief for responsibility for wrongs upon private rights. In the case before us, the warden and burgesses believed that the fence stood upon the highway and that they had the right to remove it. Apparently the warden came to the execution of their mandate clothed with official authority and power, not intending any injury. In all like cases it is best for those concerned that the individual should respect that authority and submit to the exercise of it, having knowledge that if he can prove that he has suffered any wrong, he can look to a responsible corporation rather than to an irresponsible individual for damages." Numerous authorities are therein cited and quoted from with approval, including *Hildreth v. Lowell*, 11 Gray, 349; *Hawks v. Charlemont*, 107 Mass. 414; *Buffalo & H. Turnp. Co. v. Buffalo*, 58 N. Y. 639; *Sheldon v. Kalamazoo*, 24 Mich. 383; *Crossett v. Janesville*, 28 Wis. 421; *Soulard v. St. Louis*, 36 Mo. 546; *Allen v. Decatur*, 23 Ill. 332, 76 Am. Dec. 692; *Woodcock v. Calais*, 66 Me. 234; *Inman v.*

Tripp, 11 R. I. 520, 23 Am. Rep. 520; Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; Chicago v. McGraw, 75 Ill. 566. All of these cases appear to be directly in point, announcing a rule contrary to that contended for by respondent's counsel in the case at bar. To quote from each of these authorities would extend this opinion to an unwarranted length, and we shall content ourselves by brief quotations from a few of them.

In *Sheldon v. Kalamazoo*, the marshal removed a fence which it was claimed encroached upon the highway. The lower court refused to hear evidence offered by plaintiff to show that the fence was not an encroachment, giving as his reason that the president and trustees acted in the capacity of public officers, and not municipal agents, and that the corporation was therefore not liable for their acts; but the supreme court of Michigan, in granting a new trial, said: "The doctrine is entirely untenable that there can be no municipal liability for unlawful acts done by municipal authorities to the prejudice of private parties. In this respect, public corporations are as distinctly legal persons as private corporations. There are officers who are corporation agents, and there are municipal officers whose duties are independent of agency, and with distinct liabilities. But when the act done is in law a corporate act, there is no ground upon reason or authority for holding that, if there is any legal liability at all arising out of it, the corporation may not be answerable. There is no conflict whatever in the authorities on this head. . . .

There is no authority that we can find which holds such an invasion of private lands not to be an act of the corporation, and none which would exempt the corporation from liability to an action for the wrong."

In *Allen v. Decatur*, the supreme court of Illinois, many years ago, said: "We shall, in this opinion, devote our attention to the principal question which has been argued in the case, which is whether a municipal corporation can be sued, in an action of trespass, for acts done in obedience to an order of the corporation. The law is now so well settled that it is nowhere controverted that such corporations may be sued, in case, for tortious acts done under the instructions of such corporations."

In *Woodcock v. Calais*, the city government passed an order "that the street commissioner be directed to cause all fences now on the public streets to be removed." Pursuant thereto, such commissioner employed a surveyor to run a line between the plaintiff's land and the street. The line as run proved to be outside of the street limits and L.R.A.1916D.

upon the plaintiff's land. Believing the line to be correctly run, the commissioner moved the plaintiff's fence to conform to such new line, and removed from plaintiff's land earth and rocks, and built a sidewalk thereon. In holding that the principles of respondeat superior applied, and that the city was liable to the plaintiff for trespass in damages, the supreme court of Michigan held that the fact that the street commissioner "was expressly 'directed' by the city government to cause all fences on the street to be removed, and that while attempting to follow these directions he committed the trespass which is the foundation of this action, withdraws this case from the application of the principle applicable to cases of public officers. For while he was a public officer, and had lawful authority to act in the premises without any directions from the city, still the city was responsible for the safe condition of the streets, and chose by positive, formal vote to direct the commissioner. Whether he was obliged to follow the direction or not is immaterial. He did act; and in his action he became quoad hoc the city's agent; and we are of the opinion that the superior must respond."

In *Ashley v. Port Huron*, Cooley, Ch. J., in speaking for the court, said: "It is very manifest, from this reference to authorities, that they recognize in municipal corporations no exemption from responsibility where the injury an individual has received is a direct injury accomplished by a corporate act which is in the nature of a trespass upon him. The right of an individual to the occupation and enjoyment of his premises is exclusive, and the public authorities have no more liberty to trespass upon it than has a private individual. If the corporation send people with picks and spades to cut a street through it without first acquiring the right of way, it is liable for a tort."

The Minnesota court, in speaking through Mitchell, J., in *Boye v. Albert Lea*, 74 Minn. 230, 76 N. W. 1131, held the city liable for causing a dam to be constructed in an unnavigable stream, resulting in forcing water to overflow plaintiff's land. In reversing the trial court's order sustaining a demurrer to the complaint, Judge Mitchell said: "The contention of its counsel is that the tort alleged is not one which the city as a municipality could commit under any circumstances; in other words, that it was wholly ultra vires, and hence that the city was not liable. Municipal corporations, in the execution of their corporate powers, fall within the rule of respondeat superior when the requisite elements of liability coexist. To create such a liability it is fundamentally necessary that the act done which is

injurious to others must be within the scope of the corporate powers as prescribed by the charter; in other words, it must not be *ultra vires* in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances. If the act complained of lies wholly outside of the general or special powers of the corporation as conferred by its charter, the corporation can, in no event, be liable for the acts of its officers, for a corporation cannot be impliedly liable to a greater extent than it could make itself liable by express corporate vote or action. But if the wrongful act be not, in this sense, *ultra vires*, but is within the general scope of the powers of the municipality, and was so done in the execution of corporate powers of a ministerial nature, but in an improper and unlawful manner, as to injure others, it may be the foundation of an action in tort against the corporation. Dill. Mun. Corp. § 968. In this case it not only does not appear that the act complained of was *ultra vires*, in the sense above stated, but, on the contrary, it affirmatively appears from the complaint, read in connection with the city charter, that the act was done by the city in the execution of its corporate powers, to wit, the control and regulation of the flowage of the waters of Fountain lake, but in such a negligent or unlawful way as to injure the plaintiff by overflowing his land. We use the term 'corporate powers' to distinguish them from those public services not peculiarly local or corporate, imposed by statute on municipal officers, but in which the corporation, as such, has no interest except as a part of the general public. Our conclusion is that the complaint states a cause of action."

To cite further authorities seems wholly unnecessary, but we call attention to the interesting opinions in *Naumberg v. Milwaukee*, 77 C. C. A. 67, 146 Fed. 641; and to the numerous authorities therein cited. Also, the recent case of *Bunker v. Hudson*, 122 Wis. 43, 99 N. W. 448. In the latter case we quote from the opinion as follows: "In grading the street the city was doing one of the things which, as a municipal corporation, it was authorized to do. That work was done in an improper or negligent manner, so as to invade the rights of the plaintiffs, not as members of the public, but

as adjoining proprietors. Toward them the city's act was not governmental, but proprietary. For proximate damage thus caused liability results according to principle, and without conflict of authority,"—citing numerous cases.

In concluding this opinion we cannot refrain from quoting from Judge Dillon's valuable works on *Municipal Corporations* 5th ed. vol. 4, § 1651: "Cases such as those just mentioned are to be distinguished from others which resemble them in the circumstance of relating to wrongful acts, but which arise out of matters or transactions within the general powers of the corporation, and in respect of which there may be a corporate liability. Thus, if in exercising its power to open or improve streets, or to make drains and sewers, the agents or officers of a municipal corporation, under its authority or direction, commit a trespass upon, or take possession of, private property, without complying with the charter or statute, the corporation is liable in damages therefor. In such cases, also, an action will lie against a city corporation by the owner of land through which its agents have unlawfully made a sewer, or for trees destroyed and injuries done by them. A case in Louisiana, which was several times before the courts in that state, was decided upon the same principle. The mayor of a city tortiously, and in defiance of an injunction, proceeded at the head of a force of laborers and demolished a portion of the plaintiff's house, for the supposed reason that it was on public ground. The city corporation ratified the act by defending it. On the first appeal the court doubted whether the corporation could be made liable for the wrongful acts charged against its officers, especially as these were alleged to have been done by them wilfully and maliciously. On the second appeal it was held that, although the acts of the mayor were done without the previous order of the city council, yet the corporation, by reason of its subsequent ratification, was liable, and the plaintiff recovered."

It follows from what we have above said that the order appealed from was erroneous, and the same is, accordingly, reversed.

Burke, J., being disqualified, did not participate.

Annotation—Liability of municipal corporation for trespass on private property where committed in connection with streets.

It is the purpose of this note to include only cases of actual trespass by municipal officers on private property in connection with streets of a municipal L.R.A.1916D.

corporation, and to exclude cases arising from the acts of municipal officers amounting to a constructive trespass, including their acts in interfering with

or changing the natural flow of water. This latter question is in part covered in notes in 65 L.R.A. 250 and 29 L.R.A. (N.S.) 126, as to the liability of municipal corporation for damming back surface water by grading streets; and its liability for damming up water courses in changing the grades is treated in a note in 59 L.R.A. 854. Another question excluded is that with reference to the liability of a municipal corporation in grading or changing the grade of streets where the officers confine their actions within the limits of the street itself. Generally as to liability of municipality for damage to abutting property from changing the grade of streets, see the notes in 23 L.R.A. 658; 7 L.R.A. (N.S.) 108; 36 L.R.A. (N.S.) 1194; L.R.A. 1915A, 382. And on the general question as to the liability of a municipality in tort for acts beyond the scope of its powers, see note appended to *Scott v. Tampa*, 42 L.R.A. (N.S.) 908.

General rule.

It is the general rule that a municipality is liable for an unlawful act done by its officers with reference to its streets and highways, if the act is not known and understood to be unlawful at the time, and the officers had competent authority from the municipality to do the thing complained of, or their act was ratified by it, especially where they acted with an honest intention to obtain for the public some lawful benefit or advantage, unless the act complained of is entirely beyond the general scope of the powers of the corporation. *Thayer v. Boston* (1837) 19 Pick. (Mass.) 511, 31 Am. Dec. 157. But a municipality is not liable for the unauthorized acts of its officers. (Mass.) *Ibid*.

A municipality is not liable for the unauthorized and unlawful acts of its officers although done *colore officii*. To render a municipality liable, it must further appear that the act is authorized by it, or was done bona fide, in pursuance of general authority to act for it on the subject to which the act relates, or that the act was ratified and adopted by it. *Sherman v. Grenada* (1875) 51 Miss. 186. And this showing will render a municipal corporation liable for a trespass committed by persons claiming to act for it or by its authority. *Chicago v. McGraw* (1874) 75 Ill. 566. Whether authority was in fact given officers of a municipality to do the thing complained of, or whether or not it actually existed, is generally a question of fact for the jury. *Thayer v. Boston* (Mass.) supra. L.R.A.1916D.

It is impossible by the statement of any general rules relative thereto accurately to point out the extent and limits of the liability of a municipal corporation for trespasses by its officers on private property while they were acting with reference to its streets. It is only by reference to the actual decisions that it is possible to at all visualize the question of liability in this regard. Hence the cases have been arranged with reference to particular trespasses on private land by officers of public corporations.

Causing earth, gravel, etc., to fall upon private property.

A city has no right to invade private property, either intentionally or negligently, while engaged in changing the grade of the public street, and if, while making such a change, earth and gravel are caused to fall upon adjoining land, it constitutes a trespass for which it is liable. *Hendershott v. Ottumwa* (1877) 46 Iowa, 658, 26 Am. Rep. 182; *Tegeler v. Kansas City* (1902) 95 Mo. App. 162, 68 S. W. 953; *O'Donnell v. White* (1901) 23 B. I. 318, 50 Atl. 333; *Bunker v. Hudson* (1904) 122 Wis. 43, 99 N. W. 448, holding that in grading a street a city acts within its corporate powers, and it, through negligence, it causes earth to fall upon adjoining property, this constitutes an invasion of the rights of the owner for which it is accountable, its act in this regard as to the owner being not governmental, but proprietary. And a municipality has been held liable for the acts of a contractor in repairing a public street where he recklessly and wantonly caused earth to fall on adjoining premises, destroying the walls of a dwelling house. *Broadwell v. Kansas* (1881) 75 Mo. 213, 42 Am. Rep. 406.

It has been held, however, that where, in paving a street, a contractor deposited earth upon adjoining land, and the act was unnecessary, and not the actual result of making the improvement, the trespass was one for which the contractor, and not the municipality, was liable. *Fuller v. Grand Rapids* (1895) 105 Mich. 529, 63 N. W. 530.

The fact that, in making a street improvement, municipal officers encroached upon land of the abutting owner, causing the destruction of a line wall, furnishes no ground for equitable relief in behalf of such owner to enjoin the collection of a special assessment for the improvement; the court said the remedy was by an action at law for the trespass.

Davis v. Silvertown (1905) 47 Or. 171, 82 Pac. 16.

Removing earth, stone, and other material from private property for street use.

Where officers of a borough, acting in pursuance of an ordinance duly passed and entered upon the public records, constructed a sidewalk on the public street, and, in doing so, entered upon adjoining land, tore down a fence, dug up the earth, and removed trees, the municipality is liable for their action. Brink v. Dunmore (1896) 174 Pa. 395, 34 Atl. 598. And a town has been held liable for the acts of its officers in entering upon adjoining lands and taking away stone lying on the bank of a river, near the water's edge, for use in repairing a bridge on the highway. Hawks v. Charlemont (1871) 107 Mass. 414. So, where a municipality purchased for street purposes and removed a quantity of stone from land, but it did not purchase the same from the true owner, it is liable to the latter for the trespass committed. Hunt v. Boonville (1877) 65 Mo. 620, 27 Am. Rep. 299.

And upon this point see Crossett v. Janesville (1871) 28 Wis. 421, which is not strictly within the scope of the note. It is there held that a municipality is liable to an abutting property owner for injury to property caused by the removal of earth from the street in changing the grade, where its act was unlawful by reason of its failure to comply with the statutory requirement that the consent of the property owner shall be first obtained before any change is made in the grade of a street.

It has been held that the act of a municipal officer authorized to repair the streets of a city, in going upon adjoining land and removing dirt therefrom to use in making such repairs, is not in line with the duty of such officers, and the municipality is not liable therefor unless, with knowledge of the facts, his act was ratified. Sherman v. Grenada (1875) 51 Miss. 186. Where there is no charter authority for the officers of a city, in pursuance of an ordinance or otherwise, to enter upon private land and remove earth or material therefrom, although for highway or street purposes, the city is not liable for the trespass. Rowland v. Gallatin (1881) 75 Mo. 134, 42 Am. Rep. 395. So, where the grading of a street was without lawful municipal authority, it has been held that a contractor, and not the municipality, is liable for the act of the former in tres-

passing upon private adjoining property and taking dirt therefrom, to be used for street purposes. Stuebner v. St. Joseph (1899) 81 Mo. App. 273. And see Calvert v. St. Joseph (1906) 118 Mo. App. 503, 95 S. W. 308, holding that a municipality is not liable for the acts of its officers in going outside the limits of an ordinance and taking dirt from private property, and using same in the construction of the street.

Destruction of private property erroneously believed to obstruct public way.

Where the officers of the municipality, while acting within the general scope of their duties, encroach upon private property under a mistake as to the right thereto, they believing it to be the property of the corporation, the municipality is liable for the trespass thus committed by them. Lee v. Sandy Hill (1869) 40 N. Y. 442; PERSONS v. VALLEY CITY, ante, 1079. Thus, the act of municipal officers in removing a fence erroneously believed to encroach on a highway has been held to be within the corporate powers, and hence to render the municipality liable to the injured property owner. Weed v. Greenwich (1877) 45 Conn. 170; Woodcock v. Calais (1877) 66 Me. 234; Sheldon v. Kalamazoo (1872) 24 Mich. 383; Gordon v. Taunton (1879) 126 Mass. 349, holding that the question should have been submitted to the jury as to whether or not the municipality had obtained an easement by prescription in the land upon which the fence stood that was removed.

It has been held, where municipal officers, in performing their duty of removing obstructions from the public ways under the general laws of the state, enter upon private land under the mistaken belief that it is a public way, the municipality is not liable for the trespass. Manners v. Haverhill (1883) 135 Mass. 165. And this case also holds that the mayor and aldermen cannot authorize street officers to enter upon private land and destroy property thereon, although they act upon the belief that the land belongs to the public. To render the municipality liable in such a case the authority must be based upon action by the common council, and be with reference to property the city claims to own, or in the performance of work which the city was authorized to do, or in which the city had a corporate interest distinct from that of the inhabitants of the commonwealth generally. And it has been held that a

municipality is not liable for the acts of its officers in going beyond the limits of an alley, and removing buildings from private property, where they acted under an ordinance authorizing them to remove obstructions from this alley. This decision is based upon the ground that authority to remove obstructions from an alley did not render the municipality liable for the acts of its officers in removing obstructions on land adjoining the alley, although the officers erroneously believed it to be a part of the alley. *Hanvey v. Rochester* (1861) 35 Barb. (N. Y.) 177. And also that a township is not liable for the unauthorized act of its supervisor in entering upon private property under the belief that it was a public street, and cutting down trees and removing them, and also removing earth for use on a public highway elsewhere. In this connection emphasis was laid upon the fact that, in order for the supervisor to represent the township, he must have had authority in that regard from the township board, and he did not have such authority. *Moore v. Coal Twp.* (1914) 56 Pa. Super. Ct. 55.

It has been held that a street commissioner, acting under a resolution of the city council, and removing a building which encroached on a public street, which such resolution declared to be a nuisance, is not acting as the agent or representative of the municipality in its corporate capacity, but is acting in the interest of the public generally, and for a public purpose in the enforcement of police regulations; hence his act in destroying the building as a nuisance is governmental in character, and since no liability is declared by statute for such an act, the municipality is immune from liability therefor. As indicated, this decision is based on a distinction made between the liability of a municipal corporation for the acts of its officers in the exercise of the powers which it possesses for public purposes, and which it holds as agent of the state, and the powers which embrace private or corporate duties, and are exercised for the advantage of the municipality and its inhabitants. *Cummings v. Lobsitz* (1914) 42 Okla. 704, L.R.A. 1915B, 415, 142 Pac. 993.

Miscellaneous.

Where a municipality by resolution required a turnpike road company to construct a draw in its bridge connecting its road with a public street, and, L.R.A.1916D.

on its failure to do so, took possession of the bridge and destroyed it in attempting to use it for highway purposes, it was held liable for the trespass, although it had no legislative authority to make use of the bridge. It was, however, authorized to require its removal. *Buffalo & H. Turnp. Co. v. Buffalo* (1874) 58 N. Y. 639.

And see *Peters v. New York* (1876) 8 Hun (N. Y.) 405, holding a municipality liable for the act of its officers in selling buildings upon land condemned for street purposes, where the buildings belonged to the original owner, who failed to remove them upon notice.

And see *Lexington v. Parker* (1899) 20 Ky. L. Rep. 1536, 49 S. W. 765, holding a municipality liable for appropriating to its own use for street purposes a strip of land adjoining the highway, together with property thereon. And also *Ludlow v. Mackintosh* (1899) 21 Ky. L. Rep. 924, 53 S. W. 524, holding a city liable for taking property of an abutting owner, and for injury to trees, shrubs, plants, and fencing, caused while improving a street.

While not strictly within the scope of the note, attention is called to a line of cases holding a municipality liable for the acts of its officers in unlawfully opening a street through private land. *Allen v. Decatur* (1860) 23 Ill. 332, 76 Am. Dec. 692; *Ft. Wayne v. Hamilton* (1892) 132 Ind. 487, 32 Am. St. Rep. 263, 32 N. E. 324; *Ashley v. Port Huron* (1877) 35 Mich. 296, 24 Am. Rep. 552; *Soulard v. St. Louis* (1865) 36 Mo. 546; *Lee v. Sandy Hill* (1869) 40 N. Y. 442; *Hathaway v. Osborne* (1903) 25 R. I. 249, 55 Atl. 700; *Squiers v. Neenah* (1869) 24 Wis. 588.

In *Hathaway v. Osborne* (1903) 25 R. I. 249, 55 Atl. 700, the liability of the town is based upon the ground that, in laying out and constructing highways, the corporation acts within its general powers; and hence, if the council, without right, directs its officers to enter upon private land and lay out a highway, and they do so, the town is responsible for the trespass thus committed.

Of course, the rule holding a municipality liable for the acts of its officers acting under authority in laying out a public street on private property, where based upon the fact that the municipality had general powers to lay out streets, does not apply where a municipality, in laying out a street, acted in violation of an express statutory prohibition. In

such case it has been held not to be liable to the owner of the property appropriated for street purposes. Cuyler

v. Rochester (1834) 12 Wend. (N. Y.) 165.
A. G. S.

TENNESSEE SUPREME COURT.

STATE OF TENNESSEE EX REL. O. J. TIMOTHY et al.

v.

H. E. HOWSE et al.

(134 Tenn. 67, 183 S. W. 510.)

Office — provision for removal — conflict of statutes.

1. A statutory provision for ouster of officers generally is not affected by a subsequent statute providing for the recall of those in a particular city so as to prevent proceedings for their ouster, if the latter statute provides that the method of removal provided by it shall be cumulative.

For other cases, see Officers, I. e, 3, in Dig. 1-52 N. S.

Judge — disqualification — passing on preliminary motion.

2. Acting upon a preliminary motion to suspend an officer for malfeasance in office does not disqualify the judge from sitting upon trial of the merits of a proceeding to oust him from his office.

For other cases, see Judges, III. in Dig. 1-52 N. S.

Appeal — discretionary matters — severance.

3. Whether or not a severance shall be granted in a proceeding to oust several incumbents from office rests in the discretion of the trial judge.

For other cases, see Appeal and Error, VII. i, 6, in Dig. 1-52 N. S.

Statute — ouster of officer — retroactive effect.

4. A statute providing for ouster of officials from office will apply to acts done prior to its passage if the acts were illegal at that time and the statute only provides a remedy.

For other cases, see Statutes, II. d, in Dig. 1-52 N. S.

Office — removal — prior term.

5. One may be removed from public office for offenses committed during a prior term.

For other cases, see Officers, I. e, 3, in Dig. 1-52 N. S.

Jury — right — ouster from office.

6. A constitutional preservation of the right to trial by jury does not apply to summary proceedings to oust one from public office.

For other cases, see Jury, I. b, 1, a, in Dig. 1-52 N. S.

Evidence — character — oral — summary proceeding.

7. Oral evidence is admissible in sum-

Note. — As to the recall, see annotation following *State ex rel. Brown v. Howell*, post, 1102.
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mary proceedings to oust one from public office, although the statute provides that the proceedings shall be conducted in accordance with procedure in chancery in which the testimony is taken in writing.

For other cases, see Officers, I. e, 3, in Dig. 1-52 N. S.

Officer — removal — obeying will of constituent.

8. The mayor of a city is subject to removal from office for refusal to execute a state prohibitory liquor law, although the persons who elected him to office desire that it shall not be enforced.

For other cases, see Officers, I. e, 3, in Dig. 1-52 N. S.

Same — suspension — direction as to election of successor.

9. The court may not, in a proceeding to oust from office the mayor of a city, determine as to the right to elect his successor, where the office is being filled by one elected in accordance with law to carry on the duties of the mayor during his suspension pending trial.

For other cases, see Officers, I. e, 3, in Dig. 1-52 N. S.

(February 15, 1916.)

CROSS APPEALS from a judgment of the Circuit Court for Davidson County in a proceeding for the removal of defendants from office; relators appealing from the decree reinstating defendant Elliott, and defendant Howse appealing from the decree of ouster. Affirmed.

The facts are stated in the opinion.

Messrs. W. C. Cherry, Harry S. Stokes, and J. G. Stephenson, for relators:

Incompetency and ignorance are grounds for ouster.

State use of Fentress County v. Reed, 116 Tenn. 110, 7 L.R.A.(N.S.) 1084, 95 S. W. 809.

The refusal to enforce any ordinance, even though to enforce it would violate the conscience of the municipal official, is ground for ouster.

Riggins v. Waco, 100 Tex. 32, 93 S. W. 426.

Where a contract is forbidden by charter or ordinance, it is not material that no financial harm was suffered by the city.

Re Smith, 48 App. Div. 634, 63 N. Y. Supp. 1018.

The delegation by a mayor to a subordinate to sign his name is a delegation of a legislative power, which is ground for ouster.

Lyth v. Buffalo, 48 Hun, 175.

The incompetency or neglect of a municipal officer to exercise supervisory powers under the charter constitutes a wilful neglect, which is ground for ouster.

Heaney v. Chicago, 117 Ill. App. 412.

The suspension of Mayor Howse did not deprive him of his *de jure* status of officer, and the selection of Mr. Ewing only constituted him a *de facto* officer. Therefore, when Mr. Howse was ousted, Mr. Ewing's right to perform the duties of the office of mayor was *ipso facto* determined.

29 Cyc. 1373, 1393; State ex rel. Childs v. O'Leary, 64 Minn. 207, 66 N. W. 264; State ex rel. Whitney v. Van Buskirk, 40 N. J. L. 463; Atty.-Gen. ex rel. Haight v. Love, 39 N. J. L. 476, 23 Am. Rep. 234; Smith v. Dyer, 1 Call (Va.) 562; People v. Blanding, 63 Cal. 333; People ex rel. Eldred v. Palmer, 154 N. Y. 133, 47 N. E. 1084; Wright v. Adams, 45 Tex. 134; Smith v. Bryan, 100 Va. 199, 40 S. E. 652.

Mr. Ewing having been selected by a board composed of only three commissioners, instead of four, as required by chapter 22 of the Acts of 1913, was never validly selected to perform the duties of the office of mayor.

Webb v. Carter, 129 Tenn. 182, 165 S. W. 426.

The proceedings for the removal of public officers "are of a character which is peculiar to themselves, and the remedy is one in which the legislature has seen fit to provide a special practice, which governs in such proceedings only."

State v. Borstad, 27 N. D. 533, 147 N. W. 380; Myrick v. McCabe, 5 N. D. 422, 67 N. W. 143; Yoder v. Com. 107 Va. 823, 57 S. E. 581; Rankin v. Jauman, 4 Idaho, 53, 36 Pac. 502; State ex rel. Jackson v. Wilcox, 78 Kan. 597, 19 L.R.A. (N.S.) 224, 130 Am. St. Rep. 385, 97 Pac. 372; State ex rel. Kirby v. Henderson, 145 Iowa, 657, 124 N. W. 767, Ann. Cas. 1912A, 1286; State ex rel. Cosson v. Baughn, 102 Iowa, 308, 50 L.R.A. (N.S.) 912, 143 N. W. 1100; Fuller v. Ellis, 98 Mich. 96, 57 N. W. 33; Govan v. Jackson, 32 Ark. 553; Davis v. State, 37 Tex. 227; People ex rel. Akin v. Kiple, 171 Ill. 44, 41 L.R.A. 784, 49 N. E. 229; Fields v. State, Mart. & Y. 168.

Summary proceedings for the removal of officers are not unconstitutional because no jury trial is provided for.

24 Cyc. 128, 135; Bank of State v. Cooper, 2 Yerg. 599, 24 Am. Dec. 517; Davis v. State, 92 Tenn. 642, 23 S. W. 59; Fields v. State, Mart. & Y. 171; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Ex parte Wall, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569; Foster v. Kansas, 112 U. S. 201, 205, 206, 28 L. ed. 629, 630, 697, 5 Sup. Ct. Rep. 897; Wilson v. North Carolina, 169 U. S. 586, 594, 596, 42 L. ed. L.R.A. 1916D.

865, 870, 871, 18 Sup. Ct. Ct. Rep. 435; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Eilenbecker v. District Ct. 134 U. S. 31, 33 L. ed. 801, 10 Sup. Ct. Rep. 424; Marvin v. Trout, 199 U. S. 212, 226, 50 L. ed. 157, 162, 26 Sup. Ct. Rep. 31; Luria v. United States, 231 U. S. 928, 58 L. ed. 101, 107, 34 Sup. Ct. Rep. 10; Yoder v. Com. 107 Va. 823, 57 S. E. 581; Brown v. Epps, 91 Va. 726, 27 L.R.A. 676, 21 S. E. 119; Munk v. Frink, 81 Neb. 631, 17 L.R.A. (N.S.) 439, 116 N. W. 525; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; State ex rel. Burke v. Jenkins, 148 N. C. 25, 61 S. E. 608; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; Sevier v. Justices of Washington County, Peck (Tenn.) 339; Tipton v. Harris, Peck (Tenn.) 414; State ex rel. Kirby v. Henderson, 145 Iowa, 657, 124 N. W. 767, Ann. Cas. 1912A, 1286.

Where it is practically the same or identical office, and there is a continuous, wilful neglect, or acts of misfeasance in office, those acts are competent to be proven to show the scienter and even grounds of removal.

State v. Welsh, 109 Iowa, 19, 79 N. W. 369; State ex rel. Billon v. Bourgeois, 45 La. Ann. 1350, 14 So. 28; Territory v. Sanches, 14 N. M. 493, 94 Pac. 954, 20 Ann. Cas. 109; State ex rel. Douglas v. Megaarden, 85 Minn. 41, 89 Am. St. Rep. 534, 88 N. W. 412; State ex rel. Atty.-Gen. v. Lazarus, 39 La. Ann. 142, 1 So. 361; People ex rel. Burby v. Auburn, 85 Hun, 601, 67 N. Y. S. R. 3, 33 N. Y. Supp. 165; State ex rel. Perez v. Whitaker, 116 La. 947, 41 So. 218; State v. Hill, 37 Neb. 80, 20 L.R.A. 573, 55 N. W. 794; Re Barnard, 4 Lincoln, Const. History, 605.

Messrs. John T. Lellyett and E. F. Langford for defendants.

Williams, J., delivered the opinion of the court:

A petition of accusation on relation of ten or more citizens was filed July 20, 1915, under the provisions of Pub. Acts 1915, chap. 11, commonly known as the ouster act, seeking the removal from their respective offices of H. E. Howse, mayor of the city of Nashville, and Robert Elliott, commissioner of waterworks, street cleaning, and workhouse of that city. The defendants filed answers, and proof was heard on an application made to the circuit judge to suspend both of the defendants from office, and he passed an interlocutory decree to that effect.

Later amended petitions of accusation were filed to which the defendants replied by answers.

The grounds of ouster set forth in the

pleadings of the relators may be concisely stated as follows:

(1) Substitution by defendants of administrative regulation of saloons, bawdy-houses, etc., for the charter requirement of legislative regulations by ordinance, and a wilful failure to enforce the laws and ordinances in relation thereto.

(2) The delegation to subordinates of the duty to approve vouchers, which unlawful delegation made possible the thefts shown throughout the record.

(3) The approval of vouchers without consideration, if signed by the head of a particular department, as an unlawful delegation of duty.

(4) Increase of offices, salaries, and various expenditures for other departments, while depriving the waterworks department of its own profits necessary for the acquisition and repair of machinery to protect life and property of the inhabitants.

(5) Padding the budget with railway park funds and other funds which were not receipts.

(6) Failure to require affidavits to contracts, showing the contractor not a person forbidden by law to contract with the city.

(7) Failure to keep separate bank accounts of trust funds as required by the charter.

(8) Failure to keep separate deposits of the school funds as required by § 1007 of the city digest.

(9) Encroachment on trust funds.

(10) Dealing with persons prohibited by the charter.

(11) Wanton waste of the city's money.

Nearly all of these charges were denied by defendants in the answers filed.

A large volume of proof was taken orally before the circuit judge, and it shows that the city had been brought to a financial condition that bordered on practical bankruptcy at the date of the filing of the petition.

The trial judge on the final hearing decreed that Howse should be ousted from the office of mayor, but he reinstated Elliott. The relators have appealed, complaining of the ruling last mentioned, and Howse has appealed from the decree of ouster, and the case is before this court on the two appeals.

Pub. Acts 1915, chap. 11, is entitled, "An Act to Provide for the Removal of Unfaithful Public Officers, and Providing a Procedure Therefor," and it makes provision for removal of such officers of certain classes who "shall knowingly or wilfully misconduct [themselves] in office, or who shall knowingly or wilfully neglect to perform any duty enjoined upon such officer by any of the laws of the state of Tennessee." L.R.A.1916D.

see." It is provided thereby that petitions of accusation may be filed on relation of the attorney general or other public officials or of ten or more citizens and freeholders of the state, county, or city, as the case may be.

Section 6 provides: "The proceedings under this act, whether in the circuit, chancery, or criminal courts, shall be conducted in accordance with the procedure of courts of chancery where not otherwise expressly provided herein; and all of said courts having cognizance of such proceedings are hereby given the full jurisdiction and powers of courts of equity with respect to such proceedings.

"Section 7. That said proceedings in ouster shall be summary and triable as an equitable action, and shall have precedence over civil and criminal actions, and shall be tried at the first term after the filing of the complaint or petition herein named: Provided the answer herein named shall have been on file at least ten days before the day of trial. A continuance may be granted either side for good cause shown, but no continuance shall be granted by an agreement of the parties."

Other provisions of the act are for the expedition suitable to a summary proceeding, such as those that the petition and answer shall constitute the only pleadings allowed, thus obviating the delay incident to demurrers, and that amendments shall not delay the trial. Answers are required to be upon oath or affirmation of the defendants.

The first assignment of error to be noticed in logical order is: That the lower court "erred in not holding the ouster act (chap. 11 of Acts of 1915) unconstitutional." This assignment of error does not point out the ground of unconstitutionality relied on, and is too indefinite for consideration under the rules of this court governing such assignments.

It is urged that the charter of the city of Nashville provided for the removal of officers of that corporation by recall, and that the remedy of recall is exclusive, and that therefore the ouster act does not apply to or affect appellant.

We held in this case when it was before us last year (*State ex rel. Timothy v. Howse*, 132 Tenn. 452, 178 S. W. 1112) that the ouster act was remedial in nature, and only provided a new or additional remedy. The charter provision in respect to recall plainly sets forth that it is also a cumulative remedy, thus: "This method of removal shall be cumulative and additional to the methods that are now or may hereafter be prescribed by law for the malfeasance, misfeasance, or nonfeasance of

public officers." Priv. Acts 1913, chap. 22, § 32.

The contention is manifestly untenable.

The appellant next contends that the court erred in refusing to sustain his motion that the trial judge order a transfer of the case to be tried before another judge on interchange on the ground that the circuit judge had prejudged the case when the case was before him on the motion to suspend appellant from office.

The fact that Judge Matthews, of the circuit court, heard the application, and suspended Howse, in no sense disqualified him to sit in the trial on the merits. The trial on the application to suspend was in this case (132 Tenn. 452, 178 S. W. 1112) likened to interlocutory orders passed by a chancellor in an ordinary equity proceeding, and the circuit judge is no more disqualified by hearing such an application than is a chancellor who, when an application for extraordinary process, such as an injunction, is heard by him at chambers, grants the same, and the case comes on later to be heard on the merits.

A motion was made by Howse in the court below for a severance and separate trial. It is assigned for error that this was denied. Whether a severance shall be granted in a civil case, such as this is, is in the discretion of the trial court. *Tyson v. Netherton*, 6 Heisk. 19; 38 Cya. 1268. There is nothing in the ouster act that provides to the contrary.

The appellant renews on the hearing of this appeal the insistence he urged on the former hearing in this court, to the effect that the trial judge erred in admitting in the trial on the merits testimony as to acts of malfeasance done during his pending term, but prior to the passage of the ouster act, January 19, 1915. We then held that the circuit judge in the trial of the application to suspend Howse properly considered such testimony, since "the act undertook to make nothing illegal that was not illegal before the act's passage, but that the act is merely remedial in its nature, and it only provides a new remedy." This holding was after full consideration, and it is upon reconsideration affirmed. A judgment of ouster under the act may therefore be predicated upon official acts transpiring prior to the passage of the act.

But the counsel of appellant point out that the circuit judge, over objections made, admitted evidence offered by the relators of certain acts of Howse while serving as mayor in the previous term of office. It is insisted that the better doctrine is that an officer cannot be removed from office for violation of his duties in such preceding term.

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This is a question upon which the authorities are divided, and so much so that it is difficult to say on which side of the exact point is the weight of authority, though perhaps it is with appellant's contention. Those cases proceed upon the fundamental notion that the re-election of the official operates to condone his past offenses.

In our view, however, the opposing cases announce the better doctrine, and the one more nearly in accord with our cases and with the precedent rulings in relation to our ouster act.

The reasoning and rulings in *Day v. Sharp*, 128 Tenn. 340, 345, 161 S. W. 994, 995, are leveled against this underlying notion: "The protection of the public is involved in the proceeding and judgment. Nothing in the statute suggests that electors, even, can condone the misfeasance."

The reference was to another disqualifying statute of this state.

In *Territory v. Sanches*, 14 N. M. 493, 94 Pac. 954, 20 Ann. Cas. 109 (cited in 132 Tenn. at page 459, 178 S. W. 1112), it was said: "It is essential to determine at the outset and to bear in mind throughout the true nature and purpose of the proceeding brought here for review. They could hardly be better expressed than in the words of Kent, J., in *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172, in which the state was represented by its attorney general, Honorable Thomas B. Reed: 'The object of the removal of a public officer for official misconduct is not to punish the officer, but to improve the public service, and to free the public from an unfit officer.' To the same effect is *Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502. With this clear statement, which cannot be gainsaid, as a guide, we shall be prepared to deal with the first claim of error for the defendant, discussed in the brief in his behalf, namely, that the trial court erred in holding that the defendant could be removed from office for acts done by him while holding the same office in the term immediately preceding the one in which his trial took place. The weight of authority, in numbers, is probably with the defendant on that point. But is a public officer less unfit to hold his office, or are the people less injuriously affected by his holding it, because the act demonstrating his unfitness was committed on the last day of one term of office rather than on the first day of the next succeeding term? There can be but one answer to that question."

In *State v. Welsh*, 109 Iowa, 19, 79 N. W. 369, the court said: "The defendant was re-elected sheriff of Johnson county at

the general election of 1898, and during his second term, commencing January 1st of the year following, this action for his removal was begun. On motion the particular averments of official misconduct and neglect of duty during the first term were stricken from the petition on the ground that removals are only allowable for acts during the term being served. The statute contains no such limitation. The very object of removal is to rid the community of a corrupt, incapable, or unworthy official. His acts during his previous term quite as effectually stamp him as such as those of that he may be serving. Re-election does not condone the offense. Misconduct may not have been discovered prior to election, and in any event had not been established in the manner contemplated by the statute.

. . . The commission of any of the prohibited acts the day before quite as particularly stamps him as an improper person to be intrusted with the performance of the duties of the particular office, as though done the day after."

See also *State ex rel. Billon v. Bourgeois*, 45 La. Ann. 1350, 14 So. 28; *State ex rel. Douglas v. Megaarden*, 85 Minn. 41, 89 Am. St. Rep. 534, 88 N. W. 412, and other cases in accord cited in note in 50 L.R.A. (N.S.) 553, where also the cases holding to the contrary are collected.

Let us assume that a candidate for the mayoralty of a city is elected on pledges personally given to the electorate to enforce the laws; that he is elected, and that in consequence he gains control of the police department and the machinery for law enforcement; that near the close of his term, in order to a re-election, he uses all the machinery intrusted to him to nullify the laws' effectiveness for the purpose of bringing to his support those interested in nonenforcement; that by use of other means known to the modern politician and shown in this record he is elected. May it be said that the arm of the law is too short to reach and remedy this wrong; that a majority of the votes so secured operates to render immune the culprit? If so, the law itself holds out a reward, under the guise of condonation, for him who subverts the law, and a temptation to perpetuate himself in office by a repetition of the acts of subversion, whether they be acts of bribery, or the use of funds gathered from law violators as the price of their protection. We hold that the law is not to be thus made the instrument of its own undoing. Any doctrine that tends in that direction does not commend itself, and should be rejected.

The appellant, as defendant below, demanded a jury to try the questions of fact, L.R.A.1916D.

and, that demand having been denied, the ruling is assigned as error. It is argued that thereby a right guaranteed by the Constitution was withheld.

Our Constitution of 1870 in the embodied Declaration of Rights provides: "The right of trial by jury shall remain inviolate." Article 1, § 6.

The same language was used to express the guaranty in the Constitutions of 1834 and 1796, and its meaning as to the nature of the "right" is to be gathered from that language used in the earliest Constitution. In relation to another constitutional guaranty of trial by jury, this court said in *Eason v. State*, 6 Baxt. 466, 474: "When the Constitution of 1870 was adopted, the same language which had thus been judicially interpreted was again readopted, and, we have a right to presume, with full knowledge of its uniform interpretation in the Constitutions of 1791 and 1834. This being so, this interpretation of the language becomes incorporated with the Constitution of 1870 as part of the fundamental law of the state."

At an early date it was held that the provision in the Constitution of 1796 did not guarantee a jury trial in every sort of case. In *Goddard v. State* (1825) 2 Yerg. 96, a bastardy case, it was held that a trial by jury was not a right of the putative father, the court saying: "The English Magna Charta has the same provision, from which the framers of our Constitution borrowed it, the construction of which has been settled as early as the time of Sir Edward Coke, who in his reading upon this statute tells us that the cases in which courts act without a trial by jury, or 'peers,' are innumerable and undefined, being done 'by the law of the land.'"

The court in that case instanced by way of example that a sustention of the defendant's contention would prevent a court of chancery decreeing upon property rights without the intervention of a jury, on demand being made for one.

If the proceeding for ouster prescribed by the act is one summary in nature, it is, we think, manifest that a trial by jury was not demandable as a matter of constitutional right. From very early times it has been held that the meaning of the term "summary proceedings" is such proceedings as are not according to the course of the common law (4 Bl. Com. 280); therefore not such proceedings as fell within the provision of Magna Charta above referred to.

A "summary proceeding" is defined in *Bouvier's Law Dict.* to be "a form of trial in which the established course of legal proceeding is disregarded, especially in the

matter of trial by jury." See also 7 Words & Phrases, 6786; 4 Words & Phrases, 2d Series, 786; 24 Cyc. 128, 135; 37 Cyc. 528.

The Constitution containing no express prohibition, it was competent for the legislature to provide a summary procedure for the removal of public officers for misconduct in office, without violating the right to trial by jury. *Fields v. State*, Mart. & Y. 168; *Sevier v. Justices of Washington County*, Peck (Tenn.) 334; 24 Cyc. 134; *People ex rel. Akin v. Kipley*, 171 Ill. 44, 41 L.R.A. 775, 49 N. E. 229; *Moore v. Strickling*, 46 W. Va. 515, 50 L.R.A. 279, 33 S. E. 274; *State ex rel. Burke v. Jenkins*, 148 N. C. 25, 61 S. E. 608.

Modern ouster statutes which in terms deny the right to trial by jury (such as the one involved in *State ex rel. Kirby v. Henderson*, 145 Iowa, 657, 124 N. W. 767, Ann. Cas. 1912A, 1286) are not on that account unconstitutional; nor are officers proceeded against entitled to a jury where the proceedings are made summary in nature and no trial by jury is expressly provided for. *Woods v. Varnum*, 85 Cal. 639, 24 Pac. 843; *Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502.

In the last-cited case it was said: "The right of the legislature to provide for the summary removal of incompetent or unfaithful officers is no new doctrine. . . . It arises from the exigencies of government, and, if its enforcement is to be obstructed by all the delays and embarrassments incident to a jury trial, the aim and purpose of the law would be entirely defeated."

We are of the opinion that it was the intention of the legislature in the act under review to make the proceeding a summary proceeding. The language, "said proceedings in ouster shall be summary," clearly manifests that purpose.

It is argued by appellant that this is not the proper construction; that its popular meaning, rather than its legal, should be given to the word "summary," and the provision of the act construed to mean only that proceedings under it shall be speedy and expeditious. We had occasion to comment in the opinion on the former hearing that the act evidences the use of legal terminology. It was the work of a draftsman skilled in the law, and, when a summary proceeding was provided for, the legislature had in mind the nature of such a proceeding as contradistinguished from a regular one.

This being settled, it follows that, when a summary proceeding was provided, that, without more, meant that the trial should be one without the intervention of a jury. This, as we have seen, is a part of the very definition of the phrase "summary proceeding." When the phrase is used in a stat-

ute without more, a trial by jury is, in terms as if express, excluded. *Woods v. Varnum*, supra; *Govan v. Jackson*, 32 Ark. 557, cited in *Taylor v. Carr*, 125 Tenn. 249, 141 S. W. 745, Ann. Cas. 1913C, 155, with approval; *Yoder v. Com.* 107 Va. 823, 57 S. E. 583. And the same principle is recognized in *Territory v. Sanches*, 14 N. M. 493, 94 Pac. 954, 20 Ann. Cas. 109.

An extended argument is made that, because the act provides that ouster suits shall be "triable as equitable actions," and "shall be conducted in accordance with the procedure of courts of chancery where not otherwise expressly provided herein," and because in the ordinary or regular chancery cause material issues of fact may, it is claimed, be submitted to a jury as a matter of right, the constitutional guaranty applies to this proceeding. The right to a jury in the proceeding, however, is to be deemed excluded, not because it is an equitable action, but because, while it is such, it is also a peculiar action, irregular and summary in character, in respect to which a court of equity, of whatever character, does not proceed according to the course of the common law.

We need not, therefore, follow able counsel into their elaborate argument as to when, if ever, trial by jury of issues of fact in ordinary equity causes was guaranteed by a constitutional provision; as to which, however, see *Gibson's Suits in Ch.* 2d. ed. § 547, note, and cases cited.

In this connection it may be observed that this court has held that in the legal action of mandamus there is no constitutional right of trial by jury, such not having been demandable at common law (24 Cyc. 129), though such a trial may be granted in the discretion of the court (*Marler v. Wear*, 117 Tenn. 244, 96 S. W. 447); that election contests are not jury cases (*Shields v. McMahan*, 112 Tenn. 4, 81 S. W. 597; *Taylor v. Carr*, 125 Tenn. 235, 249, 141 S. W. 745, Ann. Cas. 1913C, 155); that a proceeding to disbar an attorney and deprive him of his status as an officer of the court is to be tried summarily by the court without a jury (*Davis v. State*, 92 Tenn. 634, 642, 23 S. W. 59).

The circuit judge properly ruled against appellant on his demand for a jury.

The appellant in the lower court at a timely stage objected to the introduction of oral evidence, on the ground that the proceeding is provided to be conducted "in accordance with the procedure of courts of chancery, where not otherwise expressly provided herein," and that the Code, Shannon, § 6272, stipulates that in chancery cases testimony shall be taken in writing. We are of opinion, in view of the fact that

the proceeding is summary, that oral proof was properly admitted. To have taken the proof in the form of depositions under the rules of chancery procedure, allowing four months for proof in chief and two months for proof in rebuttal, would have frustrated the purpose of the act which looked to expedition.

The purpose of the act was to advance the remedy, and in such case the construction to be given it should be liberal to the same end. *Cannon v. Wood*, 2 Sneed, 177; *Rose v. Wortham*, 95 Tenn. 505, 30 L.R.A. 609, 32 S. W. 458.

Council of Howse advance the proposition that he, as mayor, was a "civil officer" within the meaning of article 5, § 5, of the Constitution, and that this section provides the causes for which and the exclusive procedure under which he may be removed from office. This argument is not well based, for reasons set forth in full in the opinion this day handed down in the case of *State ex rel. Thompson v. Crump*, — Tenn. —, 183 S. W. 505; the two cases having been heard, considered, and decided at the same time as companion cases.

We come, then, to a consideration of the assignment of errors which relate to the facts and seek to impeach the judgment rendered on the merits in the court below.

Howse was first elected to the office of mayor in the fall of 1909. In the previous spring a city ordinance had been passed prohibiting the sale of intoxicating liquors. In the platform on which Howse ran was the statement: "There can be no two opinions among good citizens and law-abiding people about the expediency of enforcing any law that has been regularly passed by the constituted authority."

In an address to the voters (which was published), after commenting upon the then recent passage of the state prohibition law, Howse said: "I want to be understood as saying in this connection that if I am placed at the head of the Nashville government I will vigorously and literally see to the enforcement of this law. I will not confine my efforts in this direction to isolated spasms of activity, or to widely separated and showy contortions of zeal. The mayor of Nashville has the power, if he has the will, to see that every lawful statute and ordinance is consistently enforced."

The address contains another significant passage: "It should not be said that any law which, in the opinion of the lawmaking body, was proper to be enacted for the purpose of protecting the morals of our people, can, with impunity, be violated, or that it can, with official countenance, become a void letter in the city which is the educational center of the South."

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Howse was elected to the mayoralty, and he was again elected in 1911, and then became ineligible under the terms of the existing charter of the city. A new charter was passed by the legislature which permitted of Howse's election to the mayoralty a third time in the fall of 1913. At that time open saloons were running in violation of the law in the business section of the city. As mayor, Howse had control and supervision of the police department.

The record makes manifest that funds were raised from the saloonists that went into the 1913 campaign fund of Howse, and that in return for the monthly levies made upon them they secured protection in the violation of law. One of these, Morse, who was a close friend of Howse, a co-director in the same bank, and whose place of business was near that of Howse, testifies that he was treasurer of this fund and contributed \$15 per month himself; others more. Continuing:

Q. You were running, and you were not being raided by the police of Nashville?

A. No, sir.

Q. And you were receiving protection in violation of law?

A. Well, you might call it that.

Q. I am asking you.

A. Yes; you might call it that.

Q. And you were paying \$15 a month to get that protection, weren't you?

A. That is true.

Q. Didn't you consider protection cheap at \$15 a month?

A. Well, yes; that is pretty reasonable.

The funds were deposited in the bank referred to, and the treasurer can give no satisfactory account of the expenditure of the fund or of those to whom it was checked out.

Contrasted with the above pledges is the following excerpt from the answer of Howse to the charges contained in the petition of accusation:

"Answering further, the defendant Hilary E. Howse says that from the time he was elected mayor in October, 1909, up to January 15, or thereabouts, 1915, that liquors were sold in Nashville with his knowledge, and that he was elected to office when the public sentiment of the city was such that it demanded the sale of liquors. Defendant knew of their sale, and did not order or direct the suppression thereof, because he had announced in his candidacy for the office in 1911 that he was opposed to prohibition, but, favored local option, and he lived up to the statements he had made to the people who elected him after election as to the practice in the enforcement of the liquor laws."

He further says in his answer that "in deference to the changed sentiment of his party and the people, and in conformity to the policy adopted by the state officials, he ordered the suppression of the liquor traffic by the police force."

The facts just recited, without more, constitute ample cause for ouster. *State ex rel. Martin v. Ryan*, 92 Neb. 636, 139 N. W. 235, Ann. Cas. 1914A, 224; *State ex rel. Jackson v. Wilcox*, 78 Kan. 597, 19 L.R.A.(N.S.) 224, 130 Am. St. Rep. 385, 97 Pac. 372. The attempted justification of himself on the ground that the local public sentiment was opposed to law enforcement is no sort of justification or palliation. An official is elected and sworn to enforce the law, not public sentiment; and any suggestion that a municipality, a creature of the state, or its officers may set at naught or defy the laws of a sovereign state cannot be too severely rebuked. That way leads to anarchy. The officer who treads it brands himself as unworthy.

We shall not undertake to discuss and specifically pass on each of the other grounds of accusation against Howse as mayor. Several, though not all, of them are sustained by the proof.

We shall, however, refer to two of these.

One relates to the building of a market house on Haymarket square at a total cost above \$17,500. In order to avoid the charter provision requiring that in case any estimated expenditure amounted to more than \$500 the work should be advertised and let to the lowest responsible bidder, the work was done without compliance with these requirements. One firm did most of the work, and was paid by means of vouchers of \$500 or under, signed by Howse, as if separate smaller contracts were let, thus, in substance, defeating the charter's check on collusion and extravagance. Color is given to this transaction by the facts that this market house was erected within a short distance of Howse's business establishment, without any real need of it at that place; that in order to induce its construction a number of those owning property near by subscribed to a fund to be donated to the city in part payment; that Howse's firm was one of the subscribers; and that on the completion of the building this fund was returned to the subscribers. It is fairly indicated on the record that the market house was from the outset a failure, entailing a heavy loss on the city.

In respect of a distinct charge of the illegal delegation to subordinates of the duty of approving vouchers, it appears that the mayor, in violation of § 3 of the city charter, frequently permitted his subordinates to sign his name to vouchers in approval, L.R.A.1916D.

and that in instances the practice led to the commission of gross frauds on the city treasury.

Without prolonging the discussion under this head, we hold that the circuit judge did not err in ousting Howse from his office.

The relators assign error in the judgment below in that Commissioner Robert Elliott was reinstated in his office, from which he had been suspended by interlocutory decree.

We have carefully read the record on this point, and have reached the conclusion that the circuit judge correctly ruled in favor of appellee Elliott. The solution of the dispute depends on questions of fact which we shall not undertake to discuss.

A second error assigned by the relators is that the trial judge did not decree that the board of commissioners of the city as then constituted "may proceed to the election of a successor to defendant Hilary E. Howse as mayor." The circuit judge was of opinion that there was no issue in the pleadings to support such an adjudication, and that all parties necessary for its determination were not before the court, and that it was not proper to adjudge in respect of the tenure of the person who had been chosen to carry on the duties of the mayor at the time of Howse's suspension. We think that the circuit judge held and enforced the correct view. The right of Howse only was in issue. The status of his successor under the act was not to be determined without the latter having a day in court. He did not hold by reason of any court appointment, but under an election held in pursuance of the charter of the city.

Finding no error in the rulings of the Circuit Judge which could affect the result, the judgment entered below is affirmed. The cost of the appeal will be paid three fourths by appellant Howse, and one fourth by appellees.

TENNESSEE SUPREME COURT.

STATE OF TENNESSEE EX REL. LAURENT BROWN et al., Pliffs. in Certiorari,
v.

H. B. C. HOWELL et al., Election Commissioners of Davidson County.

(134 Tenn. 93, 183 S. W. 517.)

Election — recall — joint petition — partial invalidity — effect.

No action can be taken under a recall petition against several officers jointly; at least, if some are not elected by the con-

Note. — As to the recall, see annotation following this case, post, 1102.

stituency originating the petition and others have already vacated their offices.
For other cases, see Initiative, Referendum, and Recall, in Dig. 1-52 N. S.

(February 26, 1916.)

CERTIORARI to the Court of Civil Appeals to review a judgment reversing a judgment of the Circuit Court for Davidson County sustaining a petition for a writ of mandamus to compel defendants to certify a list of voters and to order an election to recall or remove certain officers from office. Affirmed.

The facts are stated in the opinion.

Messrs. **Laurent Brown, William B. Marr, Richard P. Dews, Robert L. Sadler, Charles Gilbert, and R. A. Goodman**, for plaintiffs in certiorari:

Irregularities do not avoid an election unless they affect the result of the election.

10 Am. & Eng. Enc. Law, 766, 767; 15 Cyc. 318, 319; *McCraw v. Harralson*, 4 Coldw. 34; *Puckett v. Springfield*, 97 Tenn. 264, 37 S. W. 2; *Louisville & N. R. Co. v. County Ct. 1 Sneed*, 638, 62 Am. Dec. 424; *Hord v. Rogersville & J. R. Co.* 3 Head, 208; *Red River Furnace Co. v. Tennessee C. R. Co.* 113 Tenn. 697, 87 S. W. 1016; *Richardson v. Young*, 122 Tenn. 471, 125 S. W. 664; *Butler v. Mills*, 61 Ark. 477, 33 S. W. 632.

Either act charged in the recall (regarded as crime, tort, or breach of contract) would support a joint action.

Fowler v. State, 3 Heisk. 154.

The recall "should receive a liberal construction with a view to promoting the purpose for which it was enacted," which is "that the people may have an effective and speedy remedy to remove an officer who is not giving satisfaction," "without form or ceremony."

Dunham v. Ardery, 43 Okla. 619, L.R.A. 1915B, 232, 143 Pac. 331, Ann. Cas. 1916A, 1148; *Conn v. Richmond*, 17 Cal. App. 705, 121 Pac. 714, 719; *Robinson v. Anderson*, 26 Cal. App. 644, 147 Pac. 1182; *State ex rel. Clark v. Harris*, 74 Or. 573, 144 Pac. 109, Ann. Cas. 1916A, 1156; *State ex rel. Smith v. Barbur*, 73 Or. 10, 144 Pac. 126; *Mills v. Nickeus*, 81 Wash. 409, 142 Pac. 1145; *Bonner v. Belsterling*, — Tex. Civ. App. —, 137 S. W. 1154, 104 Tex. 432, 138 S. W. 571; *Hilzinger v. Gillman*, 56 Wash. 228, 105 Pac. 471, 21 Ann. Cas. 305; *Good v. San Diego*, 5 Cal. App. 265, 90 Pac. 44; *State ex rel. Topping v. Houston*, 94 Neb. 445, 50 L.R.A.(N.S.) 227, 143 N. W. 796.

There was express authority for removal.

Hayden v. Memphis, 100 Tenn. 582, 47 S. W. 182.

Where the mayor has authority to remove any officer appointed upon his nomination, L.R.A.1916D.

he may remove the appointee of his predecessor.

Williams v. Gloucester, 148 Mass. 256, 19 N. E. 348; *MacLellan v. Marine*, 98 Md. 53, 56 Atl. 359.

The election of a successor is the primary object of the recall, and the removal is only incidental.

Poole v. Lawrence, 86 N. J. L. 90, 90 Atl. 668.

The action of the election board, holding the recall petition sufficient in form, is conclusive until set aside.

15 Cyc. 320.

No discretion as to the form of the recall petition is vested in the election board.

Poole v. Lawrence, supra; *Robinson v. Anderson*, 26 Cal. App. 644, 147 Pac. 1182; *Hay v. Dorn*, 93 Kan. 392, 144 Pac. 235; *Conn v. Richmond*, 17 Cal. App. 705, 121 Pac. 714, 719; *Good v. San Diego*, 5 Cal. App. 265, 90 Pac. 44; *Dunham v. Ardery*, 43 Okla. 619, L.R.A.1915B, 232, 143 Pac. 331, Ann. Cas. 1916A, 1148.

Nonjoinder is matter in abatement, and, in a common-law case, must be set up by demurrer or plea in abatement.

1 Enc. Pl. & Pr. 14 et seq.

If the answer below be treated as a valid plea in abatement, and in bar, under the statute, the matter in abatement has been waived, because no separate action was invoked on it in the circuit court.

Cincinnati, N. O. & T. R. Co. v. McCollum, 105 Tenn. 623, 59 S. W. 136; *McC Campbell v. State*, 116 Tenn. 98, 93 S. W. 100.

Messrs. **John W. Gaines, Jr., and Pius & McConico**, for defendants in certiorari:

If recall petition or proposition to be submitted to voters at referendum election is so irregular that an election based thereon would be invalid, mandamus will not lie to compel the submission of such matter to the electors.

State ex rel. Davies v. White, 36 Nev. 334, 50 L.R.A.(N.S.) 195, 136 Pac. 110; 13 Enc. Pl. & Pr. 493, 494.

The filing of a separate recall petition against each officer sought to be removed is the proper practice.

Conn v. Richmond, 17 Cal. App. 705, 121 Pac. 714, 719; *Robinson v. Anderson*, 26 Cal. App. 644, 147 Pac. 1182; *Bennett v. Drullard*, 27 Cal. App. 180, 149 Pac. 368.

An officer subject to recall cannot be regarded as "recalled" until after the recall election is over and its result ascertained and declared. The mere filing of a recall petition does not amount to a "recall" of the incumbent officer.

Bonner v. Belsterling, — Tex. Civ. App. —, 137 S. W. 1154.

When the terms under which the power of

removal or motion is to be exercised are prescribed, they must be pursued with strictness.

State ex rel. Miller v. Berg, 97 Neb. 63, 149 N. W. 61; 2 Dill. Mun. Corp. 5th ed. § 468.

Constitutionality of recall provisions is sustained upon the ground that they are applicable only to officers elected after the passage of the recall statute.

State ex rel. Topping v. Houston, 94 Neb. 445, 50 L.R.A. (N.S.) 227, 143 N. W. 796; Hilzinger v. Gillman, 56 Wash. 228, 105 Pac. 471, 21 Ann. Cas. 305; Bonner v. Belsterling, — Tex. Civ. App. —, 137 S. W. 1154, 104 Tex. 432, 138 S. W. 571.

The unlawful inclusion of three officers not subject to recall, in the recall petition, operates to make the same illegal.

Bennett v. Drullard, 27 Cal. App. 180, 149 Pac. 368; Hay v. Dorn, 93 Kan. 392, 144 Pac. 235; Leavenworth v. Wilson, 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367.

Fancher, J., delivered the opinion of the court:

The charter of the city of Nashville (Priv. Acts 1913, chap. 22) provides for a commission form of government. It also provides that the mayor or any commissioner elected by the people under this act may be removed from office by the qualified voters of the city.

The suit now before us on writ of certiorari to review the judgment of the court of civil appeals was instituted in the circuit court of Davidson county by a petition of Laurent Brown and others, petition for a writ of mandamus to compel Howell, Turner, and Carr, commissioners of election, to certify a list of voters, and to order an election to recall or remove Hilary E. Howse, mayor, and J. M. Wilkerson and R. B. Elliott, commissioners, from office.

The petition avers that there had been signed by upwards of 2,500 voters, as required by the city charter, a joint and several petition asking for the removal of these three officials and others, that the petition had been filed with the board of election commissioners for more than thirty days, but that Howell and Carr had refused to join their co-commissioner, Turner, in providing for said election.

Turner answered and showed a willingness to comply, and averred that he had tried to get his associates to do so, but they refused.

Howell and Carr answered, and pointed out a number of alleged irregularities in the recall petition which they averred justified their refusal to act. These defects were, among others, that Lyle Andrews, commissioner of finance, whose removal

was sought, had been removed previously, and his successor selected in a legitimate way; that the petition sought the removal of Wilkerson and Alexander, who were not subject to recall under the charter of the city. They also pointed out that the petition was not joint and several, but jointly against a number of officials, whereas there should have been circulated and presented separate petitions against each separate officer whose removal was sought.

The case was heard on petition and answers.

It appeared that Wilkerson had resigned subsequent to the filing of the petition, and that Howse and Elliott had been temporarily suspended from office under what is known as the ouster law (Pub. Acts 1915, chap. 11), a statute of the state providing for the removal of officials from office upon a judicial hearing. The temporary suspension of Howse and Elliott was shortly after the recall petition had begun to circulate among the voters. Since the case has been pending Howse has been permanently removed in the ouster case, and Commissioner Elliott has been restored to office by judgment of this court.

The circuit court judge ordered the commissioners of election to attach their certificate and to order a recall election as to Howse, Elliott, and Wilkerson. The court of civil appeals by a divided court reversed the circuit judge and dismissed the petition.

The city charter provides for the recall by a petition signed by duly qualified and registered voters equal in number to 25 per cent of the entire vote cast for the office of mayor at the last preceding general city election, and demanding the election of a successor of the person sought to be removed, which shall be filed with the chairman of the county board of election commissioners. The petition shall state the grounds on which the removal is sought. The signatures need not be all appended to one paper, but each signer shall add to his signature his place of residence, giving street and number. Five of the signers to each such petition shall make oath before some competent officer that the statements made therein are true, as he believes, and that each signature appended is the genuine signature of the person whose name it purports to be. When filed with the board of election commissioners, they shall determine whether it is signed by a sufficient number of voters, to be ascertained from the registered voters, and it shall remain on file at the office of said board, and any citizen may procure a copy. Within thirty days from the date of filing any citizen may appear before the board of election commissioners and

show by competent evidence that the names of parties signing the petition should be stricken therefrom on the ground that they are not duly qualified and registered voters. After the lapse of thirty days from the filing of the petition the board of election commissioners shall attach their certificate showing the result of said examination. In the event the petition shall be deemed sufficient by said board of election commissioners it shall be its duty to fix a date for holding said election, not less than thirty days nor more than ninety days from the date of said certificate that a sufficient petition has been filed.

If, by certificate of the county board of election commissioners, the petition is shown to be insufficient, it may be amended within ten days from the date of said certificate, and the said board shall then make like examination of the amended petition within ten days after the amendment.

There are other provisions unnecessary to set out. An election is provided for. Any person sought to be removed may be a candidate to succeed himself, and his name shall be placed on the ballot without nomination unless he in writing requests otherwise. If some other person than the incumbent shall receive the highest number of votes, the incumbent shall thereupon be deemed removed from office upon the qualification of his successor, who shall hold for the unexpired term.

It will be seen that the board of election commissioners pass upon the sufficiency of the petition for removal.

It appears that one official whose name was included in this recall petition was not then in office, and two of these officials were not subject to recall, because they were not elected by the people under the terms of this act of 1913. The election, had it been called, would have been void as to these officials. The learned circuit judge saw the incongruity in this petition to remove men not subject to the recall along with those who might be, and he ordered the mandamus to apply only to Howse, Elliott, and Wilkerson. It is urged that this was proper.

We are of opinion the action of the court of civil appeals lays down the proper construction of this statute and the practice. The petition signed by the voters was for the removal of all the officials jointly. By what means can we determine that the people would sign a recall as to one or a few, less than all of the officials? The petition was joint and proceeded against all.

After a judicial inquiry by the courts under the ouster bill, Mayor Howse has been ousted from office, and Commissioner Elliott has been restored to office. Wilkerson has resigned. So, if we were to order the L.R.A.1916D.

writ of mandamus, and the election should be held, it could only apply now to Elliott, the only remaining officer subject to removal. How may we know that these 2,500 voters who signed the joint petition for removal would now desire the removal of Elliott alone?

This illustrates how improper it is to include a number of officials in one petition or proceeding for removal.

The petition signed by the voters constitutes, so to speak, the pleading or indictment initiatory to remove an official. It should be directed against a single individual for the reason, first, as we think, that it is so contemplated by the act of the legislature granting this remedy in the city charter. The act starts out with the provision that the mayor or any commissioner elected by the people under the terms and provisions of this act may be removed from such office by the qualified voters of the city. All the way through it grants authority to proceed against an officer sought to be removed, and nowhere indicates that the method may be proceeded with against a number of officials jointly. See Priv. Acts 1913, chap. 22, § 32.

The impropriety and injustice of proceeding against a number of persons in one petition are manifest. It is subject to objection on the ground that a voter, when presented with the petition, must judge as to the question of whether he shall ask for a removal of a number of men or else submit to the retention in office of all. He is not given the clear-cut right to pass on each individual and exercise his own individual judgment as to that particular person. The fact that the petition stated the same cause of removal against all does not cure it of this objection. The voter ought to have the right to judge singly against each officer if he so desires. The legislature evidently so intended.

The same right to exercise independent judgment on each separate official must exist in the initiatory step of removal, as effectively as that the voter may so exercise at the ballot box his right and duty to elect a new official or recall an old one. As well might it be said that the voter shall be compelled to vote for a number of men jointly and be denied the right to vote as to each one singly, as to say he may not judge of the propriety of holding in office each individual official who had been previously elected. The initial step in the removal is quite as important as the final vote in the recall.

The official also should have the right to be judged alone by his fellow citizens as to his own merits or demerits. That the law-making body so intended in providing the

recall we have no doubt. To construe it otherwise would be to attribute to the legislature the enactment of an unwise and intolerable law.

We have been furnished with no citation showing that any state has permitted the practice of including in the petition for recall a number of officials to be considered jointly. We take it for granted that none can be found, for counsel have prepared the case with great care. This indicates that the practice is the contrary wherever the remedy has been applied.

Two California cases have been found and cited where the removal of several officials occupying similar positions was sought by separate petitions against each official, circulated and signed by the voters. These are *Conn v. Richmond*, 17 Cal. App. 705, 121 Pac. 714, 719, and *Robinson v. Anderson*, 26 Cal. App. 644, 147 Pac. 1182. These cases afford a construction of the proper practice under similar proceedings to that now before the court by a state which was a pioneer in this remedy of recall of public officials.

Those authorities cited by the petitioners holding that the recall is an efficient means of removal and should be given a liberal construction do not touch the question here, which is fundamental and goes to the personal right of the citizen. It is not a mere question of nicety of pleading. It is a question of construction of a statute of the state, and we construe it in accord with the spirit of our institutions.

This law is intended as a simple, direct, and just method of declaring a public official unfit to hold a given office, and gives 25 per cent of the voters the power to stamp him with disapproval. When so disapproved, he is by that act presented to all the voters for recall. How important it is, then, to the official himself, as well as to the public, that such power be so administered as to prevent political combinations, those who object to one official combining with those who object to another.

This is not a mere matter of pleading, requiring a demurrer or plea in abatement. In their initiatory petition there was a failure to comply with the statute providing for the recall. The petition being improperly directed at a number of officials jointly, which is not permitted or provided for in the statute, it was a void proceeding.

In *Bennett v. Drullard* (1915) 27 Cal. App. 180, 149 Pac. 368-370, the subject of municipal legislation by an initiative petition directed to the passage of ordinances by the people was before the court. The initiative petition contained matters embracing two so-called alternative propositions or sections along with the main ordi-

nance. The conclusion of the court was that the statute authorizing such legislation did not provide for the two alternative propositions to be submitted under one petition. The court declared the whole petition void for that reason. In that case a general rule applying as well here as there was stated as follows: "The answer to all of these questions depends almost entirely upon the provisions of the city charter. It is agreed by the parties to this proceeding that the charter is a grant of the powers, and not a limitation, so that no act can be legally exercised thereunder unless such act finds express authority in the charter itself, or is implied from some of its express terms."

That court cited for the proposition *McQuillin on Municipal Corporations*, vol. 1, p. 783. And this is in accord with the previous holdings of our court.

The California court impliedly held that to authorize the submission of more than one ordinance in one petition it should have been provided for by the charter of the city. The court used the following language: "On the first point, that is, the claim that an initiative petition may contain more than one ordinance, no provision of the city charter to that effect has been shown to the court, and after a somewhat exhaustive search the court has been unable to find any. On the contrary, in every section throughout the article of the charter dealing with the initiative, the singular, 'ordinance,' is used, and there is nothing contained in said sections which gives the slightest encouragement to the claim of petitioner."

Then going further to the policy as well as the legality of submitting more than one ordinance to be voted on, and that to be the one the voter had petitioned for, the court further said: "Here is a power granted unto the people to propose their own laws for adoption, provided certain legal procedure be allowed to properly place said laws before the voters. Assume, if you please, that certain features are included in such proposed laws, or in connection therewith, which appealed to the voter, and in fact served as the controlling influence inducing him to sign the petition. Has he not the right to assume, and should not the law protect him in the assumption, that he will have the opportunity and right to vote for the matters which he has petitioned for?"

The application of the reasoning in the California court above quoted is apparent. The learned circuit judge eliminated some of these officials from the petition in order to make it apply to those whom he conceived might be legally removed from office.

But how may the court know that the required number of voters would have signed the petition if some of the names had been left out of the petition?

In the opinion of the California court in the case last cited, it was held that the alternative features included in the initiatory petition rendered it void; that, embracing matters not permissible, it could not be cured by a revision by cutting out the illegal features.

There is no more reason for reading into the charter of Nashville an implied power to include more than one official in a petition for removal, than there was for the California court to find an implied authority in the charter provisions there considered to include in the initiative petition more than one ordinance to be voted on. The principles there decided have full application here.

The inclusion of the three officers in the petition who were not subject to the recall was illegal, therefore, because neither the election board nor the court by mandamus had the right to split up the recall petition and segregate objectionable features, and submit to the voters only those portions of the recall petition deemed proper or legal.

The inclusion of unauthorized and improper matter in the petition, namely, the three officers not subject to the recall, rendered the petition dual, and for that reason illegal. This proposition in principle was held in two Kansas cases. In one case the questions of purchase of an existing water plant for the city, and the construction of a new one, were attempted to be included together, submitting to the voters a proposition to issue bonds "to purchase, procure, provide, or contract for the construction of waterworks," and included in one ballot. This was held to be dual, and for that reason illegal, and an election carried by the use of such ballots was void. *Leavenworth*

v. Wilson, 60 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367.

The other Kansas case is *Hay v. Dorn* (1914) 93 Kan. 392, 397, 144 Pac. 235-237. This was a mandamus suit to require the holding of a recall election. The writ was denied because the petition included not only a demand to elect a successor to the officer sought to be removed for the reasons stated in the petition, but included without statutory authority for it another person therein to be nominated or elected as a successor to the officer sought to be recalled. The supreme court said: "The statute does not authorize the naming in a recall petition of another person to be nominated or elected as a successor to the incumbent upon his removal. Some electors might desire the recall of the incumbent, provided the successor named in the petition was to be elected, but otherwise would be opposed to the recall. Such a petition presents to the electors a dual question, and is illegal. *Leavenworth v. Wilson*, supra. The petition in such cases must present the single question, viz., Shall the city officer, naming him, be recalled?"

In the note in 2 Ann. Cas. 369, the illegality of thus submitting dual matters to the voters to be acted upon jointly, and showing the necessity of submitting such questions single and separate from any other question that might influence the voter, is illustrated by citation of a large number of authorities.

For these and other reasons unnecessary to be mentioned we conclude that the petition for removal was absolutely void, and the election commissioners properly refused to certify it or provide for an election under it. The writ was granted in favor of petitioners, but, for reasons herein stated, the judgment of the Court of Civil Appeals is affirmed.

Annotation—The recall.

- I. Constitutionality, 1103.**
- II. Exclusiveness of remedy, 1103.**
- III. Necessity of legislation to carry constitutional provisions into effect, 1103.**
- IV. Enforcement:**
 - a. Mandamus:**
 - 1. In general, 1104.**
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 - b. Injunction, 1104.**
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 - 3. Verification, 1107.**

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V. a—continued.

- 4. Withdrawal of names, 1107.**
- 5. Filing, 1107.**
- b. Conclusiveness of officer's certificate, 1107.**
- c. Sufficiency of certificate, 1107.**
- d. Duties of officer, 1108.**
- e. When recall may be had, 1108.**
- f. Miscellaneous, 1108.**

The earlier cases on the recall are discussed in the note to *State ex rel. Topping v. Houston*, 50 L.R.A.(N.S.) 227.

I. Constitutionality.

For earlier cases on the constitutionality of the recall, see note in 50 L.R.A. (N.S.) 227.

In the absence of an express inhibition in the Constitution, cities given a constitutional power to frame their own charter are not impliedly prohibited from putting into practice the power to recall their officers. Such a provision is not in conflict with a constitutional provision that the governor and other elective state officers shall be subject to impeachment for certain offenses, and that all elective officers not liable to impeachment shall be subject to removal from office in such a manner and for such causes as may be provided by law, and that the legislature shall pass such laws as are necessary for carrying into effect the provisions of such article. *Dunham v. Ardery* (1914) 43 Okla. 619, L.R.A. 1915B, 232, 143 Pac. 331, Ann. Cas. 1916A, 1148. Nor is such a provision in conflict with the constitutional provision that all laws in force in the territory of Oklahoma at the time of the admission of the state into the Union which are not repugnant to the Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state until they expire by their own limitations, or are altered or repealed by law. (Okla.) *Ibid*.

II. Exclusiveness of remedy.

For discussion of this question, see note in 50 L.R.A. (N.S.) 229.

See also *STATE ex rel. TIMOTHY v. HOWSE*, ante, 1090.

III. Necessity of legislation to carry constitutional provisions into effect.

In the absence of legislation carrying into effect recall provisions contained in a Constitution, the question arises whether the recall is operative; in other words, whether the constitutional provision is self-executing. Some Constitutions expressly provide that the provisions as to recall shall be self-executing. In the absence of such an express provision this question is one of construction. A constitutional provision is self-executing if it enacts a sufficient rule by means of which the rights given may be enjoyed and protected, or the duty imposed may be enforced. Note on the initiative and referendum in 50 L.R.A. (N.S.) 198. In another form it is stated that constitutional provisions are self-executing where it is the manifest intention that they should go into immediate effect, L.R.A. 1916D.

and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty or a liability imposed. *State ex rel. Clark v. Harris* (1914) 74 Or. 573, 144 Pac. 109, Ann. Cas. 1916A, 1156.

The constitutional provision for the recall of public officers which was held self-executing in *State ex rel. Clark v. Harris* (Or.) supra, fixed the maximum percentage of electors required to file a petition, provided that the petition should set forth the reasons for the recall, and went at length into the details of the recall. It provided also that additional legislation such as may aid the operation of the constitutional provision shall be provided by the legislative assembly, including provision for payment by the public treasury of the reasonable special election campaign expenses of the officer; but the words "the legislative assembly shall provide," or any similar or equivalent words in the constitutional provision or any amendment thereto, are stated not to be construed to grant to the legislative assembly any exclusive power of lawmaking, or in any way to limit the "initiative and referendum" powers reserved by the people. With reference to this specific provision the court states that the legislative assembly is required to pass such legislation as may "aid" the operation of the constitutional provision; that this does not mean legislation to put the section in operation, but such as will aid its operation; and it seems to imply that the section will be in operation before such legislation shall be enacted. The first paragraph of the constitutional provision was to the effect that every public officer in the state is subject, as therein provided, to recall by the legal voters of the state, or of the electoral district from which he is elected. With reference to this the court states that every officer is made by this section subject to recall as provided therein, and not as the lawmaking department may provide. With reference to the provision by the legislative assembly for payment of the election expenses of an officer, the court states that the right to have an officer recalled in accordance with the provisions of the Constitution is not made dependent on the passage of such an act; that it is the duty of the legislative assembly to pass such an act, but the right to recall an officer cannot be suspended or defeated by the failure of the legislature to do its duty in the premises.

The fact that the constitutional pro-

vision was to the effect that there may be required 25 per cent, but not more, of the number of electors, to institute a petition for the recall of an officer, instead of providing definitely what per cent shall be required, was held not to prevent the constitutional provision from being self-executing; that until the legislative assembly or the people enact the contrary, every petition for a recall must be signed by not less than 25 per cent of the electors. (Or.) *Ibid.*

IV. Enforcement.

a. *Mandamus.*

1. *In general.*

The earlier cases on this question are discussed in note in 50 L.R.A.(N.S.) 229.

Where the duties of the officer examining the petition require the exercise of discretion and judgment, his action cannot be controlled by mandamus. *Dunham v. Ardery* (1914) 43 Okla. 619, L.R.A. 1915B, 232, 143 Pac. 331, Ann. Cas. 1916A, 1148. It is stated in this case that the writ of mandamus was denied in *Chesney v. Jones* (1912) 31 Okla. 363, 126 Pac. 715, on the ground that the duties of the official were discretionary or quasi judicial. There is nothing appearing in the opinion in the *Chesney Case*, however, to support this construction, but that case turned upon other matters discussed below.

When a statute vests in the official making the examination a quasi judicial power is a question of the construction of particular statutes. In *Dunham v. Ardery* (Okla.) *supra*, the statute required the petition to be signed by electors entitled to vote for a successor to the officer sought to be removed, after providing for some details with reference to the petition. It contained the provision that within ten days from the date of filing the petition, the city clerk shall examine and from the voters' register ascertain whether or not said petition is signed by the requisite number of qualified electors, and that he should attach to the petition his certificate showing the result of his examination. Provision is then made for an amendment in case the petition is shown to be insufficient, and for another examination after the amendment. The language of this statute was held to clearly indicate that the clerk is vested with a discretionary and quasi judicial power to determine whether the petition is sufficient; he is stated not to be required to count a name, although it appears on L.R.A.1916D.

the voters' register, if it should appear from the face of the petition and the voters' register that such party was not a legal voter under the law,—the petitioner whose name appears upon the petition and upon the voters' register having become ineligible to vote since registering by reason of removal from the city or the precinct in which he registered, or for other reasons. In conclusion the court states that the duties of the clerk are, first, to decide whether the petition in form is sufficient and whether the grounds alleged come within the charter; second, to ascertain the total number of votes cast for mayor at the last preceding election; third, from an examination of the petition, together with the voters' register, to ascertain whether the required per cent of petitioners have signed the petition; fourth, to pass on the question whether the signatures are bona fide or forgeries. He must ascertain by comparison with the voters' register whether the signers are legally qualified electors, and, this fact having been ascertained, whether they are legal electors at the time this question must be determined by looking to the law prescribing the qualifications of the voter.

Mandamus will not issue to compel a canvassing board to canvass the returns of an election in which invalid ballots were used. *Wilson v. Blake* (1915) 169 Cal. 449, 147 Pac. 129. As to ground of invalidity, see *infra*, V. f.

The rule that in mandamus the right of a relator to relief must be clear and exist at the time the relief is sought, or his action cannot be maintained, is not applicable in an action in mandamus to compel the clerk to call an election for the recall of a public official, the petitions for which were not verified as required by law, but is applicable where the relator was complaining about the refusal of the clerk to permit him to attach the proper verifications after the papers had been filed as he had a right to do. *State ex rel. Miller v. Berg* (1914) 97 Neb. 63, 149 N. W. 61.

2. *Who is entitled to writ.*

For discussion of this question, see the note in 50 L.R.A.(N.S.) 230.

b. *Injunction.*

The earlier cases on this question are discussed in the note in 50 L.R.A.(N.S.) 230.

Certiorari proceedings from a judgment refusing to grant injunctive relief to restrain the city clerk from calling a

special election were dismissed in *Mills v. Nickens* (1914) 81 Wash. 409, 142 Pac. 1145, where the cause was brought before the supreme court, both by writ of certiorari and appeal, and the counsel by stipulation submitted the cause for final determination, and it was determined upon the appeal, the court stating that such determination manifestly furnished a plain, speedy, and adequate remedy.

See *State ex rel. McCauley v. Gilliam* (1914) 81 Wash. 186, 142 Pac. 470.

V. Operation.

a. Petition.

1. Contents.

The naming in a recall petition of another person to be elected as successor to the officer sought to be recalled invalidates the petition, in the absence of a statute authorizing such naming. *Hay v. Dorn* (1914) 93 Kan. 392, 144 Pac. 235. Such a petition is stated to present a dual question to the electors, and for this reason to be illegal.

But under a constitutional provision authorizing the recall and providing that other candidates for the office may be nominated to be voted for at said special election and that the candidate who shall receive the highest number of votes shall be deemed elected, whether he be the person against whom the recall petition was filed or another, it is held not error to submit at the election the question whether the officer shall be recalled from his office, and besides this to have appear upon the ballot the candidates for the office including the officer sought to be recalled. *State ex rel. Smith v. Barbur* (1914) 73 Or. 10, 144 Pac. 126. The argument in this case was that it was error to submit the question of recall alone, and that the only legal way the Constitution could be complied with was found in the expression of the electors of their preference among the candidates for the possible vacancy in office. The answer to this given by the court is that the people are entitled to vote directly upon the question of recalling an incumbent of a public position; that it does not necessarily follow that there will be candidates in such an election, but that the right of the people to exercise this prerogative cannot be made to depend upon the presence of possible candidates for the office.

As shown in the subdivision of the note in 50 L.R.A.(N.S.) 232, relating to the statement of cause, the grounds upon which the recall is sought need not

be stated with technical accuracy. A statement of the grounds in a petition for the recall of a supervisor, that he voted for the allowance of a claim which the district attorney had advised the board of supervisors was an illegal and invalid claim, that he commercialized his office, and in the employment of labor on the highways gave preference to electors who favored his own political convictions, and that he had little or no knowledge of practical engineering or the construction of public highways, and by reason of this lack of knowledge was extravagant and wasteful of the highway funds, was sustained as a sufficient statement of cause, under a statute requiring the petition to contain a statement of the grounds on which the removal or recall is sought, but providing that the statement is intended solely for the information of the electors. *Laam v. McLaren* (1915) — Cal. App. —, 153 Pac. 985.

The sufficiency of the grounds is a question for the electors under this statute. The court cannot pass upon this question. It is also immaterial whether the grounds alleged are true or false. (Cal.) *Ibid.*

But under constitutional and statutory provisions authorizing a recall for malfeasance in office, it was assumed that the sufficiency of the grounds is for the court, in *Pybus v. Smith* (1914) 80 Wash. 65, L.R.A. 1915A, 285, 141 Pac. 203, Ann. Cas. 1915A, 1145. The voting by a municipal councilman for a proposition coming before the council, in consideration of an agreement by another councilman to vote for a proposition in which he was interested, was there held to be within the operation of the constitutional and statutory provisions referred to, and to form sufficient legal cause for submitting to the voters of the city the question of his recall and discharge from public office.

2. Signing.

For earlier cases on sufficiency of signing, see note in 50 L.R.A.(N.S.) 230.

The number of signers required is usually fixed at a certain per cent of the electors. It is sometimes fixed at a percentage "of the highest vote cast" at a preceding election. "The highest vote cast," within the meaning of such a provision, was interpreted to mean the highest number of votes cast both for and against any proposition or candidate for office, not simply the highest vote cast for or against any proposition or candidate for office, in *State ex rel. Miller v.*

Berg (1914) 97 Neb. 63, 149 N. W. 61. One of the judges, in dissenting from this proposition, construed the expression "highest vote cast" to mean all the votes cast at the election.

Where the number of signers is fixed at a percentage "of the entire vote cast . . . for all candidates for the office which the incumbent sought to be removed occupied," and more than one officer of the same kind is elected at the same election (as in the case of municipal trustees), the electors voting for a candidate for one or all of such offices, as they see fit, the percentage should be based upon the total number of ballots cast at the election. *Robinson v. Anderson* (1915) 26 Cal. App. 644, 147 Pac. 182.

As to the number of signers, see *State ex rel. Clark v. Harris* (1914) 74 Or. 573, 144 Pac. 109, Ann. Cas. 1916A, 1156.

A question arose in *Mills v. Nicklaus* (1914) 81 Wash. 409, 142 Pac. 1145, a case of the recall of a member of a council, the members of which were elected at different elections, as to the meaning of a constitutional provision requiring the percentage to be computed from the total number of votes cast for all candidates "for his said office, to which he was elected at the preceding election." An election for councilmen had intervened between that at which the councilman sought to be recalled had been elected and the filing of the recall petition. It was held that the percentage must be computed on the number of votes cast at the election for councilmen next preceding the filing of the recall petition, although that was not the election at which the councilman sought to be recalled was elected. It is stated that the manifest purpose of this constitutional provision is to measure the number of required signatures upon a recall petition by the required percentage of the number of votes cast at the nearest preceding election, and to have the question whether there shall be a recall election or not decided by the required percentage of present qualified voters as near as that can be ascertained. This is true although the recall movement had its inception prior to the holding of the later election, the petition for the recall having been filed with the clerk as registration officer after that election.

A contrary decision was rendered by a California district court of appeal in *Robinson v. Anderson* (Cal.) supra. The statute involved in the California case required 25 per cent of the entire vote cast "for all candidates for the office

which the incumbent sought to be removed occupies, at the last preceding regular municipal election at which such officer was voted for." This in the case of a recall movement against a municipal trustee was held to mean the election at which the trustee sought to be recalled was voted for, and not an intervening election for other trustee offices, not including that which the officer in question occupied.

The officer whose duty it is to examine the petition for recall is by some statutes required to determine whether it is signed by a sufficient number of qualified electors by comparison with the voters' register. Under such a statute names not on the voters' register cannot be counted notwithstanding the signers may be qualified voters at the time of the filing of the petition. *State ex rel. Miller v. Berg* (Neb.) supra. Such a statute is not dealing with the question of election, but is simply providing a method for determining who shall have the right, after an election has been held and an official who was elected has taken his office, to petition for the removal of such official before the expiration of his term of office. The right to petition for the removal from office of a public official is not a right guaranteed by the Constitution, but simply a privilege granted by the legislature, and the legislature in granting the privilege may impose such conditions on the exercise of it as it sees fit.

A like decision appears under a statute requiring a petition for the recall of an officer to be examined, and the fact whether the petition is signed by the requisite number of electors to be determined by inspection of the petition and of the registration books and election returns. In order that one may be a signer upon a recall petition, it was held necessary that his name be upon the registration books. *Chesney v. Jones* (1912) 31 Okla. 363, 126 Pac. 715.

In discussing the discretion which is vested in the officer in making the examination, it is stated in *Dunham v. Ardery* (1914) 43 Okla. 619, L.R.A. 1915B, 232, 143 Pac. 331, Ann. Cas. 1916A, 1148, that although the name of a signer to the petition appears upon the voters' register, if it should appear upon the face of the petition and the voters' register that such party was not a legal voter under the law, he is not compelled to consider and count him as such, under a statute requiring the petition to be signed by electors entitled to vote for a successor to the incumbent sought to be removed.

See further discussion of this case *supra*.

The term "voters' register" as used in city charter providing that when a petition for a recall election is filed with the city clerk, he shall examine it and, from the voters' register, ascertain whether the petition is signed by the requisite number of qualified electors, has reference to the precinct books required by state laws to be furnished by the state election board to the county election board, wherein the inspectors of election are required to transcribe the names of all electors registered in the precinct, arranged in alphabetical order, and to fill the blanks after such names with the age, the street number, the post-office address, the politics, and the color of each elector as stated in his registration certificate. (Okla.) *Ibid*.

3. Verification.

Where through oversight the oath of verification is not attached to each paper signed as part of the petition for a recall, this omission may be supplied after the petitions have been filed. *State ex rel. Miller v. Berg* (1914) 97 Neb. 63, 149 N. W. 61.

4. Withdrawal of names.

The signers to a recall petition may withdraw their names at any time before final action has been taken thereon. Thus, after the petition has been filed, but before it has been acted upon by the official performing that duty, there may be a withdrawal of names. In case the official finds the petition insufficient, whereupon time is allowed for an amendment thereto, a withdrawal may be had any time before the expiration of the time limited for the amendment, but not after the expiration of such time. *Hay v. Dorn* (1914) 93 Kan. 392, 144 Pac. 235.

After the clerk to whom the duty of examining the petition is committed has acted thereon and certified to its sufficiency, the withdrawal of names has no effect to prevent the election. *Laam v. McLaren* (1915) — Cal. App. —, 153 Pac. 985.

5. Filing.

The constitutional provision that a recall petition shall be filed with the officer with whom a petition for nomination to the office, the incumbent of which is sought to be recalled, should be filed, is express and mandatory, and a failure to comply with this provision invalidates L.R.A.1916D.

the recall proceeding. Consequently, where a recall of a district attorney is sought and the petition filed with the county clerk, the recall proceeding is a nullity where petitions for nominations for district attorney are required to be filed with the secretary of state. *State ex rel. Mitsker v. Dillard* (1914) 73 Or. 13, 144 Pac. 127.

A statute authorizing certificates of nomination for county officers and district or precinct officers to be filed with the county clerk, which does not attempt to amend the section providing for the filing of petitions for nomination with the secretary of state, does not change this rule, since petitions for nominations and certificates of nominations are different instruments and their functions are different. (Or.) *Ibid*.

For an example of matters required to be filed with the petition, see *State ex rel. McCauley v. Gilliam* (Wash.) *infra*, V. f.

b. Conclusiveness of officer's certificate.

The cases of *Good v. San Diego* and *Conn v. Richmond*, discussed in the note in 50 L.R.A.(N.S.) 231, are cited on the conclusiveness of the officer's certificate, in *Laam v. McLaren* (1915) — Cal. App. —, 153 Pac. 985. And in the *Laam Case* it is stated that, in the absence of alleged fraud or mistake or other sufficient ground for challenging the correctness of the clerk's certificate, such certificate must be held conclusive. The point of attack in the *Laam Case* was that after the clerk had examined the petition and certified to its sufficiency, a number of signers had withdrawn their names or attempted to do so.

Where the officer making the examination of the petition is vested with a quasi judicial authority, his decision, in the absence of fraud or an arbitrary action, is conclusive on the courts in a proceeding for mandamus to compel him to call the election. *Dunham v. Ardery* (1914) 43 Okla. 619, L.R.A. 1915B, 232, 143 Pac. 331, Ann. Cas. 1916A, 1148.

The fact that no provision is made for a review of the clerk's decision by appeal does not authorize the giving of relief by mandamus in the absence of fraud or an arbitrary action by the officer making the examination of the petition. (Okla.) *Ibid*.

c. Sufficiency of certificate.

As to the sufficiency of the officers' certificate, see note in 50 L.R.A.(N.S.) 231.

d. Duties of officer.

The officer whose duty it is to examine and ascertain whether a petition for recall is signed by the requisite number of qualified electors, and attach to said petition his certificate showing the result of his examination, is not empowered to determine the further question whether the officer has held office a year, although the statute prohibits a recall against any officer until he has actually held his office for that time. *Poole v. Lawrence* (1914) 86 N. J. L. 90, 90 Atl. 668.

e. When recall may be had.

For earlier cases on this question, see note in 50 L.R.A.(N.S.) 232.

Under a statute prohibiting a recall against any officer until he has actually held his office for one year, the resignation of an officer who has held office more than the year, upon the initiation of a movement for his recall, and his immediate re-election, do not relieve him from the operation of the recall statute, since it is clear that his action was an attempt to evade the law. *Poole v. Lawrence* (1914) 86 N. J. L. 90, 90 Atl. 668.

As to what constitutes sufficient ground for a recall, see *supra*, V. a, 1, particularly *Pybus v. Smith*, discussed in that subdivision.

As to the right to take action under a joint recall petition, see *STATE ex rel. BROWN v. HOWELL*, ante, 1097.

f. Miscellaneous.

A statute requiring the filing by the petitioner or petitioners for a recall, at the time of filing the recall petition, of a statement giving the names and post-office addresses of all persons, corporations, and organizations who have contributed or aided in the preparation of the charge, and in the preparation, circulation, and filing of the petition; with the amount contributed by each and a detailed statement of expenditures, is not complied with by an itemized statement of the receipts and expenditures, with postoffice addresses of the contributors and of those to whom the money was distributed, without any statement of the persons, corporations, and organizations, with postoffice addresses, who have aided in the preparation, circulation, and filing of the petition. *State ex rel. McCauley v. Gilliam* (1914) 81 Wash. 186, 142 Pac. 470. It seems to have been assumed in this case that, in the absence of a compliance with the statutes, the recall election could not be held, and the auditor was accordingly L.R.A.1916D.

enjoined from taking any action on the recall petition until the proper statement was filed.

Where it is sought to recall two commissioners having different terms to serve, ballots which fail to designate the terms for which the candidates are to be elected invalidate the election, under a statute requiring the term to be printed on the ballot as a part of the title of the office, where two or more officers are to be elected for the same office for different terms. *Wilson v. Blake* (1915) 169 Cal. 449, 147 Pac. 129.

A general statute giving to any elector of a city the right to contest the right of any person declared elected to an office to be exercised therein, for certain causes, does not authorize a contest by one recalled from office on the ground that illegal votes were cast and counted in favor of his recall. *Waite v. Brendlin* (1914) 26 Cal. App. 31, 145 Pac. 739. No right to contest a recall election exists by implication from the absence of a statutory provision for contest. The ground specified in the statutes for contest upon which reliance was placed in this case were: First, malconduct on the part of the board of judges or any member thereof; second, illegal votes. These specified grounds were held limited by other provisions of the statute and its general purpose. The statute relating to the contest of elections was enacted long prior to that relating to the recall.

An action to enjoin the holding of a recall election was held to be a cause cognizable in equity, so that jurisdiction of an appeal from the granting of a temporary restraining order and an order to show cause why this should not be made perpetual was in the supreme court instead of the district court of appeal, under the California Constitution. *Laam v. McLaren* (1915) — Cal. App. —, 151 Pac. 290.

But in *Laam v. McLaren* (1915) — Cal. App. —, 153 Pac. 985, the district court of appeal assumed jurisdiction to pass upon an appeal, and held that a temporary order restraining the calling of a special election for the recall of an officer is appealable. No question seems to have been raised in the latter case as to the jurisdiction of the court of appeal, nor is any distinction attempted between this and the earlier case. As pointed out above, the earlier case was an appeal from an order granting a temporary restraining order and an order to show cause why this should not be made perpetual, while the latter was

simply an appeal from a temporary restraining order.

See *Stirtan v. Blethen*, 51 L.R.A.

(N.S.) 623, as to the validity of a contract to promote a recall movement.

W. A. E.

UTAH SUPREME COURT.

LOUISE CONWAY, Resp't.,

v.

SALT LAKE & OGDEN RAILWAY COMPANY, Appt.

(—Utah,—, 155 Pac. 339.)

Carrier — negligence — space between platforms.

1. The maintenance by an electric inter-urban railway company of a space of 7 to 10 inches between the platforms of cars in its trains, between which passengers are permitted to pass while the trains are in motion, does not constitute *prima facie* negligence in case a passenger falls between them to his injury, in attempting to pass from one car to another.

For other cases, see *Evidence*, II. h, 1, b, (1), in *Dig. 1-52 N. S.*

Same — necessity of light.

2. A railway company which permits a space between platforms of cars in its train over which passengers are permitted to pass must furnish sufficient light after dark to enable persons attempting to use the passageway to discover the danger.

For other cases, see *Carriers*, II. g, c, in *Dig. 1-52 N. S.*

Evidence — burden of proof — contributory negligence.

3. The burden of showing contributory negligence by a preponderance of evidence is upon defendant in an action to hold a carrier liable for injury to a passenger, regardless of whether the evidence upon the question comes from plaintiff's or defendant's witnesses.

For other cases, see *Evidence*, II. h, 2, in *Dig. 1-52 N. S.*

(February 7, 1916.)

APPEAL by defendant from a judgment of the District Court for Weber County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Boyd, De Vine, & Eccles, for appellant:

There was no evidence of negligence upon the part of defendant.

Ellinger v. Philadelphia, W. & B. R. Co. 153 Pa. 213, 34 Am. St. Rep. 697, 25 Atl. 1132, 6 Am. Neg. Cas. 361; *Hawes v. Bos-*

ton Elev. R. Co. 192 Mass. 324, 78 N. E. 480; *Welch v. Boston Elev. R. Co.* 187 Mass. 118, 72 N. E. 500; *Falkins v. Boston Elev. R. Co.* 188 Mass. 153, 74 N. E. 338; *Rothchild v. Central R. Co.* 163 Pa. 49, 29 Atl. 702, 6 Am. Neg. Cas. 382; *Furgason v. Citizens' Street R. Co.* 16 Ind. App. 171, 44 N. E. 936.

Messrs. George McCormick, Joseph E. Evans, and John G. Wills for respondent.

Frick, J., delivered the opinion of the court:

The plaintiff brought this action to recover damages for personal injuries which she alleged she sustained through the defendant's negligence while a passenger on one of its trains. She, in substance, alleges in her complaint that the defendant was negligent in the following particulars:

(1) That, owing to the large number of persons who were about to enter the cars of the defendant at the time and place the accident occurred, defendant was negligent "in failing to provide servants for the proper direction and management of said persons," etc.; (2) for failure to "provide its passengers then and there being with sufficient transportation accommodation, facilities, and equipment," etc.; (3) for failure to "provide any reasonable means for passage from one of its said cars to the other;" and that it did "negligently construct, maintain, and operate its said cars so as to leave an open space between the ends of the platforms thereof of about 17 inches distant in width, and so as to leave said platforms inadequately and insufficiently lighted and illuminated." The plaintiff further alleged that, in entering upon defendant's train, consisting of four cars, at about 11 o'clock at night at Lagoon station, and while said train was standing still for the purpose of receiving passengers, she passed up the steps of one car, and, on reaching the platform thereof, noticed that the seats in said car were all occupied by passengers, and, in order to obtain a seat, she, in attempting to pass through the opening or doorway at the end of the vestibule of the car she was on to the vestibule of the adjoining car, stepped into the space between the two cars existing as aforesaid, and fell, by reason of which fall she sustained severe bodily injuries. The evidence on the part of the plaintiff, in brief, is to the effect that Lagoon station is a pleasure resort between Salt Lake City and Ogden,

Note.—For permitting space between platforms of cars as negligence, see annotation following this case, post, 1113. L.R.A.1916D.

on the line of defendant's electrically equipped interurban railway; that on the night of July 17, 1913, there were a large number of people at said Lagoon station from Ogden city, among whom were the plaintiff and some of her friends or family; that the defendant provided a train of four cars, one of which the plaintiff boarded with a view of getting a seat. In describing what then happened, the plaintiff testified: "No, I didn't get a seat. I was on the platform, and the platform was pretty well crowded, and I asked Mrs. Stevens to step aside to allow me to pass, so she tried to move aside, and I went to go from one car to the other, and that is the last I remember. I fell and don't know anything more about it. I became unconscious and remained so from Thursday until Saturday evening."

On cross-examination she further testified:

The platform was crowded. I just stepped up and then turned. Mrs. Stevens was standing there, and I asked her to step aside and allow me to pass from one car to the other. That would be the one south of the one I was on. I don't know, but I suppose I just took one step and supposed it was all inclosed like an ordinary train.

Q. And you just started to walk right through, looking over into the other car?

A. Yes, sir.

Q. You were looking into the other car to see if you could get a seat while you were walking through?

A. To see if there was any chance. Both platforms were crowded.

Q. When you started to walk between these cars, you were looking right ahead of you, into the car?

A. There was no way of looking down; there was too much of a crowd there.

Q. Was there a crowd between the cars?

A. Standing just like they were as crowded as they could be.

Q. Was there a crowd of people standing between the two cars?

A. I suppose there was.

Q. You suppose there was? Well, was there?

A. Well, no. How could they be between?

Q. That is what I am asking you. There were no people between the cars?

A. No.

Q. So that the crowd of people didn't prevent you from looking down between the cars?

A. It wasn't light enough to see, if I had looked down.

Q. How do you know? You didn't look down?

A. My gracious! The lights weren't good that night anyway.

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Q. But you didn't look down?

A. I naturally wouldn't look down.

Q. And you didn't look down?

A. I didn't look down, no.

Mrs. Stevens, who was a witness for the plaintiff, testified: "The platform was packed. In the car it was packed all through. I was backed right up against the brake, and, when Mrs. Conway asked me, I was talking to her, and then I turned to my husband, and the next I remember is her speaking to me and asking me if I would move so that she could pass through to the car on the south. The next I remember is turning and seeing her step right into the chain. There was a chain that linked the cars together, and her foot caught right in there, and she fell toward the west, and her head struck the ground, or the track; I don't know which. I could not say what the space was between the cars, but I think it was the ordinary space, somewhere about a foot, I should judge."

Apart from the evidence that there was much crowding in getting onto the cars and on the platforms thereof, and the evidence respecting plaintiff's injuries, the foregoing is practically all the evidence in respect of how the plaintiff was injured and the condition of the platforms of the cars, and the lighting thereof.

Upon substantially the foregoing evidence, the defendant moved for a nonsuit upon two grounds: (1) That the plaintiff had failed to establish any negligence on the part of the defendant; and (2) that the evidence "affirmatively shows that the direct cause of the accident is due to the negligence of the plaintiff herself." The motion was denied, and the defendant then produced evidence to the effect that its cars were of the standard type and made used by interurban and city railways; that it was impractical to build platforms on cars used for city and interurban travel which would come in close contact like those on standard Pullman cars used on ordinary steam railways; that the reason why such platforms were not in general use and could not be successfully operated on city and interurban railways was on account of the short curves on such lines. It was, however, conceded by defendant's expert witnesses testifying upon that question that there were no very short or sharp curves on defendant's line; that the cars in use by defendant could be operated on a 50-degree curve, while the shortest curve on its line is about 60 degrees; that, while said line of railway is constructed and operated into the cities of Salt Lake and Ogden, yet there are no curves shorter than 60 degrees in either city or on the main line. Defendant

also proved that the car platforms were necessarily required to be rounded at the ends thereof so that the space between the platforms would be wider at the sides than it would be at the center where the cars were coupled together and where the passengers pass from one car to the other; that the space between the cars in the center of the platform was about 7 inches wide, while farther out towards the sides of the cars the space would be about 10 inches. It will be remembered that Mrs. Stevens testified that she judged the space between the cars in question on the night in question was about a foot.

The defendant's evidence was not controverted. After all of the evidence was in, the defendant moved the court for a directed verdict in its favor, which motion the court denied, and submitted the case to the jury upon the evidence and instructions, some of which were excepted to by the defendant, and which will be noticed hereinafter. The jury returned a verdict for the plaintiff, upon which the court entered judgment, from which the defendant appeals.

Among other instructions, the court gave the following: "While the mere fact that an accident has happened is not sufficient proof to charge the defendant with negligence, yet in this case the court instructs you that if you find from the evidence that while the plaintiff was a passenger on defendant's car, and while she was attempting to pass from one car to another, she was injured by reason of there being an open space between the vestibule platforms of said cars, then the court charges you that she has proved such facts as constitute *prima facie* evidence of negligence on the part of the defendant, and that the burden is cast upon the defendant to show that it was not negligent with respect to said passageway within the meaning of the instructions heretofore given you."

The defendant excepted to that portion of the instruction we have copied, and now insists that the giving thereof constituted prejudicial error.

It will be observed that the court charged the jury that, if they found that there was "an open space between the vestibule platforms of said cars," such fact, standing alone, was sufficient to "constitute *prima facie* evidence of negligence on the part of the defendant." In other words, the charge was to the effect that the plaintiff had made out a *prima facie* case if she proved that there was any space between the vestibule platforms of the cars from one of which she was in the act of passing to the other when she fell. The question of whether to permit such space to exist between cars operated on elevated street railways con-

stituted negligence has been passed on by the supreme judicial court of Massachusetts in the following cases: *Welch v. Boston Elev. R. Co.* 187 Mass. 118, 72 N. E. 500; *Falkins v. Boston Elev. R. Co.* 188 Mass. 153, 74 N. E. 338; *Hawes v. Boston Elev. R. Co.* 192 Mass. 324, 78 N. E. 480. In the *Falkins* case the space between the platforms of the cars was shown to be 7½ inches. The gist of the decision is reflected in the headnote, which reads as follows: "It was not negligence for an elevated railroad company to permit an open space in the passageway between the platforms of its cars, made necessary by sharp curves in its line, and to impliedly invite passengers to use such passageway at stations in going between the cars without informing them in words of the existence of such open space."

In *Hawes v. Boston Elev. R. Co.* supra, the evidence showed that the space between the platforms was 7 inches at the nearest point, and 11 inches at the widest point, and the court held that merely to show that there was such a space was not evidence of negligence. In the course of the opinion, the court says: "We see no evidence of negligence on the part of the defendant. There is nothing to show that the space between the cars could have been made any less, or that the ends of the platforms could have been made any different. The defendant was not bound to warn the plaintiff of the space between the cars, or to assist her in crossing from one to the other."

The foregoing cases are referred to in 1 *Nellis on Street Railways*, 2d ed. § 290, and no other cases are by the author referred to contrary to the rule laid down by the Massachusetts court.

In *Ferguson v. Citizens' Street R. Co.* 16 Ind. App. 171, 44 N. E. 936, it is held that the company is not liable for injuries resulting to one passenger from the crowding or pushing of other passengers. *Rothchild v. Central R. Co.* 163 Pa. 49, 29 Atl. 702, 6 Am. Neg. Cas. 382, is in principle the same as the cases cited from Massachusetts. While plaintiff's counsel, in their brief, question the soundness of the cases from Massachusetts, yet they have failed to refer to any case which holds to the contrary, and, after a somewhat extended search, we have not been able to find any. We cannot see how it can be said that the mere fact that there is an open space to the extent shown by the evidence between the platforms of two connecting cars constitutes negligence.

The burden of showing negligence was upon the plaintiff. In view of the foregoing statement of the law, defendant's counsel insist that the court erred in not

granting their motion for a nonsuit, and also erred in refusing to direct a verdict in favor of their client. We cannot go to that extent. While it is true, as we have seen, that by merely showing that there was a space between the cars the plaintiff failed to prove negligence, yet she also alleged that the defendant was negligent in not sufficiently lighting or illuminating the space between the car platforms so that such space could be seen, and that passengers could thus avoid stepping into the same. True, plaintiff testified that she did not look down in attempting to pass between the cars, but she also stated the reason why she did not, and the court correctly charged the jury with respect to her duty in that regard, and further charged under what circumstances she would be prevented from recovering. The jury found the facts in favor of the plaintiff in that respect. There was at least some substantial evidence respecting the insufficiency of light, and that the space between the car platforms was not properly or sufficiently illuminated. There was evidence both ways upon that subject, but the ultimate fact was, nevertheless, for the jury. While, as we have pointed out, merely to permit a space to exist between the car platforms did not constitute negligence, yet we are clearly of the opinion that where any considerable space was permitted between the car platforms so that passengers could or might step into the same, and where, as here, the defendant impliedly invited the passengers to pass from one car to the other over the space aforesaid, it was its duty in the nighttime to furnish sufficient light to permit the passengers to see such space, so that they could avoid stepping into it in passing from one car platform to the other. While, as has been pointed out by the Massachusetts court, no duty rested upon the defendant to warn the passengers of the existing space in the daytime, for the reason that it was open and visible to all, yet, in the darkness of the night, we think it was the duty of the defendant, either to warn the passengers of the space, or to have sufficient light between the car platforms that one passing from one to the other could see and avoid stepping into the space. To hold otherwise would permit the defendant to maintain a dangerous trap with impunity. Such is not the law. There was therefore sufficient evidence upon the charge with respect to insufficient light to take the case to the jury. The court therefore committed no error in denying the motions to which we have referred.

Complaint is also made of instruction No. 3, given by the court on its own motion. It L.R.A.1916D.

is contended that the instruction is erroneous because it places the burden of proof upon the defendant to show that it was not practical to operate its cars without leaving some space between the ends of the platforms. The instruction was framed upon the theory that the mere fact that there was a space between the car platforms was *prima facie* evidence of negligence. We have already shown that such a theory cannot be maintained. Hence the instruction was faulty in that regard.

Instruction No. 4 is also complained of. That instruction is subject to criticism only because it confirms other instructions which, for the reasons already stated, were in themselves faulty.

What has been said also covers defendant's assignments respecting the court's refusal to charge the jury as requested by it.

In view of what has already been said herein, it could subserve no useful or practical purpose to point out wherein the offered requests were faulty, or whether they stated correct principles of law. The trial court, in following the law as herein indicated, will not commit the error complained of again. In this connection, we desire to add, however, that request No. 4, offered by the defendant, does not correctly state the rule with respect to the burden of proof upon the question of contributory negligence. The true rule in this jurisdiction is that when the evidence is conflicting, or when different inferences may be drawn therefrom, the burden of establishing contributory negligence is upon the defendant, regardless of whether the evidence with regard thereto comes from the plaintiff's or the defendant's witnesses, and in either event contributory negligence must be established by a preponderance of the evidence given upon that subject. Request No. 4 was faulty in not placing the burden of proof upon the defendant, although contributory negligence may have been inferable from the testimony produced by the plaintiff.

For the reasons hereinbefore stated, the judgment is reversed, and the cause is remanded to the District Court of Weber County, with directions to grant a new trial. Appellant to recover costs.

McCarthy, J., concurs.

Straup, C. J.:

I concur. Under the evidence I think the question of the negligence was wholly one of fact, which, to establish, the plaintiff had the burden, and that where the court told the jury certain things constituted a *prima facie* case of negligence, he invaded the province of the jury.

Annotation—Carriers: permitting space between platforms of cars as negligence.

CONWAY v. SALT LAKE & O. R. Co. ante, 1109, finds substantial support for its decision that a railroad company is not negligent in permitting an open space between cars in order that trains may safely take the curves in the tracks.

Thus, that a railroad company using a subway containing many sharp curves is not negligent in so operating its trains that when the cars are standing on or going around a curve a space between the platforms of two cars is left sufficient to permit the foot and leg of one to enter was held in *Welch v. Boston Elev. R. Co.* (1905) 187 Mass. 118, 72 N. E. 500; *Falkins v. Boston Elev. R. Co.* (1905) 188 Mass. 153, 74 N. E. 338; *Hawes v. Boston Elev. R. Co.* (1906) 192 Mass. 324, 78 N. E. 480.

Nor was it negligence for the railway company to permit passengers to pass from one car to another without warning them of the danger of stepping into the open space. (Mass.) Ibid.

It was pointed out in the *Falkins* Case that "the uncontradicted evidence tended to show that it was necessary to have this space between the cars because the grades of the defendant's road were heavier and the curves sharper in portions of the subway than on any other elevated system." And the court added that "the defendant had no responsibility for the mode of construction of its subway, which was built under legislative authority as a great public work by the city of Boston, and afterward leased to the defendant," and stated that no evidence was offered tending to show that there was any other practical mode of construction of the cars which would have been safer and better. In the *Hawes* Case, the court stated that "the defendant introduced evidence which was uncontradicted that the curves of the platforms of the cars were determined by the shortest curve which it was necessary for cars coupled together to pass, and were no greater than was required, and that experiments had been made with the Gould Buffer coupling, which was best device known for covering the space between the ends of cars, and 'the couplers went to pieces.'" While the court considered the question of negligence in the construction of the cars, the real question was considered to be as to whether it was the duty of the railway company to have a man who should warn every passenger who was

about to step from one car to another of the danger of stepping into the opening; which question was decided in the negative.

In *Louisville, N. A. & C. R. Co. v. Stout* (1896) 66 Ill. App. 298, where a passenger about to enter the coach, the platform of which was vestibuled, stepped aside to allow a lady to enter first, and his foot and leg went between the two coaches, the space between the coaches being caused by the cars going around a curve, it was held that negligence could not be imputed to the railroad company because it did not have a mat covering the opening throughout the entire width of the platform, of sufficient width to cover any space caused by the swinging and the swaying of a train in making a curve. The court stated that a mat upon the floors of the platforms and upon and across the ends of the platforms where they come together would have no connection with the vestibuling of a train, nor does a mat enter into the construction or operation of the vestibule or of the train itself; and added, that while it might conceive that a narrow mat might extend with reasonable safety from one platform to another in the center line or on the axis of the platform, it would call attention to the fact that it was not between the platform at the center that the injured party stepped, and stated that it thought that a wide mat that would cover the opening throughout the entire width of the platform would be a source of danger in the swaying and swinging of a train when making a curve, instead of an appliance of safety. The court said further that there was no proof that such a mat was a proper equipment of the train in question, or of any like train; and there was no sufficient proof that such a mat was customary or in such general use among railways as a measure of safety to their passengers as would require the railroad company to supply its cars with them.

In *Merwin v. Manhattan R. Co.* (1888) 48 Hun, 608, 1 N. Y. Supp. 267, 5 Am. Neg. Cas. 441, where one standing on the crowded platform of a coach, in consequence of the pressure made by outgoing passengers, stepped back and fell between the platforms, it was held that the railway company was negligent in not providing suitable safeguards to prevent such an accident. It would

seem that the space through which the passenger fell was toward the outside of the platforms, due to the curving of the platforms so as to permit the cars to go around curves. The duty to cover the space was not raised or considered, but the negligence attributed to the railroad company was the failure to have chain guards hooked from the stanchions of one platform across to the stanchions on the other car, which would have tended to lessen the danger of falling into the open space.

There have been a few cases, easily distinguishable from the preceding cases, which have held that for a railroad company to permit an open space between its cars constituted negligence, or at least presented a question for the jury.

Thus, in *St. Louis Southwestern R. Co. v. Keitt* (1903) — *Tex. Civ. App.* —, 76 S. W. 311, the railroad company, in changing the drawheads of its coaches, used a chain coupling which left a space between the coaches of 18 inches, which space was covered by planks which were nailed at one end and left loose at the other, and it was held that the use of such coupling and such "walk way" was negligence as to one who, in passing from one car to another, lost his balance and was thrown from the car as a result of a moving of the planks.

A railroad company which negligently uses as a passenger car a baggage car without a platform cannot defeat recovery for the death of one who, not knowing of the absence of a platform, fell between the cars in passing from the baggage car to a passenger coach, because of the fact that he voluntarily left his seat in the passenger car, the act of such person not being negligence per se, so as to overcome the negligence of the railroad company in using such

defective car. *Louisville & N. R. Co. v. Berg* (1896) 17 Ky. L. Rep. 1105, 32 S. W. 616.

Negligence on the part of a railroad company was held, in *Central of Georgia R. Co. v. Storrs* (1910) 169 Ala. 361, 53 So. 746, to be a question for the jury where there was evidence to support the allegation that the injuries of one who got his foot caught between the bumpers of two cars while crossing from one car to another were caused either by the improper action of the air brake, or because the space between the two cars was not covered.

And in *St. Louis, I. M. & S. R. Co. v. Snell* (1907) 82 Ark. 61, 100 S. W. 67, where one, after boarding a train, stood for a moment in the vestibule on the iron covering over the bumpers between two cars, and was thrown down by the violent backing of an engine in the coaches, and, because of the fact that the iron covering was not properly in place, her feet were caught between the bumpers, it was held that the question as to the negligence of the railroad company in failing to keep such covers in place was properly submitted to the jury.

But, in *Snowden v. Boston & M. R. Co.* (1890) 151 Mass. 220, 24 N. E. 40, 3 Am. Neg. Cas. 865, where a passenger in passing from one platform to another, the distance between which was 6 inches, without looking, placed her foot upon the buffers just as the train started, and, owing to the buffers' opening by the starting of the train, her foot slipped between the buffers and was injured, it was held that contributory negligence barred recovery, there being no discussion whatever as to whether the railroad company was negligent in permitting the space between the coaches. J. H. B.

WISCONSIN SUPREME COURT.

ALBERT F. TIMME, Appt.,
v.

JOHN H. KOPMEIER, Respnt.

(162 Wis. 571, 156 N. W. 961.)

Corporation — contract of director to repurchase stock from manager — validity.

A contract by a director of a corporation,

Note. — As to validity of contract or option by director for purchase of stock of employee of corporation upon discontinuance of employment, see annotation following this case, post, 1117.

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without the knowledge of the stockholders, to repurchase stock sold to the manager of the corporation, upon discontinuance of his employment from any cause, is contrary to public policy and void.

For other cases, see *Contracts*, III. c. 3, in Dig. 1-52 N. S.

(March 14, 1916.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Milwaukee County in defendant's favor in an action brought to recover the value of certain shares of stock on a contract of repurchase of the stock bought by plaintiff from the Kopmeier Motor Car Company. Affirmed.

Statement by Siebecker, J.:

This is an action brought to recover the value of 100 shares of stock, on a contract of repurchase of the stock, brought by plaintiff from the Kopmeier Motor Car Company.

The Kopmeier Motor Car Company was incorporated under the laws of the state of Wisconsin in January, 1909, with an authorized capitalization of \$50,000. On October 15, 1909, the articles of incorporation were amended, and, as amended, authorized an increase of the capital stock from \$50,000 to \$100,000. Certificates of stock were issued to John H. Kopmeier, Norman J. Kopmeier, Waldemar S. J. Kopmeier, and Meta Kopmeier, wife of Waldemar. Norman J. Kopmeier surrendered a portion of his stock in November, 1910. There were three directors of the corporation at this time, John H., Waldemar S. J., and Norman J. Kopmeier. The plaintiff entered the employ of the Kopmeier Motor Car Company about October 1, 1909, as manager, and very shortly after this date he expressed a desire to purchase some stock in the corporation. At a meeting of the directors and Mr. Timme in November, 1910, it was agreed that the corporation should sell plaintiff 100 shares of stock at the par value thereof, namely, \$10,000. He was also made a director. At the same time, and as a part of the transaction, plaintiff and defendant entered into the following contract:

This agreement, made and entered into this 5th day of December, 1910, between A. F. Timme, of the city of Milwaukee, Milwaukee county, Wisconsin, party of the first part, and John H. Kopmeier, of the same place, party of the second part, witnesseth:

Whereas, the party of the first part is now in that employ, as manager, from month to month, of Kopmeier Motor Car Company, a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, and has, on or about the 1st day of November, 1910, purchased from said company one hundred (100) shares of the capital stock thereof, for the price of one hundred dollars (\$100) per share, for the purpose of increasing the capital of said company; and,

Whereas, the party of the second part is a stockholder of said company and desirous of increasing the capital of said company to the amount of stock purchased by the party of the first part:

Now, therefore, the parties hereto agree as follows:

First. In consideration of the purchase and sale by said company to the party of the first part of said stock, and in considera-

tion of \$1 and other good and valuable considerations, the receipt whereof is hereby acknowledged, party of the first part does hereby agree to and with the party of the second part that if, at any time while said party of the first part shall remain in the employ of said company, he should desire to sell said stock, option is hereby given to the party of the second part to purchase the same and to pay to the party of the first part therefor the full face or par value of said stock, plus pro rata share of accumulated profits.

Second. The party of the first part hereby agrees to and with the party of the second part that if his employment with said company is discontinued, either by mutual agreement of the said company and the party of the first part, or by the death of the party of the first part, or by the act of either said party of the first part or said company, or by operation of law, or for any reason whatsoever, the party of the first part shall sell to, and the party of the second part shall purchase, all of said stock and pay therefor the full face or par value thereof plus pro rata share of accumulated profits of said company.

Third. It is mutually agreed, by and between the parties hereto, that all of the terms, covenants, and conditions of this contract shall inure and bind the respective heirs, executors, and administrators of the respective parties.

In witness whereof the parties hereto have hereunto set their respective hands and seals in duplicate at the city of Milwaukee, Milwaukee county, Wisconsin, the day and year first above written.

A. F. Timme.

John H. Kopmeier.

Witnessed by John T. Zilisch, W. J. Kopmeier.

At the time this contract was made and executed, the defendant was a director of the company, and continued to hold this office up to the time this action was commenced. In August, 1912, plaintiff resigned from his position with the Kopmeier Motor Car Company and demanded of defendant that he repurchase the stock in accordance with the above agreement. Defendant has refused to repurchase the stock as provided in the contract.

The trial court found that Meta Kopmeier, wife of Waldemar Kopmeier and a stockholder, knew nothing of this transaction, and that she did not ratify it, and declared the agreement void. Judgment was entered dismissing plaintiff's complaint, and from such judgment this appeal is taken.

Mr. Lynn S. Pease, for appellant:

The court erred in its conclusion of law

that the agreement made between the plaintiff and defendant under date of December 5, 1910, is void as against public policy.

Bonta v. Gridley, 77 App. Div. 33, 78 N. Y. Supp. 961; *Strait v. Northwestern Steel & I. Works*, 148 Wis. 254, 134 N. W. 387; *Porter v. Plymouth Gold Min. Co.* 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938; *Fremont Carriage Mfg. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Hesse Envelop Co. v. Addison*, — Tex. Civ. App. —, 166 S. W. 898; *Dickinson v. Zubiate Min. Co.* 11 Cal. App. 656, 106 Pac. 123; *Strodl v. Farish-Stafford Co.* 145 App. Div. 406, 130 N. Y. Supp. 35; *Johnston v. Frederick Stearns & Co.* 160 Mich. 247, 125 N. W. 29; *Seymour v. Detroit Copper & B. Rolling Mills*, 56 Mich. 117, 22 N. W. 317, 23 N. W. 186; *Morgan v. Struthers*, 131 U. S. 246, 33 L. ed. 132, 9 Sup. Ct. Rep. 726; *Phillips v. Riser*, 8 Ga. App. 634, 70 S. E. 79; *Schulte v. Boulevard Gardens Land Co.* 164 Cal. 464, 44 L.R.A.(N.S.) 156, 129 Pac. 582, Ann. Cas. 1914B, 1013; *Malcomson v. Monaton Realty Investing Co.* 154 App. Div. 694, 139 N. Y. Supp. 405; *Oregon R. & Nav. Co. v. Dumas*, 104 C. C. A. 641, 181 Fed. 781.

Mr. Henry J. Killilea, for respondent:

A director of a private corporation owes a duty to all the stockholders to vote in the selection of a general manager and other officers as the interest of the stockholders may require, unimpeded by any contract imposing a personal liability which would interfere with the free exercise of his judgment.

Wilbur v. Stoepel, 82 Mich. 344, 21 Am. St. Rep. 568, 46 N. W. 724; *West v. Camden*, 135 U. S. 507, 34 L. ed. 254, 10 Sup. Ct. Rep. 838; *Guernsey v. Cook*, 120 Mass. 501; *Woodruff v. Wentworth*, 133 Mass. 309; *Noyes v. Marsh*, 123 Mass. 286; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Withers v. Edmonds*, 26 Tex. Civ. App. 189, 62 S. W. 795; *Fennessy v. Ross*, 5 App. Div. 342, 39 N. Y. Supp. 323; *Morse v. Ryan*, 26 Wis. 356; *Figge v. Bergenthal*, 130 Wis. 594, 109 N. W. 581, 110 N. W. 798; *Sauerhering v. Rueping*, 137 Wis. 407, 119 N. W. 184.

Stiebecker, J., delivered the opinion of the court:

The trial court found that Meta Kopmeier had no notice or knowledge of the making of the contract between plaintiff and defendant for the repurchase of the stock by defendant from plaintiff, and that she at no time consented thereto or ratified it. We have examined the evidence and find that plaintiff's evidence and that of Meta Kopmeier is in sharp conflict on the point as to whether or not she had knowl-

edge of the contract between plaintiff and defendant. It is contended that the facts and circumstances show that Mrs. Kopmeier tacitly consented and acquiesced in having her husband represent her interests as a stockholder at corporate meetings and in the transaction of its business. If such consent and acquiescence were not positively refuted by other evidence in the case, we would be disposed to accede to this claim. But Meta Kopmeier testifies positively that she had no information of the transaction and this contract; that, although she made diligent effort to ascertain about the affairs of the company from her husband and others, she wholly failed to get the requested information; that she had never assented to the contract; and that none of the stockholders and officers were authorized to represent and act for her in the matter. Although the facts and circumstances might permit of the inference in conflict with these positive declarations of Mrs. Kopmeier, we cannot say that the trial court's finding on this point is against the clear preponderance of the evidence. We are of the opinion that this finding of fact cannot be disturbed by the court. This state of facts on this point distinguishes this case from the case of *Jones v. Williams*, 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353, relied on by appellant. In that case the court found that a contract of repurchase of stock executed by one who was a stockholder and director was not the personal contract of such director, but the contract of the corporation.

The principal controversy in this case arises on the question of the validity of the contract. The trial court filed an opinion in writing giving a full review of the cases before him and a full statement of the grounds for his decision. The court held that the provision of the contract, whereby plaintiff and defendant agreed that in the event that plaintiff's "employment with said company is discontinued" either by mutual agreement, or by plaintiff's death, "or by the act of, either said party of the first part or said company," or by law or any other purpose, then plaintiff shall sell and defendant shall purchase "all of (plaintiff's) said stock and pay therefor the full face or par value thereof plus pro rata share of accumulated profits of said company," is contrary to public policy, and renders the agreement illegal and unenforceable, unless made with the knowledge and consent of all the stockholders of the corporation." The court declares this result must follow, though it appears as fact in the case that the contract between plaintiff and defendant was made in good faith, and that neither party had any intent of

securing any secret or special benefit therefrom to the prejudice or disadvantage of the other stockholders.

Directors of a corporation occupy a position of trust and confidence, and are considered in the law as standing in a fiduciary relation toward the stockholders, and as trustees for them. The directors of a corporation are not permitted to use their position of trust and confidence to further their private interests nor to become parties to contracts concerning corporate affairs intrusted to their management which conflict with a free and impartial discharge of their duties toward the stockholders. Any participation by them in contracts dealing with matters of corporate interest, which is antagonistic to their free and impartial discharge of official duties, is denounced by the law, unless all of the stockholders with full knowledge assent thereto. This doctrine is declared in *West v. Camden*, 135 U. S. 507, 34 L. ed. 254, 10 Sup. Ct. Rep. 838, to be applicable "to the directors of a private corporation, charged with duties of a fiduciary character to private parties, on the view that it is public policy to secure fidelity in the discharge of such duties [citing]. We think this principle is equally applicable on the ground of public policy, although there was not to be any direct private gain to the defendant; for, . . . it was the right of the other stockholders . . . to have the defendant's judgment, as an officer of the company, exercised with a sole regard to the interests of the company."

These principles are recognized and applied in *Sauerhering v. Rueping*, 137 Wis. 407, 119 N. W. 184.

Under the facts of the instant case the defendant became interested to purchase plaintiff's stock whenever any of the contingencies specified in the contract happened. The defendant as director had a voice in determining whether or not plaintiff was to continue in the management of the corporate business, whether or not plaintiff's management was for the general interest of the corporation and its stockholders. Obviously his duties as director and his private interest under the contract to repurchase plaintiff's stock upon the conditions stated were antagonistic, and his private interests might oblige him to act contrary to his duties toward the other stockholders. Under such circumstances such contracts are held void on the grounds of public pol-

icy, unless all of the stockholders assent thereto. The transactions showing how plaintiff came to be employed and put into office by the corporation, and his purchase of the stock and the making of the contract for resale thereof to defendant, are closely interwoven and show that the plaintiff, the corporation, and the defendant were thereby mutually induced to make these arrangements by which plaintiff became interested as stockholder and officer. The case of *Wilbur v. Stoepel*, 82 Mich. 344, 21 Am. St. Rep. 568, 46 N. W. 724, involved a contract like the one here, with two directors on the one part, without the assent of all the stockholders. The court, in speaking of the antagonistic relation of such directors as contractors and corporate officers, declares: "Their natural desire and inclination would be to continue the plaintiff as manager, although it were against the interest of the other stockholders, . . . but for the agreement which might render them liable for the payment of a large sum if they failed to retain him. Nor is such contract made valid by the good faith of the parties to it. Its effect upon stockholders who are not parties to it, or do not consent to it, is the same in the one case as in the other. The law, therefore, wisely condemns and prohibits all such contracts."

Of other cases cited to our attention the following recognize the same doctrine, and apply it to contracts of this character under varying circumstances: *Guernsey v. Cook*, 120 Mass. 501; *Withers v. Edmonds*, 26 Tex. Civ. App. 189, 62 S. W. 795; *Noel v. Drake*, 28 Kan. 265, 42 Am. Rep. 162; *Sims v. Petaluma Gas Light Co.* 131 Cal. 656, 63 Pac. 1011; *Singers-Bigger v. Young*, 91 C. C. A. 510, 166 Fed. 82. Whether or not a contract between the parties to this action, which provided only for an option on the part of Timme to demand a repurchase of the stock by defendant in the event of his discontinuance in the service of the corporation, would be condemned by this rule of public policy, is not necessarily involved here, and we express no opinion on that point. The case of *Bonta v. Gridley*, 77 App. Div. 33, 78 N. Y. Supp. 961, is in conflict with the foregoing authorities, as are some arguendo observations in other cases, but we are persuaded that the better rule is as held in the *Wilbur* and other cases above cited.

The judgment appealed from is affirmed.

Annotation—Validity of contract or option by director for purchase of stock of employee of corporation upon discontinuance of employment.

A careful search has disclosed a paucity of authority upon this question; but the few cases which have been found are substantially in accord with the L.R.A.1916D.

holding in *TIMME v. KOPMEIER*, ante, 1114, to the effect that such a contract or option is void as against public policy unless ratified by the stockholders.

Thus, an agreement between two of the three stockholders and directors of a corporation, that a purchaser of stock shall be employed as a business manager for a term of years, and for the repurchase of his stock at a stated price if he desires to retire at the end of the term, is inseverable, and void as against public policy unless assented to by all the stockholders. *Wilbur v. Stoepel* (1890) 82 Mich. 344, 21 Am. St. Rep. 568, 46 N. W. 724. The court said: "This alleged agreement between the defendants, who owned a majority of the stock, and the plaintiff, is contrary to public policy, and void as against those not consenting to it. The defendants were directors, and in the management of the corporate affairs cannot but be unduly influenced by such an agreement. Their natural desire and inclination would be to continue the plaintiff as manager, although it were against the interest of the other stockholders, and would be against their own as stockholders but for the agreement which might render them liable for the payment of a large sum if they failed to retain him. Nor is such contract made valid by the good faith of the parties to it. Its effect upon stockholders who are not parties to it, or do not consent to it, is the same in the one case as in the other. The law, therefore, wisely condemns and prohibits all such contracts."

And a contract by one of the two ma-

jority stockholders in a corporation, agreeing, in consideration of the purchase of a part of his stock at a price named, to secure to the purchaser the office of treasurer of the corporation, with a fixed salary, and in case of his removal to repurchase the stock at par, is void as against public policy, and as a fraud on the other members of the corporation, in the absence of evidence that the transaction was not for the private benefit of the shareholder, or that it was consented to by the other members of the corporation. *Guernsey v. Cook* (1876) 120 Mass. 501.

And in *Noyes v. Marsh* (1877) 123 Mass. 286, it was said of a similar contract that, even if valid, a bill in equity for its specific performance would not lie, it not appearing that there was no adequate remedy at law. Generally as to specific performance of contract for sale of corporate stock, see notes in 50 L.R.A. 501; 31 L.R.A.(N.S.) 491; and L.R.A. 1915D, 300.

But a contract giving the right to manage a newspaper and control its policy for five years, to a person employed as editor and manager, is not contrary to public policy when it is part of an agreement by which he purchases a large quantity of stock from the controlling stockholder, who is given an option to repurchase upon the termination of the employment within three years, and the agreement is approved and ratified by all the stockholders. *Jones v. Williams* (1897) 139 Mo. 1, 37 L.R.A. 682, 61 Am. St. Rep. 436, 39 S. W. 486, 40 S. W. 353. W. W. A.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

GEORGE B. LATHAM et al., Plffs. in Err.,
v.

UNITED STATES.

(141 C. C. A. 250, 226 Fed. 420.)

Grand jury — unauthorized person in room — effect.

1. An indictment is vitiated by the presence in the grand-jury room to preserve the evidence on which it is founded, of a stenographer not authorized by statute, although he was a clerk in the office of the

Note. — For presence of unauthorized person in grand jury as affecting indictment, see annotation following this case, post, 1123.

As to reversal of conviction because of unfair or irrelevant argument or statements by prosecuting attorney, see note in 46 L.R.A. 641. L.R.A.1916D.

district attorney and subscribed an oath to keep secret the proceedings before the grand jury.

For other cases, see Grand Jury, I. in Dig. 1-52 N. S.

Trial — statement by prosecuting attorney of facts not in evidence.

2. The district attorney should not, in a prosecution for devising a fraudulent scheme for obtaining money by means of the postoffice in which the government's case is for the most part founded on the testimony of postoffice inspectors giving the results of decoy letters, state to the jury that persons had been defrauded, of which fact no evidence is placed before the jury.

For other cases, see Trial, I. d, in Dig. 1-52 N. S.

(October 4, 1915.)

ERROR to the District Court of the United States for the Northern District of Texas to review a judgment convict-

ing defendants of devising a fraudulent scheme for obtaining money by means of the postoffice. Reversed.

The facts are stated in the opinion.

Argued before Pardee and Walker, Circuit Judges, and Call, District Judge.

Mr. William H. Atwell, for plaintiffs in error:

An unauthorized person having been in the grand-jury room when testimony was being taken by that body with reference to this indictment, the court should have sustained the motion to abate, and, in not doing so it erred.

State v. Bowman, 90 Me. 363, 60 Am. St. Rep. 266, 38 Atl. 331; *Stuart v. State*, 35 Tex. Crim. Rep. 440, 34 S. W. 118; *Rothchild v. State*, 7 Tex. App. 519; *United States v. Wells*, 163 Fed. 321.

A scheme which requires the production of a mental condition in the party whom the schemers intend to defraud is not susceptible of legal proof; nor is it such a scheme as the statute denounces.

American School v. McAnnulty, 187 U. S. 104, 47 L. ed. 94, 23 Sup. Ct. Rep. 33; *Bruce v. United States*, 120 C. C. A. 370, 202 Fed. 104; *United States v. Fay*, 83 Fed. 839.

The indictment is fatally and vitally defective and duplicitous and uncertain, and the court erred in not sustaining the defendants' demurrer and exceptions thereto, and the defendants' motion in arrest of judgment, each of which specifically alleged such duplicity, insufficiency, and uncertainty.

United States v. Cruikshank, 92 U. S. 558, 23 L. ed. 593; *Moore v. United States*, 160 U. S. 270, 40 L. ed. 424, 16 Sup. Ct. Rep. 294, 10 Am. Crim. Rep. 283; *United States v. MacDonald*, 65 Fed. 488; *Territory v. Carland*, 6 Mont. 18, 9 Pac. 580; *United States v. Carll*, 105 U. S. 613, 26 L. ed. 1135, 4 Am. Crim. Rep. 246; *United States v. Crafton*, 4 Dill. 147, Fed. Cas. No. 14,881; *United States v. Ford*, 34 Fed. 28; *United States v. Lehman*, 39 Fed. 771; *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 577; *Stewart v. United States*, 55 C. C. A. 641, 119 Fed. 89; 1 Bishop, New Crim. Proc. § 325, ¶¶ 2-5.

The district attorney having made an improper argument not supported by the testimony, to the great prejudice of the defendants' rights, the court erred in not arresting the judgment and granting the defendants a new trial.

Williams v. United States, 168 U. S. 382, 42 L. ed. 509, 18 Sup. Ct. Rep. 92; *Hall v. United States*, 150 U. S. 76, 37 L. ed. 1003, 14 Sup. Ct. Rep. 22; *People v. Mull*, 167 N. Y. 247, 60 N. E. 629; *Stewart v. United States*, 127 C. C. A. 477, 211 Fed. 41; *Low-L.R.A.*1916D.

don v. United States, 79 C. C. A. 361, 149 Fed. 677; *Allen v. United States*, 52 C. C. A. 597, 115 Fed. 4; *McKnight v. United States*, 38 C. C. A. 115, 97 Fed. 208; *Attaway v. State*, 41 Tex. Crim. Rep. 398, 55 S. W. 45; *Miller v. State*, 45 Tex. Crim. Rep. 517, 78 S. W. 511; *Coleman v. State*, 49 Tex. Crim. Rep. 86, 90 S. W. 490; *Jenkins v. State*, 49 Tex. Crim. Rep. 461, 122 Am. St. Rep. 812, 93 S. W. 726; *Robbins v. State*, 47 Tex. Crim. Rep. 317, 122 Am. St. Rep. 694, 83 S. W. 690; *Bearden v. State*, 46 Tex. Crim. Rep. 148, 79 S. W. 37; *Grimes v. State*, 64 Tex. Crim. Rep. 70, 141 S. W. 261.

The court should never, by cross-examination or expression, indicate to the jury his opinion of the guilt of the accused.

Sandals v. United States, 130 C. C. A. 149, 213 Fed. 571; *Adler v. United States*, 104 C. C. A. 608, 182 Fed. 464; *Foster v. United States*, 110 C. C. A. 283, 188 Fed. 305; *Rudd v. United States*, 97 C. C. A. 462, 173 Fed. 914; *Starr v. United States*, 153 U. S. 614, 38 L. ed. 841, 14 Sup. Ct. Rep. 919; *Hickory v. United States*, 160 U. S. 408, 40 L. ed. 474, 16 Sup. Ct. Rep. 327; *Mullen v. United States*, 46 C. C. A. 22, 106 Fed. 892.

Messrs. James C. Wilson and William E. Allen for defendant in error.

Call, District Judge, delivered the opinion of the court:

On January 24, 1914, George B. Latham, Frank Flood, and J. H. Terrill were, in the district court for the northern district of Texas, indicted in four counts, charged with devising a fraudulent scheme for obtaining money, etc., by means of the postoffice establishment of the United States, acting under the names of the Terrill Medical Institute and the New Method Treatment Company.

On January 30, 1914, a motion to abate the indictment was made. This motion was denied, and subsequently a motion for continuance was granted Terrill, and Latham and Flood put on trial and convicted. These latter sue out writ of error, and assign as error the action of the court in denying the motion to abate, and is contained in the twenty-second assignment of error, as follows: "The court erred in overruling defendant's motion to abate, because, from the said motion and by the testimony taken thereunder, it was clearly shown to the court that an unauthorized person was present in the grand-jury room during the taking of testimony by that body relating to this indictment."

This assignment must be disposed of at the threshold of the case. If it is well taken, it disposes of this writ of error, and

any decision on the other assignments would be obiter.

The testimony contained in the bill of exceptions shows that one Lantz, who was a clerk in the office of the district attorney, and an adept stenographer, after having subscribed an oath before the clerk of the court to keep secret the proceedings of the grand jury, at the instance of the district attorney, was present in the grand-jury room and taking stenographic notes of the testimony of witnesses examined by the grand jury in investigating this case, and upon which testimony the indictment in this case was found. The question of whether the presence of this unauthorized person in the grand-jury room during the investigation by them of this case is good ground to abate and quash the indictment found is squarely presented to this court.

The decisions of the courts on this question are not uniform. Different courts have taken different views on this question. From very early times the proceedings before the grand jury, in taking testimony and in deliberating thereon, are required to be held in secret. It is a rule of universal application wherever the system of grand juries are in effect. *Wigmore, Ev. §§ 2360 et seq.; Greenl. Ev. §§ 252 et seq.* This rule rests upon public policy and in furtherance of justice. It is intended for the protection of the government and the citizen. The rights thus secured cannot be invaded without detriment to each. The cases where this rule may be waived by the courts are well defined, and are based upon sound principle.

Mr. Greenleaf and Mr. Wigmore discuss the reasons for the rule, and in *Wigmore* will be found an instructive and interesting discussion of the reasons for, and the history of, the rule, as well as the circumstances under which courts may waive its requirements and permit those proceedings to be disclosed. The statutes of the several states recognize it, both by prescribing the oath to be taken, and by providing what persons, other than the grand jurors and the witness being examined, may be present during such examination.

We may start, then, with this rule firmly embedded in our jurisprudence. And it must be maintained until the legislative branch of the government sees fit to change it. Judge Bellinger, in the *Edgerton* Case, says: "It is beyond question that no person, other than a witness undergoing examination and the attorney for the government, can be present during the sessions of the grand jury."

And, further, he says: "There must not only be no improper influence or suggestion in the grand-jury room, but, as suggested *L.R.A.1916D.*

in *Lewis v. Wake County*, 74 N. C. 194, there must be no opportunity therefor. If the presence of an unauthorized person in the grand-jury room may be excused, who will set bounds to the abuse to follow such a breach of the safeguards which surround the grand jury." *United States v. Edgerton* (D. C.) 80 Fed. 375.

In that case the unauthorized person was an expert, but on principle the difference in occupation could scarcely be material. Judge Thomas, in the *Rosenthal* Case, refers with approval to the *Edgerton* Case, and, after an exhaustive and learned discussion of the rule, has this to say: "The inconvenience of resubmitting the matter to the grand jury is temporary; the injustice of denying the defendants investigation pursuant to the law of the land would be perpetual." *United States v. Rosenthal* (C. C.) 121 Fed. 862.

In this case the person before the grand jury was a lawyer acting under instructions from the Attorney General. No improper conduct charged and no claim of improper evidence produced before the grand jury. It was prior to the act of 1906, empowering the Attorney General and certain persons at his request to appear before the grand jury. His presence and participation in the proceedings before the grand jury was held to invade the rights of the defendant, and the indictments were quashed. In *United States v. Virginia-Carolina Chemical Co.* (C. C.) 163 Fed. 66, the *Rosenthal* Case was followed, and the indictment quashed.

United States v. Heinze (C. C.) 177 Fed. 770, was another case of an expert before the grand jury, under a special appointment by the Attorney General, to aid the district attorney. The indictment was quashed. Judge Hough in that case says: "If there be a settled method of conducting the deliberations of grand jurors, established by generations of procedure, based on the experience of many courts in many communities, and evidenced by the decisions of authoritative tribunals, such method must be followed until the legislature sees fit to overturn the old rule."

In the cases of *United States v. Rubin* (D. C.) 218 Fed. 245, and *United States v. Philadelphia & R. R. Co.* (D. C.) 221 Fed. 683, the courts quashed the indictments because of the presence of stenographers in the grand-jury room. The case of *United States v. Rockefeller* (D. C.) 221 Fed. 463, was commented upon by Judge Thompson in the *Philadelphia & R. R. Co. Case*, and the reasoning of Judge Sessions in the *Rockefeller* Case to some extent criticized. Judge Sessions says: "It seems to me that, if the testimony given before the grand jury may not, under any circumstances or

conditions, be made a matter of record and reference, we are opening the door very wide, and inviting, not only perjured and incompetent testimony, but even gossip and conjecture, before the grand jury. . . . And, if no safeguards are provided, many witnesses may be influenced or persuaded or induced to indulge in statements and accusations which ought not to be permitted or tolerated."

Judge Thompson pertinently remarks: "If a record is to be kept of the proceedings before the grand jury upon those grounds, it should be equally open to the defendant and to the government."

And Judge Hough's language in the *Heinze Case*, above referred to, is equally pertinent: "If there be a settled method of conducting the deliberations of grand jurors, established, . . . such method must be followed until the legislature sees fit to overturn the old rule."

In 1906 Congress had this whole matter before it, when the act allowing certain persons to participate in proceedings before grand juries was passed, and the discussions on that act will show that the rule, as established by the decisions in several cases referred to, was recognized. Had Congress so desired, a record of the proceedings before grand juries could and would have been authorized under proper precautions.

It seems to me that the reasoning of Judge Sessions is faulty in many respects. How would the presence of a stenographer, and the fact that he was taking down the testimony of the witnesses, discourage perjury? How would it prevent incompetent testimony, or even gossip and conjecture, or how would it prevent witnesses from being influenced or persuaded or induced to indulge in statements or accusations? The only possible office such a stenographic report of the testimony could serve would be that of refreshing the memory of a witness as to those statements, in the event of a prosecution for perjury committed before the grand jury, or in case of impeachment at a subsequent trial. It seems to me that the learned judge overlooked the fact that the district attorney, or his assistant, has a right to be, and usually is, in important cases, almost certainly, present at examination of witnesses; and certainly a court would not be justified in the assumption that this government official would prostitute his office to influence or persuade or induce witnesses to indulge in statements or accusations. If he was so inclined, the mere presence of a stenographer, of his own selection, would deter him but little.

It would, no doubt, be very convenient and of the utmost assistance to the prosecuting officer in the preparation of his case for trial, to have the stenographic report

of the testimony of the witnesses given before the grand jury, and such an argument might with propriety be addressed to the Congress to induce it to pass such a law, but comes with no force to a court to authorize an invasion of the right of a defendant. Under the act of Congress there are at least sixteen members of the grand jury, each of whom may be called in a proper case to testify what a witness has said before them; certainly, then, the presence of a stenographer is not necessary to prove the witness's testimony.

In 1906, Congress passed an act (34 Stat. at L. 816, chap. 3935, Comp. Stat. 1913, § 534), before referred to, empowering certain persons to participate in grand jury proceedings. This act can have no application to this case, except to show a recognition of the rule theretofore existing and announced in the *Edgerton Case*. Most of the cases taking a contrary view are based upon the argument of convenience, as in the *Rockefeller Case*; but the answer to that whole argument is that Congress has authorized certain persons to be present at grand jury sessions and take part therein, but stenographers and clerks to district attorneys are not in that class.

Contention is made that there is no allegation or proof that these defendants were prejudiced by the presence of the stenographer. Section 1025, Rev. Stat. Comp. Stat. 1913, § 1691, and the rule and decisions on pleas in abatement, are appealed to to validate the indictment in this case. Of course, if this were merely an irregularity or informality, and no prejudice alleged and proven, then the indictment ought not to have been quashed. In none of the cases I have referred to was there any prejudice shown, save probably two cases. In all of them participation in those proceedings, some more, some less, was shown. Will the amount of participation be the criterion for decision as to whether it is a substantial right or an informality? Or is it sufficient to show participation by an unauthorized person?

The right of the citizen to an investigation by a grand jury pursuant to the law of the land is invaded by the participation of an unauthorized person in such proceedings, be that participation great or small. It is not necessary that participation should be corrupt, or that unfair means were used. If the person participating was unauthorized, it was unlawful. And this would be an unlawful invasion of the right of the citizen, and unless this unlawful invasion is rectified by a proper tribunal at the instance of the citizen, it becomes a justified illegality; and in the words of Judge Hough: "A justified illegality, however

trivial of itself, is of the highest importance."

We cannot, therefore, assent to the doctrine that the presence in the grand-jury room of the stenographer, and his participation in such proceedings to the extent of taking testimony of witnesses before the grand jury, is an informality; and, unless prejudice is alleged and shown, the motion should be denied. It is in my judgment a matter of substance. The statute relied upon to save this indictment has been on the statute books for many years, and was no doubt considered by the courts in the decisions referred to. We are therefore of opinion that the assignment is sustained, and the motion should have been granted, and the indictment quashed.

While the foregoing disposes of this case, and while, as I have said before, it is obiter to discuss and make any ruling on the other assignments, yet we think it timely and proper to notice the twenty-seventh assignment of error, that on a new indictment and retrial of this case the same fault shall not again occur.

There could have been no doubt upon the minds of the jury and the court of the fact that the mails were used and intended to be used to carry out the plans of the defendants, and thus the only live question in the case was whether the scheme was devised with a fraudulent intent. After the defendants had closed their testimony, the government in rebuttal introduced a witness, Faulkner, whose testimony tended to prove that he had paid \$75, without the benefit from the treatment received. In argument the defendants' counsel commented on the fact that only one witness had been produced to show that any money had been received, etc., a proper comment on his part. The district attorney, in closing the case for the government, made the statement that, had the train not been three hours late, he would have had another witness, who would have testified that he also had been defrauded. The defendants' counsel immediately objected, and the objection was sustained by the court, and the jury properly cautioned not to consider said statement of counsel.

The defendants' counsel assign these remarks as error in his twenty-seventh assignment. The almost unbroken line of authorities hold that it is to the action of the court upon the objection to which error may be assigned; that, if the court stops counsel and cautions the jury, this cures the violation of the defendants' right to a trial and verdict on the testimony of witnesses, and not statements of counsel not based on testimony. And in ordinary cases this is the correct rule. Yet in each of the cases, ex-L.R.A.1916D.

expressions will be found which militate against this view in exceptional cases.

Everyone must realize that there are exceptional cases where, although the court does stop counsel, and does caution the jury, the impression has been made by the remarks of counsel, and although the jury honestly try to ignore that impression, it still enters into and forms a part of the verdict. In such cases the trial court should set aside the verdict on motion for a new trial. The language of Justice Fowler, in *Tucker v. Henniker*, 41 N. H. 325, is pertinent, and applies with great force to criminal prosecutions: "Yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they in the slightest degree influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. . . . It is unreasonable to believe the jury will entirely disregard them. They may struggle to disregard them. They may think they have done so, and still be led involuntarily to shape their verdict under their influence. That influence will be greater or less, according to the character of the counsel, his skill and adroitness in argument, and the force and naturalness with which he is able to connect the facts he states with the evidence and circumstances of the case. To an extent not definable, yet to a dangerous extent, they unavoidably operate as evidence which must more or less influence the minds of the jury, not given under oath, without cross-examination, and irrespective of all those precautionary rules by which competency and pertinency are tested."

The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty. The realization of these considerations should lead the officer to the exercise of the utmost care and caution in making statements before the jury, and should induce him to confine his arguments and statements to the testimony of the witnesses, in order that no right of the defendant is violated.

It will be borne in mind in this case that the great volume of testimony was given by postoffice inspectors, writing decoy letters and giving simulated symptoms, and that the only witness who had in reality consulted the defendants was Faulkner. While the fact that anyone was actually defrauded may not have been material, yet

the fact that people had been defrauded by the scheme would, necessarily, have had great weight with the jury in arriving at their conclusion that a scheme had been formed with intent to defraud. It seems to me impossible to say that the remarks of the district attorney were not prejudicial to the defendants' right to a verdict on the

testimony of witnesses. *State v. Underwood*, 77 N. C. 502; *Jenkins v. North Carolina Ore Dressing Co.* 65 N. C. 563.

For the reasons hereinbefore given, the judgment of the District Court is reversed, and the cause remanded to the trial court, with instructions to grant the motion to quash the indictment.

Annotation—Presence of unauthorized person in grand jury as affecting indictment.

This note does not include cases involving the appearance of special attorneys or private counsel before a grand jury. For such cases, see *Hartgraves v. State*, 33 L.R.A.(N.S.) 568, and note, and the later case of *Collier v. State*, 45 L.R.A.(N.S.) 599.

Cases involving the effect of the presence on the grand jury of a juror who was not qualified to act are also excluded from the present note.

In general.

The cases agree that no person other than jurors should be present when the grand jury is deliberating or voting upon the advisability of returning an indictment; but there is a decided difference of opinion as to the effect of the presence of an unauthorized person in the grand-jury room at other times, the majority taking the view that it will not be sufficient ground for quashing or abating the indictment unless prejudice is shown, or at least probable.

Stenographers.

In *Richards v. State* (1913) 108 Ark. 87, 157 S. W. 141, Ann. Cas. 1915B, 231, involving a motion to quash an indictment because of the presence of a stranger in the grand-jury room during the examination of the charge against defendant, the stranger being a stenographer employed by the prosecuting attorney to take down the testimony of the witnesses and report it to him, the court sustained the indictment; it appearing that the stenographer was not present when the grand jury were deliberating or voting on the charge; if not appearing that anything was said or done by him calculated to in any way influence the grand jury; although the statutes provided that no person excepting the prosecuting attorney and the witnesses under examination should be permitted to be present while the grand jury were examining a charge, and no person whatever should be present while the grand jury were deliberating or voting upon a charge. The court said: L.R.A.1916D.

"If it is desirable that the testimony of witnesses before the grand jury be taken in shorthand and reported in full to the prosecuting attorney in order to further the ends of justice, it would be better done by a stenographer authorized by law to take such testimony, and acting under the sanctity of an oath not to disclose any of the secrets thereof; still we do not think, under the circumstances of this case, that the court erred in overruling the motion to quash the indictment because of his presence in the grand-jury room during the examination of witnesses in the capacity in which he was acting; it not appearing that he was present while the grand jury was deliberating or voting on the charge."

In the absence of any statute authorizing or prohibiting a person not a member of the grand jury to remain in the grand-jury room and take evidence in shorthand for the use of the prosecution, the presence in the grand-jury room, at the request of the prosecuting attorney, of a stenographer who took down in shorthand all the evidence, and afterwards wrote it out in longhand, for the use of such persons as were employed to prosecute the defendants upon the indictment, will not invalidate the indictment, where it does not appear that the reporter said or did anything in the presence of the grand jury that influenced their action in returning the indictment, and there is no allegation of fraud or improper motives on the part of either the prosecuting attorney or the shorthand reporter. *State v. Bates* (1897) 148 Ind. 610, 48 N. E. 2.

And this was held to be true although the statute provided that "the grand jury must select one of their number as clerk who must take minutes of their proceedings (except the votes of the individual members on a presentment or indictment), and also of the evidence given before them, which shall be preserved for the use of the prosecuting attorney to subserve the purposes of justice." The court said that such a de-

parture from the mode indicated by the statute should not result in the abatement of a particular indictment, without some showing that the accused was injuriously affected, or that something unauthorized was said or done which probably injured him; the presence of a stenographer before the grand jury not being necessarily inconsistent with a due administration of justice in criminal cases. *Courtney v. State* (1892) 5 Ind. App. 356, 32 N. E. 335.

In *State v. Sullivan* (1904) 110 Mo. App. 75, 84 S. W. 105, the court said that the presence in the grand-jury room of a stenographer who was not a member of the jury was improper, but refused to quash the indictment where it was admitted by defendant's demurrer that no prejudice resulted to him.

Where a stenographer is employed by a district attorney by express statutory authority as an assistant in his office, the presence of such stenographer in the grand-jury room for the purpose of taking down the testimony in shorthand for the use of the district attorney will not invalidate the indictment, in the absence of anything tending to show that the stenographer was present when the grand jury deliberated or voted upon the bill, or that he participated in the proceedings in any way than by taking notes of the testimony, or that the accused was injuriously affected thereby. *Com. v. Hedgedus* (1910) 44 Pa. Super. Ct. 157.

So the fact that the county attorney had with him in the grand-jury room, at the time the grand jury was interrogating the witnesses, a regularly sworn bailiff for the grand jury, to act as his stenographer, taking down the testimony of the witnesses, he not being present while the grand jury was discussing the propriety of finding a bill of indictment, nor while they were voting on that question, was no ground for quashing the indictment. *Porter v. State* (1913) 72 Tex. Crim. Rep. 71, 160 S. W. 1194.

The presence of the stenographer of the state's attorney in the grand-jury room during the taking of the testimony of witnesses, and the taking and transcribing of such testimony in full, will not abate the indictment in the absence of statutory requirements or prejudice to the accused. *State v. Brewster* (1898) 70 Vt. 341, 42 L.R.A. 444, 40 Atl. 1037.

Where it is a settled practice for assistants of the district attorney to attend the grand jury, the presence of a stenographer employed by authority of the government, to assist the district

attorney in the discharge of his official duties, for the purpose of taking stenographic notes of the testimony of a witness, was held to be insufficient to require the quashing of the indictment, the decision being based upon the ground that the stenographer came within the designation of an assistant to the district attorney. *United States v. Simmons* (1891) 46 Fed. 65.

Where an assistant district attorney is authorized to be present before the grand jury, the fact that he is also a stenographer and takes minutes of the testimony, which he reports to the district attorney and to another person aiding the district attorney, is not error in the absence of any law forbidding it. *United States v. American Tobacco Co.* (1910) 177 Fed. 774.

The presence of a clerk or assistant to the district attorney with the grand jury, for the purpose of taking down the testimony, although he was not an attorney at law nor an assistant district attorney, was not error, as the prohibition against the presence of outsiders in the grand-jury room during the taking of testimony arises by reason of the requirement of secrecy concerning the proceedings, and not from legislative enactment; and the stenographer in this case had taken the required oath of office so that the secrecy of the proceedings of the grand jury was preserved. *United States v. Rockefeller* (1914) 221 Fed. 462.

In *Wilson v. United States* (1916) — C. C. A. —, 229 Fed. 344, the court stated that in that circuit—the second—it has for upwards of thirty years been uniformly held that the presence of a proper shorthand reporter who merely recorded the testimony as it was given, and did not attend at the deliberations of the grand jury, did not invalidate the indictment, and, after referring to the fact that in some other circuits a different conclusion has been reached, said: "Nevertheless we are not persuaded to abandon the well-settled and long-continued practice in our own circuit. To do so would seem like a reverter to strict technicalities, overattention to which sometimes tends to defeat, rather than to advance, the ends of justice. There seems no reason why criminal law and procedure should not, like other law and procedure, progress with the progress of the age. . . . We are satisfied that the preservation of an accurate record of the testimony submitted to a grand jury tends to advance the ends of justice. The knowledge that there

is being taken a record of such sort that in any future prosecution for perjury it will probably be taken by a trial jury as a correct one is a wholesome check on the witnesses who are testifying before a grand jury. There are very many causes which come before a grand jury which involve complicated questions and call for voluminous testimony from many witnesses. It cannot all be put in at once; not infrequently the statement of one witness will indicate where another witness may be found, and days or weeks may elapse before he can be produced. The recollection of the sixteen jurors may not always be harmonious as to what some prior witness testified to; it is important, and advances the ends of justice, always to have before the grand jurors themselves when they deliberate on their future action, an accurate record of all the testimony which a stenographic report alone can give; it is as important for the person charged as it is for the government; it may save him from indictment through misrecollection." And it was held that the action of the trial judge in refusing to quash or abate the indictment was proper, especially in view of the fact that the stenographer was no chance man, called in by a district attorney for that case merely, but a regular clerk and assistant to the district attorney, appointed by the Attorney General of the United States, and had taken the oath required from all government officials.

A statute providing that "no person except the attorney for the commonwealth and the witness under examination shall be present while the grand jury are examining a charge; and no person whatever while they are deliberating or voting on a charge," is peremptory, and it is error for the court to direct the stenographer to take down the testimony heard before the grand jury. *Com. v. Berry* (1906) 29 Ky. L. Rep. 234, 92 S. W. 936.

In *State v. Watson* (1882) 34 La. Ann. 669, a judgment of conviction was reversed and the indictment and all proceedings under it quashed because the judge appointed an outsider to act as clerk of the grand jury.

The attendance of a stenographer at the proceedings of a grand jury, upon order of the presiding judge, for the purpose of taking down the testimony of witnesses, although he took an oath not to disclose any testimony taken down or heard by him, such oath not being authorized by law, and although he was

not present during the deliberations of the jury, was error of which the person indicted may take advantage. *State v. Bowman* (1897) 90 Me. 363, 60 Am. St. Rep. 266, 38 Atl. 331.

Where a stenographer who was a witness before the grand jury against the defendant remained in the grand-jury room and took notes of the testimony of all the witnesses testifying before that body, and at the close of the testimony read the notes so taken to the members of the jury, who had to pass upon the question of finding a true bill, the stenographer not even acting under the sanction of an oath to correct by report the testimony according to her best ability, the indictment should have been abated. *State v. Salmon* (1908) 216 Mo. 466, 115 S. W. 1106.

An act of Congress permitting any attorney or counselor specially appointed by the Attorney General to go before the grand jury in the same manner as a regular assistant district attorney does not authorize the appointment of attorneys to go before the grand jury for the sole purpose of taking the testimony as the grand jury under such circumstances is ground for quashing the indictment. *United States v. Philadelphia & R. R. Co.* (1915) 221 Fed. 683; *United States v. Rubin* (1914) 218 Fed. 245.

Officers.

The mere presence of the bailiff of the court in the grand-jury room while witnesses were being examined, he not being present when the question was taken upon the finding of the indictment, and it not being shown that he was not there in the discharge of his official duties, will not invalidate the indictment. *State v. Kimball* (1870) 29 Iowa, 267.

So, the fact that the bailiff was in the grand-jury room part of the time, passing in and out, was not ground for quashing the indictments, the proof clearly showing that he exerted no influence on the grand jury. *State v. Bacon* (1899) 77 Miss. 366, 27 So. 563.

And while it is improper for a court officer to unnecessarily enter or remain in the grand-jury room, and such conduct on his part should be rebuked and punished by the trial judge, yet the casual presence of a court officer in the grand-jury room during the examination of witnesses will not have the effect of vitiating an indictment or presentment unless there is some showing that the officer attempted to interfere with or influence the grand jury in its action.

Sadler v. State (1910) 124 *Tenn.* 50, 136 S. W. 430, *Ann. Cas.* 1912D, 976.

But it is improper for any outsider to take any part in the deliberations of the grand jury, and where the sheriff came into the jury room and assisted in examining a witness, eliciting evidence upon which the indictment was based and which would not otherwise have been obtained, the judgment was reversed and the indictment quashed. **Herrington v. State** (1911) 98 *Miss.* 410, 53 *So.* 783.

Judge.

Where one of the statutory grounds of a motion to set aside an indictment is that any person other than the grand jurors was present before the grand jury when the question was taken upon the finding of the indictment, or when any person other than the grand jurors was present before the grand jury during the investigation of the charge, except as required or permitted by law, the fact that the presiding judge went into the room of the grand jury while they were in session, and personally urged the indictment of parties for violating the liquor laws, is sufficient ground for quashing the indictment. **State v. Will** (1896) 97 *Iowa*, 58, 65 N. W. 1010.

And where the presiding judge required a grand jury to come into open court and have the witnesses for the state examined publicly the indictment should be quashed. **State v. Branch** (1873) 68 N. C. 186, 12 *Am. Rep.* 633.

Witnesses.

The fact that one witness before the grand jury was present in the grand-jury room while another witness was testifying is no ground for quashing the indictment. **Brown v. State** (1904) 46 *Tex. Crim. Rep.* 572, 81 S. W. 718.

So, under a statute which provides that it is a ground for setting aside an indictment that any person other than the grand jurors was present before the grand jury during the investigation of a charge, except as required or permitted by law, the fact that a father and daughter were both summoned to appear as witnesses before the grand jury, and, the daughter being very nervous and fearful about appearing before that tribunal, her father was permitted, upon his request, to be present during the time that she gave her testimony, and there was no showing that he did or said anything to influence the witness, or that defendant was in any manner prejudiced, was held not to be ground for setting aside the indictment; the decision being apparently on the ground that L.R.A.1916D.

where one was required to go before the grand jury as a witness, his presence there while another witness was giving testimony was not sufficient ground for setting aside the indictment, where no showing of prejudice to defendant was made. **State v. Wood** (1900) 112 *Iowa*, 484, 84 N. W. 503.

While the action of a grand jury must be free from malice, prejudice, or passion, its solemn findings are not to be set aside for light or trivial causes, for anything short of a sufficient substantial showing; so, where an intruder applied for admission to the jury room several times and was finally admitted by order of the foreman, was sworn, and answered the routine of questions propounded to him, and made some reference to, but knew nothing of his own knowledge about the case, several witnesses testifying that the intruder stated while in the grand-jury room that defendant ought to be indicted, his conduct fell far short of showing an exertion of improper influence such as would require quashing the indictment. **State v. Bacon** (1899) 77 *Miss.* 366, 27 *So.* 563.

But in **United States v. Edgerton** (1897) 80 *Fed.* 374, it is held that the rule is inherent in the grand-jury system with all the force of a statutory enactment, that no person other than a witness undergoing examination and the attorney for the government can be present during the sessions of the grand jury; so, where one who had testified before the grand jury as an expert was permitted to remain in the grand-jury room while other witnesses were being examined in connection with the charge against defendant, and propounded questions to such witnesses, the indictment should be quashed.

Miscellaneous.

The fact that, while a grand jury was investigating an election fraud case, the president of the board of police commissioners and a member of the board of election supervisors were present in the grand-jury room by order of the court, one to produce the ballot box and the other to produce the keys, returns, and tally sheets, was not error where they did not participate in the count of the ballots, and the grand jury did not deliberate upon any questions before it during their presence in the room. **Cochran v. State** (1913) 119 *Md.* 539, 87 *Atl.* 400.

In **State v. Justus** (1883) 11 *Or.* 178, 50 *Am. Rep.* 470, 8 *Pac.* 337, 6 *Am. Crim.*

Rep. 511, an appeal from a conviction of murder on the ground that a person not authorized by law was present before the grand jury at the request of the district attorney for the purpose of assisting in the examination of witnesses and in framing the indictment, it not appearing from the report of the case whether such person was an attorney or not, it was held that while, under the statute providing that no person other than the district attorney can be allowed to be present during the sittings of the grand jury, the presence of such person was improper, it was at most an irregularity; and it not being claimed that any injustice or wrong was done to the prisoner by reason of this error, it could not be taken advantage of after trial and verdict upon a motion for a new trial.

Under a statute providing for the secrecy of the deliberations of the grand jury, and providing that "the district attorney may go before the grand jury at any time except when they are discussing the propriety of finding a bill of indictment or voting upon the same," and making it a ground for setting aside the indictment that "some person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same,"—it was error for the court to refuse to receive evidence in open court upon an allegation that a certain person not authorized by law was present when the grand jury were deliberating upon the accusation and while they were voting upon the bill, even though the person named was

the district attorney. *Rothschild v. State* (1880) 7 Tex. App. 519.

Under the statute mentioned in the preceding case, where the person who was alleged to be present before the grand jury without authorization was not present while the jury were discussing and deliberating about finding the bill, the indictment should be sustained. *Sims v. State* (1898) — Tex. Crim. Rep. —, 45 S. W. 705.

The discussion of the evidence before the grand jury relating to an alleged crime, by persons not sworn to testify as witnesses, will vitiate an indictment whether the jurors were actually influenced by such discussion or not. *State v. Wetzel* (1914) — W. Va. —, 83 S. E. 68.

Under statutes authorizing the appointment of special assistant district attorneys to assist the district attorney before the grand jury, the appointment of an expert accountant who was not a qualified practitioner in any court was not authorized, and his presence before the grand jury, assisting in the examination of witnesses, is error for which an indictment will be quashed. *United States v. Heinze* (1910) 177 Fed. 770.

And the presence in the grand jury of an examiner from the department of justice who remained in the room during the examination of many witnesses, assisting the jury in the investigation by explaining accounts while the witnesses were on examination, and asking some questions, was sufficient ground for quashing the indictment. *United States v. Kilpatrick* (1883) 16 Fed. 765.

R. L. S.

IOWA SUPREME COURT.

RE ESTATE OF ALEXANDER MOYNIHAN, Deceased.

STATE OF IOWA, Appt.

(— Iowa, —, 151 N. W. 504.)

Appeal — failure to serve abstract — dismissal.

1. Failure to serve an abstract and argument on one of the appellees or the only attorney who represented him, as shown by the record and affidavits in support of the

Note. — The validity of discrimination against aliens by inheritance tax law as affected by treaty with foreign government is treated in the note to *Re Stixrud*, 33 L.R.A.(N.S.) 632, and *Re Peterson*, 1916A, 474.
L.R.A.1916D.

motion to dismiss, requires affirmance as to him.

For other cases, see *Appeal and Error*, IV. r and m, in *Dig. 1-52 N. S.*

Succession tax — effect of treaty.

2. Alien heirs can be subjected to no higher inheritance tax than domestic ones, under a treaty providing that citizens or subjects of each of the contracting parties shall have full power to dispose of their personal property; and their heirs, being subjects of the other contracting party, shall succeed to the same and take possession thereof, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay.

For other cases, see *Taxes*, V. b, in *Dig. 1-52 N. S.*

(March 16, 1915.)

APPEAL by the state from an order of the District Court for Polk County re-

leasing certain real estate appraised for collateral inheritance tax as a part of the property of Alexander Moynihan, deceased, from liability for such tax, in a suit for the recovery of the real estate. Affirmed.

Statement by Evans, J.:

Appeal by the state from certain orders entered in the above-entitled probate case relating to the collateral inheritance tax. The orders appealed from will be indicated in the opinion.

Messrs. George Cosson, Attorney General, and C. A. Robbins, Assistant Attorney General, for the State:

Only parties to the action or persons in privity with them are bound by a judgment or decree of court.

23 Cyc. 1237, 1280; Jasper County v. Sparham, 125 Iowa, 465, 101 N. W. 134; Guedert v. Emmet County, 116 Iowa, 40, 89 N. W. 85.

If claimants inherited the property of Alexander F. Moynihan, then the treaty between this country and Great Britain has no application, for as to real estate the treaty applies only in cases where, under the law, they would be disqualified from inheriting, and in case of personal property the treaty applies only when a citizen or subject of one of the powers dies owning property within the territory of the other power.

Sala's Succession, 50 La. Ann. 1009, 24 So. 674; Frederickson v. Louisiana, 23 How. 445, 448, 16 L. ed. 577, 579; Re Anderson, 166 Iowa, 617, 52 L.R.A.(N.S.) 686, 147 N. W. 1098; Rixner's Succession, 48 La. Ann. 552, 32 L.R.A. 189, 19 So. 597.

The act of the legislature of Iowa was never more than the exercise of the power which every state or sovereignty possesses of regulating the manner and terms upon which property, real and personal, within its dominion may be transmitted by last will and testament or by inheritance, and prescribes who shall and who shall not be capable of taking it.

Mager v. Grima, 8 How. 490, 12 L. ed. 1168; Frederickson v. Louisiana, 23 How. 445, 16 L. ed. 577.

The tax is not a tax upon property, but is a charge upon the right or privilege of receiving it.

United States v. Perkins, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; State v. Dalrymple, 70 Md. 294, 3 L.R.A. 372, 17 Atl. 82; Re Anderson, 166 Iowa, 617, 52 L.R.A.(N.S.) 686, 147 N. W. 1098.

Mr. E. J. Kelly also for the State.

Messrs. Parsons & Mills and Dudley & Coffin for appellees.
L.R.A.1916D.

Evans, J., delivered the opinion of the court:

Alexander Moynihan died intestate leaving a number of collateral heirs all of whom are parties hereto. He left an estate consisting of personal property amounting to something more than \$3,000. Whether he left any real estate is one of the points in controversy. The administrator listed 160 acres of land as property of the decedent, located in Iowa county. This land, however, was in the actual possession of Michael Moynihan, the brother, and had been in his actual possession for thirty-five years, and he claimed to be the owner of the same. Suit was begun in Iowa county against Michael by some of the collateral heirs for the recovery of such real estate. Michael appeared to such suit with a cross bill claiming title and asking that his title be quieted. A decree was entered in his favor on the cross bill. Later he filed an application in this probate case pending in Polk county, asking a formal order eliminating this real property from the list of assets of the decedent. This involved its elimination from the consideration of the appraisers for collateral inheritance tax purposes. Such application was granted. From this order the state appealed.

The appeal has been submitted to us with a motion on behalf of Michael for an affirmation of the case or a dismissal of the appeal because the appellant has failed to serve upon Michael or upon his attorney any abstract or argument. This motion is resisted on the alleged ground that Michael was represented in the trial below by more than one attorney and that service was made upon one of such attorneys. The record and showing furnish no fair support for the ground of alleged resistance. Michael appeared below by Mr. Kirby as his sole attorney. This fact appears both by appropriate affidavits in support of the motion and in the record itself. There were other attorneys who appeared for other collateral heirs. As to these their clients were specifically named in the record. The same record shows Mr. Kirby as appearing for Michael. No other attorney was authorized to appear for him or purported to appear for him. Nor did Mr. Kirby appear for any other party. The notice of appeal expressly recognized Mr. Kirby as sole attorney for Michael. The appellant, therefore, was clearly in default in failing to serve abstract and argument upon Mr. Kirby or upon his client. No excuse is offered for such default, other than the resistance above indicated. The motion to affirm as to Michael must therefore be sustained.

II. There is a second branch of the appeal which involves the interests of certain alien

collateral heirs. Such alien heirs are subjects of Great Britain. As collateral heirs, they are entitled to a share of the personal property above referred to. Because they are alien, the state contends that their succession is subject to a tax of 20 per cent under our statute. Because of the terms of our treaty with Great Britain, it is contended for these alien heirs that they cannot be subjected to any greater tax than the resident heirs. This was the view adopted by the trial court, and the rate of tax against each succession was fixed at 5 per cent.

We had occasion in *McKeown v. Brown*, 167 Iowa, 489, 149 N. W. 593, to consider the effect of the terms of our treaty with Great Britain as bearing upon the rate of collateral inheritance tax chargeable against subjects of Great Britain. The cited case, however, dealt with real property only. We have now to consider the effect of the same upon the succession to personal property. It is contended by the appellant that the terms of the treaty do not forbid discrimination in succession taxes when the inheritance consists of personal property. Article 2 of such treaty is as follows:

"Article 2. The citizens or subjects of each of the contracting parties shall have full power to dispose of their personal property within the territories of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, whether resident or nonresident, shall succeed to their said personal property, and may take possession thereof either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the citizens or subjects of the country where the property lies shall be liable to pay in like cases." [31 Stat. at L. 1939.]

Alexander Moynihan, the decedent, was a resident of this country. Whether he was a citizen hereof does not directly appear. It is so assumed, however, in appellate's argument, and we will assume it likewise. One of the contentions in argument is that article 2 is applicable only to the inherited

estate of an alien who dies in this state, and that it is therefore not applicable to the case at bar because Alexander Moynihan was not an alien. The article will not bear such construction. Alexander Moynihan being a citizen of this country, his "heirs, legatees, and donees being citizens or subjects of the other contracting party, . . . shall succeed to their said personal property and may take possession thereof . . . and dispose of the same . . . paying such duties only as the citizens and subjects of the country where the property lies shall be liable in like cases."

It will be noted, therefore, that this article covers succession, possession, and disposal of personal property, all to be subject to such duties only as the citizens of the country where the property lies will be liable to pay in like cases. No reason appears, therefore, why any different effect should be given to the terms of the treaty as applied to personal property than was given in the *McKeown Case*, *supra*, as applied to real property.

The order entered below is therefore affirmed.

Deemer, Ch. J., and Weaver and Preston, JJ., concur.

A petition for rehearing having been filed, *Evans, J.*, on November 24, 1915, handed down the following additional opinion (— Iowa, —, 154 N. W. 904):

A petition for rehearing has been submitted in this case, the same having been argued somewhat in conjunction with the original submission in the case of *Brown v. Daley*, wherein opinion has been handed down at the present term, — Iowa, —, 154 N. W. 602. The discussion in the cited case is applicable to the facts of the present case, and is controlling of the result. The result is that our affirmance of the judgment of the lower court is adhered to. We prefer, however, to rest our opinion upon the grounds indicated in the cited case.

Deemer, Ch. J., and Weaver and Preston, JJ., concur.

KENTUCKY COURT OF APPEALS.

JOHN G. WHITE et al.

v.

M. L. HARBESON, Judge.

(— Ky. —, 183 S. W. 475.)

Venue — action by receiver to enforce stockholder's liability.

An action by a receiver of an insolvent insurance company to enforce the statutory L.R.A.1916D.

liability of stock and policy holders is ancillary to the suit in which the receiver is appointed, within the meaning of a statute permitting such ancillary matters to be settled in the court of such appointment, although the stockholders reside in different

Note. — As to when local venue may be disregarded upon the ground that the action or proceeding is ancillary or incidental, see annotation following this case, post, 1134.

counties of the state, and actions at law might have been brought in the counties of their residence, to enforce their respective obligations.

For other cases, see Venue, I. in Dig. 1-52 N. S.

(March 17, 1916.)

PETITION for a writ of prohibition to prevent the defendant judge from proceeding in the matter of the settlement of the affairs of the Kentucky Fire Insurance Company, particularly in the matter of the enforcement of the assessment made by the court upon the various policy holders in said company. Writ denied.

The facts are stated in the opinion.

Messrs. G. W. Gourley, W. P. Sandidge, Walter D. Murphy, Field McLeod, L. A. Faurest, Webb & Webb, Jesse F. Nichols, N. Powell Taylor, Applegate & Manson, R. C. Simmons, W. H. Mackoy, Frank Chinn, and R. H. Winn for petitioners.

Messrs. S. D. Rouse and Myers & Howard, for respondent:

The Kenton circuit court has jurisdiction to wind up the affairs of the Kentucky Fire Insurance Company, and, as an incident thereto, jurisdiction over the persons and of the subject-matter on an assessment made upon the policy holders living in counties other than Kenton in sums less than \$50.

Hamilton v. Riney, 140 Ky. 478, 131 S. W. 287; *Phalan v. Louisville Safety Vault & T. Co.* 88 Ky. 24, 10 S. W. 10; *Fishback v. Green*, 87 Ky. 110, 7 S. W. 881; *De Haven v. De Haven*, 104 Ky. 41, 46 S. W. 215; *Dawkins v. Hough*, 112 Ky. 859, 66 S. W. 1047; *Smith v. Engle*, 44 Iowa, 265; *Royston v. Royston*, 21 Ga. 161; *Ewing v. Patterson*, 35 Ind. 326; *Jenkins v. Simms*, 45 Md. 532; *Goodrich v. Staples*, 2 Cush. 258; *State ex rel. Macklin v. Rombauer*, 104 Mo. 619, 15 S. W. 850, 16 S. W. 502; *Norton Iron Works v. Moreland*, — Ky. —, 113 S. W. 481.

Settle, J., delivered the opinion of the court:

By their petition filed in this court, plaintiffs, John G. White and others, ask that the defendant, M. L. Harbeson, judge of the Kenton circuit court, law and equity division, be prevented by writ of prohibition to be issued by this court, from proceeding further in the hearing or determination of the matters in controversy between the plaintiffs and W. N. Hind, receiver of the Kentucky Fire Insurance Company, growing out of the latter's insolvency and the settlement of its business and affairs, involved in the action pending in the Kenton

circuit court, wherein W. E. Skillman and C. O. Martin, partners under the style Skillman-Martin Printing Company, are plaintiffs and the Kentucky Fire Insurance Company and others are defendants, particularly, in so far as the receiver is seeking by his cross petition in that action to make the plaintiffs herein liable as policy holders of the Kentucky Fire Insurance Company for certain assessments made against and attempted to be collected of them in the action. Plaintiffs' right to the writ of prohibition prayed for is based on the alleged ground that the Kenton circuit court, of which the defendant M. L. Harbeson is presiding judge, is without jurisdiction to hear or determine the matters in controversy referred to.

A brief statement of the facts leading to the bringing of the action in which the receiver was appointed, and the connection of the plaintiffs herein with that action, will give a better understanding of the plaintiffs' object in applying for the writ of prohibition. The Kentucky Fire Insurance Company, a co-operative or assessment fire insurance company, incorporated under the laws of this state, maintaining its chief office in the city of Covington, conducted a fire insurance business in the state from its incorporation down to the beginning of the year 1915. It then had on its books outstanding insurance amounting to about \$1,500,000 and owed unpaid losses, resulting from fires, amounting in the aggregate to more than \$40,000, saying nothing of other indebtedness nearly as great, incurred by way of attorneys' fees and court costs in litigation in various courts of the state. Being without money or assets to meet this indebtedness, the Kentucky Fire Insurance Company, April 1, 1915, through its board of directors, attempted to provide for its payment by levying, as permitted by its charter and the laws of the state, assessments upon its policy holders of an amount equaling two annual premiums upon their respective policies, practically none of which was collected. This situation led to the institution in the Kenton circuit court, law and equity division, of the action against the Kentucky Fire Insurance Company by the Skillman-Martin Printing Company, a creditor thereof. The petition, after setting out the facts to which we have referred, alleged the insolvency of the defendant insurance company, the necessity for a settlement of its business and affairs, and asked that it be placed in the hands of a receiver for that purpose; that a reference be had to ascertain the names of its policy holders, the dates, respectively, upon which such policies were issued, and such of them as had been canceled; also to ascertain the

outstanding losses, when sustained, and to whom payable; and that the court make such an assessment upon its policy holders as might be found necessary to pay the losses and the costs of the action. The defendant insurance company, by answer and cross petition, alleged substantially the same facts, and prayed for the same relief. A reference was accordingly had to the receiver, and from the report of the latter it appears that the policy holders numbered about 1,500, some of whom reside in nearly every county of the state; that the outstanding, unpaid losses amounted to about \$58,000, with less than \$5,000 of it reinsured; that there were other debts owing by the insurance company, amounting in the aggregate to nearly as great a sum; that the assets of the company were of insignificant value; and that an assessment against the policy holders of \$3 on each \$100 of insurance in force, which was the maximum assessment allowed by § 709a, Kentucky Statutes, would be insufficient to pay the losses. He asked that the court make such assessment, and, if the assessments were not voluntarily paid, that he be authorized to sue the delinquents. The report of the receiver was confirmed, the assessment was made as requested therein, and the receiver authorized to bring suit against the delinquent policy holders. Thereafter, by cross petition in the action, all the policy holders who were delinquent in paying the assessments were made defendants, and judgment was prayed therein against them, respectively, for the assessment of 3 per cent, made by the court. Summons was issued to the various counties of their residence, and served upon them there. A few of the defendants failed to appear, but a majority of them appeared, for the sole purpose of objecting to the jurisdiction of the court, and to this end they demurred to the petition on that ground and moved to quash the returns on the summons. The demurrers and motions were overruled, which rulings caused the filing by the policy holders of the petition for the writ of prohibition asked in the instant case.

In urging their right to the writ of prohibition, the petitioners contend: (1) That the cause of action set up in the cross petition of the receiver is a separate and distinct action against each policy holder assessed, and that, as the sum assessed against each of them and for which the receiver sues is less than \$50, the Kenton circuit court has no jurisdiction; (2) that the action is a separable and distinct action against each of them, for which reason the Kenton circuit court, even if the amount involved as to each were as much or more

than \$50, could only acquire jurisdiction by the service of summons in the county in which the suit is pending. On the other hand, in support of his assumption of jurisdiction, it is contended by the judge of the Kenton circuit court that the cross action against the policy holders upon the assessment made is merely ancillary or incidental to the action to wind up the business and affairs of the insolvent corporation, and the granting in that action of the relief sought by the receiver is necessary to prevent a multiplicity of actions and do complete justice, for which reasons the venue of the action is in the county in which the action was brought, and the jurisdiction to entertain and determine the liability of the policy holders for the assessments in question is in the court of that county in which the action is pending and the receiver was appointed and qualified; such venue being fixed and jurisdiction conferred by § 65, Civil Code.

Cases are not wanting in which it has been held that matters not ordinarily connected with the subject of an action in equity may, nevertheless, be so incident thereto as to make their determination in such action necessary to the granting of the main relief sought therein, even though the venue of an independent action as to such incidental matter be fixed by another provision of the Code. This was true in *De Haven v. De Haven*, 104 Ky. 41, 46 S. W. 215, 47 S. W. 597, which was an action to settle the estate of a decedent. It was held that the court had jurisdiction to award the administrator possession of a tract of land owned by the decedent, situated in another county, upon a summons served in such other county upon the occupant of the land. Obviously the venue of an action for the possession of land is fixed by a provision of the Code in the county in which the land lies, and such would necessarily have been the holding of the court, except for the fact that the awarding to the administrator of the possession of the land was held to be a matter incident to the action for the settlement of the decedent's estate, the venue of which, as fixed by the Code, was in the county where the administrator qualified and the action was pending. In *Hamilton v. Riney*, 140 Ky. 478, 131 S. W. 287, which was an action to settle the decedent's estate, that also involved the settlement of the accounts of the decedent as guardian of her children; and, although she had qualified as such guardian in a county other than that in which the suit to settle her estate was brought, it was held that the settlement of her accounts as guardian was so connected with and incident to the settle-

ment of her estate that the court in which the suit to settle her estate was pending had jurisdiction to settle her accounts as guardian, notwithstanding another provision of the Code fixed the venue of an action to settle her accounts as guardian in the county in which she qualified. To the same effect are the cases of *Phalan v. Louisville Safety Vault & T. Co.* 88 Ky. 24, 10 S. W. 10, and *Dawkins v. Hough*, 112 Ky. 855, 68 S. W. 1047. These cases establish the rule that where the determination of a matter is incident to the action, the court has jurisdiction in that action to determine it notwithstanding the venue of an action as to such matter would, under other circumstances, be fixed by a different provision of the Code in another county. It would serve no good purpose to consider and discuss seriatim the many authorities cited by counsel in this case, as to do so would stretch the opinion to an unreasonable length, and so burden it with points of differentiation and refinements of distinction as to becloud, rather than make clear, the grounds upon which we rest the conclusions we have reached. Some of the cases relied on by counsel for the plaintiffs are undoubtedly in conflict with our conclusions, but it will be found that they emanate from other jurisdictions. Others, decided in this jurisdiction, relied on by the same counsel, which apparently conflict with our views, when compared with the authorities cited and considered in the opinion, will be found not to do so. We concede that a case will not be found in any jurisdiction which holds that an assignee or receiver of an insolvent estate can maintain a single action in equity against all the debtors of the insolvent estate, to recover of them debts due such estate. But while this is true, we have not been referred to a case in any jurisdiction in which it has been held that a receiver, or even a creditor, may not, under such circumstances as obtain in this case, maintain a single action in equity, against all the policy holders of an insolvent insurance corporation, who are likewise stockholders thereof, to enforce their liability as such policy holders or stockholders.

This right seems to have been recognized in the early case of *Castleman v. Holmes*, 4 J. J. Marsh. 1, under the law then existing with respect to corporations like that involved. It appears that the stockholders were liable for the debts of the corporation incurred during their ownership of stock in proportion to the amount of stock held by each. Suit was brought in equity by a judgment creditor of the corporation against the stockholders, seeking a discovery as to who the stockholders were and the amount

of the stock owned by each, and to enforce the payment of his debt by apportioning it among them and compelling each to pay his proportion thereof. The question of jurisdiction was raised in the circuit court, but it was held, on appeal, that the circuit court, irrespective of the equitable remedy of discovery which the petition sought, had jurisdiction as a court of equity upon the ground that it was necessary, in order to avoid a multiplicity of suits and to do complete justice at once, and, further, that payment by such of the stockholders as were before the court could be coerced by a judgment in that court. It appears that some of the stockholders were not before the court, and there was no accounting or reimbursement sought or obtained against them by the stockholders who were before the court, because it was held that the liability was several. In *Cook on Corporations*, 7th ed. § 220, it is said:

"Perhaps the most difficult, unsettled, and unsatisfactory question concerning the statutory liability of stockholders is the question whether that liability must be enforced at law, or must be in equity, or may be in either a court of law or of equity. After determining this point there arises the further difficulty of ascertaining who shall be parties plaintiff and parties defendant,—whether one corporate creditor may sue, . . . or all the stockholders must be brought in. . . .

"Section 222. The remedy in equity is the favorite remedy of the courts. It is just, certain, impartial, and clear. It enforces once for all the liability of the stockholders, and at the same time provides for contribution. It distributes the assets equally and equitably among all the corporate creditors. It prevents a multiplicity of suits, and avoids the difficult question as to whether a suit at law will lie. The only and great objection to the remedy in equity is that it is protracted . . . and expensive. Frequently the courts have held that an action at law to enforce a statutory liability is not a proper proceeding, but that the rights of all parties can be properly adjudged in a court of equity, and that the latter remedy is exclusive of all others. Such are the latest decisions in New York. The New York court of appeals holds, however, that a suit in equity does not lie to enforce a statutory liability where the liability is unlimited, and there is no fund to be protected and distributed. . . . In some jurisdictions the rule prevails that creditors in these cases have a concurrent remedy, either at law or in equity. The action at law will lie upon the debt, while, on the other hand, the equitable jurisdiction arises from the power of

a court of chancery to compel contribution among the stockholders and to effect an equitable distribution among the creditors. The tendency is to hold that a suit in equity is always a proper remedy, even though it may not be the exclusive remedy. The Supreme Court of the United States has recently held, however, that the jurisdiction of a court of equity on the ground of preventing a multiplicity of suits exists only where such is the actual situation.

"Where creditors seek to subject unpaid subscriptions to the payment of their claims, after exhausting their remedies at law, it is the rule in many jurisdictions that equity is the proper forum. That this right on the part of creditors now exists is almost universally conceded by the courts, and many of them hold that equity is the exclusive forum, where the remedy has not been changed . . . by statute. The meaning and application of this rule is that where creditors have exhausted their legal remedies against the corporation, and where the assets of the corporation are insufficient to pay its debts, they may have relief in equity to compel the delinquent stockholders to pay any unpaid balance." [4 Thomp. Corp. § 5075.]

Again, in § 5076, the same author says: "In some states courts of equity take exclusive jurisdiction in the enforcement of the statutory liability imposed upon stockholders, for the purpose of adjusting equities and for the preventing of a multiplicity of suits. Equity jurisdiction is also preferred on the ground that the doing of full justice involves complex contributions among stockholders, which cannot be worked out by a court of law. Equity is the proper forum in such cases, unless the statute imposing the liability intends to give a remedy to any creditor against any stockholder distributively; and even then equity may have jurisdiction though there is a concurrent remedy at law."

It is apparent, therefore, that while a creditor of an insolvent corporation may sue a stockholder at law upon his statutory liability, as allowed in *Williams v. Chamberlain*, 123 Ky. 150, 94 S. W. 29, that fact does not militate against the right of the creditor to sue in equity an insolvent corporation and its stockholders to enforce the statutory liability of the stockholders. The right to bring such equitable action has been recognized and allowed, not only in the case of *Castleman v. Holmes*, supra, but also in the more recent case of *Game-well Fire Alarm Teleg. Co. v. Fire & Police Teleg. Co.* 116 Ky. 759, 76 S. W. 862. The action last mentioned was instituted by the creditor in the chancery court, by judgment L.R.A.1916D.

of which the statutory liability of a non-resident, a stockholder, was enforced. In the opinion it is said: "The purpose of this action, as stated by appellant in the prayer of its petition, was to have the affairs of the insolvent resident corporations placed in the hands of a receiver of the court, and their assets collected, and the same paid to the creditors of the two corporations. The assets of the two corporations consisted, in addition to visible personal property, in debts due them by contract, as well as sums due from stockholders under their liability created by the statutes. It was certainly connected with the subject of this action and the settlement of these insolvent corporations for the appellees to ask the court to require the appellant, a nonresident corporation, to pay and settle the amount it owed under its statutory liability. This would not have been improper even if it had been a resident corporation." *Cook v. Carpenter*, 212 Pa. 165, 1 L.R.A.(N.S.) 900, 108 Am. St. Rep. 854, 61 Atl. 799, 4 Ann. Cas. 723.

It is our conclusion that, in an action brought to settle the affairs of an insolvent corporation in the hands of a receiver, and wherein the latter is seeking to enforce the statutory liability of the stockholders, a court of equity has jurisdiction to grant the relief here sought against the several stockholders, though they reside and were summoned in a county or counties other than that in which the action was brought; and, further, that such jurisdiction exists notwithstanding the fact that the receiver had a concurrent remedy at law by instituting actions at law against each stockholder, to enforce his liability, in the county of his residence. In other words, such jurisdiction is possessed and may be exercised by the court because the right of the receiver to recover of each stockholder is incident to the settlement of the corporation's affairs, and for the further reasons that to do so will prevent a multiplicity of suits and enable the court to do complete justice in the action before it.

If right in the conclusion that the Kenton circuit court, law and equity division, has the jurisdiction claimed and attempted to be exercised by it, it follows that the venue of the action is fixed by § 65, Civil Code. Moreover, the expenses incident to the enforcement of the equitable remedy invoked by the receiver will be insignificant as compared with what such expense would be if he were compelled to resort to suits at law against the several stockholders sought to be held liable. Manifestly, if a suit at law against each stockholder, in the county of his residence, were required,

the costs resulting in each of such actions would amount to nearly as much, and, in some instances, more, than the amount of the assessment owing, and, in any event, such costs, together with those in the main action, when paid, would leave nothing of

consequence to be distributed to the creditors of the corporation.

For the reasons indicated, the demurrer filed by the defendant judge to the petition for the writ of prohibition is sustained and the writ refused.

Annotation—When may local venue be disregarded upon the ground that the action or proceeding is ancillary or incidental.

As to the right to maintain a single suit in equity to enforce the separate liability of members of an insolvent insurance association, see *Burke v. Scheer*, 33 L.R.A.(N.S.) 1057, and note thereto.

As to the jurisdiction of equity to enforce the liability of a mutual insurance company, see note to *McCall v. Bowen*, 40 L.R.A.(N.S.) 781.

Action by receiver or trustee to enforce liability of stockholders or members of company.

In accord with *WHITE v. HARBESON*, ante, 1129, and its companion case of *Brandenburg v. Harbeson* (1916) — Ky. —, 183 S. W. 479, are *McCall v. Bowen* (1912) 91 Neb. 241, 40 L.R.A.(N.S.) 781, 135 N. W. 1014, and *Randall v. McClain* (1913) 94 Neb. 487, 143 N. W. 478, holding that an action by the receiver of a mutual insurance company against the members, to recover an assessment made by the court, in order to pay the liabilities of the company, may be maintained in a court of equity in the county in which the receiver was appointed and the assessment made, and summons may issue out of that court to any county in the state wherein one of the defendants resides or may be summoned, and proper service therein will give the court jurisdiction.

And a suit by a trustee in bankruptcy to enforce a call for unpaid stock subscriptions should be brought in the United States court where the bankrupt estate is being administered. *Re Crystal Spring Bottling Co.* (1899) 96 Fed. 945.

But it has been held that the receiver of an insolvent mutual hail insurance company organized under a statute limiting the liability of the members to the amount of the obligations expressed in their applications, providing that members cannot be compelled to pay more, and also that suits at law may be brought against any members who shall neglect or refuse to pay any obligations, etc., cannot join in one action to recover individual unpaid assessments, all policy holders or members of the company who are severally liable for such assessments, —those who reside in counties other L.R.A.1916D.

than that in which the action is brought, as well as those who reside within that county,—on the ground that the suit is ancillary or auxiliary to the main insolvency proceeding. *Burke v. Scheer* (1911) 89 Neb. 80, 33 L.R.A.(N.S.) 1057, 130 N. W. 962.

Summary proceeding by trustee in bankruptcy to recover personal property.

A summary proceeding by a trustee in bankruptcy to recover personal property belonging to the estate, which is in the possession of a stranger, who resides outside of the territorial limits of the court in which the original adjudication in bankruptcy was made, while ancillary in character, nevertheless presents a completely distinct and separable controversy, and cannot be maintained in the court of the original adjudication, but must be brought in the bankruptcy court within the territorial limits of which the respondent resides and the property is located. *Re Waukesha Water Co.* (1902) 116 Fed. 1009, followed in *Re Alphin & L. Cotton Co.* (1904) 131 Fed. 824; *Staunton v. Wooden* (1910) 102 C. C. A. 355, 179 Fed. 61; *Re Rathfon Bros.* (1912) 200 Fed. 108; *Re Farrell* (1912) 119 C. C. A. 576, 201 Fed. 338, *Re Geller* (1914) 216 Fed. 558.

As stated in *Staunton v. Wooden* (1910) 102 C. C. A. 355, 179 Fed. 61: "It may be conceded that the court in which the petition in bankruptcy is filed has plenary jurisdiction in bankruptcy, coextensive with the United States, to order and control the disposition of the bankrupt's estate, and is vested with jurisdiction to determine all liens thereon and all interests affecting it. . . . But this is not to say that the court of bankruptcy may issue its process to run into another district. It is one thing to issue citation to persons in another jurisdiction to appear before the court of bankruptcy in a proceeding which, in its exclusive jurisdiction, it is authorized to institute with a view to determining liens or rights of property, wherever situate; but it is quite another

thing to issue process to be enforced in another jurisdiction."

Suit against assignee for benefit of creditors, joined with suit against debtor.

A cause of action against the assignee for the benefit of creditors of the maker of a note, and the assignee's sureties and others, who are entitled by statute to be sued in the county of their residence, though it may properly be joined with a cause of action against the maker, on the note, cannot be maintained in another county, in which the note was made payable, although the cause of action against the maker, on the note, may be maintained in the latter county. *First Nat. Bank v. East* (1897) 17 Tex. Civ. App. 176, 43 S. W. 558.

Cross bill seeking affirmative relief.

A statute requiring suits for the possession of real estate, or whereby the title thereto may be affected, to be brought in the county wherein such real estate lies, does not apply to an equitable cross bill for relief from a fraudulent sale of real property under a deed of trust given to secure a promissory note, which cross bill is filed in an action brought in a county other than that in which the land lies, to recover the balance due upon such note, after the sale; the question of title being merely incidental to the main controversy. *Hewitt v. Price* (1907) 204 Mo. 31, 120 Am. St. Rep. 681, 102 S. W. 647.

And where a plaintiff instituted a suit in the court of a county other than that of his residence, to enjoin the defendant from exercising a power of sale in a deed given by him to secure the payment of certain notes, the defendant may maintain, in that court, even after the plaintiff's dismissal of his petition, a cross bill asking for a general judgment on the note, and a judgment setting up a special lien on the land, as "this was not a new and distinct matter, entirely independent of that set out in the original petition. The subject-matter of the petition and the answer in the nature of a cross bill was one and the same. The issues raised in each involved the same debt, the same deed, the same land, and the same controversy. The petition sought to enjoin the defendant from collecting the debt by pursuing a remedy given in the deed. The effect of the answer was to abandon the remedy sought to be enjoined, and rely upon a remedy to be given by the court into which the defendant had been drawn by the petition of the plaintiff. L.R.A.1916D.

The plaintiff's plea to the jurisdiction could not avail him. He came voluntarily into the superior court of Fulton county, seeking its aid in his behalf, and thus submitted himself to its jurisdiction in relation to all matters directly connected with the case that he had originated. One who goes into the court of a county other than that of his residence, to assert a claim or set up an equity, must be content to allow that court to determine any counterclaim growing out of the original suit which the defendant sees fit to set up by a cross action." *Ray v. Home & F. Invest. & Agency Co.* (1898) 106 Ga. 492, 32 S. E. 603.

But a cross action to recover land situated in another county cannot be maintained against nonresident parties, in connection with an action to try title to other land, which was properly brought in the county in which the latter land is situated. *Hanner v. Caudle* (1899) — Tex. Civ. App. —, 49 S. W. 411.

Scire facias against bail, etc.

Scire facias against bail is not such an original suit as is contemplated by a constitutional provision that one is liable to be sued only in the county in which he resides, but the original suit in which bail was required gives the court jurisdiction to proceed against the bail, as a part of the proceedings appertaining to the original suit, though the bail resides in another county. *Garvin v. Gallagher* (1846) 1 Ga. 315.

And a scire facias against an indorser of an original writ, to recover the costs of the original suit, is not a transitory action within the meaning of a statute requiring such action, where both parties are inhabitants of the state, to be commenced in the county where one of them is an inhabitant, but "it is founded upon a record, is in its nature local, and must be brought not only in the court, but in the county, where the record remains." *Parsons v. Pearson* (1818) 1 N. H. 336.

Suit for injunction, etc., as ancillary to another suit or proceeding.

Although a suit for an injunction must, by statute, be brought in the county of the domicile of the defendant, an application for an injunction against a railroad company, which is merely ancillary to a suit for a specific performance of a contract, which may, by statute, be brought in any county through or into which the company operates its railroad, is not within the statute, and the suit may be maintained,

and the injunction granted, in any county through which the company operates its railroad, although not that of its domicil. *International & G. N. R. Co. v. Anderson County* (1912) — *Tex. Civ. App.* —, 150 S. W. 239.

And an application for a temporary injunction restraining the defendant from transferring or suing upon any of certain notes given by the plaintiff to the defendant for a part of the purchase price of certain property, which injunction is merely ancillary to a suit for the cancelation of the notes and annulment of the contract of sale, and for damages, need not be brought in the county of the defendant's domicil, but the suit and application for injunction may be maintained in another county in which the main action may properly be brought. *Royal Amusement Co. v. Columbia Piano Co.* (1914) — *Tex. Civ. App.* —, 170 S. W. 278.

Likewise, a constitutional provision that equity cases shall be tried in the county where a defendant resides, against whom substantial relief is prayed, does not apply to an ancillary bill which seeks only to enjoin a common-law suit, and asks no relief independently of that, and such a bill may be brought in the county in which the suit is pending, although the party sought to be enjoined resides in another county. *Carswell v. Macon Mfg. Co.* (1868) 38 Ga. 403; *Clark v. Beall* (1869) 39 Ga. 533.

And a bill in equity for injunction and relief, filed as ancillary to a suit at law, is maintainable against a nonresident plaintiff in the suit at law, and will be retained to grant relief as to all matters involved in a proper settlement of the litigation pending at law. *Beall v. Rust* (1882) 68 Ga. 777.

"In some senses, perhaps, these ancillary proceedings may be called equity causes; but, in a striking sense, they are not. They depend upon, and are merely in aid of, a common-law issue. They are necessary proceedings to get at the true rights of the parties in the matter pending in the common-law tribunal. . . . If they seek other relief, become aggressive, instead of simply defensive, they are, so far, demurrable." *Carswell v. Macon Mfg. Co.* (Ga.) *supra*.

A bill to enjoin the enforcement of a default judgment against the complainant, and to obtain a new trial and the right to defend, is not, however, aggressive, but is strictly defensive, and may be maintained in the county in which the original suit was brought, and the L.R.A.1916D.

judgment obtained, although the defendant in the bill resides in another county. *Dew v. Hamilton* (1857) 23 Ga. 414.

And a bill to enjoin an action at law pending against the complainant, and also to obtain other and independent relief against the defendant, who resides in another county, may be maintained for the injunction, but not for the other relief, in the county where the action at law is pending. *Key v. Robison* (1859) 29 Ga. 34.

A bill in equity, to aid in the prosecution of, and purporting to be ancillary to, a claim for land upon which an execution has been levied, may be filed in the county in which the claim is pending, although the defendants in the bill reside in another county. *Merchants' Bank v. Davis* (1847) 3 Ga. 112.

And the constitutional requirement that cases in equity must be brought in the county where one of the defendants against whom substantial relief is prayed resides does not apply to an equitable proceeding for an injunction and the appointment of a receiver, in aid of a levy which has been met by a fraudulent and frivolous claim of an insolvent person, as such proceeding is not an independent one, but is ancillary and in aid of the plaintiff's rights involved in the claim case, and may be brought in the county in which that case is pending, although the claimant resides in another county. *Dawson v. Equitable Mortg. Co.* (1899) 109 Ga. 389, 34 S. E. 668.

But a suit in the nature of an ancillary bill cannot be maintained against one not a party to the original suit, and having no interest therein, and not having waived jurisdiction, in the courts of a county other than that of his residence. *Bishop v. Brown* (1912) 138 Ga. 771, 76 S. E. 89.

And the mere fact that an execution in favor of a plaintiff residing in one county has been levied on personal property of the defendant, who resides in a different county, does not give the court jurisdiction of the person of the execution plaintiff in the latter county, so that the execution defendant can maintain a bill in equity in that county to protect his rights as against the execution and the judgment upon which it was issued. *Mays v. Taylor* (1849) 7 Ga. 238.

Under a statute providing that all petitions for equitable relief shall be filed in the county of the residence of one of the defendants against whom substantial relief is prayed, except in

cases of injunction to stay pending proceedings, when the petition may be filed in the county where the proceedings are pending, the following have been held not to be "pending proceedings," to stay which a petition for an injunction may be filed in a county other than that of the residence of a defendant against whom substantial relief is sought:

—issue and levy of an execution, *Dade Coal Co. v. Anderson* (1898) 103 Ga. 809, 30 S. E. 640, *Malsby & Co. v. Studstill* (1907) 127 Ga. 726, 56 S. E. 988;

—levy of an execution and other ministerial acts to effect a sale, *Rounsaville v. McGinnis* (1894) 93 Ga. 579, 21 S. E. 123;

—levy of an execution issued upon an affidavit to foreclose a lien on personalty, or the fact that the sheriff is about to put the purchaser in possession, after disregarding a counter affidavit filed by the defendant in execution, and selling the property levied on, *Macon Nav. Co. v. Stallings* (1900) 110 Ga. 352, 35 S. E. 647;

—mere issuance and levy of a distress warrant, *Townsend v. Brinson* (1903) 117 Ga. 375, 43 S. E. 748;

—"dispossessory" warrant in the hands of a sheriff for execution, *Woolley v. Georgia Loan & T. Co.* (1897) 102 Ga. 591, 29 S. E. 119;

—advertisement and preparation for the sale of property under authority given by a security deed, *Meeks v. Roan* (1903) 117 Ga. 865, 45 S. E. 252.

So, a bill against the grantee, to set aside a sheriff's deed, "is not ancillary to or defensive of any action or suit at law or in equity which has been instituted by . . . [the grantee] against the complainants in the bill, but it is an original bill seeking relief against" him, and must be brought in the county in which he resides, and cannot be maintained in the county of the sheriff who made the deed, if the grantee resides elsewhere. *Caswell v. Bunch* (1886) 77 Ga. 504.

And under a statute declaring that equity cases shall be tried in the county where a defendant resides against whom substantial relief is prayed, except that a petition for an injunction to stay pending proceedings may be filed in the county where the proceedings are pending,—a petition for an injunction to stay an execution pending a motion to set aside the judgment upon which the execution was issued is not ancillary to the motion to set aside the judgment, so that the pendency of that motion in a court of a certain county gives that L.R.A.1916D.

court jurisdiction of the equitable suit, where the only defendant against whom substantial relief is prayed resides in another county, but the suit must be brought in the latter county. *Malsby & Co. v. Studstill* (Ga.) supra. The court said: "The principle which authorizes equitable proceedings ancillary to suits already pending, for purposes of injunction, to be brought in the county where the suit is pending, rests on the idea that the plaintiff, by voluntarily instituting his suit, gives the superior court of the county where it is so instituted jurisdiction of his person sufficient to answer the ends of justice respecting the suit originally instituted.

. . . The suit of *Malsby & Co. v. Studstill* [in which the judgment in question was rendered] was not pending at the time the petition for injunction was filed. It had eventuated in a judgment and had ceased to pend. The motion to set aside the judgment is no part of the original trover suit, but an aftermath of it. The motion to set aside the judgment is a separate and distinct proceeding. The statute requires it to be filed in the court where the judgment sought to be set aside was rendered, but that does not give equitable jurisdiction to the court to stay the proceedings until the motion to set aside the judgment is decided."

Matters incidental to an action.

Although, generally, it is the privilege of a defendant to be sued in the county of his residence, yet, to avoid a multiplicity of suits, a cause of action arising against a nonresident of the county upon an open account (*Ball v. Southern Rock Island Plow Co.* (1899) — *Tex.* Civ. App. —, 50 S. W. 158), or upon a note not payable in the county (*Middlebrook v. David Bradley Mfg. Co.* (1894) 86 *Tex.* 706, 26 S. W. 935), may be embraced in a suit against him upon notes payable in the county, and by their terms fixing the venue of the suit there.

And although the venue of an independent action for the recovery of real property is the county in which some part thereof is situated, real property situated wholly in another county may be recovered from a resident thereof, upon a summons served in that county, as an incident in a suit by an administrator for the settlement, distribution, and partition of his decedent's estate, brought in the county in which he qualified (*De Haven v. De Haven* (1898) 104 *Ky.* 41, 46 S. W. 215, rehearing denied in (1898) 104 *Ky.* 45, 47 S. W. 597), or a

suit to surcharge a settlement made by the plaintiff's former guardian, brought in the county in which the guardian qualified (*Dawkins v. Hough* (1902) 112 Ky. 855, 60 S. W. 1047).

And although an independent action for the sale of land must be brought in the county where the land is situated, a court of one county, having jurisdiction of the parties to an action and the original controversy, has jurisdiction to decree a sale of land in another county as incidental to the relief originally sought. *Webb v. Wright* (1867) 2 Bush (Ky.) 126; *Fishback v. Green* (1888) 87 Ky. 107, 7 S. W. 881; *Doty v. Deposit Bldg. & L. Asso.* (1898) 103 Ky. 710, 43 L.R.A. 551, 46 S. W. 219, rehearing denied in (1898) 103 Ky. 721, 43 L.R.A. 554, 47 S. W. 433.

So, in an action for the settlement and partition of an estate, the accounts of the decedent as guardian of her children may be settled as incident to the settlement of her estate, although she qualified as guardian in another county than

that in which the action is pending, and it is provided by statute that a suit for the settlement of a guardian's accounts must be brought in the county in which he qualified. *Hamilton v. Riney* (1910) 140 Ky. 476, 131 S. W. 287.

And in an action by the administrator of an estate and the guardian of an infant for whom the intestate was guardian at the time of his decease, to obtain a settlement of the decedent's estate and recover the amount of the infant's estate, with which the deceased guardian was chargeable at the time of his death, which action was properly brought in the county in which the administrator qualified, and in which the decedent qualified as guardian, a bank which holds property belonging to the estate of the infant, which it wrongfully obtained from the deceased guardian, may, although its corporate domicile and place of business is in another county, be summoned there and required to account for such property. *Taylor v. Harris* (1915) 164 Ky. 654, 176 S. W. 168. A. C. W.

LOUISIANA SUPREME COURT.

LEOPOLD WOLFF

v.

SHREVEPORT GAS, ELECTRIC LIGHT,
& POWER COMPANY et al., Appts.

(138 La. 743, 70 So. 789.)

Municipal corporation — purpose of ordinance.

1. The purposes of the ordinance of the city of Shreveport of October 20, 1908, regulating the "inspection and testing of gas meters, gas piping, and installation of all kinds of gas apparatus," are to provide for the safety of the public and afford some protection to the consumer against insufficient service and overcharges; and the assumption

Headnotes by MONROE, Ch. J.

Note. — As to liability of gas company for negligence in escape or explosion of gas, see notes to *Ohio Gas Fuel Co. v. Andrews*, 29 L.R.A. 337; *Consolidated Gas Co. v. Connor*, 32 L.R.A. (N.S.) 809; and *Manning v. St. Paul Gaslight Co.* L.R.A.1915E, 1022; and see later case, *McWilliams v. Kentucky Heating Co.* L.R.A.1916A, 1224.

As to effect of consolidation, merger, or absorption of corporation (including the purchase by one corporation of the assets and business of another) upon the unsecured liabilities of the original corporation, see notes to *Atlantic & B. R. Co. v. Johnson*, 11 L.R.A. (N.S.) 1119; *Luedecke v. Des Moines Cabinet Co.* 32 L.R.A. (N.S.) 616; and *Jennings, N. & Co. v. Crystal Ice Co.* 47 L.R.A. (N.S.) 1058. L.R.A.1916D.

tion that the city council, in passing the ordinance, attempted to divest the gas company of any of its property, or deny the right to inspect, or relieve it of liability for negligent handling of, the same, is unwarranted.

For other cases, see *Gas*, IV. a, in *Dig.* 1-52 N. S.

Gas — leakage — injury — liability.

2. The company owns the service pipe from its main pipe to the meter through which it is measured and delivered to the consumer, and is responsible for its capacity to retain the gas conveyed through it; and the consumer is responsible for the condition of the pipes which supply the house, from the meter; and, when both service and supply, or house, pipes are allowed to deteriorate, and the gas, leaking from them, ignites and explodes, inflicting injury upon a passer-by in the street, the company is liable, in solido with the consumer, in damages.

For other cases, see *Gas*, IV. a, in *Dig.* 1-52 N. S.

Corporation — transfer to new one — liability.

3. Where a gas, electric light, and power company, after an explosion inflicting injuries for which it is liable in damages, makes a conveyance, *omnium bonorum*, to a new corporation, under circumstances which warrant the conclusion that the new company is merely a continuation or reorganization of the old company, the person injured may recover against either corporation, or both.

For other cases, see *Corporations*, II. in *Dig.* 1-52 N. S.

Evidence — burden of showing character of transfer of corporate property.

4. Where one corporation conveys all of its property, corporeal and incorporeal, including its business, to another, under circumstances which disclose the earmarks of a transaction between persons dealing with themselves, and the two corporations are sued, in tort, upon a claim which arose prior to such conveyance, the burden is thrown upon them (since they possess the information and the plaintiff can only obtain it from them) of showing that the conveyance was bona fide, for an adequate consideration, and not, in effect, a mere reorganization or merger of the old company into the new; and particularly is that true where the old corporation is created under the laws of this state, and the new, under the laws of another state.

For other cases, see Evidence, II. c, 7, in Dig. 1-52 N. S.

(January 10, 1916.)

APPEAL by defendants from a judgment of the Judicial District Court for the Parish of Caddo in plaintiff's favor, in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant Shreveport company. Affirmed.

The facts are stated in the opinion.

Messrs. Alexander & Wilkinson, E. W. Browne, and P. N. Browne, for appellants:

A claim for damages is not a "debt" in the proper sense of the term.

Thayer v. Southwick, 8 Gray, 229; Crouch v. Gridley, 6 Hill, 250; Esmond v. Bullard, 16 Hun, 66; Day v. Bennett, 18 N. J. L. 287; Holcomb v. Winchester, 52 Conn. 447, 52 Am. Rep. 609; Finlay v. Bryson, 84 Mo. 664; Sunday Mirror Co. v. Galvin, 55 Mo. App. 412; El Paso Nat. Bank v. Fuchs, 89 Tex. 197, 34 S. W. 206; Fox v. Hills, 1 Conn. 294; Hill v. Bowman, 35 Mich. 191; Zimmer v. Schleeauf, 116 Mass. 52; Parker v. Savage, 6 Lea, 406; Doolittle v. Marah, 11 Neb. 243, 9 N. W. 54; Cable v. McCune, 26 Mo. 371, 72 Am. Dec. 214; Cable v. Gaty, 34 Mo. 573, 86 Am. Dec. 126; Manion v. Ohio Valley R. Co. 99 Ky. 504, 36 S. W. 530; Bolden v. Jensen, 69 Fed. 745; Leathers v. Janney, 41 La. Ann. 1120, 6 L.R.A. 661, 6 So. 884; Rownd v. Davidson, 113 La. 1050, 37 So. 965; Goothey v. Delatour, 111 La. 766, 35 So. 896.

A corporation purchasing the assets of another corporation is not liable for the torts of the latter committed before the sale.

Edgar Lumber Co. v. Cornie Stave Co. 95 Ark. 449, 130 S. W. 452; Abilene Cotton Oil Co. v. Anderson, 41 Tex. Civ. App. 342, 91 S. W. 607; Castle v. Acrogen Coal Co. 145 Ky. 591, 140 S. W. 1034; Chesapeake, O. & S. W. R. Co. v. Griest, 85 Ky. 619, 4 L.R.A.1916D.

S. W. 323; White v. Atlanta, B. & A. R. Co. 5 Ga. App. 308, 63 S. E. 234; Chase v. Michigan Teleph. Co. 121 Mich. 631, 80 N. W. 717; Ewing v. Composite Brake Shoe Co. 169 Mass. 72, 47 N. E. 241; Port Gibson v. Moore, 13 Smedes & M. 157; Shaw v. Norfolk County R. Co. 16 Gray, 407; Smith v. Chicago & N. W. R. Co. 18 Wis. 17; Houston & T. C. R. Co. v. Shirley, 54 Tex. 125; Menasha v. Milwaukee & N. R. Co. 52 Wis. 414, 9 N. W. 396; Lake Erie & W. R. Co. v. Griffin, 92 Ind. 487; Sappington v. Little Rock, M. R. & T. R. Co. 37 Ark. 23; Cook v. Detroit, G. H. & M. R. Co. 43 Mich. 349, 5 N. W. 390; Hageman v. Southern Electric R. Co. 202 Mo. 249, 100 S. W. 1081; Colorado Springs Rapid Transit R. Co. v. Albrecht, 22 Colo. App. 201, 123 Pac. 957.

Messrs. Blanchard & Smith and Lyle Saxon, for appellee:

Where the negligence of two persons or corporations concurs to produce an injury, both may be liable in solido.

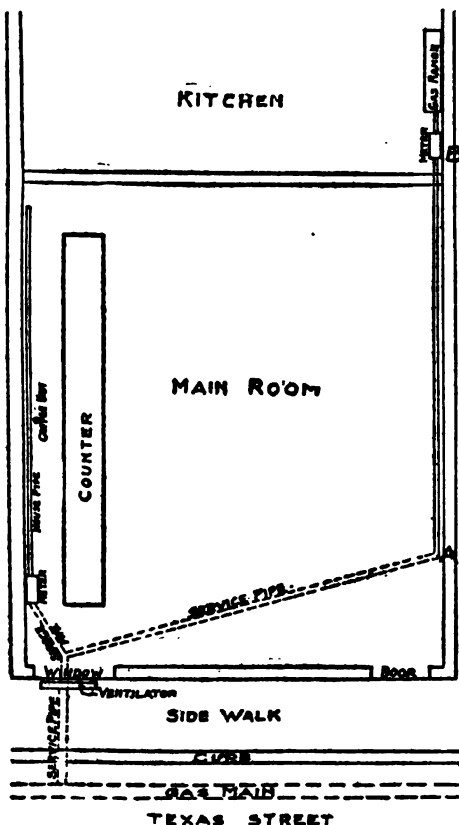
Standard Chemical Co. v. Illinois C. R. Co. 130 La. 155, 57 So. 782; Cunningham v. Penn Bridge Co. 131 La. 196, 59 So. 119; Bigelow v. Old Dominion Copper Min. & Smelting Co. 225 U. S. 111, 56 L. ed. 1009, 32 Sup. Ct. Rep. 641, Ann. Cas. 1913E, 875; 38 Cyc. 488-490; Cleveland, C. C. & St. L. R. Co. v. Hilligoss, 171 Ind. 417, 131 Am. St. Rep. 258, 86 N. E. 485; Day v. Louisville Coal & Coke Co. 60 W. Va. 27, 10 L.R.A.(N.S.) 167, 53 S. E. 776; Elkhart Paper Co. v. Fulkerson, 36 Ind. App. 219, 75 N. E. 283; South Bend Mfg. Co. v. Liphart, 12 Ind. App. 185, 39 N. E. 908; Pine Bluff Water & Light Co. v. McCain, 62 Ark. 118, 34 S. W. 549; City Electric Street R. Co. v. Conery, 61 Ark. 381, 31 L.R.A. 570, 54 Am. St. Rep. 262, 33 S. W. 426; Atkinson v. Goodrich Transp. Co. 60 Wis. 141, 50 Am. Rep. 352, 18 N. W. 764; Huntington Light & Fuel Co. v. Beaver, 37 Ind. App. 4, 73 N. E. 1002.

The pretended sale of all of the assets of the Shreveport company to the Southwestern company, for a nominal consideration, and without the assumption by the latter of any of the liabilities of the "old company," was in its legal effect a mere continuation of the "old company," or selling corporation, subjecting the "new company" or "buying company" to all of the liabilities of the "old company."

Charity Hospital v. New Orleans Gaslight Co. 40 La. Ann. 388, 4 So. 433; Hancock v. Holbrook, 40 La. Ann. 61, 3 So. 351; Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. 4 McCrary, 432, 13 Fed. 516; W. F. Taylor Co. v. Gulf Land & Lumber Co. 119 La. 434, 44 So. 187; Luedecke v. Des Moines Cabinet Co. 140 Iowa, 223, 32

L.R.A.(N.S.) 617, 118 N. W. 456; 7 R. C. L. § 157, p. 184; Cook, Corp. § 673, and note; Chicago, M. & St. P. R. Co. v. Third Nat. Bank, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; Morawetz, Priv. Corp. 2d ed. § 784, p. 754; Atlantic & B. R. Co. v. Johnson, 11 L.R.A.(N.S.) 1127, note; Thompson v. Abbott, 61 Mo. 176; Couse v. Columbia Powder Mfg. Co. — N. J. Eq. —, 33 Atl. 297; McWilliams v. New York, 134 Fed. 1015; Slattery v. St. Louis & N. O. Transp. Co. 91 Mo. 217, 60 Am. Rep. 245, 4 S. W. 79; McIver v. Young Hardware Co. 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169; Schaae v. Eagle Automatic Can Co. 135 Cal. 472, 63 Pac. 1025; Swing v. American Glucose Co. 123 Ill. App. 156; Vicksburg & Y. City Teleph. Co. v. Citizens' Teleph. Co. 79 Miss. 341, 89 Am. St. Rep. 656, 30 So. 725; Camden Interstate R. Co. v. Lee, 27 Ky. L. Rep. 75, 84 S. W. 332; Austin v. Tecumseh Nat. Bank, 59 Am. St. Rep. 549, note; Morrison v. American Snuff Co. 89 Am. St. Rep. 638, note; Note to Tanner v. Lindell R. Co. 103 Am. St. Rep. 558; People v. Bullard, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54.

The following is the diagram referred to in the opinion:



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Monroe, Ch. J., delivered the opinion of the court:

The Shreveport Gas, Electric Light, & Power Company, a corporation established under the laws of this state (hereafter designated as "Shreveport company"), and the Southwestern Gas & Electric Company, a corporation established under the laws of the state of Delaware (hereafter designated as "Southwestern company"), are appellants from a verdict and judgment condemning them, in solido, to pay to plaintiff the sum of \$2,427 as damages resulting from personal injuries sustained by him in consequence of an explosion of gas, attributed to the negligence of the company first above named.

Plaintiff's original petition contains the following, among other, allegations, to wit:

"That the explosion was directly caused by an accumulation of natural gas that had leaked from the gas company's main pipe, . . . in Texas street, or from the said company's supply pipe that conveys the gas from the main pipe, to the meters in the Chamberlain Café, . . . and that said gas accumulated under the floor of said building and had become ignited. . . . That the said leakage . . . and explosion . . . were due to the fault . . . of the Shreveport . . . company, in this, to wit:

"That the said company had not made any inspection of its main pipe, nor its supply pipes that connect the buildings on Texas street, since the same had been laid, which was about 1875. That the said company has not made any provisions by which it might make a test or inspection of the said main pipe or supply pipes, without tearing up the street; i. e., that it had no appurtenances, such as shut-off valves, shut-off cocks, or other similar conveniences, by which it could get at said pipes in order to inspect them or to detect the leaks in them. That said company had no regular or efficient system of inspection of its main and appurtenant pipes by which it could ascertain and detect the rust, decay, and breaks in said iron pipes. . . . That said company should have installed heavier and stronger pipes at the time that it contracted to convey natural gas. . . . That the pipes then in use were corroded and leaky. That the said pipes were intended to convey manufactured gas, and not natural gas, and therefore the joints were not threaded and fitted, as they should have been to hold natural gas. That the main pipe in Texas street and the supply lead to the Chamberlain Café had been in the earth since about the year 1875, and the same were rusty, decayed, and leaky,

and the said pipes did break and leak and are the direct and proximate cause of the gas accumulation under Chamberlain's Café, and that such gas . . . was the proximate cause of the explosion. That said company failed to install shut-off cocks at that establishment, as required by law. . . . That, since the explosion, . . . other explosions, at other establishments in the same vicinity, have occurred, . . . and that said explosions were also due to the leaks in the main and supply pipes of said company. . . . Petitioner shows that on October 28, 1912, the Shreveport . . . company purported to sell all of its assets, of every nature, to the Southwestern . . . company, incorporated under the laws of the state of Delaware, for . . . \$1,000. . . . That the said Southwestern . . . Company is composed of practically the same parties who owned and composed the Shreveport . . . company, and that, in reality, the alleged sale was a mere consolidation or reorganization, or . . . the Southwestern . . . company is merely the reincarnation of the Shreveport . . . company; or, in the event it should be held that the said Southwestern . . . company was not a consolidation or reorganization of the old company, along with others, then, and in that event, petitioner alleges that the Shreveport . . . company is in fact merged into the Southwestern . . . company, and that said company has acquired all of the old company's assets and business, and has left the Shreveport . . . company merely a corporate shell, and that the said Southwestern . . . company did not assume any liabilities of the Shreveport . . . company, but bought subject to the mortgage or bonded indebtedness against the Shreveport . . . company. That the alleged sale or transaction was without any real consideration, and was a mere division (diversion) of the corporate property of the Shreveport . . . company to the said Southwestern . . . company. That the said Southwestern . . . company, having taken over all the assets of the Shreveport . . . company, without any consideration or any transaction in which any real consideration was paid, is liable for all debts and liabilities of the Shreveport . . . company."

He prays for judgment against the two companies, in solido, or, in the alternative, should the court hold that the said "Southwestern . . . company is not indebted in solido with the Shreveport . . . company, then, and in that event, for a judgment against said Southwestern . . . L.R.A.1916D.

company . . . and for all further and necessary orders and for general relief."

By supplemental petition plaintiff further prayed for citation of, and judgment (in solido with the other defendants) against, the owners, and J. W. Chamberlain, lessee of the Chamberlain Café property, alleging: "That the said owners had the said building piped and fitted for the use of gas, and that the said J. W. Chamberlain also equipped the said place of business with gas fixtures, pipes, etc., necessary for cooking and heating in said building. . . . That the said pipes and fixtures were not properly installed, . . . and that they were permitted to deteriorate and become defective, in that natural gas was permitted to escape, and that the said natural gas, . . . added to that escaping from the pipes of the Shreveport . . . company, caused an explosion on January 2d, that demolished the building, . . . injuring your petitioner, as fully set forth in his original petition. . . . That proper inspection of the said gas pipes and fixtures would have disclosed the defects . . . of the same, whereby natural gas was permitted to escape. . . . That the said owners . . . and the said Chamberlain were . . . each and every one of them guilty of negligence in permitting natural gas to escape . . . and in failing to have the said pipes and fixtures inspected."

The owners and lessee filed pleas of misjoinder and estoppel (based upon the allegations of the original petition), which pleas were sustained, and, as no appeal was taken from that judgment, those parties are eliminated from the case.

The Southwestern Company filed an exception of no cause of action, which was overruled, after which the two companies joined in a general denial, followed by the allegations that the pipes of the Shreveport company were suitable for the conveyance of gas, were in good condition at the time of the accident, and were properly inspected; that the company had no control of, or responsibility for, the pipes leading into the building in question; and that, if any gas leaked into the basement of said building, it must have come from pipes belonging to, and controlled by, other persons.

We find the following facts established by the testimony, to wit:

Plaintiff was walking on the south side of Texas street, at about 9:30 o'clock on the morning of January 2, 1912, when, suddenly in front of "Chamberlain's Café, he became unconscious, and, shortly afterwards, found himself, lying, bleeding profusely about the head, upon a bolt of cloth,

in a near-by store, whence he was removed to a sanitarium, where his wounds, which had been inflicted by flying glass, were cleansed, sewed, where sewing was required, and dressed, after which he was taken home, where he was confined to his bed, or apartment, for about three weeks, and then, though able to go out, continued, for three weeks more, to have his wounds dressed and bandaged every few days, and, for another six weeks, was hardly in a condition properly to attend to his business." He appears, however, to have sustained no permanent injury or disfigurement. Chamberlain's Café was situated in a much frequented locality, and in a building which had a frontage of 20 feet on Texas street, by a depth not shown. The front, and main, room, in which the patrons were served, appears to have been about 40 feet deep by the width of the building. It had a show window in the eastern side of the front, a counter, set out some 3 or 4 feet from the wall and extending nearly the depth of the room, on the same side, and a door in the front in the western side. The floor was elevated from 18 inches to 2 feet above the ground, and the ground underneath was, and had always been, in bad condition, by reason of water and sewerage which stands there. In the sidewalk, immediately in front of the show window, there was an excavation, say 20x14 inches and 12 inches deep, with a grating over it, which was intended to afford ventilation under the floor. Gas was introduced into the establishment from a cast-iron main pipe laid in the street, through a wrought-iron service pipe which passed underneath the ventilator and the window, and, after entering the premises, was supplied with a "Y" or "T" joint and thus extended in two directions; the one, to a meter which stood behind the counter at a distance, as we take it, of 6 or 7 feet from the front; and the other, to a meter which stood in the back room (or kitchen, as we shall call it), near the western wall. Our understanding of the situation is expressed by the subjoined diagram, which is made, in part, from a similar diagram, filed in evidence on behalf of plaintiff, and, in part from what we conceive to be the preponderance of the evidence and the surrounding conditions. The diagram which we have prepared differs from that filed by plaintiff in the one particular (save as to minor matters), that it shows but one service pipe entering the premises from the main pipe, whereas the other shows two such pipes. We have made this difference because Chamberlain, who had occupied the premises for years and had had some of the pipes installed, testified positively that there was but one serv-

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ice pipe entering from the main, and we are satisfied that he was in a better position to know than either Gill or Wessell; the first named of whom appears to have visited the premises on the day after the explosion, when all the pipes had been removed, and is not shown to have been there before; and the last named of whom visited the premises some three weeks, or a month, later, and had not been there previously, since an occasion, about eighteen months before the explosion, when, he says, that, though not employed by Chamberlain to fix gas pipes, or for any other purposes, as we understand him, he nevertheless went under the floor to mend a sewer, the ground being covered with water and sewage, being only 18 inches or 2 feet below the floor, lighted only by the ventilator in front, and the place being altogether the most terrible that he was ever in, and there made the observations from which he testified. If, however, there were two pipes, that circumstance would militate to the advantage of plaintiff as increasing the probability that the escaping gas came from a pipe installed by the company, and not by the owner or tenant. We may add, in this connection, that, in preparing the diagram hereto attached, we have given the defendants the benefit of the showing of the other, to the effect that the service pipe extending to the meter in the kitchen was brought through the floor at the point "A," though we can see no reason why it should not have continued under the floor until it reached the meter. Mr. Seip, a witness called by defendants, testified that he examined the pipe leading from the meter, in front, along the east wall, a few minutes after the explosion; that it was upon, and not under, the floor; that it was very thin and covered with rust, which, by the jarring of the floor, might have been shaken off, leaving pits or holes through which the gas could escape. He did not testify that he saw any such pits or holes. He also testified that he saw other pipes, which had been under the floor (the floor at that time having been blown to pieces), and that they, like the pipe that he examined, were in bad condition. He further testified that the explosion was, apparently, "from the front, back, about half way the building;" that the floor was about 18 inches above the ground; that the ground was covered with water; that the condition was favorable to the deterioration of the pipes; and that the presence of sewerage was likely to hasten such deterioration.

It is beyond question that the explosion occurred beneath the floor, and we find no reason to believe that the pipe which Mr. Seip examined, whatever may have been its

condition, contributed thereto, since the tendency of gas, escaping from it, would have been upwards, and not downwards through a plank floor.

Mr. Seip, in giving his opinion of the pipes, other than the one examined by him, makes no discrimination in favor of the service pipes; and, as they were subjected to the same deteriorating influences as the house pipes, it is to be presumed that their condition was no better. Moreover, there was a circumstance which creates an unfavorable presumption against the defendants on that point, to wit, while the fire was in progress, the gas company, having no other means of stopping the escape and burning of the gas than to dig down to the pipe beneath the sidewalk, assigned a gang of men to that job under George Moore as foreman, and they not only removed the pipe from under the sidewalk but from the entire premises. After the institution of this suit, Moore was examined, out of court, by consent, as a witness for the defense; but defendants' counsel did not offer the testimony so taken, on the trial, and, when it was offered by counsel for plaintiff, they objected on the ground that the witness had not been sworn, and the objection was sustained. Plaintiff's counsel then proposed that the testimony be again taken, by consent or by order of the court, at the residence of the witness, who was ill; but defendants' counsel declined to give their consent, and the proposition could not be sustained. Defendants' counsel did not offer any of the removed pipe in evidence, on the trial, nor do they appear to have tendered it to plaintiff; but it is shown that counsel whom Chamberlain had employed to bring a suit in his behalf, and who recovered \$3,500 paid by way of compromise, had made a demand for it, and that certain pipe had been returned, concerning which, Chamberlain testified, in effect, that he did not know whether it was the same that had been taken away; that the part which was returned, as service pipe, was rusty and had holes in it which may have been made in digging it up, that it was about 4 feet long, and that he threw it away. We conclude, taking the evidence and presumptions together, that the holes were caused by rust, that the service pipes had deteriorated, and were in a leaky condition, and, as plaintiff alleges in his supplemental petition that the house pipes leaked, it follows that the escape of the gas which caused the explosion must be attributed to the bad condition of both service and house pipes.

Upon the question of the ownership of, and responsibility for, the service pipes, and the gas contained in them, some testi-

mony offered by plaintiff was admitted, and some excluded (as we think, improperly).

W. E. Hamilton testified that he and others bought the "Old Shreveport Gas Company," and, after liquidating it, sold the property to the Shreveport company (present defendant), of which he was practically manager, from the beginning, and later, president, and, further, as follows:

Q. Mr. Hamilton, in selling your stock to the present company—you sold your stock to the present company?

A. Yes, sir.

Q. I believe that the Daweses controlled that company and bought you out?

A. Rufus Dawes bought, individually; then, of course, he and his associates acquired the property.

Q. Mr. Hamilton, who owned the service pipe, in your time; that is, the pipe from the main to the meter?

A. The company owned the pipe from the main to the meter.

Joshua Gill, at one time manager (under Hamilton) of the Shreveport company, and afterwards plumbing inspector and gas inspector of the city of Shreveport, and practical plumber, gave the following, with other testimony:

Q. When is the consumer charged with gas?

A. As measured by the meter.

Q. So, after it passes the meter, it is owned by whom? (Objection that the question, who pays for gas and who owns it, is a matter of personal contract, and that the witness was not a party to such contract, he was incompetent to testify on the subject; which objection was sustained.)

Q. Mr. Gill, if gas escapes from a service pipe, that is, from the main to the meter, whose loss is that? (Objected to as irrelevant, and objection sustained.)

Q. I will ask you whose duty it was to inspect the service pipe?

A. The gas company's.

In the act of conveyance from the Shreveport company to the Southwestern company, "service pipes" are especially mentioned as among the things conveyed.

Mr. Curtis, manager of the Shreveport division of the Southwestern company, was called (as for cross-examination) by plaintiff, and testified at some length. He did not undertake to repudiate the title to the service pipes thus vested in his company.

In the answer filed by the two defendant companies, it is alleged:

"That the mains and pipes of the Shreveport . . . company, used to convey natural gas, were suitable and proper for

that purpose; that said pipes and mains were in good condition at the time of the alleged accident; that a proper inspection of such pipes and mains was maintained by said company; that said company had no control over, or responsibility for, pipes leading into the building No. 313 Texas street, further than the sidewalk."

The defense thus set up may be otherwise stated as follows: That the Shreveport company has no control over, or responsibility for, pipes which it had bought and paid for, which constituted an essential part of its plant which it used for the conveyance and delivery of the gas sold by it; of which it alleges that they were suitable and proper for the conveyance of gas; that "a proper inspection was maintained by said company" (meaning itself), and that they were in good condition at the time of the accident. And, as thus stated, the defense is unintelligible, since the law vests in the owner the control of that which belongs to him, and holds him responsible for the manner of its use, and the allegation "that a proper inspection of said pipes and mains was maintained by said company" (said company being the owner of "said pipes and mains") is a recognition of "said company's" control of the pipes and mains, at least for the purposes of inspection, and of its obligation and responsibility with respect to such inspection.

The answer, itself, contains no other interpretation of the excerpt above given than that which its language imports; but we find in the record an objection interposed by defendants' counsel to certain testimony offered on behalf of plaintiff, which seems to throw some light upon the subject, reading as follows:

"Objected to by counsel for defendants, for the reason that it is not shown that the company has anything to do with the service line inside of the curb of this building.

"Objected to on the further ground that, . . . when they installed natural gas in the city, the city council passed an ordinance, . . . dated October 20, 1908, entitled 'An Ordinance Governing Installation, Extension, and Repair or Alteration, of Gas Piping in Buildings,' etc. This ordinance distinctly makes the dividing line of responsibility and control between the gas company and the consumer at the curb, or 1 foot inside of the curb. The duty to inspect and look after the piping, inside of the dividing line, or 1 foot inside of the curb, is fixed upon the consumer; and the ordinance requires that the consumer, on its passage, must, before the piping is installed, and also as to existing piping, make application to the plumbing inspector and have him inspect the pipes, from the curb L.R.A.1916D.

in, and must pay him for the inspection. The ordinance provides that the gas company is authorized (does not say required) . . . to prevent their own loss, by leaking gas, . . . to put in stop cocks. This ordinance takes the control, from the curb line in, out of the gas company, and places it in the consumer, and makes it the duty of the plumbing inspector to make the inspections, and we have no control over them, and cannot be held responsible for any leakage that occurs between the curb and the building, and therefore any evidence, as to previous explosions which were caused by leakings inside of the line, . . . is irrelevant. . . ."

From our reading of the ordinance in question (which is in evidence), we understand its purposes to be to protect the public from the dangers resulting from the use of gas, by imposing certain obligations upon those who deal in, provide means for the distribution of, or use, that dangerous commodity, and, at the same time, to afford the consumer some means of protection against inefficient service and overcharges by the purveyor. The assumption by defendants that, in passing the ordinance, the city council has attempted to devalue the gas company of its property in the manner set forth in the above objection, to deny it even the right of inspection, and to relieve it of all liability for its negligent handling, is unfounded; and, if such an attempt had been made, it could, by no possibility, be sustained. The ordinance reads, in part:

"Be it ordained . . . that all inspection and testing of gas meters, gas piping, and installation of all kinds of gas apparatus, shall be under the supervision of the plumbing inspector or his deputy, and that the following rules and regulations shall govern the same, the violation of which rules and regulations shall be unlawful:

"Section 1. Before any work of any kind which is governed by these regulations is commenced, a permit shall be applied for by the person having the work done, and an inspection fee of 50 cents shall be paid by the person to whom the permit is issued, which fee of 50 cents shall cover the cost of all inspection of the work for which the permit is issued, unless hereafter otherwise provided.

"Section 2. A shut-off cock, of the same size as service pipe from curb to house, shall be placed not more than 1 foot inside of the curb line, provided with the most approved box to insure immediate control of supply of gas by the fire department, in case of fire, and such box shall have on its cover the word 'gas.'

"Section 3. Within twelve months from the passage of this ordinance, all existing service pipes, not having shut-off cocks and boxes, shall be so equipped. Except that, where located on paved streets or alleys, a shut-off cock may be placed at the most convenient place on the premises."

There are many other provisions, intended to carry into effect the main purposes of the ordinance, and, to that end, to impose certain obligations upon all persons undertaking to install gas or deal with its distribution, and, on the other hand, to confer certain rights upon the consumer; but there are none which deny to the purveyor the right to control the delivery of its gas to the purchaser, subject to the rules thus provided in the interest of the public and of the public safety. When the gas company undertakes to install a service pipe, it is required to obtain a permit, "to have the work done under the supervision of the plumbing inspector or his deputy," and to place a shut-off cock "not more than 1 foot inside of the curb line, . . . in order to insure the immediate control of supply of gas by the fire department;" but that provision does not deprive it of its control of the service pipe, between the curb and the meter, any more than between the curb and the main. If it did, and could legally be done, the consumer would be at liberty to take the gas from the pipe before it is measured and delivered to him, through the meter, which we know the gas company, and perhaps the law, would regard as in the nature of a theft.

According to the testimony of Mr. Gill, who, as plumbing inspector, drew up the original ordinance, the proviso, beginning with the word "except," in § 3, was inserted, over his protest, at the instance of the gas company; and when Mr. Curtis, the manager of the company, was asked, when on the stand, whether the company had placed a shut-off cock in the pipe in front of Chamberlain's, his reply was: "No, sir; that was in before the passage of the ordinance"—meaning, as we assume, that the street, being paved, was within the exception, and that the shut-off cock at the meter met the requirements of the exception. But he admitted that the company puts in the shut-off cocks, and we have no hesitation in finding that the obligation to put them in, whether at the curb or the meter, rested upon the company, both as a duty and as a matter of interest, and that it had full control of the service pipes, and of the gas conveyed by them, not only for that purpose, but for all the purposes of this case, and is responsible for its negligent exercise of that control, by reason of which the pipes were allowed to become leaky and the gas to escape. We find in L.R.A.1916D.

the record the following, which concerns the relations between the defendant companies and the liability of the Southwestern company for the claim here sued on, to wit:

Mr. Hamilton testified that, when he sold the Shreveport company, "Rufus Dawes bought individually; then, of course, he and his associates acquired the property." The act of conveyance whereby the Shreveport company sold to the Southwestern company reads, in part:

"This indenture . . . entered into this 28th day of October, 1912, by and between the Shreveport Gas, Electric, Light, & Power Company, a corporation duly organized and existing under and by virtue of the laws of the state of Louisiana (hereinafter, for convenience, termed the 'old company') and the Southwestern Gas & Electric Company, a corporation duly organized and existing under and by virtue of the laws of the state of Delaware (hereinafter, for convenience, termed the 'new company'), witnesseth:

"That, for and in consideration of the sum of \$1,000 and other good and valuable consideration, the receipt of which is hereby acknowledged, the old company has granted, bargained, sold . . . and set over . . . unto the new company . . . all of the following described real, personal, and mixed property, rights, privileges, and franchises; to wit,"

And then follows an exhaustive enumeration of property, rights, privileges, concessions, etc., and a general clause, reading:

"Each, all, and every of the old company's assets, rights, privileges, franchises, and things of value, of any and every kind, name and nature, real, personal, and mixed, legal and equitable, tangible and intangible, corporeal and incorporeal, wheresoever situated and in whatsoever form, together with all of the good will acquired by the old company in the conduct of its business, it being the intention hereof that the old company shall transfer to the new company each and every species and item of property, rights, franchises, privilege, or thing of value belonging to the old company, and that the new company shall take over and acquire the entire property and business of the old company as a going concern."

The instrument was acknowledged on behalf of the Shreveport company before a notary public of Cook county, Illinois, by Rufus C. Dawes, as president, and H. B. Hurd, as assistant secretary, and, in addition to those above quoted, contains a recital to the effect that the property "is conveyed subject to the lien of three mortgages," the dates of which are given but the amounts of which are not given.

Mr. Curtis testifies that he was the manager of the "old company" and has continued as manager of the Shreveport division of the new company; that practically no changes have been made in the office force; that Henry M. Dawes, a brother of Rufus C. Dawes, is president of the Southwestern, or new, company; that he believes that the Dawes family are largely interested in the Southwestern company, and knows that they are largely identified with the "old company," at Texarkana, which has passed to the Southwestern company; that they occupy positions with the Southwestern company, but he does not know whether they are in control of it; that "we do not have the stock books here."

It has been said that transactions whereby the interests of two or more corporations become identified are susceptible of arrangement into four general groups, and that "the first of such groups comprehends consolidations proper, where all the constituent companies cease to exist, and a new one comes into being; the second, cases of merger proper, in which one of the corporate parties ceases to exist, while the other continues. The third group comprehends cases where a new corporation is, either in law or in point of fact, the reincarnation of an old one. To the fourth group belong those transactions whereby a corporation, although continuing to exist *de jure*, is in fact merged in another which, by acquiring its assets and business, has left of the other only its corporate shell." *Atlantic & B. R. Co. v. Johnson*, 11 L.R.A.(N.S.) 1119, note.

According to the consensus of judicial opinion in this country, a newly organized corporation is liable for the debts of an old one, to the business and property of which it has succeeded, where it is shown that the succession was the result of a transaction entered into in fraud of the creditors of the old corporation; or that the circumstances attending the creation of the new, and its succession to the business and property of the old, were of such a character as to warrant the finding that the new is merely a continuation of the old corporation. The courts are also agreed that there can be no consolidation of corporations, and no merger of one into another, and particularly of a domestic into a foreign corporation, without legislative authority, general or specific, and the consent of all of the shareholders; that the properties of a corporation constitute a trust fund for the payment of its debts, and that, where there has been a misappropriation of such funds, or (according to the better opinion, as we think) the corporation has been divested thereof by consolidation, merger, reorganization, or "rein-

carnation," not only may the fund be followed, by the aid of equity, for the benefit of the creditor, but he may recover, in an action at law, against the corporation which has taken over such fund, with the business of his debtor.

There is not the same concurrence of opinion upon the question whether, or under what circumstance, the mere absorption by one corporation of the property and business of another operates as a merger of such other corporation, or subjects the property so absorbed to the claims of its creditors, or the absorbing corporation to liability for such claims. In the case of a sale, in good faith, of the property and business of a strictly private corporation, duly authorized by its shareholders, to a third person, for an adequate consideration, the property would no doubt pass free of encumbrance, and the creditors would be relegated to the proceeds in the hands of the debtor corporation; but, where the purchaser is a new corporation, composed of the same shareholders as the old, the transaction in no manner affects the rights of the creditors of the old corporation, who may proceed for the recovery of the amounts due them against either corporation, or both; and that, whether the claims be founded in contract or tort, since the real debtor, though represented by two corporations instead of one, remains the same, in contemplation of law. 10 Cyc. 286, 287, 288, 302, 303, 314; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964; *People v. Ballard*, 134 N. Y. 269, 17 L.R.A. 737, 32 N. E. 54; *Sharples Co. v. Harding Creamery Co.* 78 Neb. 795, 11 L.R.A.(N.S.) 863, 111 N. W. 783; *Atlantic & B. R. Co. v. Johnson*, 11 L.R.A.(N.S.) 1119, and note, 127 Ga. 392, 56 S. E. 482; *Luedecke v. Des Moines Cabinet Co.* 32 L.R.A.(N.S.) 616, and note (140 Iowa, 223, 118 N. W. 456); *Chicago, M. & St. P. R. Co. v. Third Nat. Bank*, 134 U. S. 276, 33 L. ed. 900, 10 Sup. Ct. Rep. 550; *Hancock v. Holbrook*, 40 La. Ann. 61, 3 So. 351; *W. F. Taylor Co. v. Gulf Land & Lumber Co.* 119 La. 434, 44 So. 187; *Louisville & N. R. Co. v. Biddell*, 112 Ky. 494, 66 S. W. 34.

The evidence to which we have referred, in the foregoing statement of the case, discloses the earmarks of a transaction between persons dealing with themselves, and threw upon them the burden of proving that it was, in fact, a sale, for adequate consideration, between different persons, and not merely part of an arrangement whereby the same persons, owning the stock of several corporations, created under the laws of as many states, have established another corporation, under the laws of still another state, in order to take over and concentrate the control of the entire property. No doubt,

the burden usually rests upon the plaintiff to make out his case; but, where a court is called upon to investigate a transaction which is out of the usual course of business, which, upon its face, operates to the prejudice of the creditors of the parties thereto, and all the information concerning which is in the possession of such parties, who are beyond the jurisdiction of the court, a somewhat different rule is applied. And the case here presented is of that character. A corporation created under, and governed by, the laws of Louisiana, and charged with a duty to the public, acquires, in virtue of that status, many rights and privileges and much property, and incurs many obligations, and it suddenly, by an instrument executed in Illinois, makes a conveyance, *omnium bonorum* (including not only all of its rights, privileges, and property, but its going business), to a Delaware corporation, which assumes none of its obligations, not even the obligation to continue the business and discharge the duty which it owes to the public; and the recited consideration for the conveyance is "\$1,000 and other good and valuable consideration in hand paid." The \$1,000 is insufficient to satisfy the judgment in this case, and, if actually paid, amounts to no consideration, and the words, "other good and valuable consideration," while no doubt satisfactory, as between the parties to the instrument, require explanation in order to give them value to the creditors, to whom they represent all that is left of property, corporeal and incorporeal, which constituted a "trust fund" a "common pledge," for the payment of their claims; and that explanation should have been given, we think, by the defendants, who alone possess the necessary information; and, as they have failed to give it, they have no reason to complain that we adopt the explanation suggested by the allegations of plaintiff's petition and by such facts as have been disclosed by the evidence.

"Where an act of sale is attacked by a creditor of the vendor, as simulated, on the ground that no price was paid" (this court has held), "proof of payment of the price is on the party interested to maintain the sale. The creditor cannot be required to prove a negative." *Fisher v. Moore*, 12 Rob. (La.) 95; *King v. Atkins*, 33 La. Ann. 1057; *State v. Jahraus*, 117 La. 286, 116 Am. St. Rep. 208, 41 So. 575; *Hollins v. New Orleans & N. W. R. Co.* 119 La. 418, 44 So. 159.

"If the corporation receiving the transfer" (says a writer on corporation law) "was controlled by the same persons as the company executing it, or if the real parties in interest were substantially the same, the burden of showing that the transfer was made in good faith, for value, would fall upon those asserting its validity against unpaid creditors." *Morawetz, Priv. Corp.* 2d ed. p. 761.

It is evident that where the question at issue is whether the corporation executing, and the corporation receiving, the transfer, are controlled by the same persons, the same reasons exist for putting the burden of proof on them, as against an unpaid creditor, as where, the identity of the control being admitted, the question is as to the verity and good faith of the transfer.

Plaintiff claimed \$2,000 for loss of business, \$2,500 for suffering, \$118 for expenses, and \$59 in reimbursement of an amount paid by way of damages which he was obliged to pay. The amount for which he obtained judgment was, as we have stated, \$2,427. We do not find it excessive, nor are we persuaded that it should be increased. The verdict and judgment appealed from are therefore affirmed.

Petition for rehearing denied February 7, 1916.

LOUISIANA SUPREME COURT.

GULF REFINING COMPANY OF LOUISIANA, Appt.,

v.

W. P. HAYNE et al.

(138 La. 555, 70 So. 509.)

Oil and gas lease — character.

1. Gas and oil leases and contracts are apart by themselves. They partake of the

Headnotes by SOMMERVILLE, J.

Note. — For right to partition mineral or oil or gas lands, see annotation following this case, post, 1154.
L.R.A.1916D.

nature of both "sale" and "lease;" and they have features which may not be applied to either. The law referring to sales and leases, found in the Code, cannot be unreservedly applied to them.

For other cases, see *Mines*, II. b, 4, in *Dig.* 1-52 N. S.

Same — statute — effect.

2. But the law in the Code will be applied to them by the courts in cases wherein it can be applied.

For other cases, see *Mines*, II. b, 4, in *Dig.* 1-52 N. S.

Landlord and tenant — contesting title.

3. A lessee under a mineral contract may not contest the title of his lessor as an owner in indivision with others, and compel him

and his co-owners to make a judicial partition in kind of the property leased.

For other cases, see Estoppel, III. 1, in Dig. 1-52 N. S.

Partition — oil land.

4. Known oil lands, like mines, cannot be judicially partitioned in kind, at the suit of one of the co-owners, or by a creditor of a co-owner.

For other cases, see Partition, I. in Dig. 1-52 N. S.

(Provosty and O'Niell, JJ., dissent.)

(November 29, 1915.)

APPEAL by plaintiff from a judgment of the Judicial District Court for the Parish of Red River, dismissing a suit for the partition of certain real estate. Affirmed. The facts are stated in the opinion.

Messrs. D. Edward Greer, Thomas W. Nettles, Thigpen & Herold, and F. C. Proctor, for appellant:

All actions of a debtor, except those strictly personal in their nature, may be exercised by his creditor.

Belcher v. Johnson, 114 La. 643, 38 So. 481; New Orleans v. Gaines (New Orleans v. Christmas) 131 U. S. 191, 33 L. ed. 99, 9 Sup. Ct. Rep. 745; Klotz v. Macready, 44 La. Ann. 169, 10 So. 706; Jack v. Harrison, 34 La. Ann. 740; Forstall v. Consolidated Asso. 34 La. Ann. 775; Spencer v. Goodman, 33 La. Ann. 906; New Orleans v. Gaines (New Orleans v. Whitney) 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428.

While joint owners, or those holding under them, are entitled to possession of the property owned in indivision, yet the court cannot put such an owner, or his grantee, in the actual corporeal possession of such undivided property. All the court can do is to recognize the right, and let plaintiffs make it good by the remedies which the law places at their disposal.

Martel v. Jennings-Heywood Oil Syndicate, 114 La. 903, 38 So. 612.

Under our system of jurisprudence there can be no legal right without an adequate legal remedy. If there be no special provision therefor, the court will supply the remedy ex necessitate rei.

Citizens' Bank v. Marr, 111 La. 602, 35 So. 780; Morris v. Cain, 35 La. Ann. 760.

Under an oil and gas lease the lessee, or grantee, acquires a real right.

Rives v. Gulf Ref. Co. 133 La. 179, 62 So. 623.

Each co-owner of land has the right to occupy, use, and enjoy the common property without thereby incurring any obligation to his co-owners for the ordinary use thereof; provided he so occupies it as not to interfere with their use and enjoyment L.R.A.1916D.

of the same; each having the right to enjoy the same according to his proportionate interest.

Timberlake v. Sorrell, 125 La. 557, 51 So. 586; Toler v. Bunch, 34 La. Ann. 997; Becnel v. Becnel, 23 La. Ann. 150; Balfour v. Balfour, 33 La. Ann. 297.

But the co-owner or his lessee, in using the property by drilling for oil thereon, must account to his co-owners for their proportionate share of the net profits, assuming, however, all risks of loss.

Elder v. Ellerbe, 135 La. 990, 66 So. 337; Thornton, Oil & Gas, § 278.

Where the lessor or grantor of an oil and gas lease has utterly repudiated his contract, and actively prevented his lessee from taking possession of the property, it would be vain and useless to call upon him to maintain the action in partition, and therefore no demand is necessary.

Southern Sawmill Co. v. Ducoite, 120 La. 1052, 46 So. 20; Johnson v. Levy, 122 La. 124, 47 So. 422, 16 Ann. Cas. 978; Beck v. Fleitas, 37 La. Ann. 495; Dwyer Bros. v. Tulane Educational Fund, 47 La. Ann. 1232, 17 So. 796; Abels v. Glover, 15 La. Ann. 247; Hivert v. Lacaze, 3 Rob. (La.) 357; New Orleans & N. R. Co. v. Ganah, 18 La. 510.

Messrs. Alexander & Wilkinson, for appellees:

The lessee under a mineral lease on an undivided interest in certain real estate is not the owner of the oil or gas underground, but only of such part as he may find and extract therefrom, and owns nothing except the right to explore for the same under the terms of the contract.

Rives v. Gulf Ref. Co. 133 La. 178, 62 So. 623; Cooke v. Gulf Ref. Co. 135 La. 609, 65 So. 758.

The holder of such lease from one of the three co-owners of real estate has no right to institute an action of partition of the real estate in kind, in order to have set aside the undivided interest of his grantor.

Smith v. Cooley, 65 Cal. 46, 2 Pac. 880; Hall v. Vernon, 47 W. Va. 295, 49 L.R.A. 464, 81 Am. St. Rep. 791, 34 S. E. 764; Dangerfield v. Caldwell, 81 C. C. A. 400, 151 Fed. 554; Thornton, Oil & Gas, §§ 276, 277; Mootry v. Grayson, 44 C. C. A. 83, 104 Fed. 613; Brown v. Challis, 23 Colo. 145, 46 Pac. 679; Aspen Min. & Smelting Co. v. Rucker, 28 Fed. 220; Lenfers v. Henke, 73 Ill. 405, 24 Am. Rep. 263, 5 Mor. Min. Rep. 67; Kemble v. Kemble, 44 N. J. Eq. 454, 11 Atl. 733; Watford Oil & Gas Co. v. Shipman, 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53; J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co. 48 Tex. Civ. App. 555, 107 S. W. 609.

There can be no partition in kind of

mineral land, and such a partition, if ordered by the court, would be void.

Thornton, Oil & Gas, §§ 276, 277.

Sommerville, J., delivered the opinion of the court:

Plaintiff and defendant W. P. Hayne entered into a contract of lease, or mineral contract, the terms of which plaintiff alleges were not complied with by defendant. That defendant represented himself and his mother, Mrs. Aurora Hayne, to be the owners of the property leased, when, in fact he was the owner of only one third in undivision with the other persons here made codefendants, and Mrs. Hayne was not the owner of any portion of the property.

That a partition in kind of the property is necessary and is demanded of Hayne and his co-owners, so that the lease held by plaintiff may bear upon the one third of the land falling to the lot of W. P. Hayne; and a money judgment is asked for in the alternative against Hayne.

W. P. Hayne and Mrs. Aurora Hayne excepted to the jurisdiction of the court, alleging themselves to be residents of Rapides parish, and the exception was sustained in so far as the demand was for damages. Certain co-owners answered to the merits, while others filed an exception of no cause of action to the petition. The exception was sustained, and plaintiff has appealed.

The only question in the case is whether a tenant under an oil lease, or mineral contract, may sue his lessor and the co-owners with the lessor for a partition in kind of the oil land leased, and have the lease declared to cover the lot or portion of ground falling to the lessor.

Article 1310 of the Civil Code provides that a tenant cannot bring a partition suit. It says: "But the possession, necessary to support this action, must be in the names of the persons enjoying it, and for themselves; it cannot be instituted by those who possess in the name of another, as tenants and depositaries."

But plaintiff argues that it is not the tenant referred to in the article quoted. It claims that an oil lease, or mineral contract, is different from the ordinary lease, and that the court has so decided. It cites the cases of *Cooke v. Gulf Ref. Co.* 127 La. 592, 53 So. 874; *Rives v. Gulf Ref. Co.* 133 La. 178, 62 So. 623; *Cooke v. Gulf Ref. Co.* 135 La. 609, 65 So. 758; *Natalie Oil Co. v. Louisiana R. & Nav. Co.* 137 La. 706, 69 So. 146; *Spence v. Lucas*, — La. —, 70 So. 796 (not yet officially reported), in which the court has so held. It also refers to act 232 of 1910, p. 393, which provides that mining contracts may be mortgaged.

In the *Rives* Case, 133 La. 178, 62 So. L.R.A.1916D.

623, it is said: "In determining the scope and legal effect of an instrument giving rights and privileges to mine or take minerals, oil, or gas, it is immaterial by what name it is called, whether a lease, license, sale, contract, grant, deed of conveyance, a real right, an incorporeal hereditament, a chattel interest, a chattel real, a right in land, or other name; the court will look to the language used in the instrument, aside from these terms so used, and determine its legal effect."

In that case, the lease was termed a "real right," a right to part ownership in the oil and gas when it would have been taken from the ground, and confined in pipes and reservoirs.

Plaintiff is the holder of the ordinary gas lease; and it argues that, as the holder of a real right in and upon the undivided one third interest of W. P. Hayne in the oil land leased to it, it is a creditor of Hayne, and that it may exercise, in the place of Hayne, its debtor, the real right of partition against Hayne and his co-owners.

The right of plaintiff is clearly not that of owner, and only an owner can sue his co-owner for a partition. Plaintiff is the owner of the right to explore and extract oil from an undivided one third interest in the property, but it is not the owner of any portion of the landed estate.

In the decided cases just referred to by plaintiff, the court also said that it would apply the law on letting and hiring to oil leases, as it was set forth in the Code and statutes, where it was possible to apply it. And article 1310 says that partition suits may not be brought by tenants and depositaries.

Plaintiff is a tenant of Hayne under the oil lease executed by them, although by its terms he may have acquired greater rights than an ordinary tenant on a predial estate would have acquired. It has a particular estate in and to the oil and gas when these minerals will have come into its possession. It has the right to go upon the land and explore for oil and gas. Nevertheless, the contract is one of lease, or letting or hiring, in which Hayne is the lessor and plaintiff is the lessee or tenant. It is a valid, existing contract between them, under which both have rights. Plaintiff may have thought that it had leased the whole tract of land, when in truth the lease only extended to the undivided one-third interest in the land owned by Hayne, its lessor. It cannot be put into possession as lessee or tenant of the undivided one third interest owned by Hayne (*Martel v. Jennings-Heywood Oil Syndicate*, 114 La. 903, 38 So. 612); and, as tenant of Hayne, it cannot ask for a partition in kind of the property.

owned by Hayne and his co-owners so that its lease may cover the land falling to the lot of Hayne.

The court might recognize the rights of plaintiff under the lease, but it cannot put it in the actual corporeal possession of an undivided interest in the land leased. Such right is a mere abstract right; while, if plaintiff's lease bore upon specific property, it might be put into possession of it.

Again, a lessee in possession cannot contest or force a change in the ownership of his lessor of the thing leased. Civil Code, art. 3441; *Hanson v. Allen*, 37 La. Ann. 732. Plaintiff cannot contest in any manner the ownership of Hayne to an undivided interest in an oil field, and compel him to accept ownership of a defined area thereof which might not contain any oil whatever. Nor can it or Mr. Hayne compel the co-owners of Hayne to accept such an unequal division. Partition implies equality; and, where equality cannot be had by a partition in kind, the partition must be by licitation.

Many courts have held that mines could not be partitioned in kind.

Thornton, on Oil & Gas, says in § 276: "In a case of an attempted partition of a mine, Justice Brewer used the following language: 'The mere fact of joint ownership in a mine does not give an equitable right to a partition. Seldom can a division of a mine be made. Generally partition must result in a sale. To such property there is an unknown value; and a chancellor may well require full information as to all the relations of the parties to the property before decreeing any partition which will practically result in dispossessing one of the parties entirely.' And in a dictum in an Illinois case it was said: 'The mines, when opened, in their nature were indivisible. Neither partition could be made at law, nor dower assigned by metes and bounds.'"

In § 277, after discussing the question of the right to partition of supposable oil or gas land, Mr. Thornton further says: "But after gas or oil has been discovered on the land, an entirely different question is presented. If the entire tract has been developed, and the wells are so distributed, and their production is well known so that their respective values can be determined, then a division might possibly be decreed; but it would be almost impossible to find an instance of this kind. And then, too, other powerful wells, in spite of the supposition that the land had been fully developed, might be sunk upon one part of the divided tract, and all attempts to find other productive wells on the other tract might be failures. In such an event the L.R.A.1916D.

partition proceedings would result in an unequal division in value,—a thing studiously avoided in partition proceedings. . . . Especially can there be no partition of the right to take oil or gas from beneath a tract of land, the surface being owned by a third person; and an attempt of the court to make partition of such a right is void."

In line with Mr. Thornton the law is thus stated in 21 Am. & Eng. Enc. Law, 2d ed. 1161: "A partition of oil and gas owned by co-owners separate from the surface cannot be decreed except by sale and division of the proceeds. A judicial partition thereof by assignment of the oil and gas under sections of the surface is void."

In the case of *Hall v. Vernon*, 47 W. Va. 295, 49 L.R.A. 464, 81 Am. St. Rep. 791, 34 S. E. 764, the court holds: "Partition of oil and gas owned by co-owners separate from the surface cannot be decreed, except by sale and division of the proceeds. A judicial partition thereof by assignment of the oil and gas under sections of the surface is void."

In the case of *Dangerfield v. Caldwell*, 81 C. C. A. 400, 151 Fed. 554, the circuit court of appeals says in the syllabus: "A tract of land known to have oil or gas or both under its surface is not property susceptible of partition in kind."

There are other decisions to the same effect. And the law set forth in the Civil Code is the same. Article 1303 is as follows: "There can be no partition, when the use of the thing held in common is indispensable to the coheirs, to enable them to enjoy, or to derive an advantage from the portion of the effects of the succession falling to them, such as an entry which serves as a passage to several houses, or a way common to several estates, and other things of the same kind."

And articles 1336, 1339, and 1340, which follow, forbid the partition in kind of property where it cannot be conveniently made.

"Art. 1336. The judge who decides on a suit for a partition and on the mode of effecting it, has a right to regulate this mode as may appear to him most convenient and most advantageous for the general interest of the coheirs, in conformity, nevertheless, with the following provisions."

"Art. 1339. When the property is indivisible by its nature, or when it cannot be conveniently divided, the judge shall order, at the instance of any one of the heirs, on proof of either of these facts, that it be sold at public auction, after the time of notice and advertisements prescribed by law, and in the manner hereinafter prescribed.

"Art. 1340. It is said that a thing cannot be conveniently divided, when a diminution

tion of its value, or loss or inconvenience of one of the owners, would be the consequence of dividing it."

It might be a most serious loss to one or more of the co-owners to divide a piece of oil land into three parts, and award one part to each owner. A lot without oil under the surface, falling to one co-owner, would work incalculable damage to him to whom it was awarded, due entirely to the consequence of dividing the land. The courts cannot compel such a division or partition.

In case of known oil land or a mine, the suit must be for a partition by licitation.

The law of France is similar to our law. It says in the Napoleon Code:

"Art. 827. If the immovables cannot be commodiously divided, a sale by auction must be proceeded in before the court. Nevertheless the parties, if all of age, may consent that the auction should be made before a notary, on the choice of whom they can agree."

"Art. 832. In the formation and arrangements of the lots, parties must avoid as much as possible disjointing estates and dividing works; and it is expedient, if it can be, to dispose in each lot the same quantity of movables and immovables, of rights or credits of the same nature and value."

"Art. 1686. If one thing common to several persons cannot be commodiously divided and without loss; or if in a partition made with mutual consent of common property, there be found some goods which none of the coparceners can or will take. The sale thereof is made by auction, and the price thereof is distributed between the joint proprietors."

But plaintiff does not seek a partition by licitation. Under such sale his lease would not follow the land, or the proceeds of the sale thereof. Civil Code, art. 1338; *Spence v. Lucas*, — La. —, 70 So. 796 (not yet officially reported). It asks for a judicial partition in kind.

The petition does not disclose a cause of action.

Judgment affirmed.

Provosty, J.:

Holds that a lessee out of possession may, in the exercise of the right of his lessor, maintain a suit for the partition in kind of the thing leased, and that so long as minerals have not actually been discovered under the soil, or the probability of their presence in one part of the property, and not in another, has not become so great as to afford a basis for judicial action, the property is divisible in kind.
L.R.A.1918D.

O'Neill, J., dissenting:

This is not a suit for a division or partition of a mine or of an oil or gas well, nor for a division or partition of the right to take oil or gas from beneath the surface of the land. It is an ordinary suit for a partition or division of a tract of land on which no oil, gas, or other mineral has ever been discovered, nor mining operations or explorations ever made, as far as the record discloses. Therefore the doctrine quoted from Mr. Thornton's work on Oil and Gas, and from other authorities, has no application whatever, viz., that a mine is not susceptible of division in kind; that, after gas or oil has been discovered on a tract of land, it is not probable that the wells would be so equally distributed and their production be so nearly equal that a fair division in kind might be made; that the right to extract oil or gas from the land cannot be divided in kind; and that a tract of land known to have oil or gas under its surface is not susceptible of partition in kind.

The plaintiff has alleged that the land of which he desires a partition can be divided in kind without diminution of its value. If the land is not susceptible of division in kind, because it is supposed to have oil or gas beneath its surface, or for any other reason, that is a matter of defense on the merits of the case. On this appeal from the judgment dismissing the suit on an exception of no cause or right of action, we must assume that the allegations of the petition are true.

The plaintiff's grantor, W. P. Hayne, could have maintained this action of partition under the allegations of the plaintiff's petition. The right of an owner of an undivided interest in real estate to maintain an action of partition against the co-owners is absolute. Rev. Civ. Code 1289. The other co-owners cannot be injured by, and have not a substantial interest in complaining of, the suit being brought by W. P. Hayne's grantee, instead of by him; and he did not file an exception of no cause or right of action.

As a general rule, a creditor or obligee may maintain any action of which his creditor or obligor has a right, except those which are purely personal to the creditor or obligor. See *Spencer v. Goodman*, 33 La. Ann. 906; *Forstall v. Consolidated Asso.* 34 La. Ann. 773; *Jack v. Harrison*, 34 La. Ann. 736; *Klotz v. Macready*, 44 La. Ann. 169, 10 So. 706; *Belcher v. Johnson*, 114 La. 643, 38 So. 481; *New Orleans v. Gaines* (*New Orleans v. Christmas*) 131 U. S. 191, 33 L. ed. 99, 9 Sup. Ct. Rep. 745; and *New Orleans v. Gaines* (*New Orleans v. Whitney*) 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428. The right of an owner of

an undivided interest in a tract of land to sue the co-owners for a partition is not more personal to him than was any one of the rights of action which the creditors were permitted to maintain in the decisions cited above. In one of them, *New Orleans v. Gaines* (New Orleans v. Christmas) 131 U. S. 191, 33 L. ed. 99, 9 Sup. Ct. Rep. 745, it was said: "The right thus claimed for the creditor (the word 'creditor' being used in its large sense, as in the civil law) may very properly be pursued in a suit in equity, since it could not be pursued in an action at law in the courts of the United States, and all existing rights in any state of the Union ought to be suable in some form in those courts."

The word "creditor" was used in its broad sense of obligor, in the foregoing opinion, as defined in the Civil Code, art. 3556, §§ 20 and 21.

The obligation of W. P. Hayne to put his grantee, the plaintiff, into possession of whatever share of the property the grantor owned is expressed in art. 1903 of the Civil Code, viz.: "The obligation of contracts extends not only to what is expressly stipulated, but also to everything that, by law, equity or custom, is considered as incidental to the particular contract, or necessary to carry it into effect."

By the express terms of the grant to the plaintiff, he was given the exclusive right to drill into this land for oil and gas, and all other rights that might be reasonably necessary to carry on the mining operations. Possession of the land, or of the share belonging to the grantor, was indeed necessary for the grantee to drill for oil or gas and to carry out the mining operations. The grantor, W. P. Hayne, knew, or is presumed to have known, that he could not deliver possession of his share in the land to his grantee if the co-owners of the land objected, except by a partition of the land. In the case of *Martel v. Jennings-Heywood Oil Syndicate*, decided more than ten years ago, reported in 114 La. 903, 38 So. 612, it was said that a judgment recognizing a joint owner's undivided interest in a tract of land could not be enforced by a writ of possession, and that all the court could do was to recognize the right of the plaintiff as a co-proprietor, and let him make it good by the remedies which the law gave him. The remedies thus referred to were to provoke a partition, and be put into possession of a proportionate share of the land, if it could be divided in kind without loss to its owners, or the proportionate share of the proceeds of a partition sale, if it could not be divided in kind without loss to its owners. Hence the right to provoke a partition of this land was one L.R.A.1916D.

of the incidents of the grant made by W. P. Hayne to the plaintiff. Rev. Civ. Code 1903. Even if this grant be regarded as an ordinary contract of lease, in the precise language of our Civil Code (art. 2692), "the lessor is bound from the very nature of the contract, and without any clause to that effect, to deliver the thing leased to the lessee."

I concur, however, in the view expressed in the recent case of *Rives v. Gulf Ref. Co.* 133 La. 178, 62 So. 623, that there is scarcely any comparison between a mineral lease and the ordinary lease of a house or farm. I also concur in the opinion there expressed, that the framers of our Civil Code had no thought of mineral leases, granting the right to drill for and extract oil or gas or other minerals from the leased premises, when these compilers of the Code adopted the articles referring to the ordinary lease of a house or farm. The rule of interpretation of an oil and gas lease was expressed, at page 182 of the opinion referred to, thus: "In determining the scope and legal effect of an instrument giving rights and privileges to mine or take minerals, oil or gas, it is immaterial by what name it is called; whether a lease, license, sale, contract, grant, deed of conveyance, a real right, an incorporeal hereditament, a chattel interest, a chattel real, a right in land, or other name; the court will look to the language used in the instrument, aside from these terms so used, and determine its legal effect."

In the decision last quoted, it was said, quoting *Heller v. Dailey*, 28 Ind. App. 555, 63 N. E. 490, that a mineral lease, like the one before us, is to be regarded not as a grant of the land nor as a lease, properly so called, but as a grant of a right in the nature of an incorporeal hereditament, and that is the common-law definition of what is called a real right in our Civil Code. Attention was called, in the case last cited, to the fact that our Civil Code does not expressly define nor refer to a mineral lease. This was repeated in *Cooke v. Gulf Ref. Co.* 135 La. 609, 65 So. 758, where it said that the legislature also had been silent on the subject of mineral rights and contracts. And, in the case of the *Natalie Oil Co. v. Louisiana R. & Nav. Co.* 137 La. 706, 69 So. 146, it was said that our Code of Practice was also framed and adopted at a time when there was no thought that oil existed under our soil, and that the laws were not framed to meet such conditions. In the session of 1910, however, the legislature adopted act No. 232, authorizing the owner of an oil or gas lease or other mineral lease to mortgage such real right, because, as said in the preamble

of the statute, such mineral leases had become so numerous in this state that the mining industry ought to be encouraged and promoted by facilitating the securing of the capital required.

The principles underlying the provisions in our Civil Code on the real right called servitudes are, in my opinion, applicable to such a mineral lease as we have now to deal with, which is in the nature of a servitude. It is not a real or predial servitude, imposed upon one estate for the benefit of another, but is like a personal servitude in favor of the grantee (Rev. Civ. Code, art. 646), in the nature of a usufruct, which is defined as the right to enjoy the property of another and draw therefrom the profit, utility, and advantages thereof (Rev. Civ. Code, art. 533), which right may be conferred in a divided or limited portion (Rev. Civ. Code, art. 539), and may be limited as to the time of its beginning and end (Rev. Civ. Code, art. 608). It is, of course, not a perfect usufruct, because it confers upon the grantee "the right of accession," which the grantor had, to "construct below the soil all manner of works, digging as deep as he deems convenient, and draw from them all the benefits which may accrue." Rev. Civ. Code, art. 505. In other words, the grant confers upon the grantee the mineral rights which the law does not, itself, confer upon an ordinary usufructuary. Rev. Civ. Code, art. 553.

There is no reason why the principles of the following articles of the Civil Code should not be applied to the case before us, viz.:

"Article 739. The coproprietor who has consented to the establishment of a servitude on property held in common, cannot prevent the exercise of the servitude by objecting that the consent of his coproprietor has not been given.

"If he becomes the owner of the whole estate, he is bound to permit the exercise of the servitude to which he has before consented."

"Article 740. If the coproprietor has established the servitude for his part of the estate only, the consent of the other owners is not necessary, but the exercise of the servitude must be suspended, until his part be ascertained by a partition. In this case, he to whom the servitude has been granted, may compel the coproprietor from whom he received it, to sue for a partition, or may sue for it himself."

There was no express provision in the French Code, that he to whom a servitude was granted on an undivided interest in a tract of land could sue for a partition so that the servitude might be exercised on the part allotted to the grantor, or on the

whole property, if the grantor of the servitude acquired the whole estate at the partition sale, as provided in articles 739 and 740 of our Code. The jurisprudence of France, however, recognizes this right of the grantee of a servitude from the owner of an undivided interest in a tract of land to sue for a partition of the land, under the general provision of article 1168 of the Code Napoleon, giving a creditor or obligee all of the rights of action possessed by his debtor or obligor, except strictly personal rights. See Carpentier & Du Saint, vol. 34, vo. "Servitude," No. 786.

Article 1309 of our Civil Code expressly provides that it is not indispensable to be an owner in common of the land itself to be entitled to an action of partition; that a coproprietor of a real right, and especially of a usufruct, may maintain an action of partition; and a usufruct is a servitude on land in favor of a person. Rev. Civ. Code, art. 646.

There are several reasons why article 1310 of the Civil Code, denying one who possesses as a tenant the right of action for a partition, has no application to this case. In the first place, an ordinary tenant or lessee in possession has no reason to institute an action of partition. In the second place, it is settled by the decisions of this court, cited above, that the words "tenant," meaning an ordinary lessee of a house or farm, as used in the Code, has no reference to a grantee under a so-called mineral lease. In the French text of article 1233 of the Civil Code of 1825, the English text of which is reproduced verbatim as article 1310 in the Revision of 1870, the French word translated as "tenant" is "fermier," indicating that it referred to a tenant under a predial lease, or lease of a farm. And, for the precise meaning of the words which were translated from the French into our present Code, as was said in the cases of *Breadlove v. Turner*, 9 Mart. (La.) 353, and *Lafourche v. Terrebonne*, 34 La. Ann. 1230, reference should be had to the French text. But beyond these reasons, if the ordinary tenant in possession were not expressly denied the right of action for a partition, he would have no right to institute it or any other real action. Code of Practice, arts. 26, 28, 29, 43, 48. The right of the grantee under such a mineral lease as we have before us, on the contrary, is a real right, *jus in re*, as is settled by the decisions quoted above. And our Code of Practice, in articles 5, 6, and 7, provides that a real action, such as a petitory or possessory action, may be maintained not only by the owner of an estate, but by anyone "who has a right upon or growing out of it." It cannot be doubted that a grantee in posses-

sion of a tract of land under a mineral lease could maintain a possessory action, or that such grantee out of possession could maintain a petitory action.

Article 1310 of the Civil Code does not, nor does any other article, expressly deny a lessee out of possession the right of action for a partition, as the obligee or creditor of the coproprietor, if such action be necessary for the exercise of his right of possession of the share in the property belonging to his landlord. Article 1310 merely provides that the action of partition shall not be brought by a tenant in possession; and the reason is that such action on his part would be an unnecessary interference with the title of his landlord. To apply this article of the Code to a grantee of a real right, out of possession, compels not only the overlooking of all reason for the law, but also the inversion of its very terms.

It is not and cannot be disputed that the plaintiff has a real right in this land. Hence he must have a remedy, though it be not expressly provided in our Code of Practice or Civil Code. *Fortier v. Slidell*, 7 Rob. (La.) 398; *Morris v. Cain*, 35 La. Ann. 759; and *Citizens' Bank v. Marr*, 111 La. 602, 35 So. 780. And, in the absence of any express law, either granting or deny-

ing a remedy, where there is a legal right, we are bound to proceed and decide according to equity, by applying natural law and reason. Rev. Civ. Code, art. 21.

The plaintiff does not allege that he made a formal demand upon his grantor to file the partition suit before filing it himself. It was not necessary to allege a formal putting in default, in view of the allegation that the grantor actively violated his obligation to deliver possession, by repudiating the contract and forcibly preventing the plaintiff from taking possession. See *New Orleans & N. R. Co. v. Ganah*, 18 La. 510; *Hivert v. Lacaze*, 3 Rob. (La.) 357; *Abels v. Glover*, 15 La. Ann. 247; *Beck v. Fleitas*, 37 La. Ann. 492; *Dwyer Bros. v. Tulane Educational Fund*, 47 La. Ann. 1232, 17 So. 796; *Southern Sawmill Co. v. Ducote*, 120 La. 1052, 46 So. 20; and *Johnson v. Levy*, 122 La. 118, 16 Ann. Cas. 978, 47 So. 422.

Being of the opinion that the plaintiff is entitled to the remedy invoked, and that his petition discloses a cause of action, I respectfully dissent from the opinion and decree to the contrary, rendered in this case.

Petition for rehearing denied January 10, 1916.

Annotation—Right to partition mineral or oil or gas lands.

For other notes concerning the question of partition, generally, see "Partition," Index to L.R.A. Notes, p. 1060.

Partition is accomplished either by the act of the parties, as where the cotenants in person or by their agents agree upon the property to be awarded to each, or select persons to make partition for them, or by the courts, on their interposition being sought by one or more of the cotenants. 30 Cyc. 153.

Partition by the act of the parties.

The right of partition by the act of the parties, of mining property held in common, like the right of alienation, is an incident of that kind of ownership, and is limited only by such restraints as the law has thrown around it in regard to personal capacity and mode of conveyance. *Byers v. Byers* (1898) 183 Pa. 509, 39 L.R.A. 537, 63 Am. St. Rep. 765, 38 Atl. 1027; *Robbins v. Penn Gas Coal Co.* (1903) 28 Pa. Co. Ct. 49. The statute of frauds does not apply to executed partitions between tenants in common, and as such divisions rest solely on the agreements and intentions of the owners, there is no room for distinctions in regard to the methods of partition, L.R.A.1916D.

whether by vertical or horizontal lines. Thus, in *Byers v. Byers* (Pa.) supra, the court said: "There is no difference in the right nor in any other respect except in facility of proof of the intent, inasmuch as the ordinary mode is by vertical lines; and therefore such partition is more readily presumed, and acts done in pursuance of it on the surface are more easily shown. Horizontal divisions of land, as such, are comparatively rare, but they are well established, and may be made in the same way, and subject to the same rules, as any other mode, if the parties so agree."

Partition by act of the parties may be had by parol or by deed, either of the entire tract of mining property or of a parcel thereof. *Robbins v. Penn Gas Coal Co.* (Pa.) supra. The cotenants may mutually agree to make partition of a part only of their land, retaining the rest in common; or they may except out of the partition mines, ore banks, or plaster beds in the lands, and agree to hold them in common. (Pa.) Ibid. And see *Davell v. Roper* (1854) 24 L. J. Ch. N. S. 779, 3 Eq. Rep. 1004, 3 Drew. 294, 3 Week. Rep. 467, 10 Mor. Min. Rep. 406;

Coleman v. Coleman (1852) 19 Pa. 100, 57 Am. Dec. 641, 11 Mor. Min. Rep. 183.

A parol partition of land may be limited to the surface, and does not, as matter of law, extend to coal in the ground, if the intent was to retain this in common. *Byers v. Byers* (Pa.) supra. The parties may make partition of all their land, or of any part of it, and in any manner they choose to agree upon. (Pa.) Ibid.

So, it is within the power of tenants in common to make a partial partition of their common holdings by conveying to one of their number all their undivided interest except that in a stratum of coal, as to which the common tenancy is continued. *Robbins v. Penn Gas Coal Co.* (Pa.) supra. And subsequently such cotenants may have compulsory partition of the coal stratum so reserved. (Pa.) Ibid.

But the presumption from the fact of the partition of the surface of land by parol is that it includes the coal beneath as well as the surface; and one who denies it has the burden of proof. *Byers v. Byers* (Pa.) supra.

A parol partition of a mining claim, followed by actual exclusive possession of the parts assigned, acquiesced in by the parties in accordance with the terms of the partition, is valid. 420 Min. Co. v. Bullion Min. Co. (1876) 3 Sawy. 634, Fed. Cas. No. 4,989; *Kinney v. Consolidated Virginia Min. Co.* (1877) 4 Sawy. 382, Fed. Cas. No. 7,827. And upon such a partition the parties cease to be tenants in common. 420 Min. Co. v. Bullion Min. Co. (Fed.) supra. But a naked parol agreement to make partition of such property, it seems, would be inoperative (Fed.) Ibid. *Kinney v. Consolidated Virginia Min. Co.* (Fed.) supra.

Where, prior to the location of a quartz mining claim, the several persons occupying the surface agreed that one should locate for all, and that, after the issue of the patent, conveyances should be made, vesting in each full title to the surface occupied by him, but the conveyances were never in fact made, the agreement and continued occupation after the patent issued did not constitute an oral partition, but merely created an equitable right to hold the locator as trustee. *Mullins v. Butte Hardware Co.* (1901) 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004.

The purchaser of an undivided half interest in a lot containing minerals is not charged with constructive notice of an oral partition of the lot by her vendor and his cotenant by the fact the latter

has, for years, paid taxes on a particular half of the lot. *Hurley v. O'Neill* (1902) 26 Mont. 269, 67 Pac. 626. Neither is she charged with actual notice of such partition by the fact that, after taking her deed, she paid taxes on the part which her vendor had occupied, and, when forbidden by the cotenant to sweep her dirt onto the part occupied by him, said that his deed was not fixed right, and that she could do what she felt like until there was a division. Under such circumstances the burden of proving actual notice of such partition rests upon the party alleging such notice. (Mont.) Ibid. And see *Mullins v. Butte Hardware Co.* (Mont.) supra.

A conveyance by a parcener who has made a verbal partition of the land, and is in the exclusive possession of part thereof, conveying a portion of the oil and gas therein, and describing the land wherein the oil and gas so conveyed is, as land "owned and controlled" by him, and also in a general, indefinite, and incomplete manner as bounded by adjacent land of other persons, passes title to the oil and gas in that portion assigned to him by the verbal partition. *Stevenson v. Yoho* (1907) 63 W. Va. 144, 59 S. E. 954.

Partition by judicial proceedings—generally.

The general rule is that all property capable of being held in cotenancy is subject to partition by judicial proceedings; and if there is a cotenancy in mineral land, the presumption should be that the law has provided a means for its severance. *Robbins v. Penn Gas Coal Co.* (Pa.) supra.

Partition by such proceedings may generally be accomplished in one of two ways: (1) by a division in kind, by metes and bounds, or (2) by a sale of the property and a division of the proceeds. Sale is only a method of partition when division in kind cannot be had. *Preston v. White* (1905) 57 W. Va. 284, 50 S. E. 236.

Personalty connected with mining claims is the subject of partition in an action to partition such claims, only in so far as it constitutes a part of the realty. *Manley v. Boone* (1908) 87 C. C. A. 197, 159 Fed. 633, reversing (1905) 2 Alaska, 552.

In *Christy's Appeal* (1885) 110 Pa. 538, 5 Atl. 205, it was decided that the orphans' court, by an inquest of partition, had no power to order a separate appraisal of coal beneath the surface and the surface.

In *Paul v. Cragnas* (1900) 25 Nev.

293, 47 L.R.A. 540, 59 Pac. 857, 60 Pac. 983, it was decided that a person excluded by a cotenant from a mine in which he has an undivided interest can maintain an action for damages, and his remedy is not limited to an action for partition, or an accounting of rents and profits.

The participation of a lessee of oil land in the partition of the property, and his recognition of the several ownership of the parties of their respective tracts, changes the character of his holding from that of lessee from the joint owners of the whole tract to lessee from each owner of the respective tracts. *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.* (1908) 48 Tex. Civ. App. 555, 107 S. W. 609.

A deed by a parcener, who has made a verbal partition of the land and is in the exclusive possession of part thereof, conveying a portion of the oil and gas therein, and describing the land wherein the oil and gas so conveyed is, as land "owned and controlled" by him, and also in a general indefinite and incomplete manner as bounded by adjacent land of other persons, passes title to the oil and gas in that portion assigned to him by the verbal partition. And in a suit by the grantee in such deed for a partition of the oil produced by a well located on a portion of the land other than that which was assigned to the grantor by the verbal partition, under a claim of title thereto by virtue of such deed, the grantor may, by reason of the implied warranty obtaining between coparceners, defend and resist the demand for partition of the oil from such well. *Stevenson v. Yoho* (1907) 63 W. Va. 144, 59 S. E. 954.

Division of land held in common by a decree in partition providing that the mineral rights in the whole of the land shall remain undivided is a reservation, not of an easement, but of the entire ownership of ore in place under the land divided. *Barksdale v. Parker* (1890) 87 Va. 141, 12 S. E. 344.

Compensation cannot be allowed in a suit to partition a mining claim for the cost of improvements on adjoining mining property, which incidentally enhance the value of the common property. *Dall v. Confidence Silver Min. Co.* (1868) 3 Nev. 531, 93 Am. Dec. 419, 11 Mor. Min. Rep. 214.

In partition of coal between owners who do not own the surface, mining privileges pass as appurtenant or incident to the coal, without express words, and include the use of a pit mouth which

is not within the lines of either purpart, but which is close to one of them, where it was the manifest intention to divide all the good, merchantable coal. *Ran-kin's Appeal* (1888) 1 Monaghan (Pa.) 308, 2 L.R.A. 429, 16 Atl. 82.

Pending a suit for the partition of mining property, the court has ample power, upon a proper showing, to appoint a receiver to protect the interests of all the parties. *Ames v. Ames* (1894) 148 Ill. 321, 36 N. E. 115; *Heinze v. Butte & B. Consol. Min. Co.* (1903) 61 C. C. A. 63, 126 Fed. 1. But the appointment of a receiver in a partition proceeding is not of frequent occurrence. And a decree appointing a receiver on the application of adult cotenants, and authorizing him to lease the property to the adults during the minority of infant cotenants, and to pay the adults for operating the mine and other business, including a store run in connection with the mine, all without the consent of the infants or their guardian, was held to be erroneous, as the appointment did not seem to have been made to preserve the property pending the litigation between the cotenants. *Ames v. Ames* (Ill.) supra.

And in *Heinze v. Butte & B. Consol. Min. Co.* (Fed.) supra, it was decided that the appellate court could not say, in view of the evidence, that the trial court exceeded or abused its discretion in extending its receivership for the interest of one of the owners of mining property to the entire property, or in directing the receiver to operate the mines.

And a court of equity which has assumed jurisdiction to partition land, the substantial value of which is in unopened coal, has power, pending its partition, to preserve the property by enjoining one tenant in common, on complaint of his cotenant, from mining coal through an entry from an adjoining tract owned by the latter. *Rainey v. H. C. Frick Coke Co.* (1896) 73 Fed. 389.

A suit to partition a mining claim, the alleged common ownership of which is only sought to be defeated by alleging a forfeiture for the plaintiff's failure to contribute to the performance of assessment work, is properly triable in equity, under Code Civ. Proc. (Alaska) chap. 43, §§ 397, 398, 403, providing for the partition of lands; and for the court to dismiss the suit and remit the plaintiff to his action in ejectment is error. *Forderer v. Schmidt* (1906) 77 C. C. A. 36, 146 Fed. 480.

The right to have mining property par-

tioned by judicial proceedings may be waived by agreement of the owners. *Coleman v. Coleman* (1852) 19 Pa. 100, 57 Am. Dec. 641, 11 Mor. Min. Rep. 183; *Robbins v. Penn Gas Coal Co.* (1903) 28 Pa. Co. Ct. 49. And see *Coleman v. Grubb* (1854) 23 Pa. 393; *Coleman v. Blewett* (1862) 43 Pa. 176. So, an agreement to exempt certain ore banks or mine hills from a partition made by cotenants because the property could not be divided without injustice to some of the parties has been held valid, and sufficient to preclude a subsequent compulsory partition. *Coleman v. Coleman* (Pa.) *supra*.

But in *Haussler v. Missouri Iron Co.* (1892) 110 Mo. 188, 16 L.R.A. 220, 33 Am. St. Rep. 431, 19 S. W. 75, 17 Mor. Min. Rep. 458, it was held that a stipulation against the institution of partition proceedings, made by cotenants, who undertake to bind themselves, their heirs and assigns forever, not to institute such proceedings without the written consent of all the parties, is void as an unreasonable restraint upon the enjoyment and use of the property. Generally as to the validity of agreements against the right of partition, see note to the above case in 16 L.R.A. 220.

— in kind.

As a general rule, mining property, from its very nature, is not susceptible of a division by metes and bounds. The veins or bodies of ore are most frequently of uneven distribution, while the values are purely conjectural until proved by extended developments and careful tests, obtained only as the result of a vast expenditure of money and time; so that it is known in advance of bringing suit for partition that the only feasible relief that can be awarded is a decree for the sale of the property. *Brown v. Challis* (1896) 23 Colo. 145, 46 Pac. 679; *Aspen Min. & Smelting Co. v. Rucker* (1886) 28 Fed. 220; *Ryan v. Egan* (1903) 26 Utah, 241, 72 Pac. 933, and see cases cited, *infra*, "Partition by Sale."

There is dictum in *Lenfers v. Henke* (1874) 73 Ill. 405, 24 Am. Rep. 263, 5 Mor. Min. Rep. 67, to the effect that mines, when opened, in their very nature are indivisible, and that partition cannot be made at law by metes and bounds, but only by a sale and division of the proceeds. And see *Wilson v. Bogle* (1895) 95 Tenn. 290, 49 Am. St. Rep. 929, 32 S. W. 386, where the court, citing this case, commits itself to the proposition that a mine must necessarily

be partitioned through the instrumentality of a sale.

But, whenever it is possible to readily divide the property without great prejudice to any of the owners, such a partition will be decreed (*Royston v. Miller* (1896) 76 Fed. 50, 18 Mor. Min. Rep. 418; *Manley v. Boone* (1907) 87 C. C. A. 197, 159 Fed. 633, reversing (1905) 2 Alaska, 552 on other grounds; *Mitchell v. Cline* (1890) 84 Cal. 409, 24 Pac. 164; *Ryan v. Egan* (1903) 26 Utah, 241, 72 Pac. 933) for, as between a sale and partition, the courts will favor the latter as not disturbing the existing form of the inheritance. *Royston v. Miller* (1896) 76 Fed. 50, 18 Mor. Min. Rep. 418.

And a chancellor may well require full information as to all the relations of the parties to the property before decreeing any partition which will practically result in dispossessing one of the parties entirely. *Aspen Min. & Smelting Co. v. Rucker* (Fed.) *supra*.

In *Boone v. Manley* (1905) 2 Alaska, 552, reversed on other grounds in (1908) 87 C. C. A. 197, 159 Fed. 633, where the placer mining claims, the pay streak of which ran through their center and was of approximately equal value through its whole length, were owned one fourth by the plaintiffs and three fourths by the defendants, and could not be sold except on partial payments and at a loss of three fourths their actual value, it was decided that partition by metes and bounds was more equitable than by a sale and division of the proceeds. The court said: "While our statute gives to the partition by shares the preference, yet a mining claim is a property whose value lies hidden beneath the ground to such an extent that generally it cannot be divided on the surface, but must be sold. But where its hidden wealth is explored and so ascertained as to be capable of location and fair partition by shares, the rule permits it to be done that way, and the statute requires it."

And in *Manley v. Boone* (1908) 87 C. C. A. 197, 159 Fed. 633, reversing (1905) 2 Alaska, 552, because, under the statute, the court could not itself make the division of the property between the parties, except in the indirect mode of confirming the report of the referees appointed for the purpose of carrying out the order of partition, the court said: "It is quite true that mining property, from its very nature, is not, as a rule, susceptible of division, and consequently that partition of such property must generally result in its sale. . . Still, not only may such property be divided

among the owners in proportion to their respective interests, but, according to the terms of the statute under which the present proceedings were taken, must be so divided unless it be made to appear that a partition thereof cannot be made without great prejudice to the owners. That is a question of fact upon which the evidence in the present case is very conflicting, and we think no good reason appears why the conclusion of the trial court upon it should be disturbed."

In *Ryan v. Egan* (Utah) *supra*, it was decided that a mining claim containing no known veins or bodies of ore, and having no fixed or market value, the only thing giving it value being its locality and close proximity to other mines, was susceptible of partition by metes and bounds, there being no evidence to show that the ground within the boundaries of the claim was of unequal value, or that a partition by such method would result in great prejudice to any of the co-owners.

And in *Heaton v. Dearden* (1852) 16 Beav. (Eng.) 147, where one of two tenants in common of an estate agreed to demise the mines and minerals under his undivided moiety, it was decided that the lessee was entitled to a decree for specific performance, and for a partition of the estate to set out by metes and bounds what portion of the property was included in the demise, and in respect of which the plaintiff was entitled to work the minerals.

And see, *infra*, "Partition by Sale," for cases in which it was decided that partition in kind could not be made; and see also *Maffet's Estate* (1896) 8 Kulp (Pa.) 184.

A court of equity, in a proceeding for partition, may, with the consent of the parties, separate the ownership of the surface from the underlying mineral, giving the surface to one and the mineral to the other, with distinct titles in fee, in severalty. *Brand v. Consolidated Coal Co.* (1906) 219 Ill. 543, 76 N. E. 849; *Ames v. Ames* (1896) 160 Ill. 600, 43 N. E. 592.

And for the purpose of equalizing the shares of the parties in partition to whom the ownership of the surface and the underlying mineral are respectively and separately allotted, the court may order owelty to be paid. *Ames v. Ames* (Ill.) *supra*. And see *Dall v. Confidence Silver Min. Co.* (1868) 3 Nev. 531, 93 Am. Dec. 419, 11 Mor. Min. Rep. 214.

In *Wamsley v. Mill Creek Coal & Lumber Co.* (1904) 56 W. Va. 296, 49 S. E. 141, it was decided that, in partitioning

timber and coal lands, commissioners are not required to report the extent of coal deposits and the acreage, quantity, and quality of timber, considered by them in arriving at their conclusion as to the relative value of the several parcels and shares assigned by them to the parties entitled thereto. The court said: "We hardly see the object of reporting the value of the parcels or any of them, nor of the acreage of coal and timber. The commissioners go upon the land and view the same, taking into consideration everything whatever that may be known, that gives value to each and every part of it, whether of coal, minerals, timber, or the surface for agricultural purposes, and these various elements of value are taken into consideration by the commissioners in arriving at their conclusions, and they equalize the value of the shares of the various parties entitled thereto, by increasing the acreage of those shares which contain less of the elements of value, or decreasing the quantity, as the case may be. It is very evident from the report of the commissioners that they observed, or at least tried to observe, these principles in allotting to the appellants their shares, as they increased their acreage from 185 6/13 acres to 250 acres each, making an excess of 64 1/2 acres of the quantity they would be respectively entitled to, if each and every acre of the premises was of the same value."

— by sale.

To avoid the infliction of a great hardship upon any of the owners, it is generally provided by the laws of most states that the property may be sold in the entirety, and the proceeds of the sale distributed between the co-owners whenever a partition in kind will result in great prejudice to any of such owners. And in a suit for the partition of a mining claim, a sale of the property should never be decreed, except when a partition will result in great prejudice to the respective owners. *Dall v. Confidence Silver Min. Co.* (Nev.) *supra*; and in addition to the cases cited in this section, see cases cited *supra*, "Partition in kind." And before a court will be justified in ordering a sale, the party asking for it must show by a preponderance of evidence that a partition of the property in kind will result in great prejudice to one or more of the co-owners, as nothing will be presumed in favor of a sale. *Ryan v. Egan* (1903) 26 Utah, 241, 72 Pac. 933. The court, quoting from *Lindley, Mines*, § 792, said: "As an abstract

proposition of law, a sale of a mine cannot be ordered in a partition suit, except in cases where partition would be manifestly injurious to the interests of the cotenants. Whether or not a partition can be made without great prejudice to the owners is a question of fact, the decision of which is not aided by judicial notice of any fact or circumstance not proved; and, where a sale is sought, the burden is upon the party urging it to show the facts upon which an order of sale may be made—the presumption being that an actual partition may be had.” *Mitchell v. Cline* (1890) 84 Cal. 409, 24 Pac. 164, is to the same effect.

And if the evidence is substantially conflicting as to whether partition can be made without great prejudice to the owners, the decision of the lower court, ordering a partition, will be sustained on appeal. (Cal.) *Ibid.*

Partition by sale is a matter of absolute right when the conditions prescribed by the statute to authorize a sale are found to exist. *Wilson v. Bogle* (1895) 95 Tenn. 290, 49 Am. St. Rep. 929, 32 S. W. 386.

Where land is principally valuable for its minerals and timber, and the minerals and water are almost exclusively on one end of the tract, and the minerals are undetermined in extent and value, and no equitable or advantageous partition thereof can be made, it is manifestly to the advantage of all the parties that the same should be sold. (Tenn.) *Ibid.*

In *Smith v. Frenche* (1877) 28 N. J. Eq. 115, where there were indications of minerals in some parts of the property sought to be partitioned, the conclusion of the master as to the indivisibility of the property without great prejudice to the interests of the owners was sustained and a sale ordered.

And in *Kemble v. Kemble* (1888) 44 N. J. Eq. 454, 11 Atl. 733, a partition of lands containing mineral deposits, the location, extent, and value of which were uncertain, by allotting a portion of the property between the parties, and ordering a sale of the remainder, was refused because it could not be done without great prejudice to the owners.

In *Ames v. Ames* (1894) 148 Ill. 321, 36 N. E. 110, it was held that mining property consisting of mining lands and machinery for operating the mines, not being susceptible of division between the cotenants, part of whom were infants, without prejudice to the interests of the owners, should be ordered to be sold as an entirety.

Where several persons under several L.R.A.1916D.

leases of different parts of a colliery worked it in partnership, it was decided on a dissolution that one of the co-owners could not insist on a partition, although there were no debts, but that the whole must be sold. *Wild v. Milne* (1859) 26 Beav. (Eng.) 504, 11 Mor. Min. Rep. 207.

In *Brown v. Challis* (1896) 23 Colo. 145, 46 Pac. 679, it is decided that the right of a tenant in common in a lode mining claim to a sale thereof under Mills's Anno. Stat. § 3346, when it could not be partitioned without great prejudice to the owners, was not extinguished by an amendatory act passed pending the partition proceedings.

In *Sheffield Coal & I. Co. v. Alabama Fuel & I. Co.* (1913) 185 Ala. 51, 64 So. 67, where only a portion of the land was underlaid with mineral, which rendered it more valuable than it would be for mere agricultural purposes, but the ore deposits were disclosed to be both rich and lean, so that there was a problematic factor in the natural uncertainty as to the quantity and quality of the ore as well as the difference in the probable cost of extracting the same from such rich or lean deposits, a finding that the land could not be partitioned in kind, and that a sale was necessary, was sustained.

In *Barnes v. Brogglio* (1911) 17 West. L. R. (Can.) 294, upon the application of the owners of the larger part of the undivided interests or shares in a number of mining claims, an order was made under the English partition act of 1868, for a sale of the claims under the direction of the court,—an equitable partition being deemed impossible. It was the right of the plaintiffs to insist upon the sale, the court said, notwithstanding the opposition of the defendant (the holder of the remaining shares, which were much less in amount), based upon the assertion that the possession of the claims by persons who might purchase them and be antagonistic to the defendant, as the independent owner of other property in the vicinity, would prejudice the defendant.

Where, in a suit to partition mining interests, none of the parties had any interest in the surface or soil of the property, but had only title to the coal, gases, salt waters, oil, and minerals of every description in, upon, and under the land, together with the necessary rights of way over and across the land for mining and transporting the coal, gases, etc., with the right to use such timber trees found on the land as might

be necessary for mining purposes, it was held that the interests of the parties could not be partitioned in kind, but that such interests could only be partitioned by a sale thereof and a division of the proceeds among the parties entitled thereto. *Robertson Consol. Land Co. v. Paul* (1907) 63 W. Va. 249, 59 S. E. 1085, 15 Ann. Cas. 775.

In *Rickards v. Rickards* (1866) 36 L. J. Ch. N. S. (Eng.) 176, 16 L. T. N. S. 562, 15 Week. Rep. 380, the court ordered a sale of the entirety of an estate, a part of which was underlaid with coal and other minerals, because of the difficulty and disadvantage of a partition in kind, resulting from the fact that there were twelve cotenants, some of whom were infants, and that the testator from whom they took was only entitled to two thirds of the coal beds.

In *Richardson v. Monson* (1854) 23 Conn. 94, under a statute authorizing a court of equity to order a sale of any real estate, and of any rights existing in, or issuing out of, the same, held in joint tenancy, tenancy in common, or coparcenary, and to distribute the proceeds, whenever partition could not conveniently be made in any other way, it was decided that a court of equity on a bill for that purpose might order the sale of an ore bed, and a distribution of the proceeds thereof, among the tenants in common, owning the same, in conformity with such statute, the constitutionality of which the court sustained.

In *Curtis v. Coleman* (1875) 22 Grant, Ch. (U. C.) 561, it was held that where one tenant in common files his bill against his cotenant, for a partition and an account of the profits of the estate in question, the plaintiff is entitled to such account where it is shown that the defendant has received a greater share from the estate than that to which he is entitled, by the sale of that which composes the property, whether it be turf, brick-clay, plaster, or other such material.

In *Mootry v. Grayson* (1900) 44 C. C. A. 83, 104 Fed. 613, it was sought to set aside the sale of mining property in a suit for partition because of the gross inadequacy of the price for which it was sold, together with circumstances attending the sale which rendered it inequitable for the court to allow the transaction to succeed; but it was decided that higher upset values previously placed upon the property by the court were insufficient to show that the price realized was so inadequate as to render the sale invalid, and subject to collateral im-

peachment for that reason, in the absence of other evidence showing fraud.

But in *Conant v. Smith* (1826) 1 Aik. (Vt.) 67, 15 Am. Dec. 669, 11 Mor. Min. Rep. 199, the court refused to order either a partition or sale of land, valuable chiefly as an ore-bed, because of the inability to ascertain the value of the different parts, and because the parties could obtain a less hazardous and more adequate remedy in chancery, where the enjoyment of the property could be regulated between the owners by restricting them to the proportion of their respective interests by compelling accounts between them, and by appointing a common receiver for all parties.

Partition of oil and gas contained in land, the co-owners of which do not own the surface of the land, cannot be made by any assignment or allotment of sections of the land below the surface, but can be made only by sale and division of the proceeds. *Hall v. Vernon* (1899) 47 W. Va. 295, 49 L.R.A. 464, 81 Am. St. Rep. 791, 34 S. E. 764; *Preston v. White* (1905) 57 W. Va. 284, 50 S. E. 236. *GULF REF. CO. v. HAYNE*, ante, 1147, is to the same effect, and see *Cecil v. Clark* (1900) 47 W. Va. 402, 81 Am. St. Rep. 802, 35 S. E. 11.

And, as has been said, while it is undoubtedly true that a court of equity has the power to order the partition in kind of a tract of land known to have oil or gas, or both, under its surface, the question will always arise as to whether, in the interest of all of the parties, such partition can and ought to be made. *Dangerfield v. Caldwell* (1907) 81 C. C. A. 400, 151 Fed. 554, where the court said: "A division of the land in such fashion as to assign one of these wells to one interest and one to another interest has, as shown by the plot filed by the commissioners, the effect of so butchering the land of all practical purposes as to destroy greatly the value of the several parts for all purposes except the production of gas, and even for that, assuming that gas may be obtained anywhere on the tract, to burden the portion assigned to Rebecca C. Davis with the practical necessity of laying pipe lines over the other portions, and to burden the other portions with rights of way for that and other purposes. Again, it is shown that coal underlies at least a considerable portion of this land, and the division sought to be made unquestionably vastly reduces the value of the land for mining purposes."

In *Spence v. Lucas* (1916) — La. —, 70 So. 796, it was decided that an oil

and gas lease of the whole property, made by a co-owner, duly registered, bears upon the property sold in the hands of a transferee, but that, in a judicial partition of the property by licitation, the lease ceases to exist as to the land, and it cannot be referred to the proceeds of the sale.

An owner of an undivided interest in minerals, gases, etc., underlying a certain tract of land, cannot, in an action against infants who own the remaining undivided interests in such minerals, gases, etc., as well as an undivided like interest in the fee, enforce a sale of all the minerals, gases, etc., on the ground of their indivisibility. *Ball v. Clark* (1912) 150 Ky. 383, 150 S. W. 359; *Scott v. Pond Creek Coal Co.* (1913) 152 Ky. 67, 153 S. W. 23.

Under the Nevada statute, providing that if one of the cotenants files an affidavit showing that the sale of an entire mining claim would be injurious to him, the court must divide the claim, as prescribed by the statute, a sworn answer setting up the same matter takes the place of such affidavit, and is sufficient. *Dall v. Confidence Silver Min. Co.* (1868) 3 Nev. 531, 93 Am. Dec. 419, 11 Mor. Min. Rep. 214.

Estate or interest partible.

Mining claims have been recognized as legal estates of freehold, and are subject to partition. *McConnell v. Pierce* (1904) 210 Ill. 627, 71 N. E. 633; *Ames v. Ames* (1896) 160 Ill. 600, 43 N. E. 592; *Hughes v. Devlin* (1863) 23 Cal. 501, 12 Mor. Min. Rep. 241. And see *Jones v. Wagner* (1870) 66 Pa. 429, 5 Am. Rep. 385, 13 Mor. Min. Rep. 690, where the right to partition is collaterally recognized.

Where mining claims upon public lands are claimed and possessed by several, as joint tenants, tenants in common, or as coparceners, or even as partners, such several interests or estates are in the nature of an estate of inheritance, and liable to be partitioned between the several claimants, the same as other real property. *Hughes v. Devlin* (1863) 23 Cal. 501, 12 Mor. Min. Rep. 241.

The mere fact that a mining claim is owned and worked by several persons as partners is no valid objection to a partition of the same between the owners, where the answer does not set up, and it is not shown, that a suit in equity is necessary to settle the accounts and adjust the business of the partnership. And in such case all the material allega-

tions of the complaint for partition which are not denied by the answer are deemed admitted for the purposes of the trial. (Cal.) *Ibid.*

And under the statutes of Colorado, partition of a mining claim held by joint owners, under the possessory rights given by acts of Congress, may be had, notwithstanding the legal title has not yet passed from the general government. *Aspen Min. & Smelting Co. v. Rucker* (1886) 28 Fed. 220. The court said: "It is well to understand definitely what the title of these parties is. The averment of the bill is that they are owners, and in possession. The answer, admitting the ownership, simply pleads that the patent has not issued, and that the fee-simple title remains in the government. The import of these averments is that the equitable title is in the parties; the legal title in the government. The property is called a 'mining claim,' and it is alleged in the bill that it was discovered and located by certain parties in 1880, all of whose interests have become vested in the present litigants. The statutes of the United States provide that, upon performance of certain conditions, the discoverer of a mine becomes entitled to a patent. If all these conditions have been performed, the full equitable title is vested in the discoverer, and all that the government retains is the naked legal title, in trust for the equitable owner. If only partially performed, he has an absolute right of possession, and an inchoate title, which further performance will perfect and complete. Such a right, possessory in its nature, yet coupled, under existing laws, with further rights as to acquisition of title, is declared by the statutes, and the decisions of the supreme court of Colorado, to be a real-estate title. Such a property passes to the heir, is subject to seizure and sale as real estate, must be conveyed by deed, and is subject to partition. *Gillett v. Gaffney* (1877) 3 Colo. 351; *Sears v. Taylor* (1877) 4 Colo. 40, 5 Mor. Min. Rep. 318; *Filmore v. Reithman* (1881) 6 Colo. 124. See also *McKeon v. Bisbee* (1858) 9 Cal. 142, 70 Am. Dec. 642, 2 Mor. Min. Rep. 309; *Watts v. White* (1859) 13 Cal. 324, 13 Mor. Min. Rep. 11; *Merritt v. Judd* (1859) 14 Cal. 64, 6 Mor. Min. Rep. 62; *Lowe v. Alexander* (1860) 15 Cal. 302; *Hughes v. Devlin* (1863) 23 Cal. 502, 12 Mor. Min. Rep. 241; *Spencer v. Winselman* (1871) 42 Cal. 479, 2 Mor. Min. Rep. 334; *Dall v. Confidence Silver Min. Co.* (1867) 3 Nev. 531, 93 Am. Dec. 419, 11 Mor. Min. Rep. 214." Concerning *Strettell v. Bal-*

lou (1881) 3 McCrary, 46, 9 Fed. 256, 11 Mor. Min. Rep. 220, the court said: "In that case it appeared that the title to the property in controversy was in the United States, and that the parties had jointly a possessory claim or interest, with the right to take ore therefrom, but had no other title. It was held this court had no jurisdiction because the complainant had no title to the land. If this case established a rule of property, I should be reluctant to depart from it, even if I did not assent to its reasonings and conclusions. The maxim stare decisis would seem applicable. As, however, nothing was involved save a matter of practice and a question of forum, I do not consider myself concluded by it."

However, a bare "mining right," it has been held, is not an estate which can be the subject of an action for partition. *Smith v. Cooley* (1884) 65 Cal. 46, 2 Pac. 880.

Thus, a grant of an undivided interest in a piece of mining ground, expressly conditioned that no rights are conveyed except a mining right upon the premises, vests in the vendee only the right of taking from the land any minerals or ores contained in it to the extent of the interest granted. It does not constitute him a copartner, joint tenant, or tenant in common with the vendor in the land itself; and his interest is not an estate which can be the subject of an action for partition. (Cal.) *Ibid*.

An estate in minerals in the soil, created by a severance of the title to the surface and the minerals, is the subject of partition. *Ball v. Clark* (1912) 150 Ky. 383, 150 S. W. 359; *McConnell v. Pierce* (1904) 210 Ill. 627, 71 N. E. 622; *Brand v. Consolidated Coal Co.* (1906) 219 Ill. 543, 76 N. E. 849.

So, in *Brand v. Consolidated Coal Co.* (Ill.) *supra*, it was held that tenants in common of coal in place, the title to which had been severed from the title to the surface, were entitled to a partition, but that they had to be tenants in common to have that right.

But a bill to partition coal in place, alleging a conveyance by the complainant to defendant of the right to mine three fourths of the coal under her lands, cannot be maintained where it alleges that the defendant has mined and removed a portion of the coal under the land, the amount and area of which are unknown to the complainant, instead of alleging that defendant had mined and removed a portion of the three fourths of the coal it had the right to mine, since L.R.A.1916D.

there is in such case nothing to show that any part of the three fourths remains in place under the lands to be partitioned. (Ill.) *Ibid*.

In *Canfield v. Ford* (1858) 28 Barb. (N. Y.) 336, 11 Mor. Min. Rep. 201, affirming (1857) 16 How. Pr. 473, it was decided that a deed to one and his heirs and assigns forever of all the mines, ores, minerals, and metals in or upon certain lands, the same being a conveyance of all the estate, right, title, etc., whatsoever, of the grantor in and to such mines, ores, etc., together with the right of ingress and egress to raise, work, and carry away such minerals, and to put up all buildings and to use all lands necessary for that purpose, conveyed an estate of inheritance and such an interest as came within the intent and meaning of the provisions of the Revised Statutes relative to partition; and that an action was maintainable for the partition of such interest. The Revised Statutes, mentioned here, provided that when several persons should hold and be in possession of any lands, tenements, or hereditaments, as joint tenants, or as tenants in common, in which one or more of them should have estates of inheritance, or for life or lives, or for years, any one or more of such persons, being of full age, might apply to the court for a division or partition of such premises, according to the rights of the respective parties interested therein, and for sale of such premises, if it should appear that a partition could not be made without great prejudice to the owners. And in conclusion the court said: "This is a certain grant, and no difficulty occurs in making equality of division. But if the provisions of our Revised Statutes are not broad enough to include the power to partition, it has been settled that this court, as now constituted, has common-law jurisdiction to partition real estate (Story, Eq. Jur. §§ 646, 658; *Smith v. Smith* (1843) 10 Paige (N. Y.) 470); limited, however, to the power to divide estates certain. It is only necessary in a court of equity, to entitle to partition, so far as this point is in question, to show that equality can be obtained, in value, of lands; especially in advantages and profits redounding from each share to the several owners (Allnat, Partition, 10). Whatever is capable of being divided may be the subject of partition in equity."

And under the statutes of Nevada, Gen. Stat. § 3295, providing that, in actions for the partition of real property, "the rights of the several parties, plain-

tiffs as well as defendants, may be put to issue, tried and determined by such action," the rights of the respective parties in a mine may be determined in the suit for partition, and it is immaterial whether the title of the plaintiff is legal or equitable, as he is entitled to the same relief. *Royston v. Miller* (1896) 76 Fed. 50, 18 Mor. Min. Rep. 418.

In *Beardsley v. Kansas Natural Gas Co.* (1908) 78 Kan. 571, 96 Pac. 859, it was decided that an ordinary oil and gas lease does not convey an interest in real estate, or any present title to the oil and gas which may be found in the leased premises, but merely grants the privilege of exploring for oil and gas, and the right to sever the same if found, and that since the provisions of the statute relating to partition apply to real estate only, a petition in an action for the partition of property other than real estate, such as the right of the lessees under an ordinary oil and gas lease, will be deemed insufficient unless it contains averments which show the condition of the property to be such that equitable intervention is necessary to preserve the property or to protect the interests of the owners thereof. The court said: "This court has held in several cases that such a lease grants no estate in the land, or in the oil or gas which it may contain. It merely creates a license to enter and explore for oil and gas, and to sever them if found. *Rawlings v. Armel* (1905) 70 Kan. 778, 79 Pac. 683; *Kansas Natural Gas Co. v. Neosho County* (1907) 75 Kan. 339, 89 Pac. 750; *Phillips v. Springfield Crude Oil Co.* (1908) 76 Kan. 783, 92 Pac. 1119. That such property, or indeed any property of a personal character, owned in common, may be partitioned among its several owners, where the nature of the property is such that its division in kind is possible and practical, seems to be generally conceded. If the property is not susceptible of such a division, then a distribution will be made which seems to be most nearly equivalent to possession in severalty. This may be effectuated by a sale and an equitable division of the proceeds among the owners, or by an actual division of the property, or otherwise, as may be equitable. The power to make such partition or division of personal property belongs exclusively to courts of equity, and they have generally exercised such power where no other remedy is provided by statute. . . . No provision for the partition of personal property has been provided by the statutes of this state. The statu-

tory provisions relating to partition apply to real estate only. . . . The petition, in this case, appears to have been drawn upon the theory that a compliance with the statute was sufficient, and it merely states the kind of property owned by the parties, and the interest of each therein. No facts are stated which indicate loss in value of the property, mismanagement, irreconcilable differences as to the disposition or control of the property, or other peculiar circumstances which justify equitable action. For the want of these facts, we think the petition is insufficient, and the demurrer was properly sustained."

An oil and gas lease executed by one tenant in common without the knowledge of his cotenants is valid as to his interest, though void as to theirs, and if afterwards he joins his cotenants in such a lease to another person who has notice, no title to his interest passes to the new lessee; but each lessee has a valid lease as to the interests of his respective lessors, and while neither lessee is entitled to a partition, they may, by agreement with each other, operate for oil and gas while the premises are undivided, or either of the lessors can maintain partition, and in that way give to his lessee the sole right to operate for oil and gas, in the portion of the land which may be set off to such lessor. *Zeigler v. Brenne-man* (1908) 237 Ill. 15, 86 N. E. 597.

And in *Watford Oil & Gas Co. v. Shipman* (1908) 233 Ill. 9, 122 Am. St. Rep. 144, 84 N. E. 53, it is held that the lessee under an oil and gas lease has no right to compulsory partition of the oil and gas in place, considered separately from the land, or of the land itself.

And a grantee from one tenant in common of the right to dig ores cannot have a partition of the premises. *Boston Franklinite Co. v. Condit* (1869) 19 N. J. Eq. 394, 14 Mor. Min. Rep. 301. While the deed in such case will be held to bind the grantor, it is void as to his cotenants. The reason is, that it would prejudice the right of the cotenants to a partition. The court said: "Each tenant in common of an undivided moiety has a right to partition by having one half of the whole premises set off to him; he must not be compelled to partition one part with one cotenant, and another with another cotenant, as he would be if such conveyance were good; but the partition must be made into two shares between him and his cotenant, and then, if the part conveyed by the cotenant shall fall within the share allotted to him, his deed for the

same will bind him, and convey it to his grantee. So, if the ores in one undivided half be conveyed as in this case, the cotenant will not be affected by it, but would be entitled to a partition of the whole between him and his original cotenant, without regard to the rights of the grantee. The whole tract must be divided into two shares equal, not in quantity, but in value; the ores and mines on one part would be valued as against the meadows, water power, or buildings, on the other part. And if the part containing the mines or minerals were allotted in partition under the acts requiring partition by lot, or assigned on other proceedings to the cotenant, he would have the right to retain it, although the grantee of the ores should thereby lose all right. His title as against such cotenant is void." *Ball v. Clark* (1912) 150 Ky. 383, 150 S. W. 359, is to the same effect. And in the same connection see *Adam v. Briggs Iron Co.* (1851) 7 Cush. (Mass.) 361, 13 Mor. Min. Rep. 225, holding that a reservation of his interest in the mines in and upon the land granted by a tenant in common is void.

In *Grubb v. Beyard* (1851) 2 Wall. Jr. 81, Fed. Cas. No. 5,849, 9 Mor. Min. Rep. 199, it was decided that the right or privilege to dig, take, and carry away ore to be found on certain premises was not divisible or susceptible of apportionment, and that an assignee of the right, unless clothed with the whole of it, had nothing, and could support no suit as against the owner of the soil.

A purchaser of the interests of some of the heirs in coal in place, leased by their paternal ancestor, with the right in the lessee to mine it to exhaustion in

consideration of a stipulated royalty, or a fixed sum in lieu thereof if a minimum quantity is not mined annually, the lease to be void upon default in payment of such fixed sum, is not entitled to partition of the said coal, in his suit against other heirs for that purpose, during the life of the lease. *McMullen v. Blecker* (1908) 64 W. Va. 88, 131 Am. St. Rep. 894, 60 S. E. 1093.

And in *Hanna v. Clark* (1902) 204 Pa. 149, 53 Atl. 758, it was held that partition of oil in and under certain land was properly refused, such lands being subject to oil leases previously made and still in effect.

But in *Haeussler v. Missouri Iron Co.* (1892) 110 Mo. 188, 16 L.R.A. 220, 33 Am. St. Rep. 431, 19 S. W. 75, 17 Mor. Min. Rep. 458, it was held that possession of land under a mining lease is not adverse to the interests of the owners of the fee, so as to prevent partition between them. And see *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.* (1908) 48 Tex. Civ. App. 555, 107 S. W. 609.

In a suit between tenants in common for the partition of a mining interest in real estate, which has been carved out of the fee, the owner of the fee, who is the common source of title to all the tenants, is not a necessary party. *Canfield v. Ford* (1858) 28 Barb. (N. Y.) 336, 11 Mor. Min. Rep. 201.

And in an action by the lessees in an oil and gas lease for a partition of their interests thereunder, it was held that the lessors were not necessary parties. *Beardsley v. Kansas Natural Gas Co.* (1908) 78 Kan. 571, 96 Pac. 859.

W. W. A.

MINNESOTA SUPREME COURT.

BERTHA McKNIGHT, Appt.,

v.

MINNEAPOLIS STREET RAILWAY COMPANY, Respnt.

(127 Minn. 207, 149 N. W. 131.)

Judgment — split cause of action.

1. A single and entire cause of action cannot be split up into several suits, and the judgment in a suit brought upon such

Headnotes by TAYLOR, C.

Note. — For judgment in action for personal injury or death as bar to a subsequent action based on a different ground of negligence, see annotation following this case, post, 1167.
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cause of action is a bar to a second suit thereon, although the complaint in the second suit may set forth grounds for relief which were not set forth in the complaint in the first suit.

For other cases, see *Action or Suit, II. c.* in *Dig. 1-52 N. S.*

Negligence — ground of liability.

2. In suits based upon negligence, the cause of action is the violation of the ultimate duty to exercise due care that another may not suffer injury.

For other cases, see *Negligence, I.* in *Dig. 1-52 N. S.*

Judgment — negligence — other acts.

3. A judgment rendered in a suit brought by a passenger to recover for injuries sustained while alighting from a street car is a bar to a subsequent suit brought by the same passenger against the same defendant

to recover for the same injuries, although the particular acts of negligence charged may be different in the two suits, as the cause of action in both suits is the violation of the ultimate duty to afford safe egress from the car.

For other cases, see Action or Suit, II. v, in Dig. 1-52 N. S.

(October 23, 1914.)

APPEAL by plaintiff from a judgment of the District Court for Hennepin County in defendant's favor and from an order denying a motion for new trial in an action brought to recover damages for personal injuries alleged to have been caused by the negligent construction of defendant's car. Affirmed.

The facts are stated in the Commissioner's opinion.

Mr. Francis B. Hart for appellant.

Messrs. N. M. Thygeson and John F. Dahl, for respondent:

Where there are several items of damage arising, the claim cannot be divided and made the subject of several suits.

Pierro v. St. Paul & N. P. R. Co. 39 Minn. 461, 1 Am. St. Rep. 673, 40 N. W. 520; *Memmer v. Cary*, 30 Minn. 458, 15 N. W. 877; *Ziebarth v. Nye*, 42 Minn. 541, 44 N. W. 1027; *O'Brien v. Manwaring*, 79 Minn. 86, 79 Am. St. Rep. 426, 81 N. W. 746; *King v. Chicago, M. & St. P. R. Co.* 80 Minn. 83, 50 L.R.A. 161, 81 Am. St. Rep. 238, 82 N. W. 1113; *H. W. Wilson Co. v. A. B. Farnham & Co.* 97 Minn. 153, 106 N. W. 342; *Keene v. Lobdell*, 85 Minn. 110, 88 N. W. 251; *Bazille v. Murray*, 40 Minn. 48, 41 N. W. 238; *Thomas v. Joslin*, 36 Minn. 1, 1 Am. St. Rep. 624, 29 N. W. 344.

A judgment on the merits rendered in a former suit between the same parties upon the same cause of action, by a court of competent jurisdiction, is conclusive.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; *David Bradley Mfg. Co. v. Eagle Mfg. Co.* 6 C. O. A. 661, 18 U. S. App. 349, 57 Fed. 980; *Lake County v. Platt*, 25 C. C. A. 87, 49 U. S. App. 216, 79 Fed. 567; *Fayerweather v. Ritch*, 34 C. C. A. 61, 63 U. S. App. 112, 91 Fed. 721; 2 Black, Judgm. 2d ed. § 731; *Chavent v. Schefer*, 59 Fed. 231; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Chicago, K. & W. R. Co. v. Anderson County*, 47 Kan. 766, 29 Pac. 96; *Bates v. Spooner*, 45 Ind. 489; *Pugh v. Williamson*, 61 Mo. App. 165; *Bailey v. Bailey*, 115 Ill. 551, 4 N. E. 394; *Rogers v. Higgins*, 57 Ill. 244; *Newell v. Neal*, 50 S. C. 68, 27 N. E. 560; *Stark v. Starr*, 94 U. S. 477, 485, 24 L. ed. 276, 278; *Thompson v. Myrick*, 24 Minn. 11; *Columb v. Webster Mfg. Co.* 43 L.R.A. 195, 28 C. C. A. 225, 50 U. S. App. 264, 84 L.R.A. 1916D.

Fed. 592; McCain v. Louisville & N. R. Co. 97 Ky. 804, 22 S. W. 325; *Beauregard v. Webb Granite & Constr. Co.* 160 Mass. 201, 35 N. E. 555; *Liimatainen v. St. Louis River Dam & Improv. Co.* 119 Minn. 238, 137 N. W. 1099; *Armstrong v. Chicago, M. & St. P. R. Co.* 45 Minn. 85, 47 N. W. 459; *Gilbert v. Boak Fish Co.* 86 Minn. 365, 58 L.R.A. 735, 90 N. W. 767; *Jungnitsch v. Michigan Malleable Iron Co.* 121 Mich. 460, 80 N. W. 245; *West v. Hennessey*, 58 Minn. 133, 59 N. W. 984; *Taylor v. Castle*, 42 Cal. 367, 11 Mor. Min. Rep. 484; *Rossman v. Tilleny*, 80 Minn. 160, 81 Am. St. Rep. 247, 83 N. W. 42; *Bazille v. Murray*, 40 Minn. 48, 41 N. W. 238; *Thomas v. Joslin*, 36 Minn. 1, 1 Am. St. Rep. 624, 29 N. W. 344.

Taylor, C., filed the following opinion:

Plaintiff was a passenger upon one of defendant's street cars, and while alighting therefrom fell and was injured. She brought an action against defendant for damages in which she charged that defendant caused the accident by suddenly and negligently closing the gates and starting the car while she was in the act of alighting. After a trial lasting several days the jury returned a verdict for defendant and thereafter judgment was duly entered thereon in favor of defendant. Subsequently she brought the present action against the defendant for damages for the same injury, and in this action charged that the car was provided with a defective step, and that she caught her foot on the defect in the step, and fell in consequence thereof. The trial court held that the judgment in the first action barred a recovery in the present action, and the only question for decision is whether the trial court was correct in so holding.

In *Thompson v. Myrick*, 24 Minn. 4, decided in 1877, the court held that a judgment decides "every matter which pertains to the cause of action or defense set up in the action, or which is involved in the measure of relief to which the cause of action or defense entitles the party, even though such matter may not be set forth in the pleadings, so as to admit proof and call for an actual decision upon it;" that "where the cause of action is entire and indivisible the judgment determines all the right of the parties upon it, although it may be but partially presented to the court;" that "all claim for relief, special or general, upon the cause of action or defense, is disposed of and determined by the judgment when the particular circumstances justifying such relief are not pleaded, as effectually as when they are fully set out;" and that such judgment is a bar to a second suit, if such sec-

ond suit "presents no new cause of action, but only new grounds for relief upon the same cause of action."

The rule announced in that decision, and which, in later cases, has been summarized in the statement that "a single and entire cause of action cannot be split up into several suits," has been consistently followed ever since. *Geiser Threshing Mach. Co. v. Farmer*, 27 Minn. 428, 8 N. W. 141; *Pierro v. St. Paul & N. P. R. Co.* 39 Minn. 451, 12 Am. St. Rep. 673, 40 N. W. 520; *Bazille v. Murray*, 40 Minn. 48, 41 N. W. 238; *Northern Trust Co. v. Crystal Lake Cemetery Asso.* 67 Minn. 131, 69 N. W. 708; *O'Brien v. Manwaring*, 79 Minn. 86, 79 Am. St. Rep. 426, 81 N. W. 746; *King v. Chicago, M. & St. P. R. Co.* 80 Minn. 83, 50 L.R.A. 161, 81 Am. St. Rep. 238, 82 N. W. 1113; *Gilbert v. Boak Fish Co.* 86 Minn. 365, 58 L.R.A. 735, 90 N. W. 767; *H. W. Wilson Co. v. A. B. Farnham & Co.* 97 Minn. 153, 106 N. W. 342; *Liimatainen v. St. Louis River Dam & Improv. Co.* 119 Minn. 238, 137 N. W. 1099; *Kinzel v. Boston & D. Farm Land Co.* 124 Minn. 416, 145 N. W. 124.

The decisions cited and relied upon by plaintiff do not establish a different rule. In *West v. Hennessey*, 58 Minn. 133, 59 N. W. 984 the court held that the cause of action in the first suit was not the same as in the second suit, although both arose out of the same transaction. In the second suit plaintiff sought to recover damages sustained through false representations made by defendant and relied upon by plaintiff. No question of fraud or false representations was involved in the first suit. In *Wayzata v. Great Northern R. Co.* 67 Minn. 385, 69 N. W. 1073, it was held that a judgment defining the rights of defendant in respect to the use of the streets of the village in connection with a passenger station and boat landing maintained by it in the village was not conclusive as to its rights in such streets in an action brought after it had removed its station and boat landing to a point outside the village. In *Swanson v. Great Northern R. Co.* 73 Minn. 103, 75 N. W. 1033, a demurrer had been sustained on the ground that the complaint failed to state a cause of action, and it was held that the judgment rendered pursuant thereto did not bar a subsequent suit in which the cause of action alleged was valid and sufficient. In *Rossman v. Tillyen*, 80 Minn. 160, 81 Am. St. Rep. 247, 83 N. W. 42, plaintiff failed in a suit to recover the contract price for performing certain work, for the reason that he had not completed the work; and the judgment therein was held not to bar a subsequent suit for the reasonable value L.R.A.1916D.

of the services rendered, it appearing that plaintiff had been prevented from completing the contract by the act of defendant. In *Kaaterud v. Gilbertson*, 96 Minn. 66, 104 N. W. 763, it was held that a judgment in favor of defendant, in a suit to have a deed declared a mortgage and to redeem therefrom, did not bar a subsequent suit to enforce specific performance of an oral contract to convey to plaintiff the same land involved in the former suit. In *Stitt v. Rat Portage Lumber Co.* 101 Minn. 93, 111 N. W. 948, where plaintiff failed to recover upon a certain express contract, the judgment therein was held not a bar to a subsequent action upon a different contract, although both contracts related to the same transaction. In *Marshall v. Gilman*, 52 Minn. 88, 53 N. W. 811, it was held that an action for rescission, which failed because plaintiff had waived his right to rescind, did not bar an action for deceit growing out of the same transaction.

In the above cases the court held that the two suits were based upon different causes of action, and therefore that the prosecution of the second was not barred by the judgment in the first. In the discussion as to whether the two causes of action were the same, it is stated in some of the cases, perhaps without making it entirely clear that the designated test should be applied to the ultimate cause of action, and not to the particular facts alleged in the pleadings, that the "test as to whether a former judgment is a bar is to inquire whether the same evidence will sustain both the former and the present action." Plaintiff invokes this rule, and insists that this test shows that the present suit is not barred by the judgment in the former suit. She argues that as she did not allege, and hence could not prove, the defect in the step in the former suit, and has not alleged, and hence cannot prove, the negligent starting of the car in the present suit, the present suit is not based upon the same cause of action as the former. This does not necessarily follow. In arriving at this conclusion plaintiff overlooks the rule stated in *Thompson v. Myrick*, supra, and repeatedly reiterated in later cases, that the judgment decides "every matter which pertains to the cause of action, . . . even though such matter may not be set forth in the pleadings so as to admit proof" thereof; and that "all claim for relief, special or general, upon the cause of action or defense, is disposed of and determined by the judgment, when the particular circumstances justifying such relief are not pleaded, as effectually as when they are fully set out;" and that such judgment bars a second suit which "presents no new cause of action, but only new grounds

for relief upon the same cause of action." The test is not whether the two complaints are so drawn that the same evidence would be admissible under both, but whether the same evidence which will sustain the cause of action upon which a recovery is sought in the second suit would also have sustained the cause of action upon which a recovery was sought in the first suit. Whether the instant case falls within or without the rule depends upon whether the wrong for which redress is sought is the same wrong for which redress was sought in the former suit, and not upon whether the complaint sets forth grounds for relief which were not set forth in the former complaint. The case of *Liimatainen v. St. Louis River Dam & Improv. Co.* 119 Minn. 238, 137 N. W. 1099, is decisive of the present case. It is there said that "one action only lies to redress a single wrong, or, as frequently expressed, a single tort gives rise to a single cause of action, and a plaintiff cannot be permitted to indulge in unnecessary litigation by splitting up a cause of action and prosecuting more than one suit thereon."

And the decision in *Columb v. Webster Mfg. Co.* 43 L.R.A. 195, 28 C. C. A. 225, 50 U. S. App. 264, 84 Fed. 592, holding that a judgment for defendant in a suit to recover for personal injuries barred a subsequent suit between the same parties to recover for the same injuries, although additional acts of negligence were alleged in the second suit was approved. It is further stated in the *Liimatainen* Case that

"a cause of action for wrong is predicated upon the violation of an ultimate duty, and though the performance of such duty may require the doing or omission of many separate and distinct acts, the omission or doing of which would constitute a violation of the ultimate duty, it is nevertheless the violation of the latter, and not the specific acts or omissions, which constitutes the actionable wrong."

In suits based upon negligence, the cause of action is the violation of the ultimate duty to exercise due care that another may not suffer injury. In the instant case plaintiff was a passenger upon defendant's street car, and it was the duty of defendant to afford her safe egress therefrom. Her claim for damages is grounded upon the charge that defendant violated such duty. The violation of this duty constitutes her cause of action. In the first suit she charged that defendant violated this duty by suddenly starting the car while she was in the act of alighting. In the present suit she charges that defendant violated such duty by providing a defective step for her to use in descending from the car. Both suits are based upon the violation of the ultimate duty to afford safe egress from the car. The second suit "presents no new cause of action, but only new grounds for relief upon the same cause of action," and under the authorities cited is barred by the judgment in the former suit. It follows that the decision of the trial court was correct, and must be affirmed.

Annotation—Judgment in action for personal injury or death as bar to a subsequent action based on a different ground of negligence.

As to the effect of a pending action under a statute authorizing actions to recover for injuries resulting in death, as a bar or abatement of an action under another statute, see note appended to *Nashville, C. & St. L. R. Co. v. Hubble*, L.R.A. 1915E, 1132. As to the effect of a judgment rendered in the lifetime of the deceased or subsequently to his death as a bar to any further action to recover for the death, see note appended to *St. Louis & S. F. R. Co. v. Goode*, L.R.A. 1915E, 1141. As to several actions for death or injury causing death, see note appended to *Rowe v. Richards*, L.R.A. 1915E, 1095.

As indicated by its title, this note is limited to cases involving the effect of a judgment for the defendant in an action to recover for personal injuries on another action to recover for the same injuries based upon a different ground of negligence. L.R.A.1916D.

It is a rule of law that parties to an action must present all the facts and raise all the issues which may be relied upon for a recovery or as a defense; hence the judgment in an action will operate as an estoppel not only as to questions of fact and law which were raised and decided in the action in which the judgment was rendered, but also as to all grounds of recovery or defense which might have been, but were not, presented or passed upon. This general rule as applied to the question here presented renders the judgment for the defendant in an action for personal injuries received in a certain accident an estoppel or bar to another action to recover for the same injuries by or in behalf of the same parties, although upon a different ground of negligence from that presented in the former action. *Columb v. Webster Mfg. Co.* (1898) 43 L.R.A. 195, 28 C. C. A. 225, 50 U. S. App.

264, 84 Fed. 592; *McCain v. Louisville & N. R. Co.* (1893) 97 Ky. 804, 22 S. W. 325; *McKNIGHT v. MINNEAPOLIS STREET R. Co.* ante, 1164.

In *Beauregard v. Webb Granite & Constr. Co.* (1893) 160 Mass. 201, 35 N. E. 555, in considering the question of election of different grounds of negligence, a question not included herein, the court said that the whole liability of the defendant for the death of an employee ought to be tried in one action, and the judgment in that action ought to be a bar to any subsequent action be-

tween the same parties for the same cause of action.

While not within the scope of this note, attention is called to *Ogden v. Chicago, R. I. & P. R. Co.* (1908) 131 Mo. App. 331, 111 S. W. 516, holding that a judgment for defendant in an action to recover damages for overflowing plaintiff's land, based upon certain alleged negligence, was a bar to another action to enforce the same cause of action based upon a different ground of negligence.

A. G. S.

NEBRASKA SUPREME COURT.

ETTA GIFFIN, Appt.,

v.

GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN
and

ELEANOR MASURETTE et al., Impleaders.

(— Neb. —, 157 N. W. 113.)

Insurance — right of divorced wife.

1. A wife named as beneficiary in a fraternal benefit certificate, who thereafter procures an absolute divorce, without accruing alimony, forfeits her rights to such benefits, where the law of the state or the by-laws of the society restrict the payment of its benefits to the families, heirs, blood relations, affianced wife, or persons dependent upon the member.

For other cases, see *Insurance*, VI. d, 2, b, in *Dig. 1-52 N. S.*

Interpleader — insurance claimants.

2. The act of a fraternal society in filing a bill of interpleader to determine conflicting claims is proper, and cannot prejudice the rights of claimants when the same are fixed by law.

For other cases, see *Interpleader*, in *Dig. 1-52 N. S.*

(March 18, 1916.)

A PPEAL by plaintiff from a judgment of the District Court for Buffalo County in favor of the interpleaded defendants in an action brought to recover the amount of a benefit certificate. Affirmed.

The facts are stated in the Commissioner's opinion.

Headnotes by MARTIN, C.

Note. — The effect of divorce on rights of beneficiaries under insurance policy or benefit certificate is treated in the notes to *Wallace v. Mutual Ben. L. Ins. Co.* 3 L.R.A. (N.S.) 478; *Green v. Green*, 39 L.R.A. (N.S.) 370; and *Filley v. Illinois L. Ins. Co.* L.R.A.1915D, 130. L.R.A.1916D.

Messrs. J. M. Easterling and T. F. Hamer for appellant.

Messrs. H. M. Sinclair and W. D. Oldham, for appellees:

Plaintiff was not within the class that could be paid death benefits under the statute of this state.

Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 397, 2 Ann. Cas. 660; *Fisher v. Donovan*, 57 Neb. 361, 44 L.R.A. 383, 77 N. W. 778; *Britton v. Supreme Council R. A.* 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675; *National Mut. Aid Asso. v. Gonser*, 43 Ohio St. 1, 1 N. E. 11; *Alexander v. Parker*, 144 Ill. 355, 19 L.R.A. 187, 33 N. E. 183; *Schonfield v. Turner*, 75 Tex. 324, 7 L.R.A. 189, 12 S. W. 626; *Tyler v. Odd Fellows' Mut. Relief Asso.* 145 Mass. 134, 13 N. E. 360; *Dahlin v. Knights of Modern Maccabees*, 151 Mich. 644, 115 N. W. 975; *Green v. Green*, 147 Ky. 608, 39 L.R.A. (N.S.) 370, 144 S. W. 1073, Ann. Cas. 1913D, 683; *Kirkpatrick v. Modern Woodmen*, 103 Ill. App. 468.

The petition does not state a cause of action.

Warner v. Modern Woodmen, 67 Neb. 233, 61 L.R.A. 603, 108 Am. St. Rep. 634, 93 N. W. 397, 2 Ann. Cas. 660; *Fisher v. Donovan*, 57 Neb. 361, 44 L.R.A. 383, 77 N. W. 778; *Leumann v. Grand Lodge, A. O. U. W.* 85 Neb. 803, 124 N. W. 475; *Skillings v. Massachusetts Ben. Asso.* 146 Mass. 217, 15 N. E. 566; *Wolf v. District Grand Lodge, No. 6, I. O. B. B.* 102 Mich. 23, 60 N. W. 445.

The right to the "death benefit" by operation of law vested in appellees at the death of the member, Thomas Coppinger, their ancestor.

Schmidt v. Northern Life Asso. 112 Iowa, 41, 51 L.R.A. 141, 84 Am. St. Rep. 323, 83 N. W. 800; *Britton v. Supreme Council, R. A.* 46 N. J. Eq. 102, 19 Am. St. Rep. 376, 18 Atl. 675; *William's Appeal*, 92 Pa. 69; *Supreme Lodge, K. L. H. v. Menkhausem*,

209 Ill. 277, 65 L.R.A. 508, 101 Am. St. Rep. 239, 70 N. E. 567; *Knights of Columbus v. Rowe*, 70 Conn. 545, 40 Atl. 451; *Lister v. Lister*, 73 Mo. App. 99; 29 Cyc. 156.

Martin, C., filed the following opinion:

Thomas Coppinger was a member in good standing of the Grand Lodge of Ancient Order of United Workmen, a fraternal insurance society organized under the laws of this state. On the 25th day of June, 1901, the society, through its subordinate lodge at Gibbon, Nebraska, issued to him a certificate for \$1,000, wherein the plaintiff, then his wife, was named as beneficiary. On August 25, 1912, the plaintiff obtained an absolute divorce from said Thomas Coppinger, and on the 4th day of March, 1913, said Coppinger died. No change of beneficiary was made in the benefit certificate after the plaintiff procured her divorce. She brought this action against the society to recover the amount of the benefit certificate. The defendant society paid the amount of this benefit certificate into court on an order of interpleader granted on its own showing and motion. The interpleaded defendants are the sisters and brother of said Thomas Coppinger, deceased. The interpleaded defendants had judgment for the amount of the benefit certificate, less the sum of \$130.40, which it was shown that plaintiff had paid as dues upon the said certificate. The plaintiff was allowed an equitable lien upon the benefit certificate fund for the amount expended by her in keeping the benefit certificate in force. From that decision the plaintiff is here on appeal.

Thus it appears that the controversy here is between the divorced wife and the heirs of the insured. The contract of the parties is made up of the benefit certificate, the by-laws and constitution of the society, and the laws of the state under which said society is organized. Authorities need not be cited to the point that all these are elements which constitute the contract as a whole. The insured and the insuring society are alike bound by them. Nor need cases be presented to support the well-established proposition that in benefit societies the beneficiary at the time of the issuance of the certificate acquires no vested interest therein, but that the same is simply an expectancy. Section 98 of the laws of said society is as follows: "Each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall in every instance be one or more members of his family, or someone related to him by blood, or his affianced wife."

This section was strictly complied with L.R.A.1916D.

by the designation of the member's wife as his beneficiary. Under the doctrine laid down by some of the authorities, that a designation of beneficiary valid in its inception remains so, we might be called upon to reverse this case, if it were not for the laws of said society and the statutory law of the state relating to such subject. Section 98 of the laws of said society provides that if the beneficiary named in the certificate shall die during the lifetime of the member and the member shall have made no other direction, the benefit shall be paid to his widow, and in case he leaves no widow surviving him, then said benefit shall be paid to his children or blood relatives, etc. It is argued that the only contingency provided for in this section is the death of the beneficiary during the life of the member, and that divorce is not death. This section fixes the order of payment, and it should be construed in a way to effectuate the intention of the society. When the law severs the bonds of matrimony, the relationship of husband and wife is broken as effectually as if death had removed one of the parties. Section 3298, Rev. Stat. 1913, is as follows: "Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, the member."

Said sections of the society are clearly a limitation upon the insured, and require him to designate as his beneficiary someone related to him as in the said sections provided, and to whom the beneficiary fund due at his death shall and can be paid. These provisions of the society's laws and the section of the state law referred to are a prohibition against the payment of any certificate by the society to any person who does not belong to those classes or bear such relationship to the insured at the time of his death. A former wife who secured an absolute divorce from the insured without accruing alimony does not come within such classes or bear such relationship; consequently she is not qualified or eligible to receive benefits from this society.

"A person who is not eligible as a beneficiary under the statute is not entitled to the fund even though named as beneficiary, and in such case the heirs of the deceased member are entitled to the fund." *Grand Lodge, A. O. U. W. v. Ehlman*, 246 Ill. 555, 92 N. E. 962.

It is evident from the laws of this order that its object is to provide benefits for the families or dependent ones of its members. To permit such benefits to be paid to persons who do not sustain the prescribed relationship to the insured at the time of his death would surely thwart the purpose of the or-

ganization. *Kirkpatrick v. Modern Woodmen*, 103 Ill. App. 468; *Green v. Green*, 147 Ky. 608, 39 L.R.A.(N.S.) 370, 144 S. W. 1073, Ann. Cas. 1913D, 683; *Green v. Knights & Ladies of Security*, 147 Ky. 614, 144 S. W. 1076; *Knights of Columbus v. Rowe*, 70 Conn. 545, 40 Atl. 451; *Larkin v. Knights of Columbus*, 188 Mass. 22, 73 N. E. 850.

In the case of *Dunmore v. Modern Woodmen of America*, No. 18598 (decided by commission and findings of fact journalized, but not published), we held that a "wife named as beneficiary in a fraternal benefit certificate who thereafter procures an absolute divorce forfeits her rights to such benefits where the by-laws of the society restrict the payment of its benefits to the wife, surviving child, heir, blood relative, or person dependent upon, or member of the family of the insured, at the time of his death."

In the foregoing case the by-laws of the society restricted payment to persons sustaining certain relationships to the insured, whereas in the instant case the statute makes such restriction.

Under the prohibition of the statute the divorce obtained by the plaintiff from the insured operated to revoke the designation of her as beneficiary in the certificate, and to substitute in her place those next specified under the by-laws of the order and the law of the state, which persons in this case are the interpleaded defendants.

The contention on the part of the plaintiff that objection to the ineligibility of the

beneficiary named in the benefit certificate can be raised by the society alone is not in accord with the better reasoned cases as we view them. The society simply pays the money into court on the order of the court, and asks to be relieved from litigating, as between two sets of claimants. The aid of the court is invoked to determine which of the claimants is entitled to the fund. This we understand to be a proper case for interpleader. The statute of this state prohibiting payment to anyone not belonging to the classes therein designated fixes the rights of the parties. This being true, claimants, in good faith under the laws of the state and those of the society, cannot be prejudiced by the act of the society in asking the court to determine their rights.

"The fact that the beneficiary named in a certificate is not eligible is not an objection such as the society alone can raise, as the rights of the parties are fixed by law, and are not affected by the action of the society in filing a bill of interpleader to determine conflicting claims." *Grand Lodge, A. O. U. W. v. Ehlman*, supra; *Supreme Council, R. A. v. McKnight*, 238 Ill. 349, 87 N. E. 299.

It follows that the judgment should be affirmed.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment of the District Court is affirmed, and this opinion is adopted by and made the opinion of the court.

OHIO SUPREME COURT.

BENJAMIN ROSE INSTITUTE, Plff. in
Err.,
v.
MYERS, Treasurer of Cuyahoga County,
et al.

(92 Ohio St. 252, 110 N. E. 924.)

Tax — public charity — exemption.

The real estate belonging to an institution of purely public charity is exempt from taxation only when used exclusively for charitable purposes, and, if such real estate is rented for commercial and residence pur-

poses, it is not exempt, although the income arising from such use is devoted wholly to the purpose of the charity.

For other cases, see *Taxes*, I. f, 3, in *Dig.* 1-52 N. S.

(Wanamaker, J., dissents.)

(June 4, 1915.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas sustaining a demurrer to a petition filed to prohibit the collection of taxes on certain real property in the city of Cleveland. Affirmed.

Statement by Nichols, Ch. J.

In June, 1910, the Benjamin Rose Institute sought the remedy of injunction in the common pleas court of Cuyahoga county against the treasurer and auditor of that county to interdict the collection of taxes on certain real property in the city of Cleveland; it being contended that the prop-

Headnote by the COURT.
Note. — As to effect of using property of religious, charitable, or educational institution in secular business or for revenue, upon its right to exemption from taxation, see note to *Com. v. Lynchburg Y. M. C. A.* 50 L.R.A.(N.S.) 1197.

Generally, as to exemption of property of Young Men's Christian Association, see note to *Y. M. C. A. v. Parish*, ante, 272. L.R.A.1916D.

erty in question was exempt from taxation by favor of the last clause of § 5353, General Code, reading: "Property belonging to institutions of public charity only, shall be exempt from taxation."

The Benjamin Rose Institute, with a board of trustees named in the last will and testament of Benjamin Rose, late of Cuyahoga county, was created by such will, having for its purpose the carrying into effect certain provisions thereof relative to the distribution of the income arising from the property sought to be exempted from taxation, among certain beneficiaries designated in the fourth item of said will, in the language following:

"It is my purpose to provide relief and maintenance so far as I am able for respectable and deserving, needy, aged people, as far as practicable, and mostly of the Anglo-Saxon race, and to supply temporary relief and aid to needy, crippled children or youth."

An elaborate scheme of instituting and managing the trust is set forth in great detail in the will. The property in question was devised to the Citizens' Savings & Trust Company, as trustee, charged with the duty of holding and managing the same and paying over the net income to the institute aforesaid.

That the property so sought to be exempted is of great value is evidenced by the allegation of the petition that the semiannual instalment of taxes payable in June, 1910, amounted to the sum of \$14,000. The petition seeking the relief sets forth in detail that no part of said property or the income thereof has been diverted to private use or profit, but that said property and the funds arising therefrom have been used exclusively in maintaining and prosecuting the charities provided for in said will. It is conceded, however, by the Benjamin Rose Institute, that none of the real property sought to be exempted from taxation is either actually or directly occupied or used for charitable purposes of any kind or character; in fact, by stipulation of the parties, it is agreed that all of said real estate, excepting a portion of small value situated in Nottingham, has been rented for residence and commercial purposes, and that the income and rental therefrom only have been used and are being used in maintaining and prosecuting the charities created by said will.

The treasurer and auditor of Cuyahoga county demurred to the petition of the Benjamin Rose Institute, which demurrer was sustained by the common pleas court, and on appeal the same action was had in the circuit court of Cuyahoga county.
L.R.A.1916D.

Messrs. N. O. Mather, Squire, Sanders, & Dempsey, W. C. Boyle, and Thomas M. Kirby for plaintiff in error.

Messrs. Cyrus Locher, John A. Kline, F. W. Green, G. A. Howells, and Walter D. Meals for defendants in error.

Nichols, Ch. J., delivered the opinion of the court:

The supreme court has been frequently called upon to interpret the statutes exempting properties from taxation, and quite an array of reported cases on this subject are available. It is substantially conceded by counsel for the institute that, under any and all of these former interpretations, the real property of Benjamin Rose so trusteeed would not be in the exempted class, but it is their contention that, by virtue of the amendment of May 9, 1908, to § 2732, Revised Statutes, and more especially of the ratification on February 15, 1910, of the report of the codifying commission, by the general assembly of Ohio, all of the property, both real and personal, so devised to the above-mentioned public charity, is wholly exempt from taxation. The adjudications of this court were all had prior to the amendment of May 9, 1908; the cases, chronologically arranged, being *Cincinnati College v. State*, 19 Ohio, 110; *Gerke v. Purcell*, 25 Ohio St. 229; *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201; *Cleveland Library Assn. v. Pelton*, 36 Ohio St. 253; *Watterson v. Halliday*, 77 Ohio St. 150, 82 N. E. 962, 11 Ann. Cas. 1096. It is quite evident that but for the amendments to the statutes of May 9, 1908, and February 15, 1910, respectively, exempting property, this action would not have been instituted. An examination of the several tax exemption statutes is not only necessary for a proper consideration of the case, but is alike interesting and illuminating.

Prior to the adoption of the Constitution of 1851 the nature and extent of exemption from tax were wholly a matter of legislative discretion, which was afterwards limited in set terms by the then new Constitution. The original statute, under the new order of things, was adopted in 1852 (see 50 O. L. 135), and provided that "all buildings belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit," shall be exempted, etc.

By the revision of 1880 this language was carried into and became a part of § 2732, Revised Statutes of Ohio. In 1894 (see 91 O. L. 216) this particular paragraph was amended and made to read as follows: "All buildings belonging to institutions of

purely public charity and all buildings belonging to and used exclusively for armory purposes by lawfully organized military organizations which are and shall continue to be fully armed and equipped at their own expense, by law made and subject to all calls of the governor for troops in case of war, riot, insurrection, or invasion, together with the land actually occupied by such institutions and that owned by and used as sites for such armory buildings of said military organizations, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustain, and belonging exclusively to, said institutions and military organizations."

In May, 1908 (99 O. L. 449), a further change was made, and the paragraph then read: "All property belonging to institutions of purely public charity, and all buildings belonging to and used exclusively for armory purposes by lawfully organized military organizations which are and shall continue to be fully armed and equipped at their own expense and by law made subject to all calls of the governor for troops in case of war, riot, insurrection; or invasion, together with the land actually occupied by such institutions and that owned and used as sites for such armory buildings of said military organizations, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustain, and belonging exclusively to, said institutions and military organizations."

In February, 1910, the report of the codifying commission was adopted by the legislature of Ohio, and thereafter the exemption of institutions of purely public charity was entirely disassociated from those of armory organizations, with which they had been classified since 1894, and associated instead with county, township, and village infirmaries. General Code, § 5353. And the exemption of armory organizations was provided for in separate § 5354, General Code. An examination of these several enactments will disclose the fact that from 1852 to 1908, the statutes read, "All buildings belonging to institutions of purely public charity," etc., whereas in 1908 the word "buildings" was changed to the word "property." It is around the change of the word "buildings" to "property" that counsel for the institute seek to build their case in the first instance. It must be noted, however, that the language, "together with the land actually occupied by such institutions," remains intact in all of the several statutes, commencing with the original act of 1852, down to and including the act of May 9, L.R.A.1916D.

1908. If we eliminate from § 2732, Revised Statutes, as amended May 9, 1908, all reference to armory organizations, we will find it reading as follows: "All property belonging to institutions of purely public charity, . . . together with the land actually occupied by such institutions, . . . not leased or otherwise used with a view to profit,"—which is precise in terms with the original act of 1852, excepting the change above referred to of "buildings" to "property."

It is contended by the Benjamin Rose Institute that in the act of May 9, 1908, the words, "together with the land actually occupied by such institutions," have no proper place or significance, for the reason that, since the general assembly expressly exempted all property belonging to institutions of purely public charity, this latter phrase was not intended to be, and cannot be construed to be, a limitation upon the express provisions of the statute. With this interpretation the court cannot agree. If these words are to be construed as a limitation upon the express provisions of the statute as originally enacted and as amended from time to time, we can find no possible warrant authorizing a different interpretation simply by reason of the substitution of the word "property" for "buildings." We feel it to be of significance that these express words of limitation were carried into the acts from 1852 to 1908, inclusive, and are a clear and distinct expression of the legislative will to the effect that only such property as might be actually occupied and used by the institution of purely public charity, subject to the still further limitation that even that property should not be leased or otherwise used with a view to profit, was to be released from its share of the public burden of taxation. The legislature, from the beginning to the time the codifying commission did a little legislating on its own account, has been consistent on the subject.

We now approach a consideration of the question from quite a more difficult angle, and go to the main question, involving an interpretation of § 5353, as passed in February, 1910, upon which counsel for the institute chiefly rely in their effort to exempt this property from taxation. Section 5353 is as follows: "Sec. 5353. Lands, houses and other buildings belonging to a county, township, city or village, used exclusively for the accommodation or support of the poor, and property belonging to institutions of public charity only, shall be exempt from taxation."

We are concerned, of course, only in the interpretation of the latter clause of this section. It will be observed that neither

the phrase, "together with the land actually occupied by such institutions," nor the clause, "not leased or otherwise used with a view to profit," as employed in § 2732, Revised Statutes, is to be found in § 5353, General Code, it being stripped to the narrow confines of this language: "Property belonging to institutions of public charity only, shall be exempt from taxation."

This language should be interpreted by certain rules, one of which is: "Where all the general statutes of a state are revised and consolidated, there is a strong presumption that the same construction which the statute received before revision should be applied to the enactment of its revised form, although the language may have been changed." *State ex rel. Baumgardner v. Stockley*, 45 Ohio St. 308, 13 N. E. 279; *State ex rel. Clough v. Shelby County*, 36 Ohio St. 326; and *German-American Ins. Co. v. McBee*, 85 Ohio St. 173, 97 N. E. 378.

The plaintiff in error maintains that the case must turn upon the interpretation to be given the words "belonging to," and that the test is no longer one of the actual occupancy or use of the property, but simply one as to whether the institution administering the charity is the owner thereof. If the Constitution of our state was silent on the subject of exemption of property from taxation, and if the general assembly had the power to handle the subject wholly at its discretion, as it did under the Constitution of 1802, we might accede to the views of the counsel for the institute, especially since the charity created by Benjamin Rose is of such a commendable and praiseworthy character. That a beneficent public service can be and no doubt is being rendered by the institute cannot be questioned, and it is entitled to a fair and reasonable interpretation of the statute under which it asks exemption. This institute is not seeking relief from sordid or unworthy motives of any kind or character, and is, we believe, only desirous that its income be not diminished by the amount necessary to pay taxes thereon, in order that it may more effectually and on a larger scale carry on its kindly work. It must be admitted by all interested parties that the charity created by Benjamin Rose does benefit the state, in that it affords relief to the aged and needy and to the crippled young, and affords it in such a manner as to protect the beneficiary from the loss of self-respect. The testator did render a distinct public service in devoting his immense fortune to this purpose, and did possibly render to the state a fair equivalent for the release of his estate from taxation. In view of the peculiar merit of this charity, we are disposed to relax to L.R.A.1916D.

some extent the rule of construction established in the case of Cincinnati College v. State, supra, the second proposition of which case reads: "All laws exempting any of the property in the state from taxation, being in derogation of equal rights, should be construed strictly."

But this court, as well as the general assembly, has certain limitations; i. e., those recited in the Constitution, that gave both bodies their very existence. The provision on the subject is (see § 2, art. 12). " . . . Institutions of purely public charity . . . may, by general laws, be exempted from taxation."

Impressed with the duty of interpreting this language reasonably and even liberally, and giving the fairest and most reasonable construction allowable, we cannot extend to it so broad a meaning as to grant the relief which the institute asks. The all but universal judicial deliverances along the line have had the effect of confining the exemption to such property as is directly used and employed by the institution in the actual carrying on of the business of the charity. Perhaps the most thoughtful and best reasoned of the cases outside of our immediate jurisdiction are to be found in *Pennsylvania and Georgia*, in both of which states the constitutional limitations on the subject of exemption from taxation are alike with ours, word for word. Reference is made to the cases of *American Sunday School Union v. Philadelphia*, 161 Pa. 307, 23 L.R.A. 695, 29 Atl. 26; and *Academy of Richmond County v. Bohler*, 80 Ga. 159, 7 S. E. 633.

In the former of these two cases it is observed by Mr. Justice Dean:

"By no judicial rule of construction can these words be made to mean that a commercial enterprise is exempt because the whole profit of it goes into the treasury of, and it is carried on by, a purely public charity. In so far as the institution is charitable, and its revenues are derived from the contributions of the charitable, it is protected by the Constitution. But, if such institution sees fit to engage in trade for the purpose of increasing its revenue, or making any part of its business 'self-supporting,' the trade part of its business can be taxed, and ought to be."

"Nor does the fact that the profits gathered on the counter of the bookstore are devoted to the primary object of the charity, which is purely public, in any degree affect the character of the trading or commercial enterprise. Every dollar the society expends is some charitable contributor's gains or profits from some business not charitable. If such contributor devoted the whole of his profits from the sale of dry goods, gro-

series, or books to promote this particular charity, that fact would not make the source of such profit a purely public charity. And if, as the master has found, the society was compelled to put a part of its operations on a basis that was self-supporting, by starting a bookstore to sell books only of a high moral character and standard publications, that is trade. That the entire profits of this branch of the business are devoted to the purposes of the charity no more changes its business nature than if, instead of a bookstore, the society had established and carried on a shoestore. It might have operated a farm or rolling mill with the same end in view, to put the society, as the master aptly says, on a basis that was self supporting; but the end would not have exempted the business from taxation."

In the Georgia case it is said: "That the word 'institution,' both in legal and colloquial use, admits of application to physical things, cannot be questioned. One of its meanings, as defined in Webster's Unabridged Dictionary, is 'an establishment, especially of a public character, affecting a community.' And one of the meanings of 'establishment,' as defined by the same authority, is 'the place in which one is permanently fixed for residence or business; residence with grounds, furniture, equipage, etc., with which one is fitted out; also, any office or place of business, with its fixtures.' The term "institution" is sometimes used as descriptive of an establishment or place where the business or operations of a society or association are carried on; at other times it is used to designate the organized body.' Gerke v. Purcell, 25 Ohio St. 244. See also Abbott's Law Dict. and *Indianapolis v. Sturdevant*, 24 Ind. 391. . . . A charitable institution, in the ideal sense, may embody and manifest itself physically and impersonally in a place of business for permanent occupation, with all needful buildings, furniture, outfit, and supplies, for the continuous exertion of its activities. . . .

"In the case of a poorhouse, the realty might embrace, besides the land covered with the necessary buildings, grounds for recreation, exercise, for pasture of the animals, and even a farm for the inmates to cultivate. The establishment, as a whole, might embrace all these, with articles of personality to any needful extent for supplying the inmates with all the comforts of life, and keeping them in a healthy, virtuous, cheerful, and contented state of existence. We doubt not the entire establishment, however extensive or composite, would be exempt from taxation if used directly and solely for public charity, and not

as a source of profit or income. . . . The scheme of exemption as to other than public property seems to be this: To exempt all that is used immediately and directly as a part of the establishment in the conduct of the regular business there carried on, but not such as may be devoted to other uses, such as farming, merchandizing, manufacturing, etc., and from which profit or income is derived. It is the use of the property which renders it exempt or non-exempt not the use of the income derived from it. *Cincinnati College v. State*, 19 Ohio, 110; *Cleveland Library Asso. v. Pelton*, 36 Ohio St. 253; *New Orleans v. St. Patrick's Hall Asso.* 28 La. Ann. 512; *Detroit Young Men's Soc. v. Detroit*, 3 Mich. 172; *State, Elizabeth Library Asso., Prosecutor, v. Leaster*, 28 N. J. Eq. 103.

"Property used to produce income to be expended in charity is too remote from the ultimate charitable object to be exempt. If property is allowed to be used as taxed property, it also is to be taxed. If it competes, in the common business and occupations of life, with the property of other owners, it must bear the tax which theirs bears. Thus, if even a synagogue or a church were rented out during the week for a storeroom or a shop, though divine service might be performed in it on Saturday or Sunday, and though the rents were all appropriated to religious or charitable uses, its exemption would be lost. . . . When the tax officer goes forth to search for taxable property, all which he finds employed in the ordinary uses of common life, unless it belongs to the public, he is to regard as taxable. When exemption is claimed, he is not to look for persons, natural or artificial, nor for ideal beings, but for real, visible things, for places of religious worship, places of burial, institutions of purely public charity, colleges, academies, and seminaries of learning, public libraries, and the real and personal estate used by or connected therewith, books, apparatus, paintings, and statuary kept in public halls, etc., and, unless they are in present tangible existence, he cannot exempt something else which he is informed will be used to produce them hereafter. In other words, he is not to spare a form of property not enumerated because, for the time being, it represents a part or the whole of one or more of the forms which are enumerated. The exemption is not a release in personam, but a release in rem, and the res to which the release applies must be found and identified by the officer, or no exemption can be recognized."

We gather from these two cases, as well as from the several Ohio cases, these two

general and controlling rules of interpretation:

(1) It is the use of the property which renders it exempt or nonexempt, not the use of the income derived from it.

(2) The exemption is not a release in personam, but a release in rem, and the res to which the release applies must be found and identified by the officer, or no exemption can be recognized.

We are bound to apply these settled rules of construction to the case now before us, with the further admonishment that the act of 1910 must be construed together with the constitutional limitation surrounding it. If we gave to the last word of the general assembly on this subject the enlarged scope that is asked, we would so interpret it as to bring it in direct and obvious conflict with the organic law. To enlarge upon a provision of the Constitution beyond the express limitation it permits in the way of privilege and immunities is just as repugnant to the instrument as it would be for the general assembly to attempt to enact into law some measure especially prohibited by the Constitution.

The property belonging to this institution is being commercially used. It is competing with other landlords in the city of Cleveland in securing tenants for its business houses and residences. The trustees of this property would be derelict in duty if they did not secure from the occupants of these several buildings the highest possible return. They must keep these buildings in repair, by the express terms of the trust, and to do this they must draw on the rental income therefor. No pretense is made that the Citizens' Savings & Trust Company, the holding trustee, is managing this property on any other than strictly money-making principles consistent with honesty and fair dealing. The case under consideration presents even stronger and more conclusive reasons why this property should not escape taxation than did the facts and circumstances which developed in the case of Cincinnati College v. State, 19 Ohio, 110, and that case cannot be disregarded as an authority simply because the court at that time was interpreting a statute without constitutional limitations, rather than a statute that had its authority directly from the Constitution. In that case Caldwell, J., says at page 114 of 19 Ohio:

"This property is most of it leased and used with a view to profit. . . . But when any society, no matter of what kind, whether scientific, literary, or religious, enters the common business of life, and uses property for the purpose of accumulating money, the government should, and we think the statute does, treat it in the same

way persons are dealt with who are using property in a similar manner, and engaged in the same business. . . .

"The legislature could not, without a flagrant violation of the principles of equality on which our institutions are founded, make a distinction such as is contended for, between the store of the Cincinnati College and that of an individual. . . . As we have before intimated, the law applies to the property as it finds it in use, and not to what may be done with its accumulations in future."

In the case at bar the trustee is frankly and yet properly using the property under its control for the purpose of accumulating money. It is the use of property for purposes other than making money that justifies its exemption from taxation, and all Constitutions and laws on this subject are fairly replete with this spirit, and no other. The end sought is the public good, and not injustice. The small home owner, struggling sometimes amidst adverse surroundings, deserves consideration at our hands. His burden of taxation is made heavier whenever property of any kind is withdrawn from the field of taxation. The competitors of the trustee, engaged in the same line of business in the city of Cleveland, are pursuing the necessary and commendable pursuit of procuring a livelihood. They are self-supporting agents in the community, entitled to consideration and fair dealing. They, together with the small home owner, pay their share of the public burden for fire protection, police protection, the maintenance of courts of justice, and the many other instrumentalities that society employs to make the ownership of private property possible. If the institute were to sell all of the real estate devised to it for the use of the Benjamin Rose Institute, and should assemble the proceeds in one, two, three, or any number of buildings wherein the objects of the charity were to be carried out, the buildings thus being segregated and removed from their present commercial use, then they would present the ideal property subject to exemption from taxation. The trustee is not engaged in any respect in charitable work, nor will it ever be so far as the property of Benjamin Rose is concerned. Nothing more than the income can ever be used by the institute to further the purposes set forth in the instrument creating it. Therefore the income, after it is actually paid over to the institute, is the only property belonging to the body that can be held to be exempt from taxation. In this case the income is the res to which the exemption applies.

We interpret the language employed in §

5353, General Code, to have the effect of exempting from taxation the property belonging to this institution only so far as it is used and employed by the institution for purposes of charity. Any other construction would require the court to hold that the legislature exceeded its power and directly violated the Constitution. Making use of the choice of two possible constructions, we prefer the interpretation that will permit the act to survive, relying in this connection upon the well-established rule of interpretation that, as between two possible interpretations of a provision which is on its face doubtful, that one which will result in sustaining the law as against a constitutional objection will be followed, to the exclusion of another the effect of which would be to render the law unconstitutional.

In the case of *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201, the court in the second proposition of the syllabus defines "institution" in the following language: "The word 'institutions,' in the sixth clause of § 3 of the tax law, is used to designate the corporation or other organized body instituted to administer the charity, and the real estate described as belonging to such institutions has reference to property owned by them; and, to entitle such institutions to hold the property exempt from taxation, they must not only own it, but it must be so used as to fulfil the requirements of the statute."

We ascertain, therefore, that the question now before the court is a much broader one than one simply as to whether the institution administering the charity is the owner thereof, as claimed by the trustee and institute; for in the *Humphries* Case, *supra*, the court distinctly holds that the institution must not only own the real estate, but it must be so used as to fulfil the requirements of the statute.

In conclusion brief reference to the amendment adopted in September, 1912, to § 2 of article 12 of the Constitution, may

with propriety be made here. The language "institutions of purely public charity" has been eliminated, and substituted therefor are the words "institutions used exclusively for charitable purposes."

While the rights of the parties to this action, as to all taxes assessed prior to April, 1913, are to be determined by proper interpretation of the language of the Constitution as it existed at the time the taxes attached as a lien on the real estate of the institution, yet the court might regard this latest expression of the public will as one justifying a strict interpretation of all laws and statutes exempting property from taxation. It could not be contended for one moment that the property in question by any possible constitutional legislation could be exempt under the language of amended § 2 of article 12. Nor can it be maintained, under the provisions of § 2, article 12, in force from 1909 to 1913, that the property of Benjamin Rose should escape taxation, unless the decisions of our own state are to be overruled and those of most of our sister states disregarded.

More might be said, but perhaps more than is necessary has already been said. When one reflects over the many able and exhaustive opinions on this and immediately correlated subjects already to be found in our reports, it might be said that this particular exposition is a work of supererogation, or rather an attempt to gild gold already refined, but the very great importance and ever-living interest in the subject fairly justify the labor devoted to it and the space it will occupy in the archives of the court.

The judgment of Circuit Court is accordingly affirmed.

Newman, Jones, and Matthias, JJ., concur.

Wanamaker, J., dissents.

OKLAHOMA SUPREME COURT.

AMERICAN FIDELITY COMPANY OF
MONTPELIER, VERMONT, Plff. in Err.,

v.

SAMUEL E. ECHOLS.

(— Okla. —, 155 Pac. 1160.)

Insurance — accident on conveyance — double indemnity.

1. In an action upon an accident insurance policy providing a double indemnity for any bodily injury caused solely by ex-

ternal, violent, or accidental means, while the policy is in force, and while the insured is in or on a public conveyance provided by a common carrier for the regular transportation of passengers, it is not necessary for a recovery of the double indemnity that the accident for which recovery is had should have been the result of the opera-

Note. — For scope and construction of the provision in an accident policy for indemnity in case of injury while riding in or on a public conveyance, see notes to *Primrose v. Casualty Co.* 37 L.R.A. (N.S.) 618, and *Georgia L. Ins. Co. v. Easter*, L.R.A. 1915C, 456.

Headnotes by BURFORD, O.
L.R.A. 1916D.

tion or construction of the conveyance provided by such common carrier, if all the other conditions involving the double indemnity be properly established.

For other cases, see Insurance, VI. b, 3, in Dig. 1-52 N. S.

Appeal — exclusion of evidence — reversal.

2. A cause will not be reversed for the exclusion of evidence, unless it appears that such exclusion might have been prejudicial to the plaintiff in error.

For other cases, see Appeal and Error, VII. m, 3, in Dig. 1-52 N. S.

Trial — interference with verdict.

3. The jury are the triers of the facts, and where their verdict is reasonably supported by the evidence, this court will not weigh the testimony to determine whether or not it would have reached the same conclusion.

For other cases, see Appeal and Error, VII. l, 2, in Dig. 1-52 N. S.

(March 7, 1916.)

ERROR to the District Court for Greer County to review a judgment in plaintiff's favor in an action brought to recover indemnity for the loss of a hand under the terms of an accident insurance policy. Affirmed.

The facts are stated in the commissioner's opinion.

Messrs. James R. Ross and L. D. Threlkeld for plaintiff in error.

Messrs. A. R. Garrett and S. B. Garrett for defendant in error.

Burford, C., filed the following opinion:

This was an action by Samuel E. Echols against the American Fidelity Company, of Montpelier, Vermont, to recover indemnity for the loss of a hand, under the terms of an accident policy issued by the plaintiff in error in his favor. A trial was had to the jury, and a verdict returned in favor of the defendant in error (plaintiff in the court below), which verdict was approved by the court, and judgment rendered thereon.

It is alleged as error: First, that the plaintiff was allowed to recover a double indemnity, which was not justified under the terms of the policy; second, that competent questions on behalf of the plaintiff in error were excluded by the court; third, that the demurrer of the plaintiff in error to the evidence should have been sustained.

1. The evidence on the part of the defendant in error in the court below tended to show that he was injured by the accidental discharge of a shotgun while he was a passenger upon a regular passenger train operated by the Wichita Falls & Northwestern Railway Company. The policy provided in part as follows: "American Fidelity Company of Montpelier, Vermont, . . . here-

by agrees to indemnify the insured against bodily injury caused solely by external, violent, or accidental means while this policy is in force, suicide, sane or insane not included, in the sum specified in § 1 of schedule 6; or if such bodily injury is sustained while the insured is in or on a passenger elevator or public conveyance provided by a common carrier for the regular transportation of passengers, or is in consequence of the burning of a building or its destruction by a tornado or cyclone while the insured is therein, in the sum specified in § 2 of schedule A."

After providing for an indemnity for total or partial disability, the policy then proceeds: "If the injury causing such total or partial disability is sustained while insured is in or on a passenger elevator or public conveyance provided by a common carrier for the regular transportation of passengers, or is in the consequence of the burning of a building, or its destruction by a tornado or cyclone, while the insured is therein, the company will pay for the period of such disability double the weekly indemnity above provided."

It is insisted by plaintiff in error that "it was never contemplated by the insurance company that executed and delivered this policy that the beneficiary would be entitled to receive double indemnity if he accidentally maimed himself while on a train. . . . He did not lose his hand in consequence of being on a train. He did not sustain the loss of his hand in consequence of any extra hazard incident to traveling in this way."

The intention of the parties in a case of this sort must be gathered from the terms of the written contract into which they have entered. There is no limitation therein to the effect that the accident for which the double indemnity is paid shall be the result of the operation or construction of any of the conveyances mentioned therein. The policy, by its terms, affords the double indemnity for "bodily injury caused solely by external, violent, or accidental means," "while the insured is in or on a passenger elevator or public conveyance provided by a common carrier, for the regular transportation of passengers." There can be no question that the loss of the hand was sustained while Echols was a passenger in a public conveyance provided by a common carrier for the regular transportation of passengers. The language of the policy leaves no room for construction. Even if it were doubtful, the settled rules of law would require us to give it the construction most favorable to the insured. In *Travelers' Ins. Co. v. McConkey*, 127 U. S. 666, 32 L. ed. 308, 8 Sup. Ct. Rep. 1360, Mr. Justice Harlan, speaking for the court,

said: "Such being the contract, the court must give effect to its provisions according to the fair meaning of the words used, leaning, however—where the words do not clearly indicate the intention of the parties—to that interpretation which is most favorable to the insured."

In *Standard Acci. Ins. Co. v. Hite*, 37 Okla. 305, 46 L.R.A. (N.S.) 986, 132 Pac. 333, this court said: "But even were we to consider that the meaning of the provision in the light of the facts before us was in doubt (which we do not), it would be our duty to give to the policy that construction which would give it effect rather than destroy it; the rule being that where the meaning of a policy of insurance is ambiguous, or if so drawn as to be fairly susceptible of different constructions, it will be construed strictly against the insurer, and that construction adopted which is most favorable to the insured."

Again in *Capital F. Ins. Co. v. Carroll*, 26 Okla. 286, 109 Pac. 535, this court, after announcing the same rule, says: "This is a just rule, because policies generally, as in this case, are drawn by the insurer, and it is its language that the court is invited to interpret."

Numerous other cases to the same effect are to be found in the decisions of this court. It was not error, therefore, for the court, under the circumstances of this case, to render judgment for the double indemnity provided in the policy.

2. Error is assigned upon the refusal of the court to allow plaintiff in error to ask certain questions upon cross-examination of the plaintiff, Echols. The three questions set out in the brief related to whether or not certain suits had been brought involving the property of the wife of the plaintiff, Echols, and which, it is insisted, tended to show his financial condition. As to each of these questions, if such a suit had been brought, the record evidence thereof was the best. Aside from this, however, the trial court allowed counsel for plaintiff in error to examine the plaintiff, Echols, at length upon his financial condition. Each of the three questions about which complaint is made relate to the purported suit brought against the plaintiff's wife to set aside deeds to property. In this connection the court allowed the following question and answer:

Q. Is it not a fact that for months prior to February 5, 1911, you anticipated the loss of the only property owned by yourself or wife?

A. No, sir; it is not a fact.
L.R.A.1916D.

In our judgment this question and answer fairly cover the material and admissible evidence which might have been properly adduced by the excluded question. Even if the questions were competent, still this court is not able to say that their exclusion worked any harm to the plaintiff in error. It has been held by this court that before it will consider assignments of error relating to the exclusion of evidence, there must be such showing in the record as to what the excluded evidence would have been, that the court can say that there was reversible error in the ruling. See *Gault v. Thorndom*, 39 Okla. 673, 136 Pac. 742; *Turner v. Moore*, 34 Okla. 1, 127 Pac. 487, and cases cited. Although this rule might not be so strictly enforced with relation to questions upon cross-examination if it could be seen from the question itself that competent and admissible evidence might have been elicited thereby, yet a cause will not be reversed for the rejection of questions upon cross-examination, unless it can be determined, either from the form of the questions itself or from an offer of proof, that competent and admissible evidence might thereby have been excluded.

In the case under consideration, the plaintiff answered the third question of which complaint is made—which question embraced all the elements of the other two—by a denial, before an objection was made, and the objection was sustained after the answer had gone into the record. Although excluded, this answer makes it apparent that the testimony which might have been elicited by the question if permitted would have been of no benefit to the plaintiff in error. We conclude, therefore, that no reversible error was committed by such ruling.

3. The evidence of the plaintiff in the court below, if believed, established all the material allegations of his petition. Under such circumstances it was obviously not error for the trial court to overrule a demurrer to the evidence. The question of the reasonableness or the probability of the plaintiff's testimony was one solely for the jury. This court will not set aside the verdict of the jury upon the weight of the evidence, although the appellate court upon the record might not reach the same conclusion as that found by the jury. The rule is established beyond question in this jurisdiction that the appellate court will not set aside the verdict of a jury where there is any competent evidence reasonably tending to support it, nor weigh the evidence to determine whether or not the appellate court would have reached the same conclu-

sion. The jury heard the witnesses, saw the scene of the alleged accident, and although the plaintiff's testimony appears improbable upon the record, yet the jury found it was true, its verdict was approved

by an able and conscientious trial judge, and it will not be disturbed upon appeal. The judgment should be affirmed.

Per Curiam:

Adopted in whole.

RHODE ISLAND SUPREME COURT.

ALFRED HAWKSLEY

v.

THOMAS PEACE.

(— R. I. —, 96 Atl. 856.)

Weapon — accidental discharge — Liability.

1. One is liable for injury to another by the accidental discharge of a firearm in his possession, unless he shows that the injury was unavoidable.

For other cases, see Negligence, I. b, in Dig. 1-52 N. S.

Trespass — accidental discharge of firearm — injury.

2. Trespass lies for personal injuries caused by the accidental discharge of a firearm in possession of another.

For other cases, see Trespass, I. a, in Dig. 1-52 N. S.

New trial — injury by discharge of firearm.

3. The court is not deprived of power to set aside a verdict in defendant's favor in an action to recover damages for accidental discharge of a firearm, and grant a new trial, on the theory that the jury was required to frame a measure of care to be exercised by defendant and determine whether or not he performed his duty, so that its decision cannot be disturbed by the court.

For other cases, see New Trial, III. b, in Dig. 1-52 N. S.

Appeal — granting of new trial — error.

4. An order granting a new trial will not be reversed if, upon the evidence, it cannot be said that the court was clearly in error in so doing.

For other cases, see Appeal and Error, VII. i, 7, in Dig. 1-52 N. S.

(March 22, 1916.)

EXCEPTION by defendant to an order of the Superior Court for Providence and Bristol Counties granting plaintiff's motion for a new trial in an action brought to recover damages for assault and battery. Overruled.

The facts are stated in the opinion.

Note. — As to civil liability for injury by negligent discharge of firearms, see notes to *Slefer v. Paysee*, 4 L.R.A.(N.S.) 119; *Rudd v. Byrnes*, 26 L.R.A.(N.S.) 134; and *Annear v. Swartz*, L.R.A.1915E, 267. L.R.A.1916D.

Messrs. Sullivan & Sullivan and John J. Sullivan for defendant.

Messrs. Irving Champlin and Malcolm D. Champlin for plaintiff.

Baker, J., delivered the opinion of the court:

This is an action of trespass for assault and battery. The declaration contains two counts, the first of which alleges "that the defendant on, to wit, the 7th day of June, A. D. 1914, in Cranston, in said county, . . . was then and there possessed of a gun loaded with gunpowder and leaden bullets, which said gun, so loaded, he, the defendant, then and there held at or towards the plaintiff, and then and there with force and arms, with one of said bullets fired by him from said gun, struck and wounded the plaintiff in his left leg."

The second count charges assault and battery, without specifying the manner.

To this the defendant pleaded not guilty, and, specially, that "the shooting of said plaintiff was an accident unavoidable under the circumstances."

The case was tried before a court and jury in March, 1915, and the jury returned a verdict in favor of the defendant. Plaintiff duly filed a motion for new trial, which, after a hearing thereon, was granted. To this decision exception was taken, and the case is before this court on defendant's bill of exceptions, which contains this single exception.

The evidence at the trial showed the shooting to have been accidental. The evidence was conflicting as to how it happened. There was testimony to the effect that the plaintiff with a companion was propelling a boat in a creek or pond, and that the defendant, standing upon the bank about 30 feet away, shot at the boat and accidentally hit the plaintiff. The defendant's own account is that he was sitting on the bank with the loaded rifle at his side, on the ground, with its butt back of him; that he took hold of the barrel near the muzzle, and drew the rifle forward on the ground with the intention of placing it across his knees, and that in so doing it was discharged and the plaintiff was shot.

The initial subject of inquiry is as to the law which determines the civil liability for accidental injuries resulting from the use

of firearms. This precise question has not been passed upon by this court. There is an abundance of authority, however, upon the question, all substantially along one line. Passing the case in the Year Book, 21 Hen. VII. 28 a, where one shot an arrow at a mark which glanced from it and struck another and it was held to be trespass, we come to *Weaver v. Ward*, Hobart, 134, decided in 1607. *Weaver* brought an action of trespass for assault and battery against *Ward*. The defendant pleaded that he was, amongst others, by command of the Lords of the Council, in a certain band of soldiers, and so was the plaintiff; and that they were skirmishing with their muskets charged with powder against another band of soldiers, and as they were so skirmishing, the defendant casualiter et per infortunium et contra voluntatem suam in discharging his piece, did hurt and wound the plaintiff. Upon demurrer, judgment was given for the plaintiff, for it was held that "no man shall be excused of a trespass . . . except it may be judged utterly without his fault; as if a man by force take my hand and strike you; or if here the defendant had said that the plaintiff ran across his piece when it was discharging; or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable and that the defendant had committed no negligence to give occasion to the hurt."

So, in *Underwood v. Hewson*, 1 Strange, 596 (1724), it appears that "the defendant was uncocking a gun, and, the plaintiff standing to see it, it went off and wounded him, and at the trial it was held that the plaintiff might maintain trespass."

These two cases, particularly *Weaver v. Ward*, have been cited with approval in numerous American reported cases relative to injuries arising from the accidental discharge of firearms, in which essentially the same rule as to liability has been recognized. For example, in *Tally v. Ayres*, 3 Sneed, 677, while the defendant was in the act of placing a loaded gun upon his arm or shoulder, from some cause unexplained in the proof, the gun was discharged, killing plaintiff's mare standing near by hitched to a post. In upholding a verdict for the plaintiff the court said: "To constitute an available defense in such cases, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation of any degree of fault to the defendant."

In *Judd v. Ballard*, 66 Vt. 668, 30 Atl. 96, plaintiff and defendant were riding at the rear end of a large express wagon, partly lying down, facing each other. While in this position, the defendant drew out his

revolver and discharged it over the wheel of the wagon, after which, in some manner, while the revolver was still in his hands, it was discharged, the ball taking effect in the plaintiff's knee. There was a verdict for the plaintiff. The court upheld it saying: "The shooting of the plaintiff was an accident, but in no sense an unavoidable accident. It would not have occurred but for the defendant's carelessness. The test of liability is not whether the injury was accidentally inflicted, but whether the defendant was free from blame."

In *Atchison v. Dullam*, 16 Ill. App. 42, the defendant had a double-barreled breach-loading shotgun; one barrel had been discharged. While the defendant was attempting to insert a fresh cartridge, the other barrel went off and severely injured the plaintiff. In sustaining the verdict for the plaintiff the court said, citing, among others, three of the above cases: "They determine that if a person is injured by the discharge of a gun in the hands of another who has entire control of it, the burden is cast upon the latter to prove that the gun was not fired at him either intentionally or negligently, but the result was inevitable and without the least fault upon his part."

In *Thompson on Negligence*, vol. 1, § 787, the author says: "It has been held on very clear reasoning, that the accidental discharge of a gun in the hands of a person, whereby damage is inflicted upon another, is of itself presumptive evidence of negligence sufficient to take the question to a jury. When it is considered that, to constitute a valid defense in such cases, it must appear that the injury was unavoidable, or the result of some superior agency without the imputation of any degree of fault upon the person carrying the dangerous weapon; when it is further considered that the injury is one which does not ordinarily happen where reasonable care is taken to avert it,—the propriety of this conclusion must be obvious."

See also *Morgan v. Cox*, 22 Mo. 373, 66 Am. Dec. 623; *Vincent v. Stinehour*, 7 Vt. 62, 29 Am. Dec. 145; *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496; *Knott v. Wagner*, 16 Lea, 481, 1 S. W. 155; *Bullock v. Babcock*, 3 Wend. 391; *Hankins v. Watkins*, 77 Hun, 360, 28 N. Y. Supp. 967; *Beach v. Parmeter*, 23 Pa. 196; *Jennings v. Fundeburg*, 4 McCord, L. 161; *Morris v. Platt*, 32 Conn. 75; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Bahel v. Manning*, 112 Mich. 24, 36 L.R.A. 523, 67 Am. St. Rep. 381, 70 N. W. 327, 1 Am. Neg. Rep. 458; *McCleary v. Frantz*, 160 Pa. 535, 28 Atl. 929; *Winans v. Randolph*, 169 Pa. 606, 32 Atl. 622; *Glueck v. Scheld*, 125 Cal.

288; 57 Pac. 1003, 6 Am. Neg. Rep. 249; Seltzer v. Saxton, 71 Ill. App. 229; Gilmore v. Fuller, 99 Ill. App. 272; Rudd v. Byrne, 156 Cal. 636, 26 L.R.A.(N.S.) 134, 105 Pac. 957, 20 Ann. Cas. 124; Manning v. Jones, 95 Ark. 359, 129 S. W. 791; Sutton v. Bonnett, 114 Ind. 243, 16 N. E. 180; Chataigne v. Bergeron, 10 La. Ann. 699; Harper v. Holcomb, 146 Wis. 183, 130 N. W. 1128; State use of Johnston v. Cunningham, 107 Miss. 140, 51 L.R.A.(N.S.) 1179, 65 So. 115; *Annear v. Swartz*, — Okla. —, L.R.A. 1915E, 267, 148 Pac. 706, 9 N. C. C. A. 518; Addison, Torts, Am. ed. 1878, vol. 1, 568; 2 Shearm. & Redf. Neg. 4th ed. § 686; 1 Thomp. Neg. §§ 779, 780; 12 Am. & Eng. Enc. Law, 519; 40 Cyc. 872.

The question has sometimes arisen as to the appropriate action in cases of this kind, whether it should be trespass or case. The early actions were generally brought in trespass. Examination will show that as to the American cases at present in some of the older states, whose practice may be said to follow the common law, the action of trespass is preferably employed, while in the newer states and in others which have adopted codes, actions for damages for injuries resulting from accident by shooting are now generally in case. *Brennan v. Carpenter*, 1 R. I. 474, was an action for trespass on the case for an injury to the plaintiff's horse and chaise, hitched in a public street, caused by the defendant negligently driving his team against them. After a verdict for the plaintiff, the defendant moved to set aside the verdict, on the ground of the refusal of the trial court to charge the jury that, if they found the injury was the immediate effect of defendant's act of force, he was not liable in an action of trespass on the case and the jury should bring in a verdict of not guilty. From the authorities the court deduced these rules, namely: "(1) Where the injury complained of is the effect of negligence, though the force be immediate or direct, the plaintiff may maintain his action of trespass on the case, or trespass, at his option. (2) But where the injury is the effect of force direct and intentional, the action must be trespass, and not case."

As the evidence in that case showed that the injury was unintentional, the verdict was upheld. The question of the form of action in a case like the one now under consideration is therefore of no importance in this state.

It is also generally held that the form of action does not affect the rule as to liability. In *Atchison v. Dullam*, supra, on page 44 of 16 Ill. App., the court says: "But whether the liability of the defendant is sought to be enforced in an action of tres-

pass or in any action on the case can make no particular difference, as the rule of law upon which the defendant's liability is to be established is the same in either form of action."

In *Morgan v. Cox*, supra, the action was of the nature of case. The court, after commenting on the rule of liability in trespass, on page 377 of 22 Mo. says:

"The change that has been introduced by the new code in the remedy has not changed the rules of law as to the liability of the parties."

The reason of this is that the liability is founded on negligence in both forms of action. This is well stated on page 87 of 32 Conn., in *Morris v. Platt*, supra (which was a case of shooting), as follows: "We have seen that if the injury had been consequential and the form of action case, the defendant would not have been liable, and the question returns whether he can and should be holden liable because the injury was direct and immediate and the form of action is trespass. I think not, whether the decision of the question be made upon principle or governed by authority. . . . The foundation of that liability in every case of accident, where it is the result of human agency uninfluenced by the operations of nature, and the act is lawful, is really negligence. This is true of collisions between vessels on the water, or horses or vehicles and persons upon the land, which constitute the largest class of cases. . . . So, when a man in firing at a mark unintentionally wounds another, the injury is direct and the form of action is trespass, but the ground of liability is negligence in doing an unnecessary and avoidable though lawful act, without that extraordinary degree of care which the law demands in such circumstances, and which would have prevented the accident. As therefore the foundation of the liability is the same in both cases, irrespective and independent of the question whether the injury was direct or consequential, there is no reason for any distinction in respect to the justification in the two actions."

See also *Stanley v. Powell* [1891] 1 Q. B. 86, 60 L. J. Q. B. N. S. 52, 63 L. T. N. S. 809, 39 Week. Rep. 76, 55 J. P. 327, where after a careful consideration of the English cases, it is held that in a case of accidental shooting neither case nor trespass could be maintained unless the injury were the result of negligence.

In *Weaver v. Ward*, Hobart, 134, supra, negligence is clearly recognized as the rule of liability when it is said that no man shall be excused "except it may be judged utterly without his fault." Illustrating how a defendant might successfully excuse

his act, it mentions, among other things, that he might set forth the case with circumstances so as it had appeared to the court that it had been "inevitable." This word has been used in some of the reported cases of accidental shooting above cited in stating the degree of care to be exercised. It appears in the citation from *Atchison v. Dullam*, *supra*. Of course an inevitable accident furnishes a good defense, but we do not think it is true that in order to constitute a defense in a case of accidental shooting it is necessary to show that the act was inevitable, if that word is to be taken in its strictest sense. It is ordinarily a more emphatic and stronger word than its synonym "unavoidable," which we think is the more satisfactory word for use in stating the rule of liability in these cases. See the discussion as to the use of the word "inevitable" in *Stanley v. Powell*, *supra*. In concluding this discussion of the law governing the civil liability for accidental injuries resulting from the use of firearms as applicable to the present case, inasmuch as it is admitted that the plaintiff was injured by the discharge of a gun while it was being handled by the defendant, it was incumbent upon the latter, in order to excuse himself from liability for the injury, to show that the discharge was entirely without his fault, and that it happened by accident unavoidable by him.

One other point raised by the defendant remains for consideration. Ordinarily, whether or not the person causing such an injury used the care required of him in the circumstances is a question for a jury. 1 *Thomp. Neg.* § 780. See *McCleary v. Frantz*, 160 Pa. 535, 28 *Atl.* 929, and *Moebus v. Becker*, 46 N. J. L. 41. These two cases and the one following are cited on defendant's brief. In *Winans v. Randolph*, 169 Pa. 606, 32 *Atl.* 622, which was a case of accidental shooting, there was a verdict for the plaintiff. In its opinion, affirming the judgment below, the court said: "Where the standard of duty is not fixed, but varies with the circumstances as developed by the testimony, the question of negligence is for the jury. No fixed standard could be applied to the facts of this case."

There is a similar statement in *McCleary v. Frantz*, *supra*, in which a verdict for the plaintiff was upheld, and which was before the court on exceptions of defendant to his request to charge, certain of which asked for the direction of a verdict in his favor on account of plaintiff's contributory negligence.

The defendant in the present case, claiming that it is a case in which the standard of duty is not "fixed by law, says in his L.R.A.1916D.

brief: "Being a case in which the jury itself had to frame a measure of care to be exercised by defendant and fix a standard of duty to be regarded by defendant, and then compare the actual conduct of defendant with such measure or standard fixed by itself, the conclusion of the jury is conclusive, and not to be disturbed by the trial justice."

This statement is in effect that in such case on a motion for a new trial, although the trial judge may be of opinion that "the jury . . . failed to respond truly to the real merits of the controversy," and "that the verdict fails to administer substantial justice," he is without power to disturb the verdict. There is, of course, no merit in such a claim.

We think the statement in *Winans v. Randolph*, that in cases of this kind "the standard of duty is not fixed, but varies with the circumstances," is inapt and misleading. As has already been shown, there is an established standard of duty imposed upon those handling firearms. To excuse an injury caused by one handling them, it must appear that the injury was unavoidable by him. The rule is of necessity a general one. An attempt to fashion rules of conduct for all possible future emergencies, would be futile. Human foresight cannot provide by a specific rule how individuals are to conduct themselves in order to escape liability in the almost infinite variety of conditions and circumstances under which accidents caused by them may occur. Accordingly, in cases of accidental shooting the question of negligence is held to be, primarily at least, for the jury to determine by applying said rule to the facts as found by them in their consideration of the testimony. The same thing is true in most cases of every kind whatsoever brought for the recovery of damages for injuries claimed to result from negligence. It is not clear that *McCleary v. Frantz* and *Winans v. Randolph* go beyond this. In *Moebus v. Becker*, *supra*, the plaintiff requested the court to charge the jury that if they believed from the evidence that certain facts were established the defendant was guilty of negligence. The court refused to so charge. An exception was taken and there was a verdict for the defendant. The court of review said: "On this writ of error, which presents only the exception taken to the refusal of the court to charge as requested, the case is not in a position to decide the propriety of the verdict which the jury have found. The plaintiff puts himself on the single ground that it was not a proper case for the jury, and that the court erred in submitting it to them."

While it was held to be a proper case to

be submitted to a jury, the opinion clearly implies that the propriety of the verdict rendered could have been challenged and therefore that it was not necessarily conclusive.

So far as the power of a trial judge to grant a new trial after verdict in cases like the one at bar is concerned, it must be held to be the same as in the ordinary case where conflicting testimony requires its submission to a jury. He is not concluded by the verdict in either case. His power and duty as to acting on a motion for new trial in a case like the one at bar are the same as is set forth in the opinions in *Wilcox v. Rhode Island Co.* 29 R. I. 292, 70 Atl.

913; *Noland v. Rhode Island Co.* 30 R. I. 246, 74 Atl. 914; and *McMahon v. Rhode Island Co.* 32 R. I. 237, 78 Atl. 1012, Ann. Cas. 1912D, 1223.

Was the action of the trial judge in granting a new trial error? The grounds of his decision do not appear in the record. But, upon reading all of the reported testimony we are not prepared to say that he was clearly in error, even if the defendant's account of the accident were accepted as true.

Accordingly, defendant's exception is overruled, and the case is remitted to the Superior Court for a new trial.

SOUTH CAROLINA SUPREME COURT.

J. W. ADAMS, Respt.,
v.

SOUTHERN RAILWAY COMPANY, Appt.

(— S. C. —, 87 S. E. 1007.)

Carrier — lost ticket — expulsion of passenger.

1. A carrier may expel from the train a passenger who fails to produce a ticket or pay fare, although by producing a baggage check he shows that he had a ticket, which he claims to have lost.

For other cases, see Carriers, II. h, 2, b, in Dig. 1-52 N. S.

Same — abusive language — liability.

2. A carrier may be liable in damages for using abusive language to a passenger expelled from the train for nonproduction of a ticket.

For other cases, see Carriers, II. d, in Dig. 1-52 N. S.

(February 29, 1916.)

A PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Greenville County in plaintiff's favor in an action brought to recover damages for alleged abusive language and for unlawful expulsion from defendant's train. Reversed.

The facts are stated in the opinion.

Messrs. Cothram, Dean, & Cothram, for appellant:

The passenger's right to ride depends upon the production of a ticket or the payment of fare; his immunity from ejection is limited to a reasonable time to search for the ticket, and his explanation that he had bought one, but was unable to find it, could not entitle him to ride, but only to a rea-

sonable time for the search before being ejected.

2 *Hutchinson, Carr.* § 1036; *Chicago & A. R. Co. v. Willard*, 31 Ill. App. 435; *Texas & P. R. Co. v. Smith*, 38 Tex. Civ. App. 4, 84 S. W. 582; *Bolles v. Kansas City Southern R. Co.* 134 Mo. App. 696, 115 S. W. 459; *Rogers v. Atlantic City R. Co.* 57 N. J. L. 703, 34 Atl. 11, 8 Am. Neg. Cas. 511; *Nutter v. Southern R. Co.* 25 Ky. L. Rep. 1700, 78 S. W. 470; *Harp v. Southern R. Co.* 119 Ga. 927, 100 Am. St. Rep. 212, 47 S. E. 206; *Price v. Chesapeake & O. R. Co.* 46 W. Va. 538, 33 S. E. 255; *Missouri, K. & T. R. Co. v. Smith*, 81 C. C. A. 598, 152 Fed. 608, 10 Ann. Cas. 939; *Louisville & N. R. Co. v. Mason*, 4 Ala. App. 353, 58 So. 963.

The plaintiff had not established his rights as a passenger, and for that reason cannot claim the benefit of the rule which requires extraordinary care toward that class.

Atlantic Coast Line R. Co. v. Barton, 14 Ga. App. 160, 80 S. E. 530, 4 N. O. C. A. 998.

Mr. J. J. McSwain, for respondent:

Plaintiff as a passenger was entitled not only to transportation, but to courteous and proper treatment as a human being with feelings and sensibilities.

Osteen v. Southern R. Co. 101 S. C. 532, L.R.A.1916A, 565, 86 S. E. 30.

The circuit judge properly referred to the jury and left it with them to say whether or not it was the highest degree of care to eject a passenger under the circumstances, who claimed with apparent sincerity that he had misplaced his ticket.

Williams v. Atlantic Coast Line R. Co. 99 S. C. 397, 83 S. E. 604.

Fraser, J., delivered the opinion of the court:

The plaintiff bought a ticket at Green-

Note. — As to ejection of passenger who has lost or mislaid his ticket, see annotation following this case, post, 1184. L.R.A.1916D.

ville, South Carolina, for Gastonia, North Carolina. He checked his baggage and entered the train at Greenville for Gastonia. Just after the train left Greenville, the ticket collector came to him and asked for his ticket. The plaintiff told the ticket collector that he could not find his ticket. The collector went on through the car, and told the plaintiff to look carefully for it, and he would come back for it later. When the ticket collector returned, the plaintiff told him that he had lost his ticket. The collector then took the plaintiff to the conductor, who told the plaintiff he would have to produce the ticket, pay the cash fare, or get off. The plaintiff said he knew he would have to get off, as he had neither ticket nor money. The plaintiff testified that he showed the ticket collector his baggage check, and told him that, if he had not had a ticket, he could not have checked his baggage; that the ticket collector said, "There are enough dead beats now." The defendant's witnesses denied the exhibition of the baggage check and the language concerning "dead beats." After the plaintiff was put off the train, he found his ticket, which was in his pocket, and had been overlooked.

This action was brought for the insulting language and the unlawful expulsion from the cars. At the close of the plaintiff's testimony the defendant moved for a nonsuit on the whole case. There were two questions in this case: (1) Did the defendant have the right to eject the plaintiff? (2) If it had the right to eject him, did it have the right to eject him as a "dead beat?"

I. Did the defendant have the right to eject the plaintiff? It did. The presiding judge charged the jury that the carrier must heed the reasonable explanations of the passenger, and left it to the jury to say whether the explanation given was reasonable. The great weight of authority holds that, when a passenger loses his ticket, he is entitled to a reasonable time to find it, and, failing to find it, he must pay cash fare or get off the train. The reason is that it is in accord with a reasonable rule and a necessary rule. If this were not the rule, one ticket would always do for two. The passenger who bought the ticket could not be put off, because he had paid his fare. The passenger who had the ticket could not be refused transportation, because he had conclusive evidence, and the only

evidence available to the passenger, that he had paid his fare. It would not even be necessary to show collusion, or that there should be collusion, because the passenger, after he had bought and paid for his ticket, and checked his baggage on it, might have dropped it and another could have found it.

This is not in conflict with the Smith Case, 88 S. C. 421, 34 L.R.A. (N.S.) 708, 70 S. E. 1057, nor the Teddars Case, 97 S. C. 153, 81 S. E. 474. In both of those cases the agent of the defendant had made a mistake in giving the wrong ticket. Here there was no mistake or fault of any sort on the part of the agent of the defendant. The complaint alleges that the plaintiff was unnerved by the conduct and words of the ticket collector of the defendant; but the plaintiff said he was unnerved by the loss of his ticket (his own fault), and not by anything said to him by the officials of the train. This is not in conflict with the Williams Case, 99 S. C. 397, 83 S. E. 604. In that case the plaintiff was ejected before she had time to find her ticket. In this case no further time was demanded, and so far as the record shows no further time was desired. The explanation was not, as a matter of law, a reasonable explanation, and that question should not have been submitted to a jury. The bare fact that a ticket is lost is not a reasonable explanation.

II. If it had the right to eject him, did it have the right to eject him as a "dead beat?" That raises the question: Was he so ejected? It was the province of the jury to determine the facts. Did the ticket collector use the language ascribed to him; and, if so, what, under all the circumstances, did the language mean? A passenger may have the right to ride. He must show his right by competent evidence. If he cannot show it, he must pay the cash fare or get off. If he does not get off, he may be put off without abusive language. Was abusive language used to him? If he was put off with unnecessary force, or was subjected to abusive language, the defendant is liable. No unnecessary force is in evidence, but abusive language is. Was it used? Let the jury say.

The judgment is reversed.

Gary, Ch. J., and Hydrick, Watts, and Gage, JJ., concur.

Annotation—Carriers: ejection of passenger who has lost or mislaid his ticket.

The authorities are unanimous in holding that a regulation made by a railroad corporation requiring passengers to ex-

hibit their tickets when requested by the conductor, and directing the ejection from the cars of those who refuse to do

so or pay fare, is a reasonable and proper one.

So, by virtue of such a regulation, a carrier may expel from a train a passenger who fails to produce a ticket or pay fare, although he may have had a ticket, which he claims to have lost or mislaid. (As to right of passenger to a reasonable time to find his ticket, see *infra*.) *Louisville & N. R. Co. v. Mason* (1912) 4 Ala. App. 353, 58 So. 963; *Harp v. Southern R. Co.* (1904) 119 Ga. 927, 100 Am. St. Rep. 212, 47 S. E. 206; *Chicago & A. R. Co. v. Willard* (1889) 31 Ill. App. 435; *Union Traction Co. v. Vestal* (1915) — Ind. —, 110 N. E. 211; *Louisville, H. & St. L. R. Co. v. Joplin* (1900) 21 Ky. L. Rep. 1380, 55 S. W. 206; *Bolles v. Kansas City Southern R. Co.* (1908) 134 Mo. App. 696, 115 S. W. 459; *Louisville, N. & G. S. R. Co. v. Fleming* (1884) 14 Lea (Tenn.) 128; *Texas & P. R. Co. v. Smith* (1905) 38 Tex. Civ. App. 4, 84 S. W. 852; *Grand Trunk R. Co. v. Beaver* (1894) 22 Can. S. C. 498; *Duke v. Great Western R. Co.* (1857) 14 U. C. Q. B. 377.

So, one who gets on a train knowing that he has lost his ticket may be ejected upon refusal to pay his fare, without rendering the company liable therefor, although the conductor knew that he had bought and paid for a ticket. *Gulf, C. & S. F. R. Co. v. McCormick* (1907) 45 Tex. Civ. App. 425, 100 S. W. 202.

And an ejection for failure to produce a ticket or pay fare is lawful, although a passenger can prove by another railway employee that he had had a ticket which he had shown to such employee in response to the latter's request as to where he was going, and that as it was handed back to him it had blown away. *Harp v. Southern R. Co.* (1904) 119 Ga. 927, 100 Am. St. Rep. 212, 47 S. E. 206. The court stated that, had the passenger's money blown out of his hand, it is evident that his misfortune would have to fall upon himself, and not upon the company, and such loss would not have prevented his lawful ejection, and the same result would follow where the ticket itself is lost, for it might come into the hands of another, and the company might thereby be compelled to carry two passengers for one fare. Besides, any rule allowing an excuse to be substituted for a ticket would give rise to so much uncertainty and so many possibilities of fraud that the court has uniformly held that the failure to pay the fare or produce the ticket warrants an ejection.

Also one who gets upon a train with-

out a ticket, it having been mislaid by the baggage master after checking the passenger's baggage, and not found before the train departed, may be expelled upon refusal to pay fare, and the company will not be liable for injuries caused by such ejection, they being the proximate result of the passenger's disregard of the duty which he owed the railroad company to use ordinary care to prevent an aggravation of the injuries resulting from the negligence of the company's agent in losing the ticket. *Galveston, H. & H. R. Co. v. Scott* (1904) 34 Tex. Civ. App. 501, 79 S. W. 642.

And one may be lawfully ejected upon refusal to pay fare, although she has purchased a ticket, but has given it to a friend to keep for her, who fails to get on the train. *Nutter v. Southern R. Co.* (1904) 25 Ky. L. Rep. 1700, 73 S. W. 470.

And where a passenger has lost her ticket and is without money, the conductor is not required to accept her offer of jewelry as a pledge of the payment of the fare upon reaching her destination, as such offer is not tantamount to the presentation of a ticket or tender of money. *Texas & P. R. Co. v. Smith* (1905) 38 Tex. Civ. App. 4, 84 S. W. 852.

One who loses the conductor's check given to him in place of a ticket which the conductor has taken up may be required to pay fare or suffer expulsion. *Jerome v. Smith* (1876) 48 Vt. 230, 21 Am. Rep. 125.

But in *Haines v. Grand Trunk R. Co.* (1913) 29 Ont. L. Rep. 558, 15 D. L. R. 714, it was held that one who loses the hat check which is given him by the conductor upon taking up his ticket cannot be expelled upon refusal to pay fare, under a railway by-law which provides that "whenever and so often as the conductor in charge of any train requests any passenger to produce and deliver up his or her ticket, such person shall comply with the request, or in default thereof shall be deemed to be a person refusing to pay his fare, within the meaning of § 217 of the railway act of 1903, and may be expelled from and put out of the train as therein provided." The court stated that the provisions of such by-laws should not be extended to the nonproduction of a hat check, and also that no by-law of the company was offered in evidence which contained any provisions as to using hat checks or which authorized or assumed to authorize the conductor to expel from his train a passenger to whom a hat check has been given in exchange for a ticket who

does not produce it on demand of the conductor or pay fare.

In *Butler v. Manchester, S. & L. R. Co.* (1888) L. R. 21 Q. B. Div. (Eng.) 207, one who had lost his ticket was held to have been improperly ejected on refusal to pay fare. The basis of the decision was that there was no statute or by-law empowering a conductor to eject a passenger under such circumstances. It was sought to justify the ejection under the following by-law: "No passenger will be allowed to enter any carriage used on the railway . . . unless furnished by the company with a ticket specifying the class of carriage and the stations for conveyance between which such ticket is issued. Every passenger shall show and deliver up his ticket to any duly authorized servant of the company when required to do so for any purpose, and any passenger traveling without a ticket, or failing or refusing to show or deliver up his ticket, as aforesaid, shall be required to pay the fare from the station whence the train originally started to the end of his journey." But it was held that this by-law did not authorize an ejection, as it imposed only an obligation that the passenger pay the fare from the place whence the train originally started to the place of his destination, and that, the court considered to be the only contract the company had with the passenger, and it could not be extended by implication to include the right to eject one who refused to carry out his obligation, the remedy of the company, if any, being to proceed against him for the amount of fare he refused to pay.

In *Curtis v. Grand Trunk R. Co.* (1862) 12 U. C. C. P. 89, a passenger who had mislaid his ticket was, after the conductor waited some time for him to find it, ejected, although as he was being led out he offered to pay the fare. A verdict for plaintiff was affirmed, as it was the second verdict that plaintiff had obtained, although the court considered it excessive and had some misgivings as to defendant's liability.

A conductor exceeds his authority where he ejects a passenger who has mislaid his ticket, without demanding fare and giving him an opportunity to pay the same. *Robson v. New York C. & H. R. R. Co.* (1880) 21 Hun (N. Y.) 387.

And a conductor has no right to eject a passenger who has mislaid his ticket if, after a reasonable opportunity to find it, he is willing and ready to pay his fare. (N. Y.) *Ibid.*
L.R.A.1916D.

Commutation tickets.

A purchaser of a season ticket which contains the condition that it shall be subject to inspection at any time by the conductor, and if lost or mislaid will not be replaced by the company, may, in case the ticket is lost, be lawfully expelled from the train on refusal to pay the regular fare. *Cresson v. Philadelphia & R. R. Co.* (1875) 11 Phila. (Pa.) 597. The basis of the decision was that the conditions were lawful, reasonable, and proper regulations, and that the amount saved by purchasing the ticket was ample consideration to support the contract imported by such conditions.

So, a purchaser of a nontransferable commutation ticket who has lost it and refuses, on account of such loss, to pay his fare on the train, may be ejected under a rule of the railroad company requiring a conductor to eject from the train a passenger who refuses to produce a ticket or pay his fare on demand. *Crawford v. Cincinnati, H. & D. R. Co.* (1875) 26 Ohio. St. 580.

The holder of a commutation ticket which contained an agreement that regular fare should be paid whenever the ticket was not produced was ejected upon refusal to pay regular fare, where he failed to produce the ticket because he had by mistake left it at home. *Downs v. New York & N. H. R. Co.* (1869) 36 Conn. 287, 4 Am. Rep. 77.

And the purchaser of a commutation ticket which stipulates that it shall be shown to the conductors each trip, and whenever required, may, if he loses the same, be refused admission to a train unless he pays the regular fare. *Ripley v. New Jersey R. & Transp. Co.* (1866) 31 N. J. L. 388.

In *Rogers v. Atlantic City R. Co.* (1895) 57 N. J. L. 703, 34 Atl. 11, 8 Am. Neg. Cas. 511, a holder of a commutation ticket which contained a stipulation that "this ticket is to be surrendered to the conductor on the last trip taken during the period for which it is issued," on such last trip, instead of exhibiting and retaining the ticket when passing through the gate to the train, by mistake dropped it in a box which was there for the reception of tickets, and it was held that, upon failure to pay fare demanded, he was rightfully ejected. The court stated that "it is entirely obvious that any other rule would subject the conductors to the duty of an examination and adjudication of the rights of every passenger who chose to say that he had purchased and lost or mislaid his ticket, or that he had delivered it to some other

agent of the company, from whom the conductor would be entirely unable to obtain any verification of the truth of the story of the passenger. Such a rule would be disastrous to the business of the railroad company, and it is just such consequences that the law permits the company and the passenger to contract against; and this, considered as a contract or regulation, must be deemed reasonable in view of the business of a common carrier of passengers."

But the holder of a commutation ticket containing an agreement that it shall be shown to the conductor when required cannot be ejected without being given a reasonable time to find it, if he informs the conductor that he has it upon his person, but is unable to find it at the time. *Naples v. New York & N. H. R. Co.* (1871) 38 Conn. 557, 9 Am. Rep. 434, 8 Am. Neg. Cas. 104. The court stated that "the contract required him to show his ticket to the conductor, but he was not bound to do it immediately when requested. The conductor knew the plaintiff was a commuter, and the only question in his mind was whether the plaintiff would be able to produce his ticket. The plaintiff informed him that he had it, but was unable to find it because it was mislaid. Under such circumstances the plaintiff was entitled to ride so long as there was any reasonable expectation of finding it during the trip. Had a reasonable time been allowed him to find it, undoubtedly it would have been found, for it was upon his person and dropped from his garments when he undressed himself to retire that night." The court distinguished this case from *Downs v. New York & N. H. R. Co.* (Conn.) supra, stating that "there the plaintiff had left his ticket at home and so informed the conductor. The ticket could not by possibility be produced, and the plaintiff knew it and so did the conductor. Delay in that case would have been of no avail; the fact was certain. The case here is directly the opposite to that in this important respect." And further the court said: "In the *Downs* Case there was an express stipulation in the contract that he should pay his fare for the trip if the ticket should not be shown to the conductor when requested. Here, there was no such stipulation. It is true the contract required the plaintiff to show his ticket to conductors when requested by them, or when required by the rules of the company, but it may well be questioned whether the breach of such a condition in the contract gave the L.R.A.1916D.

defendants the right to eject him from the train when they knew through their conductor that he was a commuter, and knew that his inability to produce the ticket arose simply from the fact that his ticket was mislaid. In the case of *Downs* the trip was virtually excepted from the operation of the ticket by the express stipulation in the contract to pay fare for the trip if the ticket should not be produced. The case was the same as it would have been if the contract had declared in express terms that the ticket should apply only to cases where it was produced, and all other cases should be excepted from its operation. *Downs*, therefore, was nothing more than a common passenger on the train without a common passenger ticket, and was liable to be dealt with as a common passenger. But here the contract embraced the trip as much as it did any other trip that the plaintiff might make on the road. The plaintiff agreed to show his ticket in like manner with other passengers. This was required in order that the conductor might know that he was a commuter. But the conductor knew the fact. The production of the ticket under such circumstances was the merest formality. Suppose the plaintiff had agreed with the defendants that he would show his ticket to the conductor three times during each passage over the road, and on the trip in question he had shown his ticket twice to the conductor, but when required the third time to produce it the ticket happened to be mislaid. Suppose the conductor should distinctly remember that the ticket had been twice produced, and the production of it the third time would give him no needful information. Would the defendants be justified in ejecting him from the train without an express stipulation in the contract that the plaintiff should pay the fare for the passage unless the ticket should be three times produced? We think not. So we think here. There must be something more than the merest technical breach of the contract in order to justify the defendants in rescinding it so far as it applied to the trip, and treating the plaintiff as a trespasser upon the train."

Sleeping and parlor car tickets.

That there are occasions when there should be exceptions to the general rule that a conductor is entitled to have either a ticket, a pass, or money, was the view taken by the court in *Pullman Palace Car Co. v. Reed* (1874) 75 Ill. 125, 20 Am. Rep. 232. In this case the passen-

ger had purchased a ticket entitling him to a berth in one of the company's sleeping cars; this ticket he had presented to the porter of the sleeping car who, after he had assigned him to his berth, returned the ticket to him. Before the train started the conductor demanded his ticket, and upon his being unable to find it, and upon refusal to pay an additional fare for the berth, he was expelled from the car despite the assurance of the porter that he had seen it, and also the written statement of the ticket agent to whom the passenger had gone before the train started, that that passenger had purchased a certain berth. The ticket was found in the morning and returned to the passenger, who had been put into a day coach. In reversing the judgment for plaintiff as excessive, the court, being of the opinion that he was entitled to recover only the price paid for his ticket and a reasonable compensation for the trouble and inconvenience he suffered by being deprived of his berth in the sleeping car, said: "There is no dispute that the conductor was entitled to have from appellee either a ticket, a pass, or money before giving him a berth. We think the better rule is to require that, where the proof is clear and satisfactory, as it was in the present case, the applicant for the berth has bought his ticket, but has lost it, and it is limited to a particular berth and trip, and the circumstances are such that it is reasonably certain the company cannot be defrauded by the ticket being in the hands of another, he should have the berth. But this is not so clear that we can say a company should be punished by large exemplary damages merely because the employee failed to recognize in the circumstances an exception to the general rule under which he was required to act, for much may be plausibly and forcibly urged against the exception. While the ticket was, by its terms, limited to a particular berth and date, there was nothing upon it by which to designate who was its lawful holder. Any person having it in possession would, *prima facie*, be regarded as its owner and entitled to the designated berth. It does not conclusively follow that the purchaser of such a ticket at the company's office, merely because he is the purchaser, will use it himself. He may purchase for another, or, purchasing for himself, may subsequently change his mind and sell to another. A contest might thus arise between one claiming the berth because he had pur-

chased the ticket, and another claiming it because he was the owner of the ticket, leaving the company to act at its peril in deciding between them."

So, also, a purchaser of a seat in a parlor car who, having lost the ticket, procured from the ticket agent the latter's personal card with the statement thereon, "This gentleman holds seat in 'Nocomus' this P. M., mislaid. C. E. Benedict," which he presented to the conductor with an explanation of the circumstances, was held in *Buck v. Webb* (1890) 58 Hun, 185, 11 N. Y. Supp. 617, to have been improperly ejected in view of the fact that the ticket lost was good only for that day and for that train, and that the diagram in the conductor's possession showed that the seat had been sold, and that no one appeared to claim the same. The court distinguished cases which involved passage or fare tickets which were not restricted to any car or train, or were detached in such a manner as to deprive the passenger of his right to the passage, or whose use had been limited to a time which had previously expired.

But to hold a sleeping car company liable in damages for refusing to permit a passenger to occupy, even on payment of fare, a berth for which he claims to have purchased a ticket which he claims to have lost, the refusal must be shown to be unreasonable, where the conductor's diagram shows all berths of the class claimed are sold, even though the passenger's claims are corroborated by another passenger. *Armstrong v. Pullman Co.* (1914) — *Miss.* —, L.R.A. 1915B, 1202, 66 So. 283. The court stated that there is a difference between the right of a passenger purchasing an ordinary railroad ticket and the right which he obtains in buying a sleeping car ticket. The railroad ticket entitles him to ride on a train of the company. A sleeping car ticket secures for him a designated place in a certain car which is reserved for his occupancy. If a railroad ticket should be lost another ticket could be sold in its place or cash fare accepted, and no interference would result with the right of another passenger. This will not be so where a sleeping car ticket is lost. A third person may have rights to be considered. A sleeping car ticket is not simply evidence of the passenger's right to ride on the train or in any car of the train, but it reserves for his use a designated part of the car known as a berth.

Right to reasonable time to find ticket.

A passenger whose ticket has been lost or misplaced has a right to be given a reasonable time within which to find the ticket before he can be ejected. *Louisville & N. R. Co. v. Mason* (1912) 4 *Ala. App.* 353, 58 *So.* 963, s. c. subsequent appeal (1914) 10 *Ala. App.* 263, 64 *So.* 154; *Chicago & A. R. Co. v. Willard* (1889) 31 *Ill. App.* 435; *Anderson v. Louisville & N. R. Co.* (1909) 134 *Ky.* 343, 120 *S. W.* 298, 20 *Ann. Cas.* 920; *Bolles v. Kansas City Southern R. Co.* (1908) 134 *Mo. App.* 696, 115 *S. W.* 459; *Hayes v. New York C. & H. R. R. Co.* (1884) 30 *Alb. L. J. (N. Y.)* 469; *Williams v. Atlantic Coast Line R. Co.* (1914) 99 *S. C.* 397, 83 *S. E.* 604.

In *International & G. N. R. Co. v. Wilkes* (1887) 68 *Tex.* 617, 2 *Am. St. Rep.* 515, 5 *S. W.* 491, it was held that the jury were justified in finding that a conductor acted too hastily in ejecting from a car one who claimed to have mislaid his ticket and requested time to search for it, where only about a minute and a half elapsed between the time the conductor called for the ticket and the time the passenger was ejected, especially in view of the fact that the passenger had told the conductor he had shown it to the brakeman when he entered the car, and asked that he call the brakeman to verify such statement, but the conductor refused to do so.

And although an ejection is not accompanied with any insulting language or rough handling of a passenger's person, a jury will be warranted in inflicting punitive damages if they believe from the evidence that a passenger had a ticket and informed the conductor, when he approached him for it, that he had one, but that he had misplaced it, and was then endeavoring to get it and produce it, and that the conductor, in wanton, wilful, and knowing disregard of the passenger's right to be allowed a reasonable time within which to find his ticket, immediately stopped the train and ejected the passenger, giving him no chance to find and produce his ticket. *Louisville & N. R. Co. v. Mason* (1914) 10 *Ala. App.* 263, 64 *So.* 154.

But the rule that a passenger must be given a reasonable time within which to find a lost or mislaid ticket before he is ejected cannot apply unless the conductor is informed that such passenger has lost or mislaid it. *Louisville & N. R. Co. v. Mason* (1912) 4 *Ala. App.* 353, 58 *So.* 963. A reasonable time within which to produce a ticket which a passenger

has not misplaced, but has ready to hand to a conductor, is one thing, and a reasonable time which should be allowed a passenger who has misplaced his ticket, and in good faith asks for time within which to produce it, is another thing. When a conductor, in the exercise of his duties, calls upon a passenger to produce his ticket, he has a right to presume, in the absence of information to the contrary, that the passenger has the ticket convenient upon his person, and that he needs only that reasonable time which a man of ordinary understanding and intelligence would naturally need to take it from his person and hand it over. If the passenger needs more than this usual time, he should inform the conductor of the circumstances, and, if he fails to do so, and suffers by reason of such neglect, it is his fault, and not that of the conductor.

Whether or not one who has mislaid his ticket has had a reasonable opportunity within which to find it or pay fare is a question of fact for the jury. *Hayes v. New York C. & H. R. R. Co.* (1884) 30 *Alb. L. J. (N. Y.)* 469.

And the question of undue haste in ejecting a passenger 1 mile from the place of departure, where she claimed to have had a ticket, but to have mislaid it, was held to have been properly submitted to the jury in *Williams v. Atlantic Coast Line R. Co.* (1914) 99 *S. C.* 397, 83 *S. E.* 604, especially in view of testimony that the ticket was found under the seat after the train had proceeded about 1½ miles further.

The time occupied by a passenger train in running from one regular station to another is amply sufficient to enable a passenger using ordinary diligence to produce and exhibit his ticket to the conductor. *Chicago & A. R. Co. v. Willard* (1889) 31 *Ill. App.* 435.

Effect of baggage check.

A baggage check of itself does not constitute a token of one's right to transportation, who claims to have purchased a ticket, but lost it, and notwithstanding its presentation the conductor may demand the ticket or payment of cash fare, and the refusal or failure to comply with the demand would justify him in requiring such one to leave the train. *Bolles v. Kansas City Southern R. Co.* (1908) 134 *Mo. App.* 696, 115 *S. W.* 459. To hold otherwise, the court said, might result in subjecting the company to fraud and imposition, since it would enable the purchaser of a ticket to sell it after checking his baggage on it, and, by

using his baggage check as a token of his right to transportation, to defraud the carrier in the transporting two passengers for one fare.

And a passenger who has lost her ticket and baggage check may be lawfully expelled on refusal to pay fare, although she informs the conductor that her baggage is in the baggage car and offers to go with him and identify it. *Texas & P. R. Co. v. Smith* (1905) 38 *Tex. Civ. App.* 4, 84 *S. W.* 852. The court stated that the fact that the passenger purchased a ticket upon which her trunk was checked furnishes but a weak and certainly unsatisfactory circumstance in corroboration of her verbal statement that she has lost her ticket; that the presence on the train of the trunk checked as she claims was not inconsistent with the idea that her ticket may have been sold.

And see also *ADAMS v. SOUTHERN R. Co.* ante, 1183.

But although a baggage check may not take the place of a ticket, it tends to corroborate the statement of a passenger that he had misplaced his ticket, and therefore was on the train as a passenger, and so is admissible in an action for wrongful ejection, as tending to show that the conductor acted hastily in the face of evidence that one was acting in good faith in claiming that he had misplaced the ticket and was not on the train as a mere trespasser. *Bolles v. Kansas City Southern R. Co. (Mo.) supra.*

Place of ejection.

Ejection of a passenger who has lost or mislaid his ticket and refuses to pay fare must be at a regular passenger station. *Downs v. New York & N. H. R. Co.* (1869) 36 *Conn.* 287, 4 *Am. Rep.* 77;

Maples v. New York & N. H. R. Co. (1871) 38 *Conn.* 557, 9 *Am. Rep.* 434, 8 *Am. Neg. Cas.* 104.

So, while a conductor has the right to eject passengers from a train who have innocently left their tickets in the station, yet he should not wait until he has proceeded some distance from a station and require women passengers to alight in a cut where there is a deep ditch, so that in alighting they have to expose their lower limbs. *International & G. N. R. Co. v. Hood* (1909) 55 *Tex. Civ. App.* 334, 118 *S. W.* 1119; *s. c.* subsequent appeal (1909) 57 *Tex. Civ. App.* 497, 122 *S. W.* 569.

The jury must determine whether or not a conductor exercises due care in expelling a passenger who has lost his ticket, from a train at a flag station at which there is no shelter, after dark, on an unusually cold and stormy night. *Tilburg v. Northern C. R. Co.* (1907) 217 *Pa.* 618, 12 *L.R.A.(N.S.)* 359, 66 *Atl.* 846.

Right to demand train fare.

Where one who has lost his ticket offers to pay the ticket fare, but refuses to pay the train fare which is demanded by the conductor, he may be lawfully ejected. *Houston & T. C. R. Co. v. Faulkner* (1901) — *Tex. Civ. App.* —, 63 *S. W.* 655.

But a passenger who has purchased a ticket and lost it, and offers to pay the regular ticket fare, which is accepted by the conductor without any demand for the excess permitted to be charged when fare is paid on the train, may not upon refusing a subsequent demand for such excess be legally ejected from the train. *Louisville, H. & St. L. R. Co. v. Joplin* (1900) 21 *Ky. L. Rep.* 1380, 55 *S. W.* 206. J. H. B.

SOUTH CAROLINA SUPREME COURT.

RE W. S. GLENN, Appt.

(— S. C. —, 88 S. E. 294.)

Contempt — assault on juror.

A witness is not guilty of contempt in assaulting a juror for a statement made by the juror, after the termination of the trial, as to the veracity of the witness.

For other cases, see *Contempt, I. a, in Dig.* 1-52 *N. S.*

(March 8, 1916.)

Note. — For misconduct toward jurors as contempt, see annotation following this case, post, 1193.
L.R.A.1916D.

A PPEAL by defendant from a judgment of the Common Pleas Circuit Court for Spartanburg County adjudging him guilty of contempt of court. Reversed.

The facts are stated in the opinion.

Messrs. Sanders & De Pass, for appellant:

No act done or word spoken after a case is ended—unless it be in refusing to obey an order of court—can be adjudged to be contempt of court, even though such word or act has reference to the action of the judge himself.

Patterson v. Colorado, 205 *U. S.* 463, 51 *L. ed.* 881, 27 *Sup. Ct. Rep.* 556, 10 *Ann. Cas.* 689; *State ex rel. Atty. Gen. v. Circuit Ct.* 97 *Wis.* 1, 38 *L.R.A.* 554, 65 *Am. St.*

Rep. 90, 72 N. W. 193; *Percival v. State*, 45 Neb. 741, 50 Am. St. Rep. 568, 64 N. W. 221; *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415; *State Law Examiners v. Hart*, 104 Minn. 88, 17 L.R.A. (N.S.) 585, 116 N. W. 212, 15 Ann. Cas. 197; *State v. Young*, 113 Minn. 96, 129 N. W. 148, Ann. Cas. 1912A, 163; *Storey v. People*, 79 Ill. 45, 22 Am. Rep. 158; *State v. Hailey*, 2 Strobh. L. 73.

But, in any event, the rule to show cause should be discharged. The return of Mr. Glenn is duly verified, and no evidence is offered to contradict it or to show that it is false. It therefore should be accepted as true.

State ex rel. Hay v. Farnum, 73 S. O. 193, 53 S. E. 85; *Re Corbin*, 8 S. C. 390; 9 Cyc. 44; *Oster v. People*, 192 Ill. 473, 56 L.R.A. 462, 61 N. E. 469, 14 Am. Crim. Rep. 276; *Re Robinson*, 117 N. C. 533, 53 Am. St. Rep. 596, 23 S. E. 453; *State ex rel. Battle v. Cape Fear Lumber Co.* 72 S. C. 322, 51 S. E. 873.

Mr. A. E. Hill for respondent.

Watts, J., delivered the opinion of the court:

This is an appeal from the order of Special Judge Efrd, presiding over the court of common pleas for the county of Spartanburg, adjudging the appellant guilty of contempt of court. It arose out of the following facts: There was a case tried on June 1, 1915. T. E. Screven was foreman of the jury that tried the case. W. S. Glenn was a witness for the defense. A verdict was rendered for the plaintiff. On the next day after the case was tried and verdict rendered, Mr. Screven, while coming from his home to his place of business, and while he was off duty as a juror, was riding on the street car and engaged in conversation with a gentleman, made publicly a statement in reference to the case. In this conversation he referred to Mr. Glenn. This conversation was reported to Glenn, and as reported it reflected upon his character and attacked his veracity. Glenn sought an interview with Screven, and told Screven what he had heard, and demanded to know if he had used the language attributed to him. Screven denied this, but during the conversation in reference to the matter they got into a war of words and came to blows. Glenn struck the first blow, and a fight ensued. After this, upon affidavit of Screven, a rule to show cause was issued and served upon Glenn. Glenn made return under oath, stating that the cause of dispute between him and Screven was not in any manner in reference to Screven's act as a juror, and that the act of Screven as a juror, or the action of the jury in rendering the L.R.A.1916D.

verdict they did, was not in his mind, but he was actuated solely by what he had been informed Screven had publicly said about him on the street car some twenty-four hours after the verdict had been rendered, reflecting upon his character and veracity. On hearing the return and affidavit of Screven, his Honor adjudged him in contempt of court, in that he was interfering with a juror in the discharge of his duty. When the case was heard and return of respondent had been read, the following took place:

The Court: Mr. Sanders, you say Mr. Glenn was a witness in the case?

Mr. Sanders: Yes, sir.

The Court: And Mr. Screven was foreman of the jury?

Mr. Sanders: Yes, sir.

The Court: And he says he didn't know he was on the jury?

Mr. Sanders: No, sir; he says he didn't think of it at the time he went to him. (Argument by Mr. Sanders.)

The Court: I don't agree with you, Mr. Sanders, even if it was five years after the court had adjourned. It is the province of the jury in the trial of a case to disbelieve anybody they see fit, or believe anybody, and whenever that province is trampled upon you might as well shut up the court-houses and put pistols in the pockets of every man, and let might rule. Attorneys and court officers and jurors must be protected in the discharge of their duty.

Mr. Sanders: But, your Honor, jurors have no right, after the case has been tried and verdict rendered, to publicly reflect upon the integrity of a witness. I call your Honor's attention to the fact that a man has a right to trial by jury on a criminal charge.

The Court: I think Mr. Glenn is guilty of contempt in interfering with a juror in the discharge of his duty. Stand up, Mr. Glenn.

The appellant by seven exceptions challenges the jurisdiction of the court as well as the correctness of his Honor's rulings. The fourth, fifth, and sixth exceptions are:

"4. In that his Honor erred, as is respectfully submitted, in ruling and holding that the appellant was guilty of contempt of court when the facts show that the altercation arose from a remark made by Mr. T. E. Screven twenty-four hours after the verdict had been rendered by the jury of which Mr. Screven was foreman; said remark being made outside of and away from the courthouse, and reflecting, as Mr. Glenn thought, upon his character, and not from any action of Mr. Screven as a juror, or from any action of the jury in said cause.

"5. Because his Honor erred in not ruling and holding that the conduct of Mr. Glenn, in seeking Mr. Screven, was not on account of any act or conduct of Mr. Screven as a juror, but was solely on account of the act and conduct of Mr. Screven as a man, made outside of the courthouse and away from court room, at Mr. Screven's place of business, and not while Mr. Screven was acting as juror.

"6. Because, it is respectfully submitted, his Honor erred in holding that the appellant was guilty of contempt of court, in that he interfered with a juror in the discharge of his duty; the error being, as it is respectfully submitted, that Mr. Glenn's altercation with Mr. Screven was not on account of any act or conduct of Mr. Screven as a juror, but was solely and entirely on account of Mr. Screven's words, act, and conduct as a man, made outside of the courthouse and away from the court room."

These exceptions must be sustained. There is no pretense that Glenn was guilty of any direct contempt, he did nothing in the presence of the court, he was not in the court, and nothing was done in the presence of the judge. There was no resistance or defiance of the court's power or authority, and no disobedience of any of the court's orders. He simply had a personal difficulty with Screven in reference to some supposed remark Screven had made about him, reported to him as being derogatory and reflecting on his personal character, some twenty-four hours after the case in which he had been a witness had been tried. The altercation and fight did not occur until long after the case was ended. There is nothing in the record that shows there was complaining about Screven's conduct as juror. After a case is ended, nothing done, unless it is a disobedience of an order of the court, can be adjudged contempt of court. No words spoken either in reference to judge or jury after a case is ended can be construed as being contempt of court.

"When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature statement, argument, or intimidation hardly can be denied." *Patterson v. Colorado*, 205 U. S. 454, 51 L. ed. 879, 27 Sup. Ct. Rep. 556, 10 Ann. Cas. 689.

In the case of *State ex rel. Atty. Gen. v. Circuit Ct. 97 Wis. 1, 38 L.R.A. 554, 65 Am. St. Rep. 90, 72 N. W. 193*, the court uses the following language: "Important as it

is that courts should perform their grave public duties unimpeded and unprejudiced by illegitimate influences, there are other rights guaranteed to all citizens by our Constitution and form of government, either expressly or impliedly, which are fully as important, and which must be guarded with an equally jealous care."

The general rule is that, to constitute any publication a contempt, it must have reference to a matter then pending in court, . . . tending to the injury of pending proceedings upon it, and of the subsequent proceeding. *Percival v. State*, 45 Neb. 741, 50 Am. St. Rep. 568, 64 N. W. 221.

The case of *State v. Sweetland*, 3 S. D. 503, 54 N. W. 415, was a case where some contemptuous comment was made after the case was ended. The court held: "The object of contempt proceedings is, not to enable a judge, who deems himself aggrieved, to punish the supposed wrongdoer to gratify his own . . . feelings, but to vindicate the dignity and independence of the court, and to protect himself, and those necessarily connected with it, while a matter is pending before it, from insolent and contemptuous abuse calculated to intimidate, influence, embarrass, or impede the court in the exercise of its judicial functions, or prevent a fair and impartial trial. If the judge was unjustly assailed by the article in question, he had the same, and only the same, remedies for the redress of the wrong which belonged to all other citizens."

The record shows it was an unfortunate misunderstanding and difficulty between two citizens. When the case was ended, Screven's duty as a juror ceased; and the fact, even if it were a fact, that he had been a juror, was the inception of the trouble in this case, and would not make Glenn responsible in contempt proceedings, as the case was over, and no action on his part was calculated to intimidate or influence the jury, as the verdict had been returned; neither would it in any manner impede the administration of justice. If Glenn was wrong, he can be punished in the proper way for assault and battery.

We do not think it necessary to consider all of the exceptions. Under our view of the case, Glenn should not have been adjudged guilty of contempt of court, and the judgment is reversed, and rule discharged.

Gary, Ch. J., and Hydrick, Fraser, and Gage, JJ., concur.

Annotation—Misconduct toward jurors as contempt.

This note is supplemental to the note to *Poindexter v. State*, 46 L.R.A.(N.S.) 517, where the earlier cases are collected.

For misconduct toward witnesses as contempt of court, see the note to *Brannon v. Com.* L.R.A. 1915D, 569.

For personal criticism of, or insult to, court because of decision, after determination of cause, as ground for contempt or disbarment, see the note to *Re Hart*, 17 L.R.A.(N.S.) 585.

Concerning prospective jurors.

One is guilty of contempt of court who, being in the employ of a traction company, said to a friend who was one of the jurors from which the jury were to be selected in a case in which the company was a party: "If you can do anything for the traction company it will be appreciated." *Houser's Case* (1914) 57 Pa. Super. Ct. 43. So, when one said to a juror summoned to serve for the week, that he had a particular friend with a case coming up that week, and that if the juror could do anything for him it would be appreciated, "try him like you would yourself." *Ex parte Shepherd* (1913) 68 Tex. Crim. Rep. 443, 153 S. W. 628, where it was held that, if the juror was disqualified to serve, this would be immaterial if, as a matter of fact, he was serving as a juror when approached.

Concerning jurors selected to try the case.

A friend of one whose land is being taken by a trolley railroad company who, on return from the view of the premises by the jury, denounces the superintendent of the trolley road to a jurymen, may be punished for contempt. *Greason v. Cumberland R. Co.* (1913) 54 Pa. Super Ct. 595.

But an attempt to have a third party influence a juror, or get him an interview with a juror, is not a contempt when the attempt came to nothing and the third party did not intend it should. *Re Ellison* (1914) 256 Mo. 378, 165 S. W. 987.

A lawyer is guilty of contempt who, in conducting his case, insults the foreman of the jury. *Ex parte Pater* (1864) 5 Best & S. (Eng.) 299, 33 L. J. Mag. Cas. N. S. 142, 10 Jur. N. S. 972, 10 L. T. N. S. 376, 12 Week. Rep. 823, 9 Cox, C. C. 544, 15 Eng. Rul. Cas. 141.

Of particular interest in connection with *Re Glenn*, ante, 1190, is the decision in *Reg. v. Martin* (1848) 5 Cox, C. C. (Eng.) 356; where a few moments after

the foreman of the jury had reached his house after a trial and conviction, the brother of the person convicted came to the house and challenged him to mortal combat as having bullied the jury in the case of his brother, and it was held that this was a contempt of court.

Concerning grand jurors.

After a grand jury has considered the evidence on a matter, and has reported to the court that no indictments were found, a petition for resubmittment, though containing groundless charges of misconduct on the part of the grand jury, is not a contempt of court, as the petition related to a past transaction, although the grand jury were still in session. *State v. Young* (1910) 113 Minn. 96, 129 N. W. 148, Ann. Cas. 1912A, 163, where the court said: "It is elementary that publication in newspapers, or impertinent, scandalous, or contemptuous language inserted in pleadings, affidavits, or petitions filed in court, concerning a pending cause, by which it is sought to influence the action of the court therein, and prevent a fair and impartial hearing, thus embarrassing the due administration of justice, constitute a contempt of court, and may be summarily punished. But by the weight of authority the rule does not apply to proceedings which have been fully terminated, and brought to a close by final decision. And however strong and abusive a criticism of a court or any of its officers may be, having reference to past proceedings, the remedy is not by an exercise of the arbitrary power of punishment for contempt, but by an action, civil or criminal, for libel or slander, as the case may be. *State Law Examiners v. Hart*, 104 Minn. 88, 17 L.R.A. (N.S.) 585, 116 N. W. 212, 15 Ann. Cas. 197, and cases there cited."

Where a lawyer stated to two of the grand jury that there were certain individuals upon the grand jury unfit and unqualified owing to their want of capacity, and being under the government and control of improper feelings, the court stated: "Though he did not intend to decide that this was not a contempt, yet, in his view, as the attachment against a party for a contempt was a high prerogative proceeding, and as the party was thereby deprived of a trial by jury, he did think that, unless these constructive contempts were of an aggravated nature, and such as were calculated to impede the due administration

of justice, the court ought not to proceed with that rigor and severity which the process by attachment required." *Re Van Hook* (1818) 3 N. Y. City Hall Rec. 64.

In *Re Spooner* (1820) 5 N. Y. City Hall Rec. 109, the court seemed doubtful whether an attack in print on a grand juror not relative to his duties was a contempt, and said: "The facts charged amount only to a constructive contempt; and, the party having purged himself, on oath, of any intention to commit one, I do not think it requisite to grant an attachment. The issuing attachment is always a matter of discretion in the court; and, under the circumstances of the case, public justice does not, in my opinion, require our interposition, though we may condemn the publication in question."

In *Fishback v. State* (1892) 131 Ind. 304, 30 N. E. 1088, in holding that one accused of contempt in making a publication alleged to attack the judge and grand jury ought to have been discharged on his answer, the court said:

"If the article is per se libelous, making a direct charge against the court or jury, admitting of but one fair and reasonable construction, . . . then it would be trifling with justice to say that in such a case the publisher could admit the publication, but deny that he intended the plain and unmistakable meaning which the language used conveys, but when the language used in an article is not per se libelous, and only becomes so, and made to apply to the court by the use of innuendoes, and is fairly susceptible of an innocent meaning in so far as any reflection upon the court is concerned, and the defendant answers under oath that he used it in a sense not libelous, and declares he intended no imputation upon the court, either impugning the motives or integrity of the judge, or to embarrass the administration of justice, his answer must be taken as conclusive. If he swear falsely, he is liable to indictment and prosecution for perjury." Followed on similar facts in *Allen v. State* (1892) 131 Ind. 599, 30 N. E. 1093. B. B. B.

VIRGINIA SUPREME COURT OF APPEALS.

J. R. MEEK, Appt.,
v.

JOHN D. FOX et al.

(118 Va. 774, 88 S. E. 161.)

Will — estate on condition subsequent.

1. A fee upon condition subsequent is created by a provision in a will that one shall have specified land forever except she should marry, then at her death "I desire it to revert to her heirs."

For other cases, see Wills, III. g, 4, in Dig. 1-52 N. S.

Same — restraint of marriage — validity.

2. A condition in a will that in case one given a fee in real estate should marry it should at her death revert to her heirs is void as in restraint of marriage.

For other cases, see Wills, III. g, 4, in Dig. 1-52 N. S.

(March 23, 1916.)

Note.—For provision in restraint of marriage in a deed or will as a condition or a limitation, see note to *Re Fitzgerald*, 49 L.R.A.(N.S.) 615.

As to validity of provision in a deed or will in restraint of marriage, see note to *Sullivan v. Garesche*, 49 L.R.A.(N.S.) 606, and see also footnote to *Gard v. Mason*, L.R.A.1916B, 1077. L.R.A.1916D.

A PPEAL by defendant from a decree of the Circuit Court for Tazewell County in favor of complainants in a suit to construe a will. Affirmed.

The facts are stated in the opinion.

Messrs. Henson & Bowen and A. S. Higginbotham for appellant.

Messrs. George W. St. Clair and J. W. Chapman, for appellees:

By the language of the will the testator devised to his daughter Julia Anne an estate in fee simple, with a condition subsequent annexed, providing that if she married she should lose her fee-simple estate, which would be that act be cut down to a life estate.

13 Enc. Dig. Va. & W. Va. Rep. p. 818; *Sellers v. Reed*, 88 Va. 377, 13 S. E. 754; *Graves, Real Prop. §§ 253 et seq*; *Atlanta Consol. Street R. Co. v. Jackson*, 108 Ga. 634, 34 S. E. 184; *Millan v. Kephart*, 18 Gratt. 1; 1 Minor, Real Prop. § 540.

In construing a will, the object is to discover the intention, which is to be gathered in every case from the general purpose and scope of the instrument, in the light of the surrounding circumstances.

Lindsey v. Eckles, 99 Va. 668, 40 S. E. 23; *Miller v. Potterfield*, 86 Va. 876, 19 Am. St. Rep. 919, 11 S. E. 486.

The condition in the will is in general restraint of marriage, for the devisee is not restricted to any time, place, or person, but

is wholly and absolutely forbidden to marry anybody at any time or at any place.

2 Minor's Inst. 2d ed. 245 et seq; Maddox v. Maddox, 11 Gratt. 804; Tiedeman, Real Prop. §§ 275, 281; note to Phillips v. Ferguson, 1 L.R.A. 838; Smythe v. Smythe, 90 Va. 638, 19 S. E. 175; Sullivan v. Garcesche, 229 Mo. 496, 49 L.R.A. (N.S.) 605, 129 S. W. 949; Knost v. Knost, 229 Mo. 170, 49 L.R.A. (N.S.) 627, 129 S. W. 665; 1 Shep. Touch. Hilliard's Am. ed. 132; 2 Redf. Wills, p. 302; Arthur v. Cole, 56 Md. 100, 40 Am. Rep. 409; Watts v. Griffin, 137 N. C. 572, 50 S. E. 218; Burdis v. Burdis, 96 Va. 81, 70 Am. St. Rep. 825, 30 S. E. 462; Randall v. Marble, 69 Me. 310, 31 Am. Rep. 281; Kennedy v. Alexander, 21 App. D. C. 424.

Cardwell, J., delivered the opinion of the court:

The sole question presented on this appeal is the construction of the will of Peter Spracher as to the devise therein made to his daughter Julia Anne. Testator died in the early part of 1881, and his will was probated in Tazewell county court on May 10, 1881. He devised one third of his lands to his son, W. L. Spracher, in fee simple. To Eliza N. McFarland, his only married daughter, he devised one third of his land during her life, remainder to her heirs, and the provision made for his daughter Julia Anne is as follows:

"Also to my daughter Julia Anne, I desire that she shall have her equal share laid off, also according to quality and quantity, and she shall have it forever, except she should marry, then at her death I desire that it shall revert to her legal heirs."

After the death of the testator, his daughter Julia Anne, on June 20, 1882, intermarried with one Thomas Hall, and after this marriage, and after the death of her husband, Julia Anne Hall, by deed dated September 28, 1912, conveyed the land devised to her by the above clause of her father's will to appellees John D. Fox and Alexander St. Clair. After the marriage of Julia Anne, W. L. Spracher by deed dated December 15, 1885, conveyed his land to one Joseph Meek, and in this conveyance he included what he claimed to be his remainder in the land devised to Julia Anne by the clause of their father's will quoted above; so that in this litigation appellant claims the land in question under Joseph Meek, through the various conveyances and devises appearing in the record, while appellees claim the land under the conveyance to them from Julia Anne Hall, the contention of appellees being that a fee-simple estate vested in Julia Anne Spracher under the will of her father, that

the provision in said clause of his will above quoted created a condition subsequent in general restraint of marriage, that such condition is void in law, and that therefore the subsequent marriage of the said Julia Anne did not divest her of this fee-simple estate, but same continued in her, and was passed from her to the appellees by her conveyance above mentioned.

In discussing the intention of the testator, to be ascertained from the language employed in his will and the surrounding circumstances—that is, the situation of the parties, the ties which connected the testator with the objects of his bounty, and the motives which probably influenced him in disposing of his property—appellant takes the position that the purpose was to put his two daughters, Eliza M. and Julia Anne, upon an equal footing, and to provide for them alike; while appellees contend that his purpose was to discourage and prevent the marriage of Julia Anne by placing a penalty upon her marrying.

In looking first to the language employed in the will to determine what estate in the land devised to Julia Anne was vested in her, it is to be borne in mind that it is too well settled to require citation of authority that all devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is clearly indicated in the will.

As it seems to us, it would have been quite difficult, if not impossible, for the testator to have found language that would have served better to transfer a complete estate in fee simple than was used in the clause of his will making provision for his daughter Julia Anne, which clause provides that she was to have one third of the testator's land, "and she shall have it forever, except she marry, then at her death I desire that it shall revert to her legal heirs." The first part of the language used plainly means that the estate devised to Julia Anne was to be hers forever,—that is, an estate in fee simple,—and the latter part of it in effect is, "but if she marries, then she shall have only a life estate." It is equally as clear to us that it would be an unwarranted perversion of said language to make it read, as contended by appellant: "I give a life estate in one third of my lands to my daughter Julia Anne, but if she does not marry, then she is to have a fee-simple estate."

Nor can this provision in the will as to the marriage of the devisee be construed into a condition precedent or a limitation. It is not a condition precedent, for the reason that the estate had already vested in the devisee, Julia Anne, at the time of her marriage, and the effect of the provision

respecting her marriage, if valid at all, could only be to divest such estate, and not to prevent its vesting, which would be the result in the case of a condition precedent.

It is not a limitation, because it does not mark the extent of time for which the estate was to last, nor determine the duration of the estate. The testator does not say that Julia Anne shall have the estate until she marries, and thus make the time of her marrying mark the full limit of time for which the estate is given; but he gives to her an estate in fee simple, and then adds a provision, the effect of which is to cut down and destroy this larger estate and vest in her a lesser estate.

"The only general rule, perhaps, in determining whether words are words of condition or of limitation, is that where they circumscribe the continuance of the estate, and mark the period which is to determine it, they are words of limitation; when they render the estate liable to be defeated in case the event expressed should arise before the determination of the estate, they are words of condition." *Atlanta Consol. Street R. Co. v. Jackson*, 108 Ga. 634, 34 S. E. 184, quoting from 2 Washb. Real Prop. 6th ed. p. 27.

Accordingly, in *Millan v. Kephart*, 18 Gratt. 1, it is said: "While a limitation marks the bounds . . . of an estate, and the utmost time of its continuance, the effect of a condition is to defeat the estate before it reaches the boundary or has completed the full space of time described by the limitation. 1 Preston, Estates, 49."

In *Minor on Real Prop.* vol. 1, § 540, this learned author says: "Limitations differ from conditions in this: A limitation marks the utmost time of continuance of an estate; a condition marks some event which, if it happens in the course of that time, is to defeat the estate."

And at page 655, § 574, the same author illustrates as follows: "Thus a devise to 'A until she marries, and then the land to pass to Z,' is a limitation, and good; whilst a devise to A for life, on condition that if she marries the land shall pass to Z,' is a condition, and because it absolutely prohibits marriage is void. That is, the condition is void, and, being a condition precedent to Z's estate, Z can take no interest, present or future, in the land conveyed."

The latter part of the illustration quoted, and which the author declares to be a condition subsequent, is wholly parallel with and similar to the case at bar, in that by the terms of the will under consideration there is given an estate to the devisee (Julia Anne) in fee simple, on condition that if she marries the land shall pass to her heirs; her sole heir, as it happens, be-

ing her brother, W. L. Spracher, under whose conveyance appellant claims, and who, according to the rule of construction stated by Professor Minor, *supra*, could take no interest, present or future, in the land devised, and therefore could convey none to the appellant's predecessor in title.

Let us, however, revert to the language of the will itself and determine from it, if we can, the intention of the testator, and whether or not he, after giving his daughter Julia Anne an estate in fee simple, and then adding a provision the effect of which is to cut down and destroy this larger estate and vest in her a lesser estate, intended to put a penalty upon the marriage of his said daughter; that is, intended this latter provision as a condition in restraint of her marriage generally.

As a matter of construction, it is impossible to see how the words in the will, "except she marry," can be deemed identical with "until she marry," as contended by appellant. The word "except," as it appears to us, must be construed as a condition, and not a limitation. Indeed, to construe "except" as "until," in the sentence where it is used in the devise, would involve a self-contradiction, in that the sentence would then read that the testator gives the land "to Julia Anne forever until she marries, then after her death (in the event of marriage) to her heirs." The language used can only make good sense by construing "except" as "but if," or its equivalent, which would constitute it a condition subsequent.

It may be conceded that a condition subsequent may usually be distorted into the form of a limitation, or vice versa, and apparently without materially affecting the meaning of the testator or grantor; but in law there is a wide difference between the two. It would doubtless be difficult to convince the ordinary man that he is not saying exactly the same thing in two different ways when he says, "I give this land to you until you marry and then to B," and, "I give this land to you for life, but if you marry then to B." And if he should say either, it would be easy enough to twist it around and say it is the same as if he had said the other. But in law they are by no means the same, since all the legal differences at once arise that are recognized as existing between estates upon condition and estates upon limitation, amongst others the possibility that, in an estate upon condition, the condition may be void, and the estate thus become absolute and free from condition, while, if the estate is upon limitation, the limitation marks the utmost duration of the estate under the devise or

the agreement of the parties where created or conferred by deed or contract, which cannot be extended beyond that period without violating the terms of the devise in the one case, and without making a new contract for the parties in the other. Hence, while an estate limited "to A in fee, but if he attempts to alien his estate then to B in fee," would give A an absolute estate and in fee, free from condition, because the condition is an unreasonable restraint of alienation and void, yet a limitation "to A until he attempts to alien, and then to B," would be a perfectly good limitation, and upon A's attempt his estate would cease and go over to B.

Upon reason and authority the foregoing conclusions are correct, and therefore, in the instant case, the devise of the land in question to the testator's daughter Julia Anne, "and she shall have it forever," transferred upon the death of the testator to the daughter a fee-simple estate in the land, and the added provision to the devise, "except she should marry, then at her death I desire that it (the land) shall revert to her legal heirs," both by the simple construction of the language and the intention of the testator, to be gathered from the plain language used, is a condition subsequent and must be in restraint generally of his daughter's marriage; so that the only remaining question is as to the legality of such a condition.

It has, by numerous decisions of this court, been held that any contract or provision in general or total restraint of marriage is against the policy of the laws of this state; and this view, it appears, has been uniformly taken wherever the question has arisen.

In *Maddox v. Maddox*, 11 Gratt. 804, the will construed bequeathed to the testator's niece certain personal property during her life, and forever if she should remain a member of the Society of Friends, in order for her to do which it was necessary for her to marry one of the members of the society; but, there being only a few male members of the society in that community, the court held that the provision was an unreasonable restraint on marriage, and therefore void, the court saying in its opinion: "Hence, not only should all positive prohibitions of marriage be rendered nugatory, but all unjust and improper restrictions upon it should be removed, and all undue influences in determining the choice of the parties should be carefully suppressed. . . . But where a condition is in restraint of marriage generally, it is deemed to be contrary to public policy, at war with sound morality, and directly violative of the true economy of social and

domestic life. Hence such a condition will be held utterly void."

The court again took the same view of the policy of the law in the case of *Phillips v. Ferguson*, 85 Va. 509, 1 L.R.A. 837, 17 Am. St. Rep. 78, 8 S. E. 241, where it is said: "The law upon this whole subject is well summarized in a valuable treatise as follows [quoting from 2 Pom. Eq. Jur. § 933]: . . . When a condition [in restraint of marriage] is subsequent and annexed to a gift of land [or of any interest arising out of land] if general, it is void, and, although broken, the estate of the donee continues."

To a report of this case in 1 L.R.A. 838, the following note is appended: "Notwithstanding the confusion and uncertainty which surrounds the subject of contracts in restraint of marriage, the authorities recognize certain propositions which lie at the foundation; namely, that all conditions, annexed to gifts, which prohibit marriage generally and absolutely are void, unless it be a condition precedent annexed to a devise of land; and if not in absolute restraint, but in such form that it will probably operate as a general prohibition, it is void under a like limitation, and this upon the ground of public policy."

In *Smythe v. Smythe*, 90 Va. 638, 19 S. E. 175, the clause of the will construed is as follows: "I give and bequeath unto my two sisters, Kate A. and Mattie R. Smythe, all my estate of every kind, both real and personal, of which I may die seised, to be by them used and enjoyed during their natural lives. But the benefits of this bequest are to continue to my said two sisters upon the condition that they shall remain sole."

Held, null and void as placing a restraint upon marriage.

The decisions in the cases cited are in harmony with the decisions in other jurisdictions, as well as with the text writers on the subject, which are clear and emphatic on the point that a condition subsequent in general restraint of marriage is void, and cannot have the effect to divest an estate which is already vested. Among the authorities adverted to are *Sullivan v. Garesche*, 229 Mo. 496, 49 L.R.A.(N.S.) 605, 129 S. W. 949; *Arthur v. Cole*, 56 Md. 100, 40 Am. Rep. 409; *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218; *Randall v. Marble*, 69 Me. 310, 31 Am. Rep. 281; *Kennedy v. Alexander*, 21 App. D. C. 424; 2 Minor's Inst. 2d ed. 245 et seq.; *Tiedeman*, Real Prop. §§ 275, 281; 1 Shep. Touch. *Hilliard's Am. ed.* 132; 2 Redf. Wills, p. 302.

Counsel for appellant endeavor to draw a distinction between the effect of a condition subsequent in restraint of marriage

when attached to a bequest, and when attached to a devise; but the case of *Fifield v. Van Wyck*, 94 Va. 557, 64 Am. St. Rep. 745, 27 S. E. 446, cited as authority for the proposition, clearly does not go to the extent that counsel would have it go. On the contrary, it specifically refers to the case of *Phillips v. Ferguson*, supra, which is authority for the proposition that conditions subsequent in restraint of marriage have the same effect in cases of realty as in cases of personality, and are both null and void as against public policy.

No authority has been adduced by appellant's counsel to controvert the proposition that, if an intention on the part of the testator to impose a general restraint upon the marriage of a devisee is established, then such restriction is void, and the devisee will take an absolute estate.

The two cases mainly relied on by appellant are *Mann v. Jackson*, 84 Me. 400, 16 L.R.A. 707, 30 Am. St. Rep. 358, 24 Atl. 886, and *Jones v. Jones*, L. R. 1 Q. B. Div. 279. A careful examination of those cases discloses that they are not authority for appellant's contention in this case. The process of reasoning applied in those cases is wholly different from that applied in the cases decided by this and other courts and the text writers cited above. Not only so, but in *Mann v. Jackson*, supra, the court makes this statement: "It is undoubtedly an established rule of law that, even with respect to devises of real estate, a subsequent condition which is intended to operate in general . . . restraint of marriage, or the natural effect of which is to create undue restraint upon marriage and promote celibacy, must be held illegal and void, as contrary to the principles of sound public policy."

In *Jones v. Jones*, supra, *Lust, J.*, says: "As I read the words, the testator only meant to provide for her while she was unmarried" (a limitation), though the language of the will is, "Provided, said Mary remains in her present state of single woman; otherwise, if she binds herself in wedlock, she is liable to lose her share," etc.

It might have been possible and proper to distort the form of expression used by the testator (condition) into a different form (limitation) in accordance with his assumed intent, but it does not seem to us proper or even possible to do that in the case under consideration, for the obvious reason that it would involve the contradiction already mentioned of giving to the

testator's daughter *Julia Anne* an estate forever until she marries, which is repugnant and plainly self-contradictory, and if this be true then the testator must be presumed to have intended a condition subsequent, and nothing else.

Appellant relies, also, upon the case of *Selden v. Keen*, 27 Gratt. 576, and in that case the court did arrive at the conclusion that the provision in the will in regard to the marriage of the legatee was not void, as in restraint of marriage, but that same was a limitation, limiting the estate to the legatee until her marriage, and in the event of her marriage the estate given to her until that time ceased; but we deem it only necessary to say that a very different state of facts existed in that case from those of the case at bar, that the case was decided upon its own peculiar facts, and there is nothing in the court's opinion that disturbs the doctrine laid down in the case of *Maddox v. Maddox*, supra, and followed in the other cases above cited.

The great weight of authority is to the effect that conditions annexed to a bequest or a devise, the tendency of which is unduly to restrict or restrain marriage, are contrary to public policy and void, and it must be conceded that the intention of the testator in making the condition is immaterial, however praiseworthy that intent may have been. He must carry out his intention in some other way than by impinging upon the policy of freedom of marriage. But even if it could be granted that the prohibition of the law is aimed at the testator's intent to restrict marriage, and not at the restriction itself, it would seem clear that an actual restraint or discouragement of marriage would carry with it the prima facie presumption that such restraint was intended, and the burden would be upon him alleging the contrary to prove the real intention. Upon this theory, there is nothing in the will or the surrounding circumstances of the testator, as disclosed by the evidence in this case, that would satisfactorily establish an intent contrary to that to be gathered from the language of the will itself. Each side has its theory as to what the real purpose or intent of the testator was, and one seems just as plausible and as well supported as the other.

Upon the whole case, therefore, we are of opinion that the decree of the Circuit Court complained of is right, and it is affirmed.

Kelly, J., absent.

WEST VIRGINIA SUPREME COURT
OF APPEALS.

BROWN SHOE COMPANY

v.

SILAS HARDIN, Doing Business as the
City Taxicab Company, Plff. in Err.

(— W. Va. —, 87 S. E. 1014.)

Carrier — transfer men as common carriers.

1. A local carrier, such as a cabman, wagoner, or transfer man, carrying passengers and baggage for the public generally, from place to place in and about a city, or from town to town, is a common carrier, and, in his relations with his patrons, he is governed by the general legal principles applicable to carriers doing business on a larger scale.

For other cases, see *Carriers*, I. in *Dig.* 1-52 N. S.

Same — inability to deliver — duty.

2. On the performance of his contract of carriage in any case, his high obligation as carrier, making him practically an insurer of the property intrusted to him, ceases; but if, for any reason, the owner thereof does not receive it at the place of destination, the carrier is under the milder duty of exercising ordinary care for its safety until it is called for, redelivered, or disposed of in some legal way. He can neither abandon it nor leave it exposed to known danger of loss, destruction, or injury.

For other cases, see *Carriers*, III. d, 2, in *Dig.* 1-52 N. S.

Same — warehouseman.

3. A transfer man's duty as carrier ends with delivery of the goods intrusted to him at the place of destination. If, for any reason, he is not there relieved of their actual custody or possession within a reasonable time, he is under a different, further, and less exacting duty to provide for their safety, for another reasonable period of time, the degree of which duty is determined by the principles of law applicable to warehousemen.

For other cases, see *Carriers*, III. d, 2, in *Dig.* 1-52 N. S.

(February 15, 1916.)

ERROR to the District Court for Kanawha County to review a judgment in plaintiff's favor in an action brought to recover the value of property lost after having been placed for transportation in the care and custody of defendant's agent by plaintiff's agent. Affirmed.

The facts are stated in the opinion.

Messrs. Morgan Owen and E. B. Dyer for plaintiff in error.

Headnotes by **POFFENBARGER, J.**

Note. — As to liability of baggage transfer company, see annotation following this case, post, 1202.
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Messrs. Burdett & White, for defendant in error:

If plaintiff failed to call for the goods within a reasonable time, and because of such failure the relation of defendant to said goods was changed from common carrier to mere warehouseman or bailee, then it became and was the duty of the latter to exercise at least ordinary care to prevent them from being lost to the owner, and a failure to exercise such care rendered it liable for the loss thereof.

McGraw v. Baltimore & O. R. Co. 18 W. Va. 361, 41 Am. Rep. 696; *Maslin v. Baltimore & O. R. Co.* 14 W. Va. 189, 35 Am. Rep. 748; 5 Am. & Eng. Enc. Law, 2d ed. 233.

The carrier is bound to make delivery at a place reasonably suitable and convenient for the consignee to receive it, and this whether the carrier is at the time acting as a carrier or a warehouseman.

5 Am. & Eng. Enc. Law, 2d ed. 213, 214.

After the carrier becomes a warehouseman or bailee only, with respect to goods in his charge, he is then liable for such loss as results from the want of such care as men of reasonable prudence ordinarily exercise for the safety of their own goods under similar circumstances.

5 Am. & Eng. Enc. Law, 2d ed. 284.

Poffenbarger, J., delivered the opinion of the court:

The judgment for plaintiff, here complained of, is based upon a finding by the trial court acting in lieu of a jury, by consent of the parties, upon a statement of facts agreed to.

The right of the controversy depends largely upon the law of bailment. The action was brought to recover the value of two traveling trays or telescopes and their contents, which were lost after having been placed in the care and custody of the defendant's agent, by an agent of the plaintiff, for carriage as baggage from some point in the city of Charleston to the station of the Chesapeake & Ohio Railway Company in that city. The defendant, doing business as City Taxicab Company, was there engaged in the transportation of passengers and baggage for hire to and from points in and about the city and to and from the railway stations therein, under a license for the purpose issued to him by the city authorities. On a day in April, 1914, the plaintiff's agent, a traveling salesman, being in the city and intending to leave for the East on that day, by train No. 8 of said railway company, delivered to an agent of the defendant a large trunk containing samples of shoes and the two trays or telescopes for transportation to the

Chesapeake & Ohio Railway station. A claim check was given for each of the three pieces, reciting that the Taxicab Company was "C. & O. and K. & M. Railway Bonded Transfer Co., with privilege to check baggage from house or hotel to destination." The baggage was carried to the station, and each of the three pieces placed on the platform thereof, before the arrival of train No. 8, and was ready for delivery to the plaintiff when that train arrived. At some time of the afternoon of that day, and before the arrival of train No. 8, Burdett, the plaintiff's agent, altered his plans and decided to go west instead of east, and was not at the station to take the train mentioned. Nor did he advise the defendant of this fact, or give him any direction as to the disposition or custody of the baggage. He relied upon the defendant to hold it until called for by him, and to deliver it to him upon the surrender of the claim checks held by him. Nor did the defendant or his agent remove the baggage from the station platform. It is known to have remained there until 8 o'clock in the evening, when the defendant's agent, who had taken charge of it at the railway station, directed the attention of defendant's night man to the parcels, which then still had the checks attached to them. The next morning Burdett appeared and called for his baggage, and, on the surrender of the check therefor, the trunk was delivered to him by the defendant's agent, and he was informed that the other two pieces had been lost. The platform of the station on which the property was deposited was open and uninclosed. What became of the two lost pieces is not disclosed by the statement of facts.

In the transportation of the baggage from the point at which it was received to its destination, the defendant acted as a common carrier, and his obligation was practically one of insurance.

"It is generally held that truckmen, wagoners, cartmen, and other persons who undertake to carry goods for hire for the public generally and as a common employment in a city, or from one town or place to another, are common carriers." 4 R. C. L. title "Carriers," § 24, p. 557.

As to this legal proposition there is no controversy. The divergence of views of counsel relates to the status of the defendant after he had delivered the baggage on the platform at the railway station. Relying upon *Benoleil v. Durocher*, Rap. Jud. Quebec 13 C. S. 260, the defendant urges that all duty on his part ceased on such delivery. The case relied upon is the only precedent upon a question of this kind that diligent research on the part of counsel has L.R.A.1916D.

disclosed. No written opinion is reported, but the reasons for the court's conclusion are set forth at some length in the judgment entered and indicated in the syllabus, reading as follows: "Where a local carrier or carter undertakes to transport baggage from one point to another within a city, e. g., from one railway station to another, his responsibility is at an end when he has fulfilled the contract by delivering the luggage at its destination. If it be subsequently lost in consequence of the owner not being at the appointed place to receive it, he has no recourse against the carrier."

On the other hand, it is insisted that, though the high duty imposed upon carriers by law in the fulfilment of the contract of carriage may have ended with the delivery on the platform, all responsibility for the safety of the property did not then cease, and that the defendant was still bound to exercise some degree of care for its protection. In other words, the contention is that he was still liable for its loss or destruction, if occasioned by his negligence.

There was no written contract between the parties. The claim checks did not constitute contracts. They were in the nature of receipts, and constituted evidence of delivery of the articles to which duplicates thereof were attached, and of the ownership and identity of the parcels. There was an express oral contract to carry the baggage from the point of delivery to the place of destination, but it did not in terms define the rights and liabilities of the parties thereto. For these it is necessary to resort to the law founded upon usage and custom, which well and clearly defines them in all other instances of common carriage. No reason is perceived why the general principles of that law do not govern the class of common carriers to which the defendant belongs. After the completion of the contract of carriage the strict rule of liability applicable throughout the performance thereof is relaxed and modified. If the consignee of goods does not within a reasonable time call for them and take them into his own possession, the carrier's responsibility for their safety is the same as that of a warehouseman. *Hurley & Son v. Norfolk & W. R. Co.* 68 W. Va. 471, 69 S. E. 904; *Hutchinson v. United States Exp. Co.* 63 W. Va. 128, 14 L.R.A.(N.S.) 393, 59 S. E. 949; *Berry v. West Virginia & P. R. Co.* 44 W. Va. 538, 67 Am. St. Rep. 781, 30 S. E. 143, 4 Am. Neg. Rep. 241. His responsibility does not wholly end or terminate with the performance of his contract of carriage. He still remains under duty to exercise some degree of care for the safety

of the property. The same principle governs in the ascertainment of the rights of the parties respecting baggage: "If a passenger does not call for his baggage on arrival, the company cannot leave it uncared for, or abandon it. Its strict responsibility as a carrier will cease after a reasonable time has elapsed to enable the owner to claim it, and a modified liability, like that of warehouseman, will supervene.

. . . The neglect of the owner to call for the baggage within a reasonable time changes the character of the liability, but does not terminate it." *Matteson v. New York C. & H. R. R. Co.* 76 N. Y. 381; *Burnell v. New York C. R. Co.* 45 N. Y. 184, 6 Am. Rep. 61; *Fairfax v. New York C. & H. R. R. Co.* 67 N. Y. 11; *Schouler Bailm. & Carr.* 3d ed. § 694; *Hutchinson Carr.* 1291.

In such cases there is a duty to make some provision for the safety of the property, which usually consists of storage, although railroad companies and other common carriers are not engaged in the business of storage. The law recognizes the necessity of limited storage or custody for mere safety, as a necessary incident of the business of carriage. It cannot justly close its eyes to the numerous minor casualties, mishaps, and misadventures which may prevent appearance and demand at the place of destination. Moreover, it assumes that the parties impliedly contemplated some provision for their consequences as part of the contract. Ordinarily the owner is punctual in his appearance, production of his check, and claim of his property, and it does not occur to either party to make express provision for what is not likely to but may occur, but the law does not assume their ignorance of such possibilities nor their intention to make no provision for them. On the contrary, knowledge thereof, and also the intention to make some provision for the safety of the property in such an event, are assumed. Nor does even negligent failure to make a prompt appearance and claim justify abandonment. The carrier's remedy for such delays, whether due to accident or negligence, is a reasonable charge for storage. Here, as in very many other cases, the law, conforming itself to rules of conduct governing the dealings and relations of prudent and fair men, makes allowance for inadvertence, mistakes, and even wilful failures to comply with strict duty, and proportions the penalty to the offense, in the absence of an agreement inflicting a definite forfeiture of right.

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Though the defendant's business was more limited than that of a railroad company or other carrier over long distances, the same general principle must be applicable to him. On the failure of the owner of baggage to call for it at its destination, his abandonment of it would have been equally as unreasonable and unjustifiable as that of any other carrier. He was bound to take such reasonable precaution for its safety as was practicable and not unduly burdensome. Though not engaged in the storage business, and having no place especially provided for such business, common knowledge would suggest the practicability, without any great hardship, of his custody of the comparatively small articles intrusted to him, for a limited time. For aught that appears in the statement of facts, he could have deposited them in the baggage room of the railway station. It does not appear that he even made a request for such privilege. He could have taken them to his office, garage, or place of business and stored them overnight. In his business such situations are likely not of frequent occurrence, wherefore the discharge of the duty here declared would not require maintenance of a station or building especially designed for storage.

A warehouseman is a bailee for compensation or hire, bound to exercise ordinary care for the safety of the property intrusted to him (*Heatherington v. Richter*, 31 W. Va. 858, 8 S. E. 609), not a mere gratuitous one, liable only for loss or injury by wilful misconduct or gross negligence. Occasional storage or custody of goods, in consequence of failure of the owner to remove them promptly, is a necessary incident of the business for which the carrier receives compensation, and is within the contract, notwithstanding additional compensation may be charged for the incidental extra service. The decisions in *Hurley & Son v. Norfolk & W. R. Co.* 68 W. Va. 471, 69 S. E. 904; *Berry v. West Virginia & P. R. Co.* 44 W. Va. 538, 67 Am. St. Rep. 781, 30 S. E. 143, 4 Am. Neg. Rep. 241, and *Hutchinson v. United States Exp. Co.* 63 W. Va. 128, 14 L.R.A.(N.S.) 393, 59 S. E. 949, proceed upon this principle. Consistently applied here, it required such care on the part of the defendant for the safety of the property in question as a prudent man bestows upon his own property, and such a man does not leave apparently valuable and easily portable articles in an exposed and unguarded place at night.

The judgment is clearly right, and will be affirmed.

Annotation—Liability of baggage transfer company.

Earlier cases considering the question under annotation will be found in the note to *Anniston Transfer Co. v. Gurley*, 34 L.R.A. 137. As to cartman, etc., as common carrier, see the note to *Lloyd v. Haugh & K. Storage & Transfer Co.* 21 L.R.A.(N.S.) 188.

The position taken in *BROWN SHOE Co. v. HARDIN*, ante, 1199, that a company engaged in the transfer of passengers and baggage between points in a city and to and from railway stations is a common carrier, is supported by cases cited in the earlier note, and the cases cited in the present note for the most part dispose of the question of liability upon principles applicable to common carriers.

When duty commences.

A baggage transfer company which accepts the baggage check of a passenger and agrees to get her trunk and deliver it to her is, in the absence of any legal excuse, liable for the value of the trunk and its contents where it fails to deliver the trunk or to return the check. *Atlanta Baggage & Cab Co. v. Mizo* (1908) 4 Ga. App. 407, 61 S. E. 848. The court distinguished *Aiken v. Westcott* (1890) 123 N. Y. 363, 25 N. E. 503, cited in earlier note, and relied upon by the baggage company as supporting its claim of nonliability, stating that in that case the evidence showed that the trunk in question had never been in possession of the baggage company, but on the contrary had been stolen from the railroad company, and added that if, in the instant case, the transfer company had shown as a matter of defense that it never had received the trunk represented by the check, but that the trunk had been taken from the possession of the railroad company, and had so reported to the passenger and returned her check in order that she might thereby hold the railroad company liable, the facts would have been similar to those of the *Aiken* Case, and there would have been no liability on the part of the transfer company.

So, an express company whose agent solicits a passenger's baggage on the train, and taking her baggage check goes into the baggage car, and according to his custom surrenders the check to the railroad company by placing it upon the strap on the trunk with the duplicate check, and pasters on the trunk the express company's label, the intention being to claim the baggage after it has

been delivered to the baggage room at the station, is liable for the subsequent loss of the trunk or its contents, although such loss occurred before he has gone to the baggage room to claim the trunk. *Springer v. Westcott* (1901) 166 N. Y. 117, 59 N. E. 693. As to the legal effect of the premature surrender of the check under such circumstances, the court said: "Whether the effect upon the liability of the railroad company to the plaintiff was to terminate it as a carrier, convert it into that of a warehouseman, or to end it entirely, we do not determine, but confine our attention to the effect upon the liability of the express company to the plaintiff. As between the two companies the railroad company became the bailee of the trunk for the express company. Thenceforth there was a dual custody, by the latter as bailor and by the former as bailee, the same as always results from a storage of property of a principal by a bailee thereof, whether authorized by the owner or not. The possession of the railroad company thus became the possession of the express company. So far as the rights of the plaintiff are concerned the defendant had assumed control of the trunk and was bound to make safe delivery thereof to her. By its action it ran the risk of receiving the trunk, with the contents unharmed, from the railroad company, its bailee. While it was under no obligation to take any responsibility for the trunk until the actual delivery thereof, upon surrender of the check at the Grand Central Depot, it saw fit, for purposes of its own, to anticipate responsibility by giving up the check while the trunk was in transitu. It cannot now be heard to say that it did not intend this result, for the law holds it to the natural consequences of its own acts. The plaintiff was entitled to her check, unaffected by the unauthorized surrender, as unimpaired evidence of an unperformed contract of the railroad company, or the delivery of her trunk with the contents undisturbed. She cannot be tossed like a ball from one company to the other, each disclaiming liability itself and seeking to place it upon the other. One, at least, was liable, and from their intimate relations they could easily have determined which without subjecting a patron of both to the expense and delay of litigation which has lasted more than ten years."

A baggage transfer company whose

agent accepted a check for a valise for the purpose of getting the valise and transporting it to the owner's residence has the burden of proving that the valise was not received by it in good condition, where the owner shows that it was delivered to the railroad company in good condition and that he had not seen the valise during the interval between its delivery to the railway company and its delivery to him by the transfer company. *Myerson v. Woolverton* (1894) 9 Misc. 186, 29 N. Y. Supp. 737.

But a transfer company which accepts a check for baggage for the purpose of getting it from the railroad company and taking it to the owner's residence will not be liable for the damaged condition of such baggage or for loss of any of its contents, although the owner proves that he gave it to the railroad company in good condition, where the owner testifies that he did not arrive at his residence until about a half an hour after the baggage arrived, and there is no evidence as to who received it or where it was deposited in the meantime. *Eckstein v. Woolverton* (1908) 111 N. Y. Supp. 535.

Liability of an express company for loss of articles from a trunk is established by uncontradicted proof that the trunk was found unlawfully in the express company's possession and that the articles were taken therefrom during such possession. *Hoff v. Frank Parmelee Co.* (1908) 140 Ill. App. 458. See also *Springer v. Westcott* (1896) 2 App. Div. 295, 37 N. Y. Supp. 909; *Aikin v. Westcott* (1890) 123 N. Y. 363, 25 N. E. 503; *Verner v. Sweitzer* (1858) 32 Pa. 208; *De Ponte v. New Orleans Transfer Co.* (1890) 42 La. Ann. 696, 7 So. 608.

What constitutes delivery by transfer company.

A contract to deliver a trunk at a railroad station is entered when the trunk is so delivered, and the carrier is not liable for its subsequent loss. *Newby v. Ford* (1908) 36 Pa. Super. Ct. 634. The court added that if the agreement had been to deliver at the station to the owner, the law would be otherwise.

But one who accepts hand baggage for the purpose of transferring it to a railway station is liable for its loss where, instead of delivering it to the agent at the station, he deposits it on the platform outside the building and it is stolen, such act being not a delivery, but an abandonment. *Alexander v. McNally* (1905) 112 Mo. App. 563, 87 S. W. 1.

And see *BROWN SHOE CO. v. HARDIN*. L.R.A.1916D.

And negligence of a transfer company in leaving baggage on the station platform when the owner thereof failed to come forth and claim it is a question for the jury where the evidence is conflicting as to whether the owner agreed to be there to receive it. *Ft. Worth Transfer Co. v. Isaacs* (1897) — *Tex. Civ. App.* —, 40 S. W. 39, 2 Am. Neg. Rep. 75. The court in this case stated that the carrier would have no right to abandon the property because the owner had not come forth to receive it, but that he would be required to exercise such a degree of care in keeping and protecting the trunk as an ordinarily prudent person would exercise toward such property under the same circumstances, and that a failure to exercise such care would be negligence for which he would be liable for the value of the trunk and its contents.

See also *Southern Exp. Co. v. Armstead* (1874) 50 Ala. 350; *Manheim v. Carr* (1873) 62 Me. 473; *Henshaw v. Rowland* (1873) 54 N. Y. 242, cited in the earlier note.

Liability as affected by character of goods.

A baggage transfer company is not liable in an action for breach of contract of carriage, for loss of a trunk which contained merchandise of large value, where, in accepting it for carriage, it rightfully assumed from the manner of its delivery that it contained only ordinary baggage. *Nathan v. Woolverton* (1910) 69 Misc. 425, 127 N. Y. Supp. 442, affirmed without opinion in (1911) 147 App. Div. 908, 131 N. Y. Supp. 1130. See also *Hopkins v. Westcott* (1868) 6 Blatchf. 64, Fed. Cas. No. 6692; and *Richards v. Westcott* (1858) 2 Bosw. 589; *Parmelee v. Lowitz* (1874) 74 Ill. 116, 24 Am. Rep. 276, cited in the earlier note.

Damages.

In *De Leon v. McKernan* (1898) 25 Misc. 182, 54 N. Y. Supp. 167, where an expressman failed to get a trunk to the dock until after the steamer had sailed, and the owner on discovering this left the steamer and hired a tug to return to the starting point, in an action to recover for the expense of the tug, also of a cablegram in reference to trunks which had gone on the steamer, and for his living expenses while waiting for the next steamer, and for an extra ticket, it was held that the price of the extra ticket was all that the expressman could be held liable for, the other items not being in the contemplation of the parties.

when they contracted, in view of the fact that no intimation of the consequences that would follow the failure to perform the contract was given the expressman. Further, the court stated that there was nothing in the evidence to show why the owner of the trunk could not have ascertained whether his trunk had been delivered before he went on the ship, and thus have obviated the necessity of hiring the tug to bring him back. Nor was any reason given to show that he could not either have arranged with the officers of the ship with regard to his other trunks that were already on board, or have taken them off with him, and thus avoided the necessity of the cablegram. Nor was any evidence given by which the court could arrive, with any sort of certainty, at the increased cost of living expenses claimed to result from his enforced stay.

Generally, as to right to recover expenses or damages incidental to loss of, or delay in delivering, baggage, see notes to *Turner v. Southern R. Co.* 7 L.R.A. (N.S.) 188, and *Kansas City, M. & O. R. Co. v. Fugatt*, L.R.A.1916A, 549.

Limitation of liability.

Supplementing note in 34 L.R.A. 138.

One engaged in transferring baggage for hire is not within the protection of a public service law making every common carrier and railroad company liable for loss, damage, and injury to property carried as baggage to the full value thereof, but requiring value over a certain amount to be stated and extra compensation paid for the extra risk, since the word "baggage" refers to property transported as an incident to the transportation of the owner as a passenger. *Morgan v. Woolverton* (1911) 203 N. Y. 52, 36 L.R.A.(N.S.) 640, 96 N. E. 354. Although not specifically stating so, this case overrules *Meister v. Woolverton* (1910) 140 App. Div. 926, 125 N. Y. Supp. 439, as to the point that the term "baggage" in the statute is not limited to property carried as an incident to the transportation of passengers.

Under a statute which provides that every common carrier and railroad corporation shall be liable for all loss, damage, or injury to property carried as baggage up to the full value, and regardless of the character thereof, but that the value in excess of \$150 shall be stated upon delivery to the carrier, and a written receipt stating the value shall be issued by the carrier, who may make a reasonable charge for the assumption of such liability in excess of \$150, one who delivers baggage to a transfer com-

pany to be transferred is not, because of his failure to disclose the value thereof, limited in his recovery to the sum of \$150. *Meister v. Woolverton* (N. Y.) supra. The court stated that "undoubtedly if the carrier had asked the person delivering the check the value of the trunk and such value had been stated to be \$150, the plaintiff would be estopped from disputing that \$150 was the value of the trunk, and thus precluded from recovering a greater sum. But this provision in relation to a statement of the value of the baggage to be transported was for the benefit of the company to entitle it to charge an additional sum for the assumption of the increased liability. If the defendant accepted the trunk for transportation without any inquiry as to value, or any demand for an additional charge on account of the excess. It cannot claim that either the plaintiff was estopped from claiming the full value of the trunk, or that a penalty should be imposed upon the plaintiff of a loss of the amount exceeding \$150 for a failure to state the value. Accepting the trunk for transportation without inquiry as to value, fixing its own charge for transportation without such inquiry, it assumed the obligation imposed upon it by the statute, which was a liability for the full value. If it had been intended to limit its liability to the value of \$150 where the value was not stated by the person delivering the trunk for transportation, it seems to me that that intention would have been expressed. The carrier has the option to inquire as to the value, and thus bring itself within the limitations provided for by the section in question. It is not, however, bound to make such inquiry, but could accept the trunk for transportation subject to the full liability clause, and waive the provision which authorized an extra charge if it assumed a liability for a sum above \$150, and its failure to make such additional charges was a waiver of this limited liability and an acceptance of the unlimited liability prescribed by the section."

And in *Noel v. Westcott Exp. Co.* (1916) 158 N. Y. Supp. 702, it was held that the limitation as to recovery was not operative, as the owner of the baggage was not asked to state the value.

In *Morgan v. Woolverton* (N. Y.) supra, it was contended that the burden rested on the owner of the baggage to disclose the value in excess of \$150, rather than upon the carrier to ascertain such value by inquiry, but the court did not discuss the point, as it decided that

in any event the defendant was not within the protection of the statute.

But see in *Richardson v. Woolverton* (1909) 117 N. Y. Supp. 908, an action to recover for loss of two pieces of baggage received for transfer by a transfer company, where judgment for plaintiff was modified by reducing it to the sum of \$300, as "by the provisions of § 38 of the Public Service Commissions law (Laws 1907, p. 911, chap. 429) then in effect, and under which this defendant came according to the defined scope of article 2 as expressed in § 25 of that law, no valuation having been stated by the plaintiff, he might not recover more than the amount limited in § 38 of that law, namely, \$150 a piece, the sum less than which the defendant, under the provisions of that section, might not, save by express contract, limit its liability."

A limitation of liability contained in a receipt for a baggage check given an owner of baggage by a local carrier was held in *Scofield v. May* (1909) 62 Misc. 243, 114 N. Y. Supp. 787, not to be binding upon the owner of such baggage so as to preclude a recovery beyond a certain limitation, where it was not called to her attention, nor did she read it. The court stated that in this case the owner of such baggage had no opportunity for negotiation or discussion; that the slip of paper was evidently hurriedly placed in her hands, and the agent immediately passed on engaged in the performance of his duties. The court cited *Blossom v. Dodd* (1870) 43 N. Y. 264, 3 Am. Rep. 701, and *Grossman v. Dodd* (1892) 63 Hun, 324, 17 N. Y. Supp. 855, affirmed without opinion in (1893) 137 N. Y. 599, 33 N. E. 642, cited in the early note, to the point that this was one of the numerous cases known as the baggage cases, in which it has been uniformly held that tokens or writings given in exchange for baggage checks are not of such a nature as to put persons on their guard as to the memorandum printed on them, and persons receiving them are not presumed to know their contents or to assent to them.

And so it is reversible error for a trial court to rule that a limitation on a coupon check given by a transfer company for baggage which is to be transferred by it to a depot is binding upon the owner of the baggage, where it does not appear that she knew of such limitation, or as a reasonable person should be presumed to examine the coupon to see exactly what was printed upon it. *Smith v. Hughes* (1909) 63 Misc. 326, 117 N. Y. Supp. 162. L.R.A.1916D.

Under a Code provision that "a passenger consignor or consignee, by accepting a ticket, bill of lading, or written contract for carriage with a knowledge of its terms, assents . . . to the limitation stated therein upon the amount of the carrier's liability in case property carried in packages, trunks, or boxes is lost or injured, when the value of such property is not named, . . ." constructive notice of such a limitation is sufficient to legally charge one with knowledge thereof. *Merrill v. Pacific Transfer Co.* (1901) 131 Cal. 582, 63 Pac. 915.

Whether or not one, in accepting from a transfer company a receipt for a trunk containing a limitation of liability, had actual or constructive notice of such limitation, is a question for the jury. (Cal.) *Ibid.*

So, also, whether or not a transfer company, in losing a trunk, was guilty of such gross negligence as to overcome a limitation of liability contained in a receipt given for such trunk, is a question for the jury. (Cal.) *Ibid.*

The effect of a custom.

Supplementing note in 34 L.R.A. 146.

Testimony of one who transfers baggage to a railway station, that it was his custom to deposit hand baggage on the platform outside the building, is insufficient to show a custom of the railroad company to receive it there, so as to relieve the transfer man of liability for its loss. *Alexander v. McNally* (1905) 112 Mo. App. 563, 87 S. W. 1.

The general custom of a transfer company to carry passengers only, and not to hold itself out as carrying such passengers' baggage without extra compensation, is immaterial on the question of transfer company's liability for loss of hand baggage, where it undertook to transport such passenger and his baggage in return for a certain fare demanded and paid. *City Transfer Co. v. Draper* (1902) 115 Ga. 954, 42 S. E. 221.

A baggage transfer company which takes a passenger's trunk check, giving in return its transfer check, and undertakes to deliver the trunk to her at a certain hotel, is relieved from liability of loss only by a delivery to such passenger in person, or to a party holding her transfer check for her, and so proof that it has delivered it at the hotel is no defense, although such delivery is the usual and customary manner of delivering baggage. *Trice v. Miller* (1889) 3 Tex. App. Civ. Cas. (Willson) 532.

J. H. B.

ARIZONA SUPREME COURT.

LUCIA GUANA, Admr., etc., of Manuel Guana, Appt.,

v.

SOUTHERN PACIFIC COMPANY.

(15 Ariz. 413, 139 Pac. 782.)

Master and servant — change of appliances — assumption of risk.

One employed to assist in caring for and moving engines in a roundhouse in the night, without artificial light, does not as matter of law assume the risk of injury of being caught, in the customary performance of his duties, between a standing post and an engine so much wider than those upon which he had been working as to make the space between it and the post dangerous, of which fact he was not notified.

For other cases, see Master and Servant, II. b, 3, b, in Dig. 1-52 N. S.

(April 3, 1914.)

APPEAL by plaintiff from a judgment of the Superior Court for Pima County sustaining a demurrer to the complaint filed to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. Reversed.

Statement by Ross, J.:

The appellant, who was plaintiff below, prosecutes this appeal from a final judgment sustaining a demurrer to her complaint, on the ground that it failed to state facts sufficient to constitute a cause of action. It is an action by her as administratrix for damages for the death of her husband, Manuel Guana, who is alleged to have been killed on March 10, 1910, through the negligence of the appellee railroad company, for which deceased was working at the time of his death. The material parts of the complaint are set forth in the following allegations:

"VI. That, at the time of his death, the said Manuel Guana was, and for about two months prior thereto had been, in the employ of the defendant at its said roundhouse at Benson, Arizona, and that the duties of his employment were to clean and care for the engines of defendant, and occasionally to assist in running them in and out of said roundhouse and to and from the main track of the defendant, and to assist generally in all work in and about the roundhouse and yard of the defendant at said Benson, and that, in the performance of such duties, it became and was neces-

sary and proper for the said Manuel Guana to get upon and off the engines of the defendant while the same were being run into and out of said roundhouse.

"VII. That said Manuel Guana was an illiterate Mexican, aged about twenty-six years; that he was inexperienced in the line of work in which he was engaged at the time of his death; that he was not aware of the risks and hazards of said occupation, and did not know or appreciate the dangers incident thereto, as the defendant and its agents and servants well knew.

"VIII. That during the time of his employment, the greater portion of the time of the said Manuel Guana was occupied inside the roundhouse, cleaning and wiping engines, and only occasionally was he required to assist in running them from the roundhouse to the main track of defendant; that, at the time of his death, said Manuel Guana was engaged in assisting the hostler in taking a certain engine from the roundhouse to the main track; that said engine was wider than the other engines which said Manuel Guana was accustomed to work, all of which was unknown to him; that the said roundhouse was constructed with large posts used to support the roof of said roundhouse, between which said posts were the tracks leading into said roundhouse, and which were used for running the engines in and out of said roundhouse; that said posts were so placed that they would clear a man getting on or off an engine of the ordinary size and width, but would not clear a man getting on or off an engine of the size and width of the one upon which said Manuel Guana was working at the time he met his death, all of which was unknown to said Manuel Guana; that said defendant carelessly and negligently maintained said posts too near to said tracks, as aforesaid, and carelessly and negligently failed and neglected to remove the same or to place them at a safe distance from said tracks, and knowingly suffered the said posts to remain in such dangerous position.

"IX. That on the 10th day of March, 1910, the said Manuel Guana was in the employ of said defendant at its roundhouse, as aforesaid, and that about the hour of 4 o'clock A. M., while it was still dark, it then and there became and was the duty of the said Manuel Guana to assist another employee of defendant, known as a hostler, in backing or moving a certain engine of the defendant out of said roundhouse, for the purpose of placing said engine upon the main track of defendant preparatory to attaching said engine to one of defendant's trains to be run over its railroad; that said engine was wider than the ordinary

Note. — As to assumption of risk by an employee of dangers arising from a change of appliances, see annotation following this case, post, 1210.
L.R.A.1916D.

engine, as aforesaid; and that some of the posts supporting the roof of said roundhouse were too close to the tracks, as aforesaid; that while so engaged, as aforesaid, said Manuel Guana was struck by one of the posts so placed close to the track, which, on account of darkness and the fact that no lights were maintained, was not observed by said Manuel Guana; and that he sustained injuries from which he, on the last-named date, died.

"X. That at the time said injuries were received by the said Manuel Guana, resulting in his death as aforesaid, the said engine was being backed or run out of said roundhouse by a certain employee of said defendant, known as a hostler, who was then and there engaged in operating said engine and backing or moving the same out of said roundhouse; that said hostler then and there well knew, or by the exercise of ordinary care and prudence could and should have known, that said Manuel Guana was then and there at work on said engine and getting on and off thereof, in the performance of the duties of his employment, and that said engine was larger than the ordinary engine, and that said Manuel Guana was in danger of being struck by the said post so maintained in dangerous proximity to said tracks over which said engine was then and there running, and that, in getting off said engine while the same was in motion, said Manuel Guana was in danger of being struck by said post and injured thereby; but nevertheless the said hostler continued to back and move said engine, and, while said engine was so being moved and while in motion, said Manuel Guana was struck by said post, and received injuries from which he died, as aforesaid.

"XI. That said Manuel Guana received the said injuries which resulted in his death, as aforesaid, by reason of the negligence and carelessness of said defendant in maintaining and keeping the said post too close to said track, so that said Manuel Guana could not perform his duties without danger of injury while said engine was being backed out of said roundhouse, and by reason of the carelessness and negligence of said hostler in backing said engine out of said roundhouse and keeping said engine in motion when said Manuel Guana was getting on or off said engine, which said hostler knew or ought to have known that said Manuel Guana was in danger of being struck by said post and of being killed or injured thereby, and because of the negligence and carelessness of the defendant in maintaining the dangerous conditions in and about said roundhouse with-

out, providing any lights in the nighttime."

Messrs. A. A. Worsley, William M. Lovell, and Benton Dick, for appellant:

Risks resulting from the master's negligence are not assumed by the servant.

1 Labatt, Mast. & S. § 2; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518.

Whether or not there was an assumption of risk involved in this complaint or cause is a question of fact that should have been submitted to a jury; and the court erred in sustaining the demurrer, if it was sustained, upon the theory that plaintiff assumed the risk.

Rase v. Minneapolis, St. P. & S. Ste. M. R. Co. 107 Minn. 260, 21 L.R.A. (N.S.) 138, 120 N. W. 360; 26 Cyc. 1444-1446; Boucher v. Robeson Mills, 182 Mass. 500, 65 N. E. 819; Swensen v. Bender, 51 C. C. A. 627, 114 Fed. 1; Hamman v. Central Coal & Coke Co. 156 Mo. 232, 56 S. W. 1091; Carter v. Baldwin, 107 Mo. App. 217, 81 S. W. 204.

Messrs. Frank Cox and Francis M. Hartman, for appellee:

The question of assumption of risk is one of law for the court.

Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 Fed. 524, 15 Am. Neg. Rep. 483; Rush v. Missouri P. R. Co. 36 Kan. 129, 12 Pac. 582; Kenney v. Meddaugh, 55 C. C. A. 115, 118 Fed. 209; Goure v. Storey, 17 Idaho, 352, 105 Pac. 794; Riverside Iron Works v. Green, 79 Kan. 588, 100 Pac. 482; Breig v. Chicago & W. M. R. Co. 98 Mich. 222, 57 N. W. 118, 16 Am. Neg. Cas. 131; Week v. Fremont Mill Co. 3 Wash. 215, 29 Pac. 215; Lee v. Northern P. R. Co. 39 Wash. 388, 81 Pac. 834; 3 Bailey, Personal Injuries, § 2216; Bolden v. Central of Georgia R. Co. 130 Ga. 456, 60 S. E. 1047; Dozier v. Atlanta, 118 Ga. 354, 45 S. E. 306; Hoover v. Empire Coal Co. 149 Ill. App. 258; Missouri P. R. Co. v. Baxter, 42 Neb. 793, 60 N. W. 1044, 16 Am. Neg. Cas. 555; Walker v. Wehking, 29 Ind. App. 62, 63 N. E. 128; Klutts v. Gibson Bros. 37 Tex. Civ. App. 216, 83 S. W. 404; Smith v. Armour & Co. 37 Tex. Civ. App. 633, 84 S. W. 675; Chicago, B. & Q. R. Co. v. Shalstrom, 45 L.R.A. (N.S.) 387, 115 C. O. A. 515, 195 Fed. 725; Chicago, R. I. & P. R. Co. v. Watson, 36 Okla. 1, 127 Pac. 693; Bresette v. E. B. & A. L. Stone Co. 162 Cal. 74, 121 Pac. 312; Kiley v. Chicago, M. & St. P. R. Co. 138 Wis. 215, 119 N. W. 309, 120 N. W. 756, 21 Am. Neg. Rep. 394; Callanan v. Judd, 23 Wis. 343; Oatman v. Bond, 15 Wis. 21; Klein v. Valerius, 87 Wis. 54, 22 L.R.A. 609, 57 N. W. 1112; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20

Am. St. Rep. 123, 46 N. W. 128; Randall v. Baltimore & O. R. Co. 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; Moores v. Citizens' Nat. Bank, 111 U. S. 170, 28 L. ed. 390, 4 Sup. Ct. Rep. 345; Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 619, 29 L. ed. 225, 5 Sup. Ct. Rep. 1125; Higgins v. McCrea, 116 U. S. 683, 29 L. ed. 768, 6 Sup. Ct. Rep. 557; Marshall v. Hubbard, 117 U. S. 419, 29 L. ed. 920, 6 Sup. Ct. Rep. 806; Goodlett v. Louisville & N. R. Co. 122 U. S. 411, 30 L. ed. 1234, 7 Sup. Ct. Rep. 1254; Chicago G. W. R. Co. v. Roddy, 65 C. C. A. 470, 131 Fed. 712; Connelley v. Pennsylvania R. Co. 47 L.R.A.(N.S.) 867, 119 C. C. A. 392, 201 Fed. 54; Montgomery v. Southern P. Co. 64 Or. 597, 47 L.R.A.(N.S.) 13, 131 Pac. 507.

Plaintiff assumed the risk of injury.

Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Kansas City, M. & O. R. Co. v. Loosley, 76 Kan. 103, 90 Pac. 990; Schlemmer v. Buffalo, R. & P. R. Co. 220 U. S. 590, 55 L. ed. 596, 31 Sup. Ct. Rep. 561; Nivert v. Wabash R. Co. 232 Mo. 626, 135 S. W. 33; Davies v. People's R. Co. 159 Mo. 1, 59 S. W. 982; Indiana & C. Coal Co. v. Batey, 34 Ind. App. 16, 71 N. E. 101; Boyd v. Harris, 176 Pa. 484, 35 Atl. 222; Bethlehem Iron Co. v. Weiss, 40 C. C. A. 270, 100 Fed. 45; Chicago, R. I. & P. R. Co. v. Lonergan, 118 Ill. 41, 7 N. E. 55; Young v. Burlington Wire Mattress Co. 79 Iowa, 415, 44 N. W. 693; Frederick Cotton Oil & Mfg. Co. v. Traver, 36 Okla. 717, 129 Pac. 747; 3 Elliott, Railroads, § 1269, p. 658; Rains v. St. Louis, I. M. & S. R. Co. 71 Mo. 164, 36 Am. Rep. 459; Pennsylvania Co. v. Finney, 145 Ind. 551, 42 N. E. 816; Gibson v. Erie R. Co. 63 N. Y. 449, 20 Am. Rep. 552; Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; Southern P. Co. v. Seley, 152 U. S. 145, 155, 38 L. ed. 391, 395, 14 Sup. Ct. Rep. 530; Narramore v. Cleveland, C. C. & St. L. R. Co. 48 L.R.A. 68, 37 C. C. A. 499, 96 Fed. 301; Freeman v. Wilson, — Tex. Civ. App. —, 149 S. W. 413; Vandalia R. Co. v. Parker, 178 Ind. 138, 98 N. E. 705; Chicago, B. & Q. R. Co. v. Shalstrom, 45 L.R.A.(N.S.) 387, 115 C. C. A. 515, 195 Fed. 725; Bowers v. Southern R. Co. 10 Ga. App. 367, 73 S. E. 677; Wright v. Yazoo & M. Valley R. Co. 197 Fed. 94; Molt v. Northern P. R. Co. 44 Mont. 471, 120 Pac. 809; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230; Kath v. East St. Louis & Suburban R. Co. 232 Ill. 126, 15 L.R.A.(N.S.) 1109, 83 N. E. 533; Sisco v. Lehigh & H. River R. Co. 145 N. Y. 296, 39 N. E. 958; Jackson v. Chicago, R. I. & P. R. Co. 102 C. C. A. 159, 178 Fed. 432; Wilson v. New York, N. H. & H. R. Co. 29 R. I. L.R.A. 1916D.

146, 69 Atl. 364; St. Louis, I. M. & S. R. Co. v. Birch, 89 Ark. 424, 28 L.R.A.(N.S.) 1250, 117 S. W. 243; Southern R. Co. v. Carr, 82 C. C. A. 240, 153 Fed. 106; Southern P. R. Co. v. Allen, 48 Tex. Civ. App. 66, 106 S. W. 441; Mattson v. Chicago, St. P. M. & O. R. Co. 103 Minn. 239, 114 N. W. 759; Chicago, M. & St. P. R. Co. v. Donovan, 87 C. C. A. 600, 160 Fed. 826; Wabash R. Co. v. Stansberry, 118 C. C. A. 357, 200 Fed. 139; Goure v. Storey, 17 Idaho, 352, 105 Pac. 794; 4 Labatt, Mast. & S. ¶ 1626; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 57 L. ed. 852, 33 Sup. Ct. Rep. 518.

Ross, J., delivered the opinion of the court:

Does the complaint state facts sufficient to constitute a cause of action? At the time Manuel Guana was killed, Arizona was a territory, and, in answering the above question, we must be guided by the terms of the Federal employers' liability act of April 22, 1908, chap. 149, 35 Stat. at L. 65, Fed. Stat. Anno. Supp. 1909, p. 584, Comp. Stat. 1913, § 8657. The portions of that act having a bearing on this case are as follows:

"Section 2. [Damages for Injuries in Territories, District of Columbia, Canal Zone, etc.] That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Section 3. [Contributory Negligence of Employee.] That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such em-

ployee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"Section 4. [Assumption of Risk of Employment.] That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of the employees contributed to the injury or death of such employee."

It will be seen that by § 2, in the territories, the District of Columbia, the Panama Canal Zone, and other possessions of the United States, the fellow-servant doctrine of the common law is abrogated, and a liability upon the part of common carriers by railroad is created, when injury or death results to an employee from the negligence of any of its officers, agents, or employees, or by reason of any defects or insufficiency, due to negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment. Section 3 abrogates the common-law doctrine of contributory negligence, and substitutes therefor what is known as comparative negligence, and authorizes the jury to gauge the amount of damages in accordance with the degree of negligence of the employee, diminishing it as the employee's negligence increases. Section 4 retains the common-law doctrine of assumed risk, except where the injury or death is occasioned, in whole or in part, by a violation of some law by the employer enacted for the safety of employees.

The complaint does not allege any violation by defendant of any safety law enacted for the protection of employees, and it follows that plaintiff assumed those risks under the common law that have not been abrogated by this act. *Freeman v. Powell*, — Tex. Civ. App. —, 144 S. W. 1033; *Barker v. Kansas City, M. & O. R. Co.* 88 Kan. 767, 43 L.R.A.(N.S.) 1121, 129 Pac. 1151.

The complaint is based upon three acts of negligence, as we read it: (1) A failure on the part of defendant to furnish a safe place and appliances; (2) a failure to furnish lights; and (3) negligence of a fellow servant.

Our analysis of the complaint, and, upon the demurrer, its allegations must be taken as true, satisfies us that the proximate

cause of the accident that resulted in the death of Manuel Guana was the introduction into his work, without his knowledge, of a new element of danger in the wider engine, and that the failure to provide artificial lights lessened his ability or opportunity to discover a danger that, with lights, might have been easily seen and avoided. It seems that the engine was being operated in the usual manner, and that the deceased, at the time of his injury, was performing his ordinary duties in the accustomed way. The accident did not occur because of the negligent movement of the engine, nor because of any negligent omission or commission of deceased, but solely by reason of the wider engine occupying more of the space between the upright posts and leaving too little space for deceased to do his work as he had been doing it on the narrower engines. The deceased might have been prevented, because of the darkness, from discerning that the particular engine was wider than the others upon which he had been working, or the difference in width might not have been so pronounced as to attract his attention, or his visual conception might have been defective. We cannot say, as a question of law, the new element of danger interjected by the wider engine was "so patent as to be readily observed" by deceased. A most cautious person might have been lulled into a feeling of security from having repeatedly made the same trip with apparently the same means without injury.

Under the rule that the employee assumes all the ordinary risks of his employment, it may be said the deceased assumed the risks incident to working without artificial lights, so long as the instruments with which he labored remained the same, or so long as he was fully advised of any alterations or changes that enhanced his danger. A servant does not assume extraordinary or unusual risks of his employment. 26 Cyc. 1177; *Labatt Mast. & S.* § 1187. The last author says, at § 1180: "Most of the cases in which the servant's nonassumption of extraordinary risks is asserted relate to injuries caused by dangerous conditions which arise from or are incident to the intrinsic quality or the permanent arrangement and relative disposition of the instrumentalities of the business or the materials which the servant is required to handle."

The case of *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24, 15 Am. Neg. Rep. 230, in its essential features, bears enough resemblance to this case to make the principles therein announced applicable here. *McDade*, a brakeman, was struck by an overhanging iron pipe of a water tank and knocked down

from the top of a moving train and killed. The court said: "It is the duty of a railroad company to use due care to provide . . . properly constructed roadbed, structures, the track to be used in the operation of the road. *Union P. R. Co. v. O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618. The spout might readily have been so constructed and hung as to be safe. As it was maintained, it was a constant menace to the lives and limbs of employees whose duties required them, by night and day, to pass the structure. It is a case where the dangerous structure is not justified by the necessity of the situation, and we agree with judgments in the courts below that its maintenance under the circumstances was negligence upon the part of the railroad company. . . . The servant assumes the risk of dangers incident to the business of the master, but not of the latter's negligence. *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Wabash R. Co. v. McDaniels*, 107 U. S. 454, 27 L. ed. 905, 2 Sup. Ct. Rep. 932; *Northern P. R. Co. v. Herbert* 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978. The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employ-

er's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation. This rule is subject to the exception that, where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover."

While there may be cases in which it becomes the duty of the court to decide upon demurrer that the employee assumed the risks as pleaded, we do not think this is that kind of a case.

The judgment is reversed, and case remanded, with directions to overrule demurrer.

Franklin, Ch. J., and Cunningham, J., concur.

Petition for rehearing denied.

Annotation—Assumption of risk by an employee of dangers arising from a change of appliances.

From one point of view, the foregoing case presents simply an application of the general principle that an employee does not assume the risk of dangers of which he has no knowledge, actual or constructive. From another point of view, however, it presents a distinct phase of the law of assumption of risk. An employee must use ordinary care at all times, and cannot shut his eyes as to obvious dangers even though created by the negligence of the master. When an employee first undertakes dangerous work, there rests upon him the duty of using his senses to protect himself, but it is only natural that an employee should, after a time, become so accustomed to the danger that he unconsciously guards himself from it. If, however, the danger is, without warning, increased by a positive act of the master, the employee is not prepared for the added risk, and it would seem clear that there is a duty resting upon the master in cases of this character, to inform the

employee of the change; and the omission to give this information is negligence, the risk of which is not assumed by the employee. The court in *GUANA v. SOUTHERN P. Co.* ante, 1206, well expresses the situation when it says: "A most cautious person might have been lulled into a feeling of security from having repeatedly made the same trip with apparently the same means, without injury."

There are undoubtedly many cases in which the injuries suffered by the employee were caused by a change in the appliances made without his knowledge, but which were disposed of by the court by simply stating that the servant did not assume the risk of dangers of which he was unaware; in the following cases, however, the principle enunciated in *GUANA v. SOUTHERN P. Co.* was more or less clearly stated and applied:

A brakeman does not assume the risk arising from the dangerous proximity of a switch target to the track placed in

position a few weeks prior to the accident, and unknown to the brakeman, and never operated by him in its changed location, or warning given to him regarding it. *Boston & M. R. Co. v. Gokey* (1906) 79 C. C. A. 64, 149 Fed. 42, 9 Ann. Cas. 384; affirmed in (1908) 210 U. S. 155, 52 L. ed. 1002, 28 Sup. Ct. Rep. 657.

While a lineman for a telephone company assumes the risk of encountering, on a clear day without moisture anywhere, wires carrying a high current with such insulation as might be expected on wires so placed, and which have been in service and exposed to ordinary wear and tear, he does not assume the further risk, of which he is ignorant, that by the act of or with the assent of those in charge of such wires insulation had been intentionally removed and never replaced. *Co-Operant Teleph. Co. v. St. Clair* (1909) 94 C. C. A. 109, 168 Fed. 645.

The employees in a factory do not assume the risk arising from the negligent conduct of the proprietors of the factory who, in shifting an engine in the engine room, projected an unguarded shaft thereof into the working room of the factory a greater length than was necessary, and failed to cut it off because of the press of business. *Fairbank v. Haentzsche* (1874) 73 Ill. 236. The shifting in the engine room in the course of which the shaft was projected into the working room of the factory was made at night, but the employees knew of the change. It was because of the fact that it was a temporary peril to which the employees were exposed by the negligent conduct of the proprietors of the factory that they were held not to have assumed the risk incident thereto. It is further stated that under the circumstances of

the case the injured employee was under no legal obligation to give notice to the proprietors of the temporary peril to which he was exposed, and demand its removal, before he could maintain an action for injuries; that there may be cases in which such notice must be given, and, if not removed, the employee must quit the employment or assume all the hazards, but this is not such case; for here the danger was created by a positive act of the proprietors of the factory. There is neither reason nor authority for saying in such case that notice is necessary.

The finding of a jury that a yard foreman did not assume the risk incident to the use of an unfilled frog is sustained by evidence showing that he had been taken sick and quit work at a time when the frog was filled, and while he was away the track at this place was raised and repaired, but the frog had not been refilled or blocked. *Texarkana & Ft. S. R. Co. v. Toliver* (1904) 37 Tex. Civ. App. 437, 84 S. W. 375.

Whether an employee of a hotel company who operated the elevator and ran errands assumed the risk which arose from a custom of the hotel guests known to and approved of by the hotel owners, of moving the elevator in the absence of the person in charge, is for the jury, where this custom was unknown to the employee. *Lyons v. Dee* (1903) 88 Minn. 490, 93 N. W. 899, 13 Am. Neg. Rep. 542.

The general doctrine of assumption of risk by a servant is discussed in vol. 3, chap. L, *Labatt on Master & Servant*. The application to specific cases of the doctrine of assumption of extraordinary risks is discussed in § 1180 of that chapter.

W. A. E.

UNITED STATES CIRCUIT COURT OF APPEALS.

HUGH GORDEN MILLER, Trustee of Clarence D. Sire, Bankrupt,
v.

LILLIAN R. SIRE, Appt.
(Two cases.)

(140 C. C. A. 118, 224 Fed. 424.)

Contract — execution of parol promise required to be in writing — right of creditors.

A conveyance by a man to his fiancée, in consideration of which she fulfils her promise to marry him, cannot be set aside by his creditors under a statutory provision making

every agreement which is made in consideration of marriage void unless in writing, although his promise to make the conveyance was in parol.
For other cases, see Contracts, I. c, 6, b, in Dig. 1-52 N. S.

(June 22, 1915.)

APPEALS by defendant from a decree of the District Court of the United States for the Southern District of New York (Evans, J.) in plaintiff's favor, and from

Note. — For right of creditors to avoid debtor's contracts or conveyances upon the ground of the statute of frauds, see annotation following this case, post, 1213.

an order denying a motion to open a so-called default, in a suit to set aside a conveyance by the bankrupt to defendant, alleged to have been made with intent to hinder, delay, and defraud creditors. Reversed.

The facts are stated in the opinion.

Argued before Lacombe, Coxe, and Ward, Circuit Judges.

Messrs. F. Sidney Williams and Charles B. La Voe, with Messrs. Edward M. Grout and Paul Grout, for appellant.

Messrs. William Hughes and W. H. K. Davey, with Mr. True P. Pierce, for appellee:

The agreement between the parties is void, and a conveyance based upon no other consideration is void as to existing creditors.

Moses v. National Bank, 149 U. S. 298, 37 L. ed. 743, 13 Sup. Ct. Rep. 900; Walker v. Hafer, 24 L.R.A.(N.S.) 315, 95 C. C. A. 311, 170 Fed. 39; Grafton v. Cummings, 99 U. S. 100, 25 L. ed. 366; Brashear v. West, 7 Pet. 615, 8 L. ed. 804; Reade v. Livingston, 3 Johns. Ch. 481, 8 Am. Dec. 520; Dygert v. Remerschnider, 32 N. Y. 630; Hunt v. Hunt, 171 N. Y. 396, 59 L.R.A. 306, 64 N. E. 159; Whyte v. Denike, 53 App. Div. 320, 65 N. Y. Supp. 577; Clowe v. Seavey, 208 N. Y. 496, 47 L.R.A.(N.S.) 284, 102 N. E. 521; Re Majot, 199 N. Y. 35, 29 L.R.A.(N.S.) 780, 92 N. E. 402; Keep v. Keep, 7 Abb. N. C. 240; Browne, Stat. Fr. 5th ed. chap. 11, p. 287.

The order denying the motion to reopen the case is right. Moreover, the motion was addressed to the discretion of the court, and is not reviewable by an appellate court.

Foster, Fed. Pr. 352, p. 1120; Deaty, Fed. Proc. § 177, p. 661; Blitz v. United States, 153 U. S. 312, 38 L. ed. 726, 14 Sup. Ct. Rep. 924; Reagan v. United States, 157 U. S. 301, 39 L. ed. 709, 15 Sup. Ct. Rep. 610; Parsons v. Bedford, 3 Pet. 433, 7 L. ed. 732; New York C. & H. R. R. Co. v. Fraloff, 100 U. S. 24, 25 L. ed. 531; Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; Addington v. United States, 165 U. S. 184, 41 L. ed. 679, 17 Sup. Ct. Rep. 288; Prager v. Beardsley, 133 App. Div. 595, 118 N. Y. Supp. 232; Henry Huber Co. v. Soles, 12 Misc. 548, 34 N. Y. Supp. 17.

Lacombe, Circuit Judge, delivered the opinion of the court:

The main appeal may be first considered. Miller is the trustee in bankruptcy of Clarence D. Sire. The bill of complaint is not found in the record, which contains only what someone has decided to be the "essen-

tial portions of the bill." This is bad practice; it is for this court, when appeal is taken, to determine what parts of the bill are essential. However, there is enough in the record to show that Clarence D. Sire filed a petition in bankruptcy some time in 1913, and was adjudicated a bankrupt on August 7th of that year. Miller was appointed trustee, on what date the record does not disclose. He brought this suit (when, the record does not disclose) to set aside a conveyance by the bankrupt to the codefendant on the ground that it was made with intent to hinder, delay, and defraud creditors. The bill further alleges that the codefendant conspired with him and was party to the fraud. This conveyance, the validity of which was challenged, and which the court held void, undertook to convey a certain mortgage which defendant then owned. It was executed on or about December 3, 1910.

The circumstances attending the conveyance are these: Clarence Sire was soliciting Lillian D. Silverberg to marry him. She declined to do so unless he would agree to settle some property upon her. He agreed with her orally that he would assign this mortgage to her, and on December 3, 1910, he did execute the assignment, and on the same day she married him. For aught that appeared, transfer and marriage were substantially simultaneous, although possibly it is the fact that upon receiving the assignment, Miss Silverberg at once married the bankrupt.

The sole reliance of complainant, so far as the record discloses, was on the statute of frauds of the state of New York; certainly it was on that ground that the court decided the cause. The testimony does not show any conspiracy; Miss Silverberg apparently doubted Sire's financial condition, and would not marry him until he turned over to her property to an amount which she thought was sufficient. This circumstance does not establish any participation on her part in a conspiracy to hinder, delay, or defraud his creditors.

The New York statute of frauds (§ 31, chap. 45, Laws 1909, Consol. Laws, chap. 41) provides: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . is made in consideration of marriage, except mutual promises to marry."

As we understand this statute and the decisions under it, it provides that, in the specified cases, a party to an alleged contract cannot enforce its execution if it be oral only. When, however, the oral con-

tract has been fully carried out according to its terms, it is an accomplished fact, and the statute of frauds no longer cuts any figure in the transaction. That such is the view of the state courts seems manifest from the many authorities which hold that the statute of frauds is a defense, which, to be availed of, must be pleaded. When the statute says the oral contract is void, it seems void between the parties to it. When the parties carry it out fully, it ceases to be void, just as, under the statute, it ceases to be void when part consideration is paid. We fail to see how this statute, designed merely to protect the parties to the oral contract, affects third parties.

If Sire had sold his mortgage to an innocent third person for a cash sum, not so small as to furnish persuasive evidence that the purchaser was not innocent, the sale would have been good against existing creditors. Marriage is surely a valuable consideration, and when the transfer is made before marriage,—indeed, in this case, on the day of marriage,—in exchange for the consideration then fully paid, we cannot see any difference between such a transaction

and a cash sale. We do not find sufficient evidence to show such knowledge on the part of Miss Silverberg as would indicate participation in a fraud on creditors.

Referring to the New York cases cited on the briefs, we have not here a conveyance to a wife, in compliance with some alleged oral agreement made before marriage. We have a conveyance made to an unmarried woman, upon receipt of which she pays the consideration she agreed to give for it; i. e., marries the man who has already transferred the property. If, having received the transfer, she had refused to marry him,—i. e., to pay the consideration,—he could have recovered the property.

Inasmuch as the record is quite imperfect, and the trial was inartificially conducted by reason of the refusal of the gentleman Mrs. Sire asked to represent her to proceed, his other engagements preventing him, we think the ends of justice will be best served by reversing the decree, opening the default, and so insuring a new trial, when additional testimony may possibly alter the situation.

Annotation—Right of creditors to avoid debtor's contracts or conveyances upon the ground of the statute of frauds.

Statutes against fraudulent conveyances are sometimes referred to as statutes of frauds. The ultimate question in case a conveyance is attacked as fraudulent, viz., whether the conveyance is fraudulent, is beyond the scope of the present note, and to this extent the note is not concerned with statutes against fraudulent conveyances. But an element in determining whether or not a conveyance is fraudulent is the consideration therefor. In so far as the conveyance is sought to be sustained against creditors as having been made in pursuance of a previous oral agreement, unenforceable because of the statute of frauds, the note does deal with fraudulent conveyances. But this is confined to determining whether an oral contract will sustain a subsequent transfer of property in pursuance thereof, as against creditors; it does not deal with the ultimate question whether the conveyance is in fact fraudulent.

Neither is the note concerned with the right of creditors to take advantage of the statute of frauds in their debtor's contract, as affected by questions of pleading. A denial of the right on the ground that the statute has not been pleaded has not been considered.

The statute of frauds is not treated generally as making oral contracts void, L.R.A.1916D.

but merely voidable, at the option of a party to the contract, by withholding a right of action thereon. This does not require either party to ignore considerations of moral obligations, equity, and good faith by pleading the statute, but allows them to perform in accordance with their oral agreement. It is a rule of general application that this option rests with the parties, and cannot be exercised by a stranger to the contract. This rule is applied to creditors, and they are held to have no right to plead the statute of frauds to invalidate a contract entered into by their debtor where he does not take advantage of the statute.¹ It is a well-established rule

¹ Pasquay v. Pasquay (1908) 235 Ill. 48, 85 N. E. 316, denying to an execution creditor who had become a purchaser of the interest of the debtor in his ancestor's estate, upon a sale under his execution, the right to deny the validity of an oral contract by which the debtor had conveyed his interest in the estate to another heir, in satisfaction of her interest as devisee under the ancestor's will, in an action by the devisee to quiet her title to the land. A conveyance was made after an attachment had been levied.

Wright v. Jones (1886) 105 Ind. 17, 4 N. E. 281, holding that the creditors of a husband cannot object to his performance of his oral agreement to relinquish his

that, when an oral contract within the statute of frauds is executed, it is no

claim to his interest in the wife's property, in consideration of certain provision made for him in her will, in an action by the creditors to subject the property to the payment of the husband's debts.

Bauer v. Weber Implement Co. (1910) 148 Mo. App. 652, 129 S. W. 59, denying to a chattel mortgagee the right to set up the statute of frauds in a contract of his debtor with a third person for an exchange of the mortgaged property for real estate, which had been fully executed, in an action in replevin by the purchaser to recover the mortgaged property.

Singer v. Carpenter (1888) 125 Ill. 117, 17 N. E. 761, denying to the creditors of a firm the right to interpose the statute of frauds to invalidate a sale of the firm property, in an action by the creditors to subject the interest which an individual member received from the sale to the payment of firm debts, on the theory that the contract being within the statute of frauds, the property was still subject to firm debts.

In an action to enforce payment, it was held in *Crawford v. Woods* (1869) 6 Bush (Ky.) 200, that a creditor of a vendor whose debt is contracted after an oral contract for the sale of real estate has been made and partially executed by the vendee taking possession cannot interpose the statute of frauds to invalidate the contract, which is adhered to and recognized by the parties.

In *Minns v. Morse* (1846) 15 Ohio, 568, 45 Am. Dec. 590, a conveyance of land by a debtor after a judgment was obtained against him by a creditor, but in pursuance of a parol contract entered into before the obtaining of the judgment, was sustained, the court stating that since the debtor sought not the aid of the statute of fraud to enable him to perpetrate a fraud, the law would not enable the creditor to do so. See *Lefferson v. Dallas* (1870) 20 Ohio St. 68, *infra*, note, as to effect of purchase price remaining unpaid.

The mortgagee of growing crops, under a mortgage given by a tenant in possession of land under a verbal lease, unenforceable because within the statute of frauds, cannot, in an action by the first mortgagee to recover the value of the crops which had been acquired by the second mortgagee, set up the statute of frauds for the purpose of invalidating a prior mortgage on the same crops, given before the tenant had taken possession. *Grisham v. Lutric* (1898) 76 Miss. 444, 24 So. 169.

In *McCormick v. Drummatt* (1879) 9 Neb. 384, 2 N. W. 729, a purchaser at an execution sale of grain which was raised upon the land of the debtor, under a verbal agreement with another that he should have the use of the land during the lifetime of the debtor, in consideration of support, was denied the right to raise the question of the statute of frauds in such contract, in an action by the person who had thus raised the grain, to recover it. The court states that the agreement, whatever L.R.A.1916D.

it should be considered in law, was acquiesced in by all the parties thereto; and, so far as this case was concerned, the same had been fully executed.

One who has sold goods to a lessee, thinking he was selling to the lessor, cannot, in an action to hold the lessor liable therefor, set up the invalidity of the lease on the ground of the statute of frauds. *Acme Cement & Plaster Co. v. Greensboro Wood Fiber Plaster Co.* (1911) 156 N. C. 455, 72 S. E. 569.

That a creditor of a tenant in common, who has agreed with the other tenants to a partition of the estate, in pursuance of which possession has been taken of the parts assigned to the various tenants, cannot set up the statute of frauds to defeat the rights of another of the tenants in common in land assigned to her in the parol partition proceedings, is stated in *Savage v. Lee* (1885) 101 Ind. 514.

Morrison v. Collier (1881) 79 Ind. 417, holding that an execution creditor could not interpose the statute of frauds to prevent the correction of a mistake in the description of a conveyance by his debtor to a purchaser.

A creditor of a merchant who has exchanged his interest in the business for land cannot set up the statute of frauds to invalidate the agreement for the sale of the land, which is not in writing, and thereby show that the sale of the debtor's interest in the mercantile business was without consideration and void. *Bell v. Beazley* (1898) 18 Tex. Civ. App. 639, 45 S. W. 401.

While the rights of an existing creditor were involved in *Gagnon v. Baden Lick Sulphur Springs Co.* (1914) 56 Ind. App. 407, 105 N. E. 512, the property transferred by the husband to the wife in that case consisted of bonds belonging to a corporation of which he was president, and the court concludes that it will not hold that the confirmation of an invalid antenuptial agreement between husband and wife will prevent the actual owner from receiving back its property.

Creditors cannot set up the statute of frauds to defeat the application of the doctrine of estoppel against their debtor. *Cross v. Wear Commission Co.* (1894) 153 Ill. 499, 46 Am. St. Rep. 902, 38 N. E. 1038, holding that a creditor of a partner could not set up the statute of frauds to defeat a mortgage given by the firm which his debtor had not signed, where, at the time the mortgage was taken, the debtor stated to the mortgagee that he had no interest in the property mortgaged, that it was owned by the member of the firm who signed the mortgage. The creditor, in this case, is stated to have been affected by the estoppel as much as the debtor, for he had notice of the equities of the mortgagee before his judgment was rendered.

In passing upon the competency as a witness of the vendor under an oral sale

longer affected by the statute.² This rule has been invoked to preclude a creditor from taking advantage of the statute in his debtor's contracts which have been executed, on the theory that the statute is not then available to the debtor, and the creditor stands in no better position in this regard than his debtor.³ The fact that the contract is executed, however, does not preclude the creditor from challenging a conveyance of the debtor's property on the theory that it is fraudulent. This phase of the question is discussed below.

The right of a creditor to avail himself of the statute of frauds in the case of an executory oral contract of his debtor has been denied even in cases in which the other party to the contract is in effect seeking to enforce it. Thus, in an action in replevin by one who entered into a verbal contract with the debtor for the sale of wheat, to recover the wheat from creditors who had seized it on execution against the debtor, the right of such creditors to rely on the statute of frauds to invalidate the contract was denied, notwithstanding the general rule in actions of replevin that the plaintiff must recover upon the strength of his own title, and not upon the weakness of his adversary's.⁴

of personal property in an action by the purchaser against an officer who had seized the property under executions while still in the possession of the vendor, it is stated in *Sherron v. Humphreys* (1834) 14 N. J. L. 217, that the officer cannot raise the objection that parol evidence of the bargain and sale was inadmissible, the contract being within the statute of frauds; that the statute was not made to protect trespassers, and that, if the objection of the officer could be sustained, such would be the operation of it.

The right of the creditors of a husband to question the validity of an executed oral agreement between the husband and wife and the mother of the wife, by which the husband agreed to release his claims in certain property belonging to the wife, which would otherwise come into his possession, was denied in *Andrews v. Jones* (1846) 10 Ala. 400, but this decision seems to rest upon a ground with which this note is not concerned.

² 20 Cyc. 302; 29 Am. & Eng. Enc. Law, 828; Elliott, Contr. § 1214; Browne, Stat. Fr. § 116.

³ In *Hicks v. Riddick* (1877) 28 Gratt. (Va.) 418, where an oral contract for the sale of real estate had been so far executed that the vendor held nothing except the naked legal title, it was held that he had no interest subject to attachment by a creditor.

No question distinctive to the right of a L.R.A.1916D.

And in an action by the heirs of a wife to enforce an oral agreement between the wife and her husband, by which she gave certain money to her husband in consideration of his agreement to deed land to her, an assignee for creditors was denied the right to raise the question of the validity of the contract on the ground of the statute of frauds, it being stated that if the husband is willing to comply with his agreement, it may be insisted that the contract should be executed unless its execution would work an injury to other persons, or amount to constructive fraud as to creditors. It is then stated that an assignee for the benefit of creditors stands in no better position than his assignor, hence does not occupy the position of an innocent purchaser for value.⁵

But it has been held, where an oral contract is executory on the one side, and the action is in effect one to enforce it, that it will not be enforced where creditors of the party against whom it is sought to be enforced object.⁶

And it has been held, where the creditors have secured an injunction restraining the debtor from giving any preferences, that he cannot thereafter file an answer in an action by one of his creditors to enforce an oral agreement

creditor to take advantage of the statute of frauds in his debtor's contracts arises where that right is denied on the theory that an executed contract is taken out of the statute, hence no attempt is made in this note to collect all such cases.

⁴ In *Dixon v. Duke* (1882) 85 Ind. 434, it is stated that the creditors are not entitled to succeed upon the ground that the contract is within the statute, because they have no right to interpose that defense against the purchasers from their debtor. If the contract of sale is sufficient to convey title, and its only infirmity is that it is not executed or evidenced as the statute of fraud requires, it will defeat a creditor's claim. This does not mean that the creditor is precluded from recovering; in fact, in this case, the creditor's execution was held to have priority because of the fact that title had not passed at the time his execution became a lien.

⁵ *Walker v. Walker* (1897) 19 Ky. L. Rep. 626, 41 S. W. 315, affirmed on what is apparently a second appeal in (1900) 21 Ky. L. Rep. 1521, 55 S. W. 726.

⁶ *Gary v. Newton* (1903) 201 Ill. 170, 66 N. E. 267. This was an action in partition among heirs, in which it was sought to deprive one of the heirs of his interest in the estate by virtue of an oral agreement entered into between him and the ancestor that, upon certain sums of money being paid him, he would release his interest in the estate. It was held that the petition

by which he agreed to transfer property in satisfaction of an antecedent debt, thereby taking the case out of the statute of frauds.⁷ And to the extent that the purchase price remains unpaid under a parol contract for the sale of land, a creditor who has obtained a judgment prior to the payment of the remaining part of the purchase price, and the execution of the conveyance, has been held to obtain a lien⁸ which the purchaser is not entitled to have set aside and her title quieted without accounting to the creditor for the residue of the purchase money, where the balance of the purchase money was paid by the purchaser with full knowledge of the pendency of the suit against her vendor.⁹

The rule that the statute of frauds

showing these facts was demurrable by creditors. There was no allegation in the bill that the judgment creditors had any notice of the existence of the oral agreement here insisted upon prior to the rendition of their judgments, or prior to the existence of the liens acquired by them under their judgments. The judgment creditors were held to stand in the position of a purchaser against whom the oral agreement could not be enforced.

But in *Wright v. Jones* (1886) 105 Ind. 17, 4 N. E. 281, judgment creditors are stated not to be bona fide purchasers; their rights are stated to be essentially different; they have no interest or title in their debtor's land, but only a mere lien; the lien is only on the actual interest of the debtor in the land, and is subject to all prior equities. This is the theory of *Peck v. Williams* (1887) 113 Ind. 256, 15 N. E. 270, and *Old Nat. Bank v. Findley* (1891) 131 Ind. 225, 31 N. E. 62.

⁷ *Albert v. Winn* (1853) 5 Md. 66. By securing the injunction before the debtor answered in the other action, admitting the oral contract, the creditors were held to secure a right which prevented the debtor from afterwards admitting the oral contract.

⁸ In *Kendall v. Kennedy* (1886) 8 Ky. L. Rep. 532, it is stated that since a verbal contract for the sale of land is not enforceable by either party, the land may still be levied on as that of the vendor, he remaining in possession, and the levy will create a valid lien as against the vendee to the extent of what he was owing the vendor, not exceeding the debt, and subsequent attaching creditors cannot defeat this lien by garnishing in the vendee's hand what he might be owing the vendor, in the event they should consummate their contract. See *O'Neal v. First Nat. Bank*, infra, note 10.

⁹ *Jefferson v. Dallas* (1870) 20 Ohio St. 68. See *Minns v. Morse*, supra, note 1.

¹⁰ *Waite v. McKelvey* (1898) 71 Minn. 167, 73 N. W. 727, where an officer who levied upon grain sold by his debtor under L.R.A.1916D.

cannot be taken advantage of by a creditor is denied application in some cases of sales of personal property on the theory that if the verbal contract is not so far performed as to satisfy the statute, no title passes to the buyer as against an officer levying an attachment or execution.¹⁰ Consequently the attachment or execution obtains priority over the vendee under the oral contract. The theory that the title to goods sold under a contract within the statute of frauds, but which does not comply with its provisions, does not pass, is, according to *Browne on the Statute of Frauds*, 5th ed. §§ 138d-138j, sustained by the weight of authority. That author, however, states that there is much to be said against the rule. The court in *Dixon v.*

an oral contract within the statute of frauds was held to acquire a lien by virtue of his levy so that the parties could not thereafter waive the statute. The statute involved in this case made the contract void.

Ely v. Ormaby (1811) 12 Barb. (N. Y.) 570. Apparently the statute made an oral contract such as was involved in this case void.

See *Sherron v. Humphreys* (1834) 14 N. J. L. 217, supra, note 1. Also *Dixon v. Duke*, supra, note 4.

Apparently this is the theory of *O'Neal v. First Nat. Bank* (1911) 9 Ga. App. 496, 71 S. E. 807, which involved real estate also. No full report appears of the case but in the abstract it is stated that where a husband having in his possession certain money belonging to his wife purchased a parcel of land, paying therefor partly with this money of his wife and partly with money which he borrowed in his own name, and, with his wife's consent, took the title to the land in himself, with the understanding, evidenced in parol only, that when the sum so borrowed by him was repaid by her to him, he would convey the land to her. The legal title to the land was in the husband, and the wife acquired neither legal title nor a perfect equity thereto, even upon payment to the husband of the sum so borrowed, until the husband executed a deed. Likewise the title to crops severed from the land before the deed from the husband to the wife was executed was in the husband, and was subject to a common-law judgment rendered against him in behalf of one of his creditors.

Property transferred by a debtor by a transfer void under the statute of frauds was subjected to an attachment by a creditor, in the possession of the transferee, in *Sexey v. Adkison* (1870) 40 Cal. 408. It seems, however, no question was raised as to this. The creditor, who had advised the transfer, was held not estopped to deny its validity under the statute of frauds where he simply advised a transfer, but not the form or manner thereof, and the parties failed to make it valid and effectual in law.

Duke¹¹ did not regard the passing of title as dependent upon a compliance with the provisions of the statute of frauds.

There is considerable confusion and uncertainty in dealing with the right of a creditor to take advantage of an invalidity in his debtor's contract under the 17th section of the statute of frauds. This section makes a contract for the sale of goods, wares, and merchandise of over a certain value unenforceable (some statutes make the contract void) unless (1) the buyer shall accept part of the goods and actually receive the same, or (2) give something in earnest to bind the bargain, or in part payment, or (3) some note or memorandum in writing of the bargain be made and signed by the parties to be charged or their agents. The difficulty arises from the similarity of the acceptance and receipt of the goods which will take the contract out of the operation of the statute, and the delivery which, in some jurisdictions, is necessary¹² in sales of personal property to complete the sale, so that the property

cannot be levied upon by creditors of the vendor, and the continued change of possession, in questions as to fraudulent conveyances.¹³ The acceptance and receipt required by this provision of the statute of frauds, and the delivery required under the rule referred to, are particularly difficult to distinguish. It has been stated that the acceptance and receipt required by the statute is not equivalent to delivery in general.¹⁴ The result of these statutes and the rules referred to is, in cases dealing with contracts of a debtor within the 17th section of the statute, that creditors may attack the sale on several grounds which are very similar, and it is often difficult to determine the true basis for the decision.

The rule that the defense of the statute of frauds is personal has been applied to sustain a conveyance of property by the debtor in pursuance of a prior oral agreement, against the objection of creditors that the conveyance is fraudulent.¹⁵ The oral agreement furnishes a sufficient consideration for a

¹¹ Supra, note 4.

¹² Freeman, Executions, 3d ed. § 157.

¹³ A very thorough discussion of the rules applicable to change of possession as bearing upon the question whether the conveyance is fraudulent is found in Freeman on Executions, 3d ed. §§ 148-156.

¹⁴ Williston, Sales, § 74.

¹⁵ Old Nat. Bank v. Findley (1892) 131 Ind. 225, 31 N. E. 62.

Cannon v. Castleman (1904) 164 Ind. 343, 73 N. E. 689, sustaining a conveyance by a husband through a third party to himself and wife as tenants by the entirety of land which had been purchased about two months before the husband became indebted to the judgment creditor, and which had been conveyed by the vendor to the husband at the request of the wife, under an oral agreement that he would recover judgment quieting the title to the land, pay the expense thereof, and then have the same conveyed so as to vest the title in himself and his said wife as tenants by the entirety, against the objection of the judgment creditor that the agreement was void, as being within the statute of frauds.

Scudder v. Morris (1904) 107 Mo. App. 634, 82 S. W. 217, sustaining a conveyance of real estate in pursuance of an agreement to convey against which the debtor might have pleaded the statute of frauds.

One who has taken title to land under a parol agreement with the grantor to support him, and, if the grantor should become dissatisfied, to deed the land back, may, upon the grantor's becoming dissatisfied, deed the land back, in performance of his parol agreement, as against his creditors. Aultman v. Booth (1888) 95 Mo. 383, 8 S. W. 742. The protection of the statute of

frauds is for the parties to the parol contract; if they do not insist on the statute, the performance of the contract will be enforced.

A creditor of a director in a bank cannot take advantage of the statute of frauds to defeat a trust deed and notes given by the director in settlement of his liability arising from a false and fraudulent statement made by him with reference to the condition of the bank, against which the director might have pleaded the statute of frauds. Kemp v. National Bank (1901) 48 C. C. A. 213, 109 Fed. 48.

The right to interpose the objection of the statute of frauds to an oral agreement made between a husband and wife, whereby he agreed to convey to her certain land as security for money advanced by her, was denied where the conveyance had been executed. Miller v. Wroton (1908) 82 S. C. 97, 63 S. E. 62, 449.

In Cresswell v. McCaig (1881) 11 Neb. 222, 9 N. W. 52, a transfer by a son who had purchased land with his father's money and for his father, but who took title in his own name as a matter of convenience, to his mother and brothers and sisters after the death of his father, was sustained as against creditors.

Peck v. Williams (1887) 113 Ind. 256, 15 N. E. 270, sustaining a transfer by a debtor to a purchaser who had bought and paid for the land some four years before, and who had, on the faith of such purchase, taken exclusive possession and made valuable improvements thereon, although the transfer was not made until after judgment had been taken by the creditor. In a later part of the opinion, however, it is stated that the contract in this case was itself

conveyance in pursuance thereof.¹⁶ In another form it is stated that the equitable consideration arising from the agreement is sufficient to sustain the performance.¹⁷

But in the case of a postnuptial con-

taken out of the statute of frauds by the possession and improvements, and that the execution creditor in this case was put upon notice thereof.

See *Minns v. Morse*, supra, note 1; also *Gordon v. Tweedy*, infra, note 16.

¹⁶ A conveyance by a husband to his wife of lands in pursuance of a previous oral agreement to convey the land to her in consideration that she would relinquish her inchoate dower interest in certain other of his lands was held to be a conveyance upon a valuable consideration in *Brown v. Rawlings* (1880) 72 Ind. 505. That a creditor cannot take advantage of the fact that such a contract is not in writing, as required by the statute of frauds, is held also in *Gordon v. Tweedy* (1881) 71 Ala. 202.

As to the voidability in bankruptcy proceedings of a transfer within the four months' period, pursuant to an executory agreement antedating that period, see note to *Godwin v. Murchison Nat. Bank*, 17 L.R.A. (N.S.) 935, and supplemental note to *Sexton v. Kessler & Co.* 40 L.R.A. (N.S.) 639.

As to the delivery of property on eve of bankruptcy to one holding an executory contract therefor, made within the four months' period, as a preference, see note to *Stokes v. State*, 21 L.R.A. (N.S.) 901.

An oral agreement to convey land which is assigned by the obligee furnishes a sufficient consideration for property transferred to the obligee by a third person, where the obligor conveys the land in pursuance thereof. *Bauer v. Weber Implement Co.* (1910) 148 Mo. App. 652, 129 S. W. 59.

Goff v. Rogers (1880) 71 Ind. 459, sustaining, as against an assignee for creditors, a mortgage given by a husband, upon land purchased with money belonging to his wife, to her children, as agreed upon by the parties.

First Nat. Bank v. Bertschy (1881) 52 Wis. 438, 9 N. W. 534, sustaining a note given in payment of a prior oral obligation of the maker to pay the debt of another.

A note cannot be said to be without consideration where executed in pursuance of a prior agreement, void under the statute of frauds. *Stowell v. Hazlett* (1874) 57 N. Y. 637.

The oral assumption of the debt of another is a consideration for a judgment. *Keen v. Kleckner* (1862) 42 Pa. 529.

A note given by a debtor is not fictitious because the consideration therefor is a prior oral promise to pay the debt of another. *Livermore v. Northrup* (1870) 44 N. Y. 107.

It is stated not to be obligatory on the debtor to interpose the defense of the statute of frauds, either morally or legally, but it is entirely within his option whether or L.R.A.1916D.

veyance in pursuance of an oral antenuptial contract, a different rule prevails. Marriage is a good consideration for a postnuptial conveyance in pursuance of a written antenuptial contract.¹⁸ But an oral antenuptial contract cannot

not he will set up the statute of frauds against the performance of such a promise.

A deed executed by an insolvent debtor pursuant to a parol petition made many years before, and fully carried into execution, each party taking possession of and enjoying the portion allotted to him, is not void as a deed made with intent to injure, delay, or defraud creditors. *Bilaborow v. Titus* (1857) 15 How. Pr. (N. Y.) 95.

A conveyance by a debtor of land to his son in pursuance of an oral agreement made with a third person under circumstances constituting the debtor a trustee of the property is valid as against creditors, although the trust could not have been enforced, since the debtor having executed it, the title thus made and supported by the equities in the case is paramount to any equities of general creditors. *Norton v. Mallory* (1875) 63 N. Y. 434.

An oral agreement by a debtor, upon a sufficient consideration, to thereafter convey land, under circumstances which create a trust in the land, will sustain a conveyance in accordance with the agreement, valid as against creditors. *Gottstein v. Wiatt* (1900) 22 Wash. 581, 61 Pac. 715.

A conveyance by a trustee, under an oral trust, of the property, according to the trust agreement, is valid as against creditors of the trustee whose claims accrued before the trust was thus executed. *Richmond v. Bloch* (1900) 36 Or. 590, 60 Pac. 385; *Sackett v. Spencer* (1870) 65 Pa. 89; *Hyde v. Chapman* (1873) 33 Wis. 391.

In *Cresswell v. McCaig*, supra, note 15, the debtor was treated as holding the land in trust.

The general question, however, of the validity of conveyances by trustees in execution of an oral trust, as against creditors of the trustees, is not considered in this note.

A conveyance by a husband to his wife in pursuance of a parol agreement, of land purchased with property of the wife which had been reduced to possession by the husband, has been held void as to creditors. *Martin v. Com.* (1911) 141 Ky. 791, 133 S. W. 776. This decision, however, is based more upon the fact that the agreement was without consideration, and therefore not enforceable, the property which had come to the husband by virtue of the marriage being regarded as no consideration for the conveyance. Nothing is said as to the statute of frauds.

¹⁷ *Wright v. Jones* (1886) 105 Ind. 17, 4 N. E. 281, stating that where there is an equitable consideration a debtor may, notwithstanding the objections of his creditors, perform his contract.

¹⁸ 12 R. C. L. 522, § 50.

be relied upon as furnishing a consideration for a postnuptial transfer of property, as against creditors.¹⁹

Although the property agreed upon is delivered to the intended wife before marriage, under the oral contract, but not in performance of it, the purpose being not to pass the property until the marriage, and then only by force of the agreement, the transaction is treated as a performance of the agreement by the husband after marriage, and is consequently void.²⁰

An oral antenuptial contract to the effect that the husband was to have

nothing to do with a business in which the wife was engaged, and receive none of the profits, is not a consideration for a settlement made by the husband after marriage, in accord therewith, as against creditors existing when the earnings of the wife accrued.²¹ But creditors who became such after the earnings of the wife accrued and became a part of her separate estate cannot complain of the husband's performance of his agreement.²² It has been held, where a husband relinquished to the wife all his interest in her property in pursuance of an oral antenuptial agreement, that a

¹⁹ *Manning v. Riley* (1893) 52 N. J. Eq. 39, 27 Atl. 810; *Reade v. Livingston* (1818) 3 Johns. Ch. (N. Y.) 481, 8 Am. Dec. 520; *Hosmer v. Tiffany* (1907) 54 Misc. 402, 105 N. Y. Supp. 1055, affirmed in (1908) 124 App. Div. 287, 108 N. Y. Supp. 943; *Saunders v. Ferrill* (1840) 23 N. C. (1 Ired. L.) 97; *Flory v. Houck* (1898) 186 Pa. 263, 40 Atl. 482; *Barnes v. Black* (1899) 193 Pa. 447, 74 Am. St. Rep. 694, 44 Atl. 550; *Smith v. Greer* (1842) 3 Humph. (Tenn.) 118; *Lloyd v. Fulton* (1875) 91 U. S. 479, 23 L. ed. 363; *Warden v. Jones* (1857) 2 De G. & J. (Eng.) 76, 23 Beav. 487; *L'Estrange v. Robinson* (1824) 1 Hogan (Eng.) 202; *Whyte v. Denike* (1900) 53 App. Div. 320, 65 N. Y. Supp. 577; *Hayes v. Jones* (1857) 2 Patton & H. (Va.) 583.

²⁰ *Keady v. White* (1807) 168 Ill. 76, 48 N. E. 314, holding such an oral antenuptial agreement void in a creditors' bill brought to set aside a conveyance by the husband to the wife after marriage, in pursuance of the oral agreement.

That a conveyance in pursuance of an oral agreement which supplemented a written agreement is fraudulent as to creditors is especially true under a statute requiring a marriage settlement and other marriage contracts to be registered. *Saunders v. Ferrill* (1840) 23 N. C. (1 Ired. L.) 97.

A postnuptial marriage settlement by a father, in accordance with a parol promise made before the marriage of his daughter, was held invalid as to creditors in *Davidson v. Graves* (1837) *Riley, Eq.* (S. C.) 219.

An antenuptial settlement in pursuance of a parol promise made before marriage was held not to make the wife a purchaser, in *Caines v. Marley* (1831) 2 Yerg. (Tenn.) 582.

An oral antenuptial agreement that the husband shall take certain money of the wife and invest it whenever favorable opportunity offers cannot be set up to support an investment after the marriage, and conveyance of property to the wife, as against intervening creditors. *Wood v. Savage* (1846) 2 Dougl. (Mich.) 316.

In *Borst v. Corey* (1853) 16 Barb. (N. Y.) 136, affirmed in (1857) 15 N. Y. 505, the wife was denied the right to enforce such an agreement against one who was made

a trustee in a postnuptial bond and warrant of attorney, given in settlement of the antenuptial agreement, and against the assignee for the benefit of the creditors of her husband.

The contrary obiter opinion expressed by the court in *Satterthwaite v. Emley* (1845) 4 N. J. Eq. 489, 43 Am. Dec. 618, that if a parol antenuptial agreement were fairly shown, the court would be inclined to give validity to a postnuptial settlement in pursuance of it, is overruled by *Manning v. Riley* (1893) 52 N. J. Eq. 39, 27 Atl. 810. The antenuptial agreement not being fairly shown, the validity of the settlement was denied in the *Satterthwaite* Case.

In *Neilson v. Williams* (1886) 42 N. J. Eq. 291, 11 Atl. 257, a transfer by a husband fourteen years after the marriage took place, and not until after a default by the principal in a bond on which the husband was surety, was held a transfer without consideration, although claimed to have been made in pursuance of an oral antenuptial agreement. It is stated that to accept of such an allegation, sustained only by the verbal testimony of the parties themselves, after such a long lapse of time, would be most dangerous, and wholly contrary to the policy of the law.

²¹ *Deshon v. Wood* (1888) 148 Mass. 132, 1 L.R.A. 518, 19 N. E. 1.

²² *Carter v. Worthington* (1886) 82 Ala. 334, 60 Am. Rep. 738, 2 So. 516.

²³ (Ala.) *Ibid.* It was accordingly held in this case that land purchased with the proceeds of goods sold by the wife after the accrual of the debt to the complaining creditors could not be subjected to their claims where the goods had become a part of the stock of the business in which the wife was engaged prior to the accrual of the claims. The goods were accretions to the wife's separate estate which had already accumulated, resulting from the profits of her business, brought about by her industry, with the permission of the husband. The proceeds of the sale of such goods cannot be treated as earnings made after that date. Lands purchased with the earnings of the wife before the accrual of the complaining creditors' debts were held not subject to the debts, although the conveyance was made thereafter.

horse, raised and used on a farm owned by the wife and carried on by her, is not subject to the claims of the husband's creditors. This was held without reference to the time of the accrual of the creditors' claim.²³

The fact that the postnuptial settlement contains a recital that it is made in pursuance of an oral antenuptial agreement does not change the rule.²⁴ But the contrary view of this question has been taken, although it does not clearly appear to have been a holding to that effect.²⁵ This has been stated to be true as against a trustee in bankruptcy, where, at the time of making

the settlement, the husband was not indebted.²⁶

If the consideration is not merely the marriage, but an agreement to pay the husband's debts, and the wife performs her agreement before the debt in question is contracted by her husband, and a conveyance is made to the wife before the creditor obtains a judgment, the conveyance is upon a consideration sufficient to uphold it after its execution in good faith.²⁷ Or if a debt due from the husband to the wife is canceled, the conveyance in accord with the previous oral agreement will be sustained.²⁸

²³ *Sanford v. Atwood* (1876) 44 Conn. 141.

²⁴ *Smith v. Greer* (1842) 3 Humph. (Tenn.) 118; *Warden v. Jones* (1857) 2 De G. & J. (Eng.) 76, 23 Beav. 487 (dictum). The court in *Reade v. Livingston* expresses an opinion in accord with this rule. *Sterling, L. J.*, in *Re Holland* [1902] 2 Ch. (Eng.) 360, 71 L. J. Ch. N. S. 518, 50 Week. Rep. 575, 86 L. T. N. S. 542, 18 Times L. R. 563, 9 Manson, 259.

²⁵ *Dundas v. Dutens* (1790) 2 Cox, Ch.

Cas. (Eng.) 234, 1 Revised Rep. 112. It does not appear from the report of this case in 1 Ves. Jr. 196, that this point was decided in the case.

²⁶ *Vaughan Williams, L. J.*, in *Re Holland (Eng.) supra*; contra, *Stirling, L. J.*, in same case. This case was, by a majority of the judges, decided on another point.

²⁷ *Dygart v. Remerschnider* (1865) 32 N. Y. 629.

²⁸ *Hussey v. Castle* (1871) 41 Cal. 239. W. A. E.

KANSAS SUPREME COURT.

MILTON E. BAILEY et al.

v.

JOHN KELLY, Appt.

(93 Kan. 723, 145 Pac. 556.)

Landlord and tenant — defective premises — liability.

1. A landlord leased vacant property upon which there was a cistern covered by a loose lid lying upon a slightly raised platform. The lease was without warranty or covenant to repair on the landlord's part. The covering of the cistern was exposed to plain view, and its character was observed by the tenant when he entered. The tenant

used the cistern for nearly two years in this condition when on a laundry day the lid was not carefully replaced after a drawing of water, and a servant of the tenant stepped on a corner of the lid lying over the opening into the cistern, was precipitated into the cistern, and was drowned. The cistern was located in a shed in the rear of the kitchen of a building used by the tenant for a restaurant. When the deceased commenced working for the tenant he pointed out to her the location of the cistern, but in six weeks' service which occasionally brought her in proximity to the cistern the fact that the lid was loose was not brought to her attention. It is held:

The landlord is not liable in damages for the death of the servant upon the theory that the cistern was a nuisance, or upon the theory that he was guilty of actionable

Headnote by BURCH, J.

Note. — The opinion in the above case overruling the decision on an earlier appeal in the same case (*Bailey v. Kelly* (1912) 86 Kan. 911, 39 L.R.A. (N.S.) 378, 122 Pac. 1027) is in harmony with the editor's criticism in 39 L.R.A. (N.S.) 378, of the earlier decision, and is supported by the weight of authority as shown by the earlier notes, cited in the opinion, dealing with the liability of the landlord to the tenant. Those notes are supplemented in the annotation following this case, post, 1224. They include not only the cases where the injured person was a tenant, but also the cases of injury to a servant or guest of the tenant, or other person in privity with him, in which the court held or assumed that the L.R.A. 1916D.

liability was to be determined upon the same principles that apply as between the landlord and tenant. It is proposed, in subsequent annotation in the series, to deal with the correctness of that assumption with respect to various classes of persons in privity with the tenant. The liability of a landlord for injury to tenant's guests or employees by defects in the premises has been treated specifically in notes to *McConnell v. Lemley*, 34 L.R.A. 609, and *Cristadoro v. Von Behrens*, 17 L.R.A. (N.S.) 1161.

The liability of a landlord to persons not in privity with the tenant, for the condition of premises in possession of the tenant, is treated in the note to *Knight v. Foster*, 50 L.R.A. (N.S.) 286.

negligence, or upon any other theory sustained by existing law.

For other cases, see *Landlord and Tenant*, III. c. 4, in *Dig.* 1-52 N. 8.

(Johnston, Ch. J., and Mason and Benson, JJ., dissent.)

(January 9, 1915.)

A PPEAL by defendant from a judgment of the District Court for Cloud County in plaintiffs' favor in an action brought to recover damages for the death of plaintiffs' intestate alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. Theodore Laing, F. W. Sturges, Fred W. Sturges, Jr., C. L. Kagey, and R. M. Anderson, for appellant;

A landlord or lessor of premises is not liable to a servant or employee of his tenant for the condition of the leased premises even though defective, where there was no concealment or fraud or promise or agreement to repair, and where the tenant knew the condition of the premises.

Perez v. Rabaud, 76 Tex. 191, 7 L.R.A. 620, 13 S. W. 177; Scott v. Simons, 54 N. H. 431; Brewster v. De Fremery, 33 Cal. 341; O'Brien v. Capbell, 59 Barb. 497; Walsh v. Schmidt, 34 L.R.A. (N.S.) 798 and note, 206 Mass. 405, 92 N. E. 496, 1 N. C. C. A. 906; Moore v. Parker, 63 Kan. 52, 53 L.R.A. 778, 64 Pac. 975, 10 Am. Neg. Rep. 268; Note to Bailey v. Kelly, 39 L.R.A. (N.S.) 378.

Messrs. Park B. Pulsifer, Charles L. Hunt, A. L. Wilmoth, and A. M. French, for appellees:

The defendant is liable.

Bailey v. Kelly, 86 Kan. 911, 39 L.R.A. (N.S.) 378, 122 Pac. 1027; Buck Stove & Range Co. v. Vickers, 80 Kan. 29, 101 Pac. 668; Missouri P. R. Co. v. Stone, 80 Kan. 7, 101 Pac. 666; A. J. Harwi Hardware Co. v. Klippert, 73 Kan. 783, 85 Pac. 784; Norton v. Huntton, 43 Kan. 275, 22 Pac. 565; Headley v. Challiss, 15 Kan. 602; Copley v. Balle, 9 Kan. App. 465, 60 Pac. 656, 7 Am. Neg. Cas. 437; 18 Am. & Eng. Enc. Law, 2d ed. 239; Kinchlow v. Midland Elevator Co. 57 Kan. 374, 46 Pac. 703; Cristadoro v. Von Behren, 119 La. 1025, 17 L.R.A. (N.S.) 1161, 44 So. 852; Monahan v. National Realty Co. 4 Ga. App. 680, 62 S. E. 127; Texas & P. R. Co. v. Moore, 8 Tex. Civ. App. 289, 27 S. W. 962; Stenberg v. Willcox, 96 Tenn. 163, 34 L.R.A. 615, 33 S. W. 917; Herdt v. Koenig, 137 Mo. App. 589, 119 S. W. 56; Whart. Neg. § 817; Reichenbacher v. Palmeyer, 8 Ill. App. 217; McLaughlin v. Kelly, 230 Pa. 251, 50 L.R.A. (N.S.) 305, 79 Atl. 552, 1 N. C. C. A. 81; Ross v. Jack-

son, 123 Ga. 657, 51 S. E. 578; Bailey v. Dunaway, 8 Ga. App. 713, 70 S. E. 141; Paterson v. Jos. Schlitz Brewing Co. 16 S. D. 33, 91 N. W. 336; Grant v. Tomlinson, 138 Mo. App. 222, 119 S. W. 1079; Curtis v. Kiley, 153 Mass. 123, 26 N. E. 421; Colorado Mortg. & Invest. Co. v. Giacomini, 55 Colo. 540, L.R.A.1915B, 364, 136 Pac. 1039.

Even if deceased had knowledge of the condition of the cistern covering, her parents are not necessarily barred from recovery, as she would still have a right to go upon it, if she exercised ordinary care in so doing.

Maultby v. Leavenworth, 28 Kan. 745; Emporia v. Schmidling, 33 Kan. 485, 6 Pac. 893; Ottawa v. Green, 72 Kan. 214, 83 Pac. 616; Osage City v. Brown, 27 Kan. 74; Atchison, T. & S. F. R. Co. v. Ayers, 56 Kan. 176, 42 Pac. 722.

Burch, J., delivered the opinion of the court:

This case was before the court on the occasion of a former appeal. Bailey v. Kelly, 86 Kan. 911, 39 L.R.A. (N.S.) 378, 122 Pac. 1027. The action was commenced against a landlord to recover damages resulting from the death of his tenant's servant, who fell into a defectively covered cistern on the leased premises. The cistern was in a shed in the rear of the kitchen of a building used as a restaurant. The defect in the covering of the cistern existed at the time the premises were leased, was open to view, and the character of the covering was observed by the tenant when he took possession. The lease was without warranty and without covenant to repair, on the landlord's part. At the first trial the court sustained a demurrer to the plaintiff's evidence on the ground that the landlord rested under no liability. This court held otherwise, as indicated in paragraph 1 of the syllabus of the first opinion: "Where a nuisance dangerous to life is created by the owner on his premises, or through his gross negligence is suffered to remain there, he cannot, by leasing the property to another, avoid his own liability to any person who is rightfully upon the premises, and who, without any fault, is injured by reason of such nuisance; and this liability extends to a servant of the tenant, notwithstanding the tenant, by reason of his own fault or neglect or knowledge of the danger, could not have maintained an action against the owner for injury suffered by himself." (Syl. ¶ 1.)

At the second trial the court, after it had overruled a demurrer to the plaintiffs' evidence, instructed the jury in accordance with this decision, and a verdict was returned for the plaintiff. The defendant appeals, and

renews his contention that the law does not authorize the recovery of damages from him. A majority of the members of the court are convinced that the former decision was wrong. That the former decision was substantially unsupported by authority and was rendered against the settled law of this country is clear. Notes 34 L.R.A. 824; 34 L.R.A.(N.S.) 798; 39 L.R.A.(N.S.) 378; 48 L.R.A.(N.S.) 917; 49 L.R.A.(N.S.) 1120; 50 L.R.A.(N.S.) 286. The notes cited refer to others, and present a comprehensive view of the case law on the subject.

The court was conscious of the fact that it was extending the liability of the landlord, as that liability had been previously understood, but believed the extension to be justifiable. The distinction between the undefined body known as the public and a group of persons comprising a restaurant keeper, his family, and his employees becomes quite shadowy. That such a group, composed in part of persons drawn from the general public, would be assembled on the premises by the tenant was fairly within the landlord's contemplation. When the landlord takes rent for premises containing a public nuisance, he is liable. In this case the landlord took rent for the use of premises containing a pitfall which a portion of the public selected by the tenant was obliged to encounter. Consequently the court applied the nuisance theory, and held the defendant liable. The difficulty with this decision is that it is not closely discriminative with respect to facts, ignores ideas of legal duty which experience has demonstrated to be well founded and fair, and involves the law in confusion concerning some of its fundamental principles.

A description of the leased premises appears in the former opinion (86 Kan. 912, 39 L.R.A.(N.S.) 378, 122 Pac. 1027, and need not be repeated in full. The cistern was covered by a wooden platform about four feet square, raised four inches from the ground, upon which the lid or covering lay. The structure was in plain view, and the lid was adequate as a covering. Its only defect consisted in the fact that it might be displaced, and the casualty occurred in the most fortuitous way. Laundry work for the restaurant was done twice a week, the washing machine being operated by a gasoline engine. Water for this work was drawn from the cistern by means of a bucket and rope. The covering would usually be laid back against the coal house when water was being procured. At other times it was kept over the opening. On this occasion laundry work was in progress. The tenant had just drawn some water from the cistern and had gone back to the washing machine. The covering was not replaced

carefully and was lying so that one corner was over the opening into the cistern. The deceased stepped on this corner of the covering, which allowed her to fall into the cistern, and the covering then righted itself and fell into place over the opening. For almost two years the tenant had used the cistern in safety in exactly the same condition, and if the covering had been used according to its purpose and design the accident would not have occurred.

Under the foregoing circumstances it smacks somewhat of hyperbole to call the cistern a nuisance, the characteristic of which is that it must or will injure that portion of the public who may be compelled to come in contact with it. Black's Law Dict. title, "Nuisance." Broadly speaking, "nuisance, nocumtum, or annoyance, signifies anything that worketh hurt, inconvenience, or damage." 3 Bl. Com. chap. 13, p. 216. But in legal phraseology the term is applied to that class of wrongs that arises "from the unreasonable, unwarrantable, or unlawful use by a person of his own property . . . producing such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage." 1 Wood, Nuisances, 3d ed. § 1. Unless prejudice or damage threaten or result as a necessary consequence of the act done there is no nuisance. "It is a nuisance . . . to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbor." 3 Bl. Com. chap. 13, p. 218. "In order to create a nuisance from the use of property a material, substantial, and appreciable injury must be occasioned to the person or property of another." Joyce, Nuisances, § 22. "Injury and damage must concur as results of an act or thing in order to make it a nuisance." 1 Wood, Nuisances, 3d ed. § 5. A nuisance may result from negligence. But negligence is not involved in nuisance actions either as essential to the cause of action or as a ground of defense. 29 Cyc. 1155.

In this case the evidence indicates that before the lease was made the building was locked, and prospective tenants procured the key from the landlord in order to inspect the premises. In any event the property did not threaten the public or any portion of the public. The cistern was occasioning no injury or damage to anyone, rendering its maintenance intolerable. The change of possession from the landlord to the tenant did not change the lawful character of the landlord's conduct. When the deceased came upon the premises and commenced to work for the tenant, she acquired no cause of action against either the landlord or the tenant for injuries suffered or threatened on

account of the cistern, or for the abatement of the cistern as a nuisance, under any known principle of law. If a master negligently furnish his servant an unsafe place in which to work, nothing is gained, and confusion results from calling the place a "nuisance." The vehemence of the term adds nothing to the situation and relations of the parties, and cannot justify a departure from the law of negligence applicable to them. The present case is one of that character, and the nuisance theory, when applied to it, breaks down. The fact that the front room of the building was open to such portion of the public as desired to patronize the restaurant has no relevancy to the subject under consideration. The situation at the rear of the building was precisely the same as that of any private family employing servants to perform various household functions. The result is that the facts fail to bring the case within the category of those nuisance cases in which the lessor has been held to be liable for injuries sustained by third persons.

It is admitted that the ordinary inspection which a landlord has the right to expect a tenant will make did, in fact, disclose to the tenant the condition of the cistern. He could not have recovered if he had been injured. There is no contention that the lease was not made in perfect good faith, and there is no justification for speaking of the landlord's conduct as gross or wanton. The deceased was 16 years old, large for her age, healthy, intelligent, and in possession of all her faculties. When she commenced working for the tenant he pointed out to her the location of the cistern, but the jury found that in some 6 weeks' service, which occasionally brought her in proximity to the cistern, the fact the cover was loose was not brought to her attention. Only upon this narrow margin could recovery be had even from the tenant, and, notwithstanding the shocking character of the accident, reckless indifference to the safety of others does not appear on the part of anybody responsible for the condition of the premises. If, however, it once be conceded that the law of negligence governs the case, want of privity between the landlord and the tenant's servant defeats the action, however indefensible the conduct of the tenant in placing the servant at work in proximity to the cistern.

The undertaking of the landlord is not to furnish premises to be used as a place or instrumentality for the accomplishment of certain purposes by others, which he is bound to make fit for the contemplated use, like staging, scaffolding, hoisting apparatus, and other appliances, within the rule of *Heaven v. Pender*, L. R. 11 Q. B. Div. 503, L.R.A.1916D.

52 L. J. Q. B. N. S. 702, 49 L. T. N. S. 357, 47 J. P. 709, 19 Eng. Rul. Cas. 87. See *Aaron v. Missouri & K. Teleph. Co.* 89 Kan. 186, 45 L.R.A.(N.S.) 309, 131 Pac. 582. The lessor grants an estate in the premises to the lessee, and surrenders dominion over them to the lessee under conditions as definitely understood as if expressed in a written instrument of lease. "The mere letting without additional stipulations by the lessor simply implies that he holds the title, and that the lessee shall quietly enjoy the use and occupation during his tenancy; and not that the premises are or shall be in any particular condition or state of repair, or that they are suitable for the purpose for which they were let." 2 Cooley, Torts, 3d ed. p. 1276.

The tenant may or may not invite third persons, servants, patrons, guests, and others upon the premises, as he pleases, but the landlord extends, and can extend, no such invitation, either expressly or by implication. He cannot himself enter upon the tenant's possession, even to repair, unless the right be reserved or permission obtained, much less grant licenses to others. The result is the negligence theory of liability, suggested in the syllabus of the former opinion, breaks down for lack of any legal duty on the landlord's part to sustain it.

The principle upon which the lessor of premises is held liable to third persons for nuisances existing at the time the tenancy was created is this: The landlord having possession and control of his land, or the right to possess and control it, owes the public, who are suffering or must suffer from the nuisance, the duty to abate it, and must respond in damages for a breach of the duty. The duty and the liability are not satisfied by the simple act of leasing the premises, and continue until the nuisance is abated.

Much is said in the decisions concerning a presumption that the landlord contemplates a continuance of the nuisance while the tenant is in possession. The presumption is gratuitous and fictional as often as otherwise. The rent reserved is frequently reduced because of the condition of the premises and with the expectation that the tenant will put them in order. Frequently the landlord takes from the tenant a covenant that the tenant will repair. The majority of courts hold that the liability of the landlord is not ended because of a lease containing such a covenant, and it seems sufficient to say that, the landlord's obligation having once arisen, he cannot shift or evade or discharge it by leasing to another, but that the obligation continues until the public peril is actually removed.

When the condition of property is such that it does not impair the public safety, the landlord owes no duty to the public or to any member of the public to change the condition. When he comes to deal with a specific individual as a prospective tenant, he owes that individual no duty, except not to entrap him by concealing facts which ordinary inspection would not reveal, and he owes no other individual any duty at all. The landlord may in perfect good conscience offer his property, such as it is, to a tenant who takes it, such as it is, on satisfactory terms, just as the landlord and tenant did in this case. This is true, although buildings may be in tumble-down condition, excavations may be unguarded, or the premises may be otherwise uninhabitable or in unsafe condition for use. The only exception is that of property devoted to public use such as wharves, railroads, elevators, public halls, and the like. Negotiations having been fairly concluded, and possession having been given to the tenant, no obligation on the part of the landlord to safeguard or to repair remains unfulfilled. After that no obligation to repair arises during the tenancy, unless the landlord has contracted to do so. This is true, even although the tenant create a nuisance on the premises dangerous to the public. "It is a rule of the common law, applicable here, that 'the occupier, and not the landlord, is bound as between himself and the public so far to keep the premises in repair that they may be safe for the public.'" *De Tarr v. Ferd. Heim Brewing Co.* 62 Kan. 188, 192, 61 Pac. 690.

The principles just stated govern the present controversy. If it be unsound in morals or otherwise contrary to public policy to rest the duty of making and keeping premises fit for occupation and use upon occupation and use, and not upon title, the

existing law should be abrogated, and a new set of rules should be adopted. The court does not have before it the result of any social survey of the subject, and it is not perceived that the established usage is so offensive to the sense of justice that the court should anticipate legislation by proper authority, or, if it does, leap at once to the unconditional remedy of downright damages. To ingraft an exception upon the law for this particular case is to recognize the first of a wilderness of single instances. To cistern cases must soon be added cases involving defective railings about steps, stairways, porches, and areas, whereby the tenant's servants are injured. If after the fact of a distressing accident a jury should conclude to find negligence in maintaining some structure or place where the tenant's children invited some friends to play, the landlord must respond in damages. The list is certain to grow until it may be impossible to say what is the rule and what an exception. If the property law of the state is to be changed, and a general duty is to be imposed upon the landlord to make his premises secure for use by tenants and whomsoever a tenant may invite there, the legislature should create the obligation, and not the courts.

Instead of being genuinely progressive, the former decision was merely arbitrary, and it is overruled.

The judgment of the District Court is reversed, and the cause is remanded, with direction to sustain the demurrer to the plaintiff's evidence.

Smith, Porter, and West, JJ., concur.

Johnson, Ch. J., and Mason and Benson, JJ., dissent.

Petition for rehearing denied.

Annotation—Liability of landlord for injury to tenants from defects in premises.

This note supplements notes on the same subject in 34 L.R.A. 824; 34 L.R.A. (N.S.) 798, and 48 L.R.A. (N.S.) 917; and upon one phase of the question, a note in 11 L.R.A. (N.S.) 504.

The question of the liability of the lessor for personal injuries received from a defect in premises leased for public use where the defect was in a portion of the premises intended only for private use is treated in a note in L.R.A. 1915B, 387, and that of the liability of the lessor of property to be used for public purposes for personal injuries to third persons from defects therein, in a note L.R.A. 1916D.

in L.R.A. 1915B, 364; the liability of the lessor for defects in porch or steps used in common by different tenants for access to common hall is treated in a note in L.R.A. 1915B, 98.

General rule.

Supplementing note in 48 L.R.A. (N.S.) 917.

The later cases are in accord with the rule stated in the note in 48 L.R.A. (N.S.) 917, that where there is no agreement by the landlord to repair the demised premises and he is not guilty of any fraud or concealment as to their safe condi-

tion, the tenant takes the risk of their safe occupancy, and the landlord is not liable to him or to any person entering under his title or by his invitation for personal injuries sustained by reason of their unsafe condition:

—*BAILEY v. KELLY*, citing notes in 34 L.R.A. 824; 34 L.R.A.(N.S.) 798; 39 L.R.A.(N.S.) 378; 48 L.R.A.(N.S.) 917; 49 L.R.A.(N.S.) 1120; 50 L.R.A.(N.S.) 286, and reversing (1912) 86 Kan. 912, 39 L.R.A.(N.S.) 378, 122 Pac. 1027;

—*Mackey v. Lonergan* (1915) 221 Mass. 296, L.R.A.—, —, 108 N. E. 1062, holding that where the sidewalk is in the same condition as when leased the lessor is not liable for personal injuries from a defect therein received by a person having the same rights as the tenant;

—*Mills v. Swanton* (1916) 222 Mass. 557, 111 N. E. 384, holding that a lessor is not bound to keep the leased premises in repair rendering them fit for occupancy as a dwelling house, and there is no implied covenant that they were in good repair when leased;

—*Enquist v. Didden* (1913) 41 App. D. C. 179, 183 (rule stated);

—*Daley v. Towne* (1914) 127 Minn. 231, 149 N. W. 368, holding that as to obvious defects in the leased premises, if there is no agreement to repair or no concealment by the lessor, and the defects do not constitute a nuisance, the lessee takes the risk, and the lessor is not liable to him, or to any person having his rights, for personal injuries received from defects in the leased premises. To the same effect see *Keegan v. G. Heileman Brewing Co.* (1915) 129 Minn. 496, L.R.A.—, —, 152 N. W. 877. It is to be noted that in Minnesota the rule obtains that, where there is an agreement to repair, the tenant may base an action in tort thereon to recover for personal injuries received by reason of the negligent breach by the landlord of this agreement;

—*Davis v. Manning* (1915) 98 Neb. 707, 154 N. W. 239, citing note in 34 L.R.A.(N.S.) 798, and reversing on rehearing (1915) 97 Neb. 658, 150 N. W. 1019;

—*Stamm v. Purroy* (1915) 170 App. Div. 584, 156 N. Y. Supp. 415; *Alfano v. McManus* (1915) 154 N. Y. Supp. 212; *Gelb v. Silverman* (1914) 150 N. Y. Supp. 485;

—*Kurtz v. Pauly* (1914) 158 Wis. 534, 149 N. W. 143, holding that the landlord is not liable for injuries to the person of the tenant from a defect in the premises of which he had no knowledge and of which the tenant was also ignorant, even L.R.A.1916D.

though the landlord in the exercise of reasonable care might have discovered the defect and guarded the tenant against it.

Latent defect.

For earlier cases, see notes in 48 L.R.A.(N.S.) 918, and 34 L.R.A.(N.S.) 803.

Where the landlord personally or through his agent has actual notice of a defect in the leased premises prior to the lease thereof, and does not disclose the same, he is liable to the lessee for personal injuries resulting from such defect, at least where it was of such a character that it was not discoverable by the exercise of ordinary care on the part of the tenant. *Andonique v. Carmen* (1915) 162 Ky. 154, 172 S. W. 112. To the same effect is *Howard v. Washington Water Power Co.* (1913) 75 Wash. 255, 52 L.R.A.(N.S.) 578, 134 Pac. 927, holding that where the lessor has knowledge of an uninsulated electric light switch, and fails to disclose the same to the lessee, and the latter could not discover it by a reasonably careful examination, for the injury to his person therefrom, the lessor is liable.

Defective construction.

A landlord is liable to a tenant, or a person having the same rights as a tenant, for personal injuries received through defects in the construction of a building rendering it dangerous, which condition was known to the landlord when he executed the lease and of which the tenant had neither actual nor constructive knowledge. *Flood v. Pabst Brewing Co.* (1914) 158 Wis. 626, L.R.A.—, —, 149 N. W. 489. And it has been held that the lessor is liable for personal injuries resulting to the lessee from a defectively constructed fire escape. *Wardwell v. Cameron* (1914) 126 Minn. 149, 148 N. W. 110. The defect in this case was apparently an obvious one, but no point was made of this fact.

Defect in portion of premises not included in lease.

The landlord is not liable for personal injuries received by a small child of his tenant in attempting to jump from the roof of one tenement to that of another, where there is no evidence that he consented or acquiesced in the use of the roof as a playground by the children of his tenants, although it was used by the tenants as a place to hang clothes to dry. *Prickett v. Pardridge* (1914) 189 Ill. App. 307, 9 N. C. C. A. 76.

The permission of the owner of prem-

ises for a tenant to use a back stairs for the purpose of his pleasure alone does not amount to an invitation to use the stairs rendering the lessor liable to the tenant for personal injuries he received from a defect in the stairway. *Book v. Heath* (1915) — *Tex. Civ. App.* —, 181 S. W. 491.

Where the landlord retains control of the property.

Supplementing notes in 34 L.R.A. (N.S.) 807 and 48 L.R.A. (N.S.) 920.

As pointed out in the notes referred to, where premises are leased to different tenants, and the landlord retains control of a portion thereof for their common use and convenience, the law imposes upon him the duty to use ordinary care to keep in safe condition that portion of the premises over which he retains control; and if he is negligent in this regard, and a personal injury results to a tenant by reason of a defect due to such negligence, he is responsible in damages therefor.

Gaucso v. Levy (1915) 89 Conn. 169, 93 Atl. 136 (railing of veranda); *Miller v. Spreyne* (1914) 189 Ill. App. 384 (stone step in passageway); *Fowler v. Crilly* (1914) 187 Ill. App. 399 (landing to stairway); *Rossen v. Goodridge* (1914) 185 Ill. App. 164 (defective railing to rear stairway); *Pozdal v. Heisen* (1913) 184 Ill. App. 441 (stating general rule); *Mikkanen v. Safety Fund Nat. Bank* (1915) 222 Mass. 150, 109 N. E. 889 (defective freight elevator); *White v. Beverly Bldg. Assn.* (1915) 221 Mass. 15, 108 N. E. 921; *Shea v. McEvoy* (1914) 220 Mass. 239, 107 N. E. 945 (dumb-waiter); *Flanagan v. Welch* (1915) 220 Mass. 186, 107 N. E. 979 (stairway, landlord agreed to keep the same in good repair); *Johnson v. Fainstein* (1914) 219 Mass. 537, 107 N. E. 351 (stairway); *Wheeler v. Sawyer* (1914) 219 Mass. 103, 106 N. E. 592 (stairway); *Maionica v. Piscopo* (1914) 217 Mass. 324, 104 N. E. 839 (stairway); *Noonan v. O'Hearn* (1914) 216 Mass. 583, 104 N. E. 376 (roof of tenement); *Wilson v. Jones* (1916) — *Mo. App.* —, 182 S. W. 756; *Miller v. Geeser* (1915) — *Mo. App.* —, 180 S. W. 3 (defective porch railing); *Perry v. Levy* (1915) 87 N. J. L. 670, 94 Atl. 569 (roof of apartment house); *Buda v. Dzuretzko* (1915) 87 N. J. L. 34, 93 Atl. 83 (defective stairway); *Kargman v. Carlo* (1914) 85 N. J. L. 632, 90 Atl. 292 (failure to keep hall properly lighted); *Agatstein v. Stark* (1915) 156 N. Y. Supp. 393 (failure to keep stairway properly lighted); L.R.A.1916D.

Size v. Wegmann (1915) 169 App. Div. 112, 154 N. Y. Supp. 825 (clothes-pole); *Domush v. Abraham* (1914) 148 N. Y. Supp. 139 (hallway); *Pincus v. Schlechter* (1915) 167 App. Div. 361, 153 N. Y. Supp. 67 (leaky gas pipes); *Mellen v. Henderson* [1913] S. C. 1207; *Mews, Eng. Case Law Dig.* 1911-1915 p. 838 (defective stairway); *Inglehardt v. Mueller* (1914) 156 Wis. 609, 146 N. W. 808 (hallway).

It has been held where the space between the floor of one apartment and the ceiling of the next lower apartment remains within the control of the landlord, if the floor breaks due to a defective support, personally injuring the tenant, the landlord is liable to him for damages thereby resulting (*Fleischer v. Dworsky* (1915) 90 Misc. 628, 153 N. Y. Supp. 951; *Tauber v. Rockelsky* (1915) 90 Misc. 382, 153 N. Y. Supp. 199; *Simpson v. Eppinger* (1914) 150 N. Y. Supp. 473; *Richtman v. Jacobs* (1914) 149 N. Y. Supp. 947); and also where the ceiling falls due to the leaking of the roof (*Abramowitz v. Schlessinger* (1915) 152 N. Y. Supp. 337). But compare with *Stoecker v. Hearst* (1915) 89 Misc. 568, 153 N. Y. Supp. 752, denying the right of a tenant to recover for personal injuries received from the falling of a defective ceiling in that portion of an apartment house occupied by the tenant, on the ground that the tenant had control of the particular apartment leased by him.

Although the lessor retained control of steps leading to a building occupied in part by a tenant, he is not liable for personal injuries to a child of the tenant caused by the absence of one of the rails from the railing to the step, where it was gone when the premises were leased, which fact was obvious to the lessee. *Dobson v. Horsley* [1915] 1 K. B. (Eng.) 634, 112 L. T. N. S. 101, 84 L. J. K. B. N. S. 399, 31 Times L. R. 12.

Where the tenant in an apartment house occupied by different tenants has the sole use of a dumb-waiter, the landlord is not liable for personal injuries to him through a failure to keep it in repair. *Green v. Hammond* (1916) 223 Mass. 318, 111 N. E. 875.

It is a question for the jury whether or not it is the duty of the lessor of premises who retains the control of the halls and stairways, to keep the halls lighted, where the personal injury complained of resulted from the unlighted condition of the hall way. *Gallagher v. Murphy* (1915) 221 Mass. 363, 108 N. E. 1081.

A tenant injured by the accumulation of snow and ice on the sidewalk in front of premises occupied by himself and other tenants cannot recover for the injuries, since the place of injury was not that portion of the premises affected by the tenancy, and it did not appear that the landlord retained control of the portion of the premises which caused the accumulation of the ice and snow. *Valin v. Jewell* (1914) 88 Conn. 151, L.R.A. 1915B, 324, 90 Atl. 36.

Negligence in making repairs.

Supplementing notes in 48 L.R.A. (N.S.) 921 and 34 L.R.A. (N.S.) 806.

Although there was originally no obligation upon the lessor to make repairs to the leased premises, he is nevertheless liable for personal injuries resulting from his negligence in making repairs voluntarily undertaken by him. *Feeley v. Doyle* (1915) 222 Mass. 155, 109 N. E. 902; *Knowles v. Exeter Mfg. Co.* (1914) 77 N. H. 268, 90 Atl. 970; *Flam v. Greenberg* (1916) 158 N. Y. Supp. 670.

Compare with *Marston v. Frisbie* (1915) 168 App. Div. 666, 154 N. Y. Supp. 367, holding that although the landlord voluntarily undertook to repair a step on the leased premises and failed to make it safe to the knowledge of the tenant, but his effort did not make the step more dangerous, he is not liable to the tenant for an injury caused by the unsafe condition of the step, where he did not give her any assurance as to its safety, and there being no evidence that she was led to believe that it had been rendered safe.

Whether the landlord was negligent in making repairs is a question of fact for the jury. *Pincus v. Schlechter* (1915) 167 App. Div. 361, 153 N. Y. Supp. 67.

Effect of exemption of lessor.

In the absence of an agreement to repair, the lessor is not liable for injuries to the lessee from the defective condition of the leased premises, where the lease contains an express stipulation of nonliability and an acknowledgment by the lessee that he has examined the premises, and that no representation as to their condition or as to repairs has been made to him by the lessor. *McIntosh v. Wilson* (1913) 23 Manitoba L. R. 653, 14 D. L. R. 671. And the lessor is not liable to the lessee for personal injuries caused by the defective condition of the premises not obvious, and unknown to the lessor, where the lease contains a provision that the lessee accepts the premises in the condition in which they are then in, and agrees that

the lessor shall not be liable for any personal injuries caused by any defects therein. *Johnston v. Nichols* (1915) 83 Wash. 394, 145 Pac. 417.

Liability under express agreement to repair.

Supplementing notes in 48 L.R.A. (N.S.) 919, 34 L.R.A. (N.S.) 804 and 11 L.R.A. (N.S.) 504.

As pointed out in the notes referred to, and as held by the later cases, by the weight of authority the negligent breach by the lessor of an express agreement to keep the leased premises in repair will not support an action in tort by the lessee to recover damages for personal injuries received from the defective condition of the premises, although attributable to such breach.

Hart v. Coleman (1915) — Ala. —, 68 So. 315; *O'Neil v. Brown* (1914) 158 Ky. 118, 164 S. W. 315; *Dice v. Zweigart* (1914) 161 Ky. 646, L.R.A. —, 171 S. W. 195; *Lane v. Raynes* (1916) — Mass. —, 112 N. E. 152; *Dailey v. Vogl* (1915) 187 Mo. App. 261, 173 S. W. 707; *Murphy v. Dee* (1915) 190 Mo. App. 83, 175 S. W. 287; *McBride v. Gurney* (1916) — Mo. App. —, 185 S. W. 735; *Marston v. Frisbie* (1915) 168 App. Div. 666, 154 N. Y. Supp. 367.

In *Flood v. Pabst Brewing Co.* (1914) 158 Wis. 626, L.R.A. —, 149 N. W. 489, it is held that a landlord who agrees to keep the leased premises in repair is liable to the invitee of a tenant injured by a defect therein, although the action is in tort based upon the breach of duty to repair. The most of the cases cited by the court in support of this proposition were cases where the action was based upon a defect in premises used in common by different tenants, or premises leased for public or quasi public use. Indeed this case itself involved the lease of a building for saloon purposes.

In Maryland, *Pinkerton v. Slocomb* (1916) 126 Md. 665, 95 Atl. 965, it is held that an action in tort cannot be maintained to recover for personal injuries to a tenant from a defect in the leased premises, although the action is based upon a breach by the landlord upon his agreement to repair. It is held, however, that the landlord may be liable for personal injuries to a tenant resulting from a negligent failure to repair.

Liability under subsequent promise to repair.

Supplementing note in 34 L.R.A. (N.S.) 805.

In *Nutter v. Colyer* (1914) 180 Mich.

107, 146 N. W. 643, it is apparently assumed that the landlord is liable to a tenant for personal injuries received from a defective floor in the kitchen of the leased premises if, as the tenant claimed during the tenancy, he examined the floor and said it was safe, but he would nevertheless make some repair which would make it stronger, which he did not do, but she continued to use the floor until she fell through it and was injured.

Statutory provisions.

Supplementing notes in 34 L.R.A. (N.S.) 808, and 48 L.R.A. (N.S.) 920.

Under the Georgia statute providing that the landlord is responsible to others for damages arising from the defective construction or for damages for failure to keep the premises in repair, the landlord is liable to respond in damages for the death of a stepchild of the tenant killed through a defect in the premises of which the landlord had notice and negligently failed to repair. *Crook v. Foster* (1914) 142 Ga. 715, 83 S. E. 670.

But the mere fact that, after being personally injured from a defective condition of the leased premises, the tenant continued to pay rent, does not affect his right to recover damages from the landlord for such injuries. *Cohen v. Brunson* (1914) 14 Ga. App. 170, 80 S. E. 679.

Contributory negligence of the tenant.

Supplementing notes in 48 L.R.A. (N.S.) 921 and 34 L.R.A. (N.S.) 808.

Where the injured person fails to show the cause of the accident or his freedom from contributory negligence, he cannot recover from the landlord although the injury was due to the defective condition of the premises. *Francis v. Hoffman* (1916) 157 N. Y. Supp. 764.

The lessor is not liable for personal injuries to the lessee from a defect in the leased premises unknown to both parties, even though he might have discovered the defect by the exercise of reasonable care; since the tenant is also required to exercise the same degree of care to discover the dangerous condition of the premises as the landlord is, and his failure in this regard constitutes contributory negligence, precluding a recovery from the landlord. *Kurtz v. Pauly* (1914) 158 Wis. 534, 149 N. W. 143.

Where the injured person knew that the stairway used in common by dif-

ferent tenants was without a railing, but she continued to use it, she assumed the risk of any injury therefrom, and cannot recover from the landlord. *Lucy v. Bawden* [1914] 2 K. B. (Eng.) 318, 110 L. T. N. S. 580, 83 L. J. K. B. N. S. 523, 30 Times L. R. 321.

In *Staples v. Casey* (1915) 43 App. D. C. 477, where the lessor agreed to keep and maintain the leased premises in good, safe, and perfect condition, it is said that, assuming that the negligent failure of the lessor to perform the duty thus assumed would support an action to recover damages for personal injuries received from a defective stairway, the tenant cannot recover where she was guilty of contributory negligence in using the stairs with knowledge of their defective condition.

If the tenant, after calling the attention of the landlord to defects in the premises liable to endanger his health, continued to occupy the same before the landlord repaired the defects complained of, it has been held to constitute such negligence as to preclude recovery for sickness occasioned thereby. *Clements v. Blanchard* (1914) 141 Ga. 311, L.R.A. —, —, 80 S. E. 1004. So, where the tenant called the attention of the landlord to defective steps and he failed to repair them, she was guilty of negligence in thereafter using the steps, and cannot recover for personal injury received thereby. *Donehoe v. Crane* (1914) 141 Ga. 224, 80 S. E. 712.

It has been held that where the tenant complained to the landlord of the defective condition of a board walk on the premises, and he made no promise to repair it, the question whether or not the tenant in continuing to use the walk until injured by the defect therein was guilty of contributory negligence is for the jury. *Christiansen v. Navigato* (1914) 185 Ill. App. 318. And whether a tenant in an apartment building is guilty of contributory negligence in leaning against a railing of a stairway to the rear of the building is also a question for the jury. *Rosseau v. Goodridge* (1914) 185 Ill. App. 164.

The act of the tenant in remaining in the leased apartment after the lessor undertook to repair a door therein, but left it in an incomplete condition, does not constitute contributory negligence, even though the dangerous condition of the door is not a hidden defect. *Flam v. Greenberg* (1916) 158 N. Y. Supp. 670.

A. G. S.

KENTUCKY COURT OF APPEALS.

CONSOLIDATION COAL COMPANY,

Appt.,
v.

JOHN M. PRATT.

(— Ky. —, 184 S. W. 369.)

Master and servant — kick by mule — Liability of master.

A servant who, while stooping near a mule's heels, hits it with a whip, cannot hold his master liable for injury from the kick forthwith administered to him by the mule.

For other cases, see Master and Servant, II. c, 1, in Dig. 1-52 N. S.

(April 14, 1916.)

A PPEAL by defendant from a judgment of the Circuit Court for Letcher County in plaintiff's favor in an action brought to recover damages for personal injuries sustained by him while in defendant's employ by being kicked by a mule. Reversed.

The facts are stated in the Commissioner's opinion.

Messrs. Young & Dearing and O'Rear & Williams, for appellant:

The master must know the mule was vicious and fail to tell the servant.

Green River Coal & Coke Co. v. Phaup, 137 Ky. 37, 121 S. W. 651.

The appellee was guilty of contributory negligence.

Tolin v. Terrell, 133 Ky. 214, 117 S. W. 290.

In the absence of knowledge on the part of the master as to habit of the mule kicking, the appellee assumes the risk if he goes within the radius of its heels.

In order to recover, it devolved upon plaintiff to show that the mule was vicious or dangerous; that defendant either knew or by the exercise of ordinary care could have known thereof; and that plaintiff did not himself have such knowledge and could not have acquired it by the exercise of ordinary care on his part.

Mahan Jellico Coal Co. v. Bird, 167 Ky. 697, 181 S. W. 339.

Messrs. Ira Fields, Felix G. Fields, and Fields & Newman, for appellee:

Where the master knowingly furnishes to the servant a dangerous, vicious animal, unfit for use, or lulls the servant into a feeling of security by false assurances of safety, the danger being unknown, to the

Note. — As to duty and liability of master to servants in respect to animals owned or used by master, see note to Nooney v. Pacific Exp. Co. L.R.A.1915B, 433, and other notes there referred to. L.R.A.1916D.

servant, and injury results, the master is liable.

East Jellico Coal Co. v. Stewart, 24 Ky. L. Rep. 420, 68 S. W. 624; Baker v. Crescent Coal Co. 142 Ky. 191, 133 S. W. 1146; Gatcliff Coal Co. v. Wright, 157 Ky. 682, 163 S. W. 1110.

The servant may reply upon representations of the master as to safety.

Gatcliff Coal Co. v. Wright and East Jellico Coal Co. v. Stewart, supra.

The owner of a mule is responsible to his employee injured by it while in his service, where the latter, being unacquainted with the vicious propensities of the animal, is injured because induced by the owner's assurance of its gentle and reliable qualities to omit, in his use of it, some precaution for his safety that, as a person of ordinary prudence, he would otherwise have taken.

Ibid.

Clay, C., filed the following opinion:

This is a personal injury action in which plaintiff, John M. Pratt, recovered of the defendant, the Consolidation Coal Company, a verdict and judgment for \$500. The company appeals.

Plaintiff, while in the employ of defendant, was kicked by a mule. He predicates his case on the fact that the mule was dangerous, vicious, and unsafe, and, upon being whipped, beaten, or annoyed, would kick at persons, and thereby endanger their lives and safety; that these facts were known to defendant, or could have been known to it by the exercise of ordinary care, and were not known to plaintiff and could not have been known to him by the exercise of ordinary care. In addition to the foregoing facts, his petition alleges in substance that, because of the difficulty in inducing the mule to enter the mine, plaintiff was ordered by the superintendent to whip the mule, and that the superintendent assured plaintiff that the mule was gentle and safe and would not kick; that on the occasion of the accident he, in obedience to the direction of defendant's superintendent, whipped the mule for the purpose of forcing it to enter the mine, and while so doing, and as a result of said whipping, the mule kicked and injured plaintiff.

In support of the allegations contained in his petition, plaintiff testified in substance as follows: He had been doing grade work for the company for four or five months. The superintendent then directed him to drive in the mines. He worked the mule that kicked him for two days. The superintendent said that "the mule was good conditioned, but would not stop," and told plaintiff to be careful and not let the car run on him when it started, but did not say anything about its kicking. The superin-

tendent also told him to whip the mule and make it go into the mine. While driving the mule on the third day, he hit the mule and it kicked him. Before that he had trouble with the mule every time he started into the mouth of the mine. At the time of the accident, another employee was pulling on the mule with a bridle or halter. Plaintiff was stooping down, trying to get hold of the tail chain. A part of the work that plaintiff was to do was to hook and unhook the chain. On cross-examination plaintiff stated that he had worked on a farm practically all of his life. During that time he had hoed corn, grubbed, and done similar kinds of work. While he had plowed some, he had never driven any teams except oxen. He was assigned to the duty of driving the mule because he had applied to the superintendent for a job with more money. When he went to work he knew that the mule would not stand, but that was all. The chain was near the mule's feet. He stooped down to get the chain and at the same time hit the mule. He struck him with a limb or little whip. When he first went to work the superintendent helped him to whip the mule. Plaintiff further says that he did not know that the mule would kick. He had never seen it make any demonstrations of that kind.

While plaintiff bases his right of action on the fact that the mule was dangerous and vicious, and this fact was known to the master, or could have been known to him by the exercise of ordinary care, he fails to show that the mule ever kicked or showed any vicious tendencies on any previous occasion. On the contrary, he shows that he had driven the mule into the mine a number of times and had repeatedly whipped him, and that the mule bore his punishment with remarkable complacency and never attempted to injure plaintiff in any way. It was only when plaintiff took a position near the mule's hind feet and reached down to pick up the tail chain, and at the same time

struck the mule with a whip, that the mule gave way to his natural propensity and kicked plaintiff. The kicking propensity of the mule is a matter of common knowledge, and has been the subject of comment from the earliest time. It is almost as universally recognized as the fact that a duck will swim or a cat will scratch. However, a duck cannot indulge his propensity without water and, ordinarily, a cat will not scratch unless irritated or attacked. But the mule requires no particular setting for the exercise of his high prerogative. He is liable to kick at any time, and no one can plead ignorance of this tendency. This is not a case where the mule was shown to be more than ordinarily dangerous or vicious. It is not a case where the unexpected happened. It is a case where plaintiff not only invited disaster, but actually provoked it. He made himself a convenient target by stooping down and placing himself near the mule's heels. Not being satisfied with this invitation, he actually applied the lash. Of course, there may be instances where a mule will sometimes surprise you and refuse to kick, even though the circumstances be unusually propitious. But this is not such a case. Here the mule would have been untrue to himself and false to every tradition of his breed if he had passively acquiesced in such treatment and kept his heels on the ground. The quality of plaintiff's act cannot be the subject of dispute. All reasonable men will agree that he showed an utter disregard of his own safety. An employee cannot court danger by inviting and provoking a mule to kick him, and then recover of the master for a consequent injury, on the ground that he is a bona fide cripple without notice. *Tolin v. Terrell*, 133 Ky. 214, 117 S. W. 290. It follows that the trial court should have directed a verdict in favor of defendant.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

FLORIDA SUPREME COURT.

ROSE NADEL et al., Appts.,

v.

WEBER BROTHERS SHOE COMPANY.

(— Fla. —, 70 So. 20.)

Husband and wife — wife as partner — liability.

1. A married woman is not personally

Headnotes by ELLIS, J.

Note. — As to power of married woman to become member of partnership, see annotation following this case, post, 1233. *L.R.A.*1916D.

bound by any contract made by her partner in a mercantile business, nor do the partnership debts incurred by her partner in the transaction of the partnership business become a charge upon her separate property. For other cases, see *Husband and Wife*, II. b, 1, in *Dig.* 1-52 N. S.

Same — removal of disability — extent.

2. A married woman's disability of coverture is removed by § 2, art. 11, of the Constitution of 1885, to the extent that she may assume an obligation for the purchase price of property, and such obligation may be enforced out of her separate property.

For other cases, see *Husband and Wife*, I. b, 2, in *Dig.* 1-52 N. S.

Same — interest in business — liability for supplies.

3. A married woman who has acquired an interest in a mercantile business may, by her own act, upon her sole credit, purchase merchandise for the business, and for the purchase price of such goods her separate property may be subjected in equity.

For other cases, see Husband and Wife, I. b, 2, in Dig. 1-52 N. S.

Same — purchase by agent — authority.

4. If a married woman's separate property is sought to be subjected in equity to the payment of the price of goods purchased through her agent, the agent's authority should be clearly and specifically alleged in the bill.

For other cases, see Pleading, II. h, in Dig. 1-52 N. S.

Pleading — supplemental bill — demurrer.

5. Upon a demurrer to an original and supplemental bill, the allegations of the two bills will be considered together.

For other cases, see Pleading, I. o, in Dig. 1-52 N. S.

(October 26, 1915.)

APPEAL by defendants from a judgment of the Circuit Court for Lee County overruling a demurrer to a bill filed to subject certain property of defendants to the payment of a debt alleged to be due to complainant for goods sold by it to them. Reversed.

Statement by ELLIS, J.:

Weber Brothers Shoe Company, a corporation, filed its bill in equity against Rose Nadel and her husband, A. G. Nadel, for the purpose of subjecting certain real property of Rose Nadel, owned by her as her separate statutory property, and described in the bill, and certain personal property alleged to be owned by Rose Nadel and C. L. Johnson in a mercantile business conducted by them under the name of the "Quality Shop," at Ft. Myers, Florida, to the payment of a debt alleged to be due to the complainant corporation for goods shipped by it to the Quality Shop, which the bill alleges was the "firm name and style" of a business in which Rose Nadel was jointly interested with "one C. L. Johnson," who was not made a party to the bill.

The bill alleges that, at the time it was filed, the Quality Shop had a stock of goods of the estimated value of \$5,000, and that Rose Nadel had an undivided half interest therein, and that such interest was under the control of her husband, A. G. Nadel, who was her agent in fact and in law. It is alleged that in February, 1914, Rose Nadel, through her husband as her agent in fact and in law, contracted with the

complainant for the purchase of the goods, which were shipped to her and received and accepted by the Quality Shop, and that the complainant shipped the goods as stated, relying on the promise of Rose Nadel, through her husband, A. G. Nadel, to pay for the same. A list of the goods sold by the complainant is attached to the bill of complaint as "Exhibit A" and made a part of the bill. This list shows that the goods were sold by the "Weber Brothers Shoe Company" to the "Quality Shop, Ft. Myers, Florida." The bill alleges specifically that Rose Nadel is a married woman and interested in the said business, the Quality Shop, together with one C. L. Johnson, and with her husband, A. G. Nadel, as "agent and manager of said business."

In another paragraph of the bill it is alleged that such "goods and chattels were purchased by the said Rose Nadel for the use and sale in the said business known as the Quality Shop, and that such goods were sold to her in a good faith and on her credit and her representation as to the ownership of the said property both real and personal," and that the "goods were shipped to the said Rose Nadel, operating under the firm name and style of the Quality Shop, located in the city of Ft. Myers, Lee county, Florida, and were received by the said defendants, and they then and there promised" the complainant "to pay the same."

The bill prays for an accounting to ascertain the amount due to complainant by Rose Nadel, trading under the name of the "Quality Shop;" that such amount be paid by Rose Nadel within a short time, to be named by the court; and that, in default of the payment of such indebtedness by her, her interest in the personal property of the business, as well as her real property, be sold, or the rents, issues, and profits thereof sequestered to satisfy the complainant's claim.

About four months after the filing of the original bill, the complainant filed its supplemental bill of complaint against the defendants, in which it was alleged that, since the filing of the original bill, there had been a "dissolution of the partnership relations existing between the defendant Rose Nadel" and "C. L. Johnson, and that the partnership property" had been divided between them, and that Rose Nadel had in her possession and control "by and under and through the management of her husband, A. G. Nadel, a certain stock of shoes, hats, shirts," etc., and that she held the goods free from any claims of C. L. Johnson, her former partner in the business then known as the Quality Shop. It was further alleged that the partnership was dissolved by mutual consent on the 1st day of Jan-

uary, 1915, and that C. L. Johnson had agreed to settle the indebtedness of the former firm, but the complainant had not agreed to nor accepted such offer, nor released Rose Nadel, nor the property, from the payment of the debt. The bill prays that the "said personal property, consisting of the stock of goods" located in a certain building in Ft. Myers, may be subjected to the payment of the complainant's claim. It is alleged in the original bill that the real estate as well as the interest of Rose Nadel in the mercantile business was her separate statutory property, and in the supplemental bill that the personal property, consisting of part of the merchandise stock of the Quality Shop, which came to her upon the dissolution of the partnership, is her separate statutory property.

The defendants interposed a demurrer to the original and supplemental bills, on the grounds, among others, that the bills were without equity, and set forth no facts which entitled the complainant to the relief sought; that it was not alleged that the credit was given solely to the defendant Rose Nadel upon the faith of her "separate statutory estate;" that the bills sought to subject a married woman's separate statutory property to the debts of a partnership business; that the supplemental bill was bad because the original bill states no cause that could be sustained in equity; and that the supplemental bill failed to set forth any contract on the part of the married woman, and alleged that the credit was given to the business.

The demurrer was overruled. Exceptions were filed to certain matters contained in the supplemental bill, relating to the property which Rose Nadel had in her possession after the dissolution of the partnership, and the allegation that it was property purchased by Rose Nadel through her husband as manager and her agent in the mercantile business formerly known as the Quality Shop, and that some of which was the very property that "the defendant" purchased from the complainant, etc. The exceptions were overruled. From these orders Rose Nadel and her husband, A. G. Nadel, appealed to this court.

Messrs. **Randell & Lawler** for appellants.

Mr. **Walter O. Sheppard** for appellee.

Ellis, J., delivered the opinion of the court:

The theory on which the bills rest is that a married woman who is jointly interested in a mercantile business as a partner, with one who is *sui juris*, may, by using her credit, based upon her separate property in pur-

chasing goods for the business, render such separate property liable to be subjected in equity to the payment of a creditor's claim.

It is true that a married woman cannot be a member of a partnership, and is therefore not personally liable for any act or transaction of her so-called partner in the transaction of partnership business. *Virginia-Carolina Chemical Co. v. Fisher*, 58 Fla. 377, 50 So. 504; *Porter v. Taylor*, 64 Fla. 100, 59 So. 400; *De Graum v. Jones*, 23 Fla. 83, 6 So. 925. Yet, under § 2 of article 11 of the Constitution of Florida, a married woman's disability of coverture is removed to the extent that she may assume an obligation for the purchase price of real or personal property, and such obligation may be a charge in equity upon, and enforced out of, her separate property. *Micou v. McDonald*, 55 Fla. 776, 46 So. 291; *Halle v. Einstein*, 34 Fla. 589, 16 So. 554. Her so-called partner cannot, by any act of his, obligate her to the payment of partnership debts so that such debts may be a charge upon her separate property in equity, but she may, by her own act, upon her sole credit, purchase goods for the business in which she is interested, and her separate property may be subjected in equity to the payment of debts so contracted by her. Although a married woman, by reason of her disability of coverture, cannot make a valid contract of copartnership, she may acquire an interest in a mercantile business, she may invest money or other property in such business, and such interest will be her separate property, and subject to be charged in equity and sold under § 2 of article 11 of the Constitution. In such case her associates in business, that is to say, the persons with whom she has her property invested, and who conduct the mercantile business, are not necessary parties. Her obligation to pay for the goods so purchased by her rests not upon the contract of partnership, nor because she is bound by any obligation growing out of the partnership relation, but, being interested in the business in her own name, and having property employed in such business, she purchases goods upon her sole credit for the purpose of such business. In such case the goods are purchased by her, and for the purchase price thereof her separate property may be charged in equity and sold. It is immaterial that the goods so purchased are commingled with the merchandise stock, or that she parts with them by gift or sale, or destroys them, so that her separate property is not in fact increased in value or benefited by the purchase; her separate property may be charged in equity and sold because of the purchase by her of the goods and that she intended the payment thereof

to be made out of her own property. The married woman being given the right to acquire property, the Constitution, preserving it free from the debts of her husband, without her consent, makes it subject in equity to be charged for the payment of the price of any property purchased by her. *Halle v. Einstein*, supra; *Halle v. Meinhard Bros.* 34 Fla. 607, 16 So. 559; *First Nat. Bank v. Hirschowitz*, 46 Fla. 588, 35 So. 22. In analogy to the system devised by equity for charging a married woman's separate estate under circumstances in which a court of law would hold her personally bound if she were sole, the Constitution has provided this substitute for the authority to contract. See *Harwood v. Root*, 20 Fla. 940; *Micon v. McDonald*, supra. We think that the right to charge her property in equity for the price of any property purchased by her depends upon the obligation being assumed by her solely upon her credit. As she cannot make a valid contract of copartnership, and is not bound by the contracts made by her alleged partner in business, she cannot accomplish that end through an agent whom she appoints to represent her generally in the management of a business in which she is jointly interested with others.

We do not hold that she may not authorize her husband to act for her in the purchase of property upon her sole credit, to be used in a business in which she is interested; but such authorization must be made clearly to appear, and that it was her purpose to assume the obligation solely, and not jointly, as a partnership obligation.

The original bill alleges that the goods were purchased by Mrs. Nadel for use and

sale in the business, and that the goods were sold to her in good faith on her credit and her representations as to the ownership of the property, both real and personal, described in the bill. The supplemental bill alleges that the goods were purchased by Mrs. Nadel "through her husband as manager and her agent in the mercantile business," etc. The latter allegation weakens the one contained in the original bill, especially when considering the invoice which is attached to the original bill as exhibit A, and made a part of it, showing that the goods were sold, not to Mrs. Nadel on her sole credit, but were sold to the Quality Shop, the name of a business owned by C. L. Johnson and Mrs. Nadel jointly.

These allegations of the original and supplemental bills, taken together, do not exclude the idea that, as manager of the business, the husband of Mrs. Nadel acted as agent for C. L. Johnson as well as for Mrs. Nadel, and that, in purchasing the goods and managing the business, he was acting as the representative of the alleged copartnership, and that the obligation incurred for the purchase of goods for the business was intended to be a joint obligation of the alleged copartnership, and not the sole obligation of the married woman. See *Barco v. Doyle*, 50 Fla. 488, 39 So. 103; *Durham v. Edwards*, 50 Fla. 495, 38 So. 926.

The demurrer to the original and supplemental bills should have been sustained; the order of the court, overruling the demurrer, is reversed.

Shackleford, Cockrell, and Whitfield, JJ., concur. Taylor, Ch. J., absent on account of illness.

Annotation—Power of married woman to become member of partnership.

At common law.

At common law married women not only were generally regarded as incapacitated to contract for any purpose, or to engage in trade, but also, by virtue of the marriage relation, any property purchased by them passed immediately to the husband. From this it clearly follows that a married woman was unable to enter into a business partnership, for that would necessitate a capacity both to contract and to hold and deal in property. This incapacity was expressly recognized in the following cases, which involve an attempted partnership between a married woman and a person other than her husband: *Yarborough v. Bush* (1881) 69 Ala. 170; *De Graum v. Jones* (1887) 23 Fla. 83, 6 So. 925; *Ma-* L.R.A.1916D.

ghee v. Baker (1860) 15 Ind. 254 (holding that while, as an abstract proposition of law, a married woman may not enter into a partnership contract, yet, if she does make such a contract, and places her separate funds therein, such funds cannot, while so placed, be made subject to the husband's debts); *Hoaglin v. Henderson* (1903) 119 Iowa, 720, 61 L.R.A. 756, 97 Am. St. Rep. 335, 94 N. W. 247; *Bryan v. Inman* (1888) 10 Ky. L. Rep. 542; *Daniel v. Barnes* (1889) 10 Ky. L. Rep. 775; *Brown v. Jewett* (1846) 18 N. H. 230; *Little v. Hazlett* (1901) 197 Pa. 591, 47 Ala. 855; *Hagan v. Hoover* (1890) 33 S. C. 219, 11 S. E. 725; *Board of Trade v. Hayden* (1892) 4 Wash. 263, 16 L.R.A. 530, 31 Am. St. Rep. 919, 30 Pac. 87, 32 Pac. 224; *Carey*

v. Burruss (1882) 20 W. Va. 571, 43 Am. Rep. 790; Fuller & F. Co. v. McHenry (1892) 83 Wis. 573, 18 L.R.A. 512, 33 N. W. 896. In *De Graum v. Jones* (Fla.) supra, the court discussed the question as follows: "To establish a partnership between two or more persons the parties must be capable of contracting to regulate the terms of their joint enterprise, to wit: the amount of capital stock to be furnished and the services to be performed by each partner; the business in which said partners are to engage, and the length of time it is to last. These are all obligations of a purely personal character. When one of the parties is without the legal capacity to assume these obligations, as a married woman is, there can be no legally existing partnership between them. She has no separate legal existence, her husband and she being, in contemplation of law, but one person."

And a fortiori at common law a married woman could not enter into a business partnership with her husband. This rule has the express approval of the following authorities: *Leinkauff v. Frenkle* (1885) 90 Ala. 136; *Belser v. Tusculum Bkg. Co.* (1894) 105 Ala. 514, 17 So. 40; *Montgomery v. Sprinkle* (1869) 31 Ind. 113; *Huffman v. Copeland* (1882) 86 Ind. 224; *Haggett v. Hurley* (1898) 91 Me. 542, 41 L.R.A. 362, 40 Atl. 561; *Mayer v. Soyster* (1868) 30 Md. 402; *Bradstreet v. Baer* (1874) 41 Md. 19; *Artman v. Ferguson* (1888) 73 Mich. 146, 2 L.R.A. 343, 16 Am. St. Rep. 572, 40 N. W. 907; *Morris v. Palmer* (1856) 32 Miss. 278; *Boyle's Estate* (1864) Tucker (N. Y.) 4; *Suau v. Caffé* (1890) 122 N. Y. 308, 9 L.R.A. 593, 25 N. E. 488; *Noel v. Kinney* (1885) 15 Abb. N. C. (N. Y.) 403; *Fairlee v. Bloomingdale* (1884) 67 How. Pr. (N. Y.) 292, 14 Abb. N. C. 341; *Kaufman v. Schoeffel* (1885) 37 Hun (N. Y.) 140; *Payne v. Thompson* (1886) 44 Ohio St. 192, 5 N. E. 654; *Gwynn v. Gwynn* (1887) 27 S. C. 525, 4 S. E. 229.

Under statute; partnership with person other than husband.

As a consequence of the common-law incapacity of a married woman to enter into a business partnership, if such a power or right exists at all in the jurisdictions in which the common-law system prevails, it must be by virtue of statutory or constitutional authority enlarging the common-law powers and liabilities. However, statutes of this nature have been enacted in practically all jurisdictions, thus raising the now im-

portant question as to whether or not such statutes permit a married woman to enter into a business partnership. In answer to this question there has been due, in the majority of instances, to the differences in terms of the statutes conferring the powers, but caused to some extent by the variance of opinions entertained by the courts as to the extent to which the rules of public policy should be applied in construing the statutes.

Statutes of the character just referred to usually take the form of a permit to a married woman to hold a separate legal estate, and to contract with respect to same independently of her husband. Such statutes are usually construed as so enlarging the powers of a married woman as to enable her to embark her separate estate in a business partnership with any capable person other than her husband, it being regarded as no valid objection that she may thereby become liable for the acts of her partner. There is, however, considerable diversity of phraseology employed in the various statutes, some of which have not been regarded as sufficiently broad to enable a married woman to become a copartner in a commercial partnership. This variance in the statutes renders a separate treatment of each statute essential to an understanding or proper interpretation of the various adjudications. Statutes which have been held to enable a married woman to become a member of a business partnership of which her husband is not a member will be treated first.

Thus, under the Ohio statutes of 1887, which provide that neither husband nor wife has any interest in the property of the other except as to dower, and that a husband or wife may enter into any engagement or transaction with the other or with any other person which either might enter into, if unmarried, subject to the rules which govern persons occupying confidential relations with each other, a wife has the right to enter into partnership with strangers, and employ her husband as manager. *First Nat. Bank v. Rice* (1900) 22 Ohio C. C. 183, 12 Ohio C. D. 121.

And in Iowa, where by statute married women may acquire, own, and dispose of property in the same manner and to the same extent as their husbands may do, and are given the right to make contracts and incur liabilities the same as if unmarried, a married woman and a person other than her husband may lawfully engage in a business partnership.

Dupuy v. Sheak (1881) 57 Iowa, 361, 10 N. W. 731; Deere v. Bonne (1899) 108 Iowa, 281, 75 Am. St. Rep. 254, 79 N. W. 59.

So, in Massachusetts, under statutes providing that a married woman may carry on any trade or business on her separate account as if sole, may enter into any contract with reference to her separate property, and may sue and be sued, the courts have held that a married woman may enter into a business partnership if her husband is not a member thereof. Plumer v. Lord (1862) 5 Allen (Mass.) 460. In this connection the court said: "Copartnerships are among the most usual modes of carrying on trade or business; and there is nothing in their nature which would seem to exclude a married woman from such a mode of transacting business, if she had the general power to invest and dispose of property, and enter into engagements for the employment of her own time, labor, and skill. The fact that this contract might make her liable for the acts and dealings of other persons constitutes no serious objection; for this fact would exist in regard to many ordinary kinds of investment, such as a part ownership in ships, or in shares of corporations; and would arise to some extent whenever she should employ an agent in her own affairs. The language of the statute is principally relied on, which, it is argued, limits her capacity to contract to business done 'on her own sole and separate account.' But we think this language was used merely in reference to the marital relation, and the whole object and scope of the statute were to provide for and secure her independence from the control or interference of her husband, and not to restrict her power of contracting with other persons. If, therefore, her husband is no party to the contract, we are of opinion that a married woman may form a partnership in business with other persons."

And in Michigan, where, by statute, the real and personal property of a married woman is her separate estate, and, while not liable for the debts of her husband, may be contracted, sold, etc., as if she were unmarried, which statute has, by repeated decision, been held to permit married women to carry on business or trade in their own names and upon their sole account, it has been held that a married woman may enter into partnership relations with others than her husband. Vail v. Winterstein (1892) 94 Mich. 230, 18 L.R.A. 515, 34 Am. St. Rep. 334, 53 L.R.A. 1916D.

N. W. 932. In this connection the court said: "If a married woman may carry on a business in her own name, and appoint agents who may make contracts for her and in her name, we see no reason why these statutes should be interpreted as restrictive of her right to enter a firm as a partner with others aside from her husband, and thus bind her separate property for such firm's undertakings, as partners in a firm are the agents of each other in a transaction of partnership affairs, and it is conferring no more power upon the partner to bind the sole and separate property of a married woman than such married woman would have the right to contract for through any other agency."

And in England, under the married women's property act of 1882, which rendered married women capable of entering into and rendering themselves liable to the extent of their separate property on "any contract," and suing and being sued as if they were *femes soles*, a married woman may enter into a contract of partnership. 22 Laws of England (Halsbury) 20.

And in Pennsylvania, under the act of June 8, 1893, P. L. 344, whereby a married woman was given practically the same right to contract that a *feme sole* enjoyed, it has been held that a married woman may become a member of a commercial firm and be bound as such. Loeb v. Mellinger (1900) 12 Pa. Super. Ct. 592, holding that coverture was not a defense to a partnership note, although, by express exception of statute, a married woman could not become an accommodation indorser, maker, guarantor, or surety for another; Italo-French Produce Co. v. Thomas (1906) 31 Pa. Super. Ct. 503.

And in Indiana, by statutes enacted in 1881 (Rev. Stat. 1881, §§ 5115-5117), all legal disabilities of married women to contract were abolished except as therein provided with respect to real estate and becoming a surety, they being given the right to deal with personal property as if unmarried. Under this statute a married woman may enter into a business partnership and subject her property to its debts. Burk v. Platt (1882) 88 Ind. 283; Conant v. National State Bank (1889) 121 Ind. 323, 22 N. E. 250.

And in Wisconsin, under statutes converting the equitable separate estate of a married woman into a legal one, and exempting it from liability for the husband's debts, thereby giving the wife the right to deal with and contract regarding

same in the same manner as if she were unmarried, it seemingly was assumed in *Merchants' Nat. Bank v. Raymond* (1871) 27 Wis. 569, that a married woman may enter into a partnership with one other than her husband. And see *Fuller & F. Co. v. McHenry* (1892) 83 Wis. 573, 18 L.R.A. 512, 53 N. W. 896.

And in Mississippi, under Code 1871, § 1780, which provided that any married woman may make any contract for the use of her lands, and may employ her money in trade or business, and that, when a married woman engages in trade or business as a feme sole, she shall be bound by her contracts made in the course of such trade or business in the same manner as if she were unmarried, a married woman may become a member of a mercantile partnership, and her property liable for firm debts. *Newman v. Morris* (1876) 52 Miss. 402; *Brasfield v. French* (1882) 59 Miss. 632. But that the contrary was true under the Mississippi statute of 1857 (provisions not set out in report of case) was held in *Howard v. Stephens* (1876) 52 Miss. 239.

And in Arkansas, where the statute entitles a married woman to hold separate property, and to transfer same, and to carry on any trade or business, and to hold the earnings as separate property, she can form a partnership with a third person other than her husband so as to bind herself the same as if she were a man. *Abbott v. Jackson* (1884) 43 Ark. 212.

And under a Federal statute similar to the Arkansas statute, the same has been held in the District of Columbia. *Norwood v. Francis* (1905) 25 App. D. C. 463, 4 Ann. Cas. 865, construing 29 Stat. at L. 193, chap. 303, enacted June 1, 1896.

And in Missouri, under statutes allowing a married woman to retain and control her separate property, it has been held that a married woman may enter into a copartnership with strangers. *Ploss v. Thomas* (1878). 6 Mo. App. 157; *Chicago Coffin Co. v. Fritz* (1890) 41 Mo. App. 389.

And in New Jersey, under statutes authorizing married women to receive real and personal property in any manner, and providing that their wages and earnings acquired in any employment, occupation, or trade in which they are engaged, and which they carry on separately from their husbands, and all investments of such wages, moneys, earnings, or property shall be their sole and separate property as though they were

single women, a married woman may become a copartner in business with others than her husband. *Kutcher v. Williams* (1885) 40 N. J. Eq. 436, 3 Atl. 257. And see *Merritt v. Day* (1875) 38 N. J. L. 32, 20 Am. Rep. 362.

And under a New York statutory provision that a married woman might carry on any trade or business on her sole and separate account, the rule is that she may form a partnership with a stranger. *Bitter v. Rathman* (1875) 61 N. Y. 512, holding that, as to creditors of a partnership, a married woman member could not plead coverture. And see the New York case set out infra, subdivision entitled, "Partnership with husband."

And under the Ohio statute of 1874, which provided that where a married woman is engaged as owner or partner in any mercantile or other business, she may sue or be sued alone with respect to its affairs, it seems that a married woman could engage in a partnership mercantile enterprise. See *Raymond v. Breckenridge* (1900) 7 Ohio N. P. 377, holding that a judgment against a married woman sued as a member of a partnership binds only her separate property then owned by her. But see *Alexander v. Morgan* (1877) 31 Ohio St. 46, wherein it was held that the marriage of a woman engaged in a partnership business enterprise dissolved the partnership and rendered the husband liable for the wife's partnership obligations.

And in Virginia, where a married woman who has a separate personal estate is regarded as a feme sole as to such estate, it has been held that she may enter into a business partnership with the consent of her husband so as to be entitled to the profits of the trade against her husband and against his creditors if the agreement be founded on a valuable consideration, paid by the wife, so as to make her separate estate liable for firm debts. *Penn v. Whitehead* (1867) 17 Gratt. (Va.) 503, 94 Am. Dec. 478.

And in Georgia, where the statutes have largely emancipated married women (provisions not reported in cases involving such statutes), the rule is that a married woman may engage in a bona fide partnership business either with her husband or with another. *Burney v. Savannah Grocery Co.* (1896) 98 Ga. 711, 58 Am. St. Rep. 342, 25 S. E. 915; *Orr v. Cooledge* (1903) 117 Ga. 195, 43 S. E. 527; *Butler v. Frank* (1910) 7 Ga. App. 655, 67 S. E. 884.

And that in Illinois, a married woman may engage in a business partnership if

her husband consents thereto, see the case of *Heyman v. Heyman* (1904) 210 Ill. 524, 71 N. E. 591, as set out *infra*.

And that Maine statutes at one time, at least, were such as to permit a married woman to enter into a business partnership, seems inferable from a Federal case which arose in that state, it having been held in *Re Berryman* (1878) 2 Haskell, 293, Fed. Cas. No. 1,360, that a married woman who authorized her husband to sign her name to articles of copartnership was bound thereby for the term of the agreement.

And it seems that in British Columbia a married woman may enter into a business partnership. See *Pacific Land Co. v. Jamieson* (1910) 15 B. C. 219, and *McKissock v. McKissock* (1913) 18 B. C. 401.

In Tennessee, where the rule is that a married woman's separate estate cannot be charged except by express contract with respect to the particular debt, it seems that a married woman may become a member of a firm, but that neither the property embarked by her in the enterprise nor her other separate property is liable for partnership obligations unless she has entered into an express contract that such interest or property shall be bound for the particular debt with which it is sought to be charged. *Theus v. Dugger* (1893) 93 Tenn. 41, 23 S. W. 135, holding that the proper course is for the creditor in each instance to stipulate for personal liability. And see *Frank v. Anderson* (1884) 13 Lea (Tenn.) 695, wherein it was held that a married woman may rely on her coverture in bar of partnership liabilities.

In North Carolina it does not seem to have been expressly decided whether or not a married woman may enter into a business partnership, but, under some circumstances, a married woman may become liable for partnership debts. Thus, in *Stone Co. v. McLamb* (1910) 153 N. C. 378, 69 N. E. 281, it was held that a married woman who entered into a business partnership of which her husband was manager without displaying her Christian name or stating the fact that she was a married woman was a free trader within the meaning of a statutory provision that any married woman conducting a business through her husband without displaying her Christian name or stating the fact that she was a feme covert shall be treated as a free trader; and the firm assets are subject to the firm debts.

But in Texas, where the statutes give to the husband the control of the wife's L.R.A.1916D.

separate estate, and declare that the income or profits derived from such estate shall be community property, a married woman cannot enter into a business partnership with anyone, her right to contract merely extending to debts for necessities furnished herself or children, and expenses incurred for the benefit of her separate estate. *Bradford v. Johnson* (1876) 44 Tex. 381; *Brown v. Chancellor* (1884) 61 Tex. 437; *Miller v. Marx* (1885) 65 Tex. 131; *Smith v. Bailey* (1886) 66 Tex. 553, 1 S. W. 627 (holding that the married woman becomes a creditor, and not a partner); *Purdum v. Boyd* (1891) 82 Tex. 130, 17 S. W. 606 (holding same as next preceding case). And see *Keith v. Aubrey* (1910) — Tex. Civ. App. —, 127 S. W. 278.

And in Pennsylvania, by the act of 1848, which enlarged the rights of married women with respect to the use and enjoyment of their separate property, but did not give them power of disposition or power to contract, and prior to the act of 1887, a married woman could not become a member of a business partnership. See *Little v. Hazlett* (1901) 197 Pa. 591, 47 Atl. 855, holding that the marriage of a female copartner dissolved the partnership. And see *Landers v. Dithridge* (1873) 2 Pa. Co. Ct. 560, wherein it was held that the Pennsylvania act of April 3, 1873, which merely secured to married women their separate earnings, did not enable a married woman to make a valid contract of partnership, or to become liable for the conduct and obligations thereof.

So it has been held that the West Virginia statutes which merely convert the equitable separate estate of a married woman into a separate legal estate do not remove the legal incapacity of a woman living with her husband to enter into a business copartnership, so as to subject her separate property to the debts of such attempted copartnership. *Carey v. Burruss* (1882) 20 W. Va. 571, 43 Am. Rep. 790; *Ringold v. Suiter* (1891) 35 W. Va. 186, 13 S. E. 46.

And where, as in Florida, a married woman's disability of coverture has been removed merely to the extent that she may assume an obligation for the purchase price of property, which obligation is a charge upon her separate property in equity, it has been held that she cannot enter into a partnership so as to render herself personally liable for obligations incurred by the partnership as such. *Nadel v. Weber Bros. Shoe Co.* ante, 1230; *Nadel v. Schoeneman* (1915) — Fla. —, 70 So. 23; *Porter v. Taylor*

(1912) 64 Fla. 100, 59 So. 400; Virginia-Carolina Chemical Co. v. Fisher (1909) 58 Fla. 377, 50 So. 504; De Graum v. Jones (1887) 23 Fla. 83, 6 So. 925.

And under a Missouri statute providing that personal property belonging to a married woman at her marriage, or which may come to her during coverture by gift, bequest, or inheritance, or by purchase with her separate money, or as personal earnings, shall be and remain separate property, it has been held that a married woman's contracts were valid only as against her separate estate in equity; and therefore that a married woman who was a member of a partnership was not liable in an action at law wherein a personal judgment was sought for the price of goods furnished a partnership of which she was a member. *Hochstadter v. Hays* (1887) 11 Colo. 118, 17 Pac. 289, applying a Missouri law in force at the time.

And South Carolina enactments which merely declare that married women may acquire, hold, and dispose of separate property as if they were unmarried have been held not to enable married women to form commercial partnerships. *Hagan v. Hoover* (1890) 33 S. C. 219, 11 S. E. 725.

And the South Carolina statutes (in force until 1891) giving married women power to acquire, hold, and dispose of separate property as if unmarried, and to contract and be contracted with in reference "to her separate property," have been held not to permit a married woman to form a business partnership with her husband, the theory being that a partnership contract is not one with reference to a separate estate, within the sense of the act. *Hagan v. Hoover* (S. C.) supra; *Vannerson v. Cheatham* (1893) 41 S. C. 327, 19 S. E. 614. And see *Gwynn v. Gwynn* (1827) 27 S. C. 525, 4 S. E. 229, which is set out infra.

And in South Carolina, where, by the act of 1891, a married woman is given power to acquire and hold property in her own name, and to bind herself by contract as though she were unmarried, except contracts whereby she undertakes to assume a liability for the debt or default of another, it has been held that a married woman cannot enter into a business partnership, the ground taken being that, by becoming a partner, she would thereby become liable for the debts of the partnership contracted by other partners, in violation of the proviso to the statute. *Vannerson v. Cheatham* (S. C.) supra.

So, in Maryland, under statutes re-

moving the disability of a married woman to the extent of allowing her the use of her separate property, and empowering her to carry on trade as a feme sole with a capital not exceeding \$1,000, it has been held that a married woman cannot enter into a valid business partnership agreement. *Bradstreet v. Baer* (1874) 41 Md. 19.

And in Massachusetts, by a statute enacted in 1863, but expressly repealed in 1874, it was provided that the earlier statutes enlarging the rights and liabilities of married women, and which had been held to empower a married woman to enter into a business partnership with one other than her husband (see *Plumer v. Lord* (1862) 5 Allen (Mass.) 460, set out supra), "shall be so construed as not to allow her to enter into a partnership in business with any person." See *Todd v. Clapp* (1875) 118 Mass. 495, holding that the statute of 1863 was not unconstitutional as a legislative exercise of judicial power, and that under it a married woman could not enter into a business partnership with a stranger.

In Washington a married woman cannot become a member of a business co-partnership; at least, unless she makes a contribution to the firm's capital from her separate estate. *Morreau Gas Fixture Co. v. Cox* (1908) 161 Fed. 381, holding that a married woman was not liable as a member of a partnership to a creditor thereof, where her interest in the partnership was community property, and had been put in by the husband, to whom the laws gave the control thereof.

And that in Ohio, at least prior to 1873, a married woman could not, even with the consent of her husband, enter into a business enterprise not related to or connected with her separate property, see *Swasey v. Antram* (1873) 24 Ohio St. 87, holding that where she attempted to do so and engaged her husband as manager, he, and not she, must be regarded in law as the partner.

Where the statutes enlarging the rights of married women contain restrictions in the nature of conditions precedent, such conditions must be complied with. Thus, in Minnesota, where the statute provided that a married woman could, under certain circumstances, engage in trade, provided that she obtain a license from a judge of probate, it has been held that a feme covert who failed to obtain such a license could not become a member of a business partnership, and therefore that she could avail herself of her coverture to defeat a debt contracted by

such an attempted partnership. *Re Slichter* (1869) 2 Nat. Bankr. Reg. 336, Fed. Cas. No. 12,943.

—partnership with husband.

The principal conflict upon the question of the power of a married woman to form a partnership in trade or business arises where she attempts to form such a partnership with her husband, or become a member of a partnership of which he is already a member. This divergence of conclusion is not entirely due to the varying phraseology employed in the statutes, but rather is caused in the main by a reluctance upon the part of many of the courts to so construe even the broader statutes as to permit a husband and wife to become copartners in business. As a matter of fact, many courts which permit a married woman to form a partnership with a person other than her husband deny her the right to form a partnership with him. Of course, in those jurisdictions where a feme covert is held not to have the power to become the partner of a stranger, a fortiori she cannot become her husband's partner.

Thus, under the New York Acts of 1848-1849, which merely vested the property of married women in themselves, a husband and wife could not enter into a business partnership. *Boyle's Estate* (1864) *Tucker* (N. Y.) 4. (This act has been superseded by later statutes. See New York cases set out *infra*.)

And the same has been held with respect to a similar constitutional and statutory provision in South Carolina. *Gwynn v. Gwynn* (1887) 27 S. C. 525, 4 S. E. 229.

And under the Texas statutes which give to the husband the control of the wife's separate estate, and declare that the income or profits derived from such estate shall be community property, a married woman cannot enter into a business copartnership with her husband, her rights to contract being restricted to debts for necessities furnished herself or children, and for all expenses incurred for the benefit of her separate estate. *Wallace v. Finberg* (1876) 46 Tex. 35; *Cockrum v. McCracken* (1880) 1 Tex. App. Civ. Cas. (White & W.) 29; *Steinback v. Weill* (1880) 1 Tex. App. Civ. Cas. (White & W.) 525; *Brown v. Chancellor* (1884) 61 Tex. 437; *Miller v. Marx* (1885) 65 Tex. 131; *Smith v. Bailey* (1886) 66 Tex. 553, 1 S. W. 627 (holding that a wife became a creditor of the firm, but not a partner); *Cleveland v. L.R.A.* 1916D.

Spencer (1899) — Tex. Civ. App. —, 50 S. W. 405. And see *Green v. Ferguson* (1884) 62 Tex. 525, and *Keith v. Aubrey* (1910) — Tex. Civ. App. —, 127 S. W. 278.

And in Maryland, where the statutes have removed the disabilities of married women to the extent of allowing them to use their separate property and to carry on trade as a feme sole with a capital not exceeding a specified sum, it has been held that a married woman cannot enter into a partnership with her husband, although she may contract in her individual character jointly with another assuming a direct obligation. *Cruzen v. McKaig* (1882) 57 Md. 454.

So, in Maine, under statutes rendering a wife personally liable for her debts contracted after her marriage "in her own name," it has been held that a married woman cannot enter into a business partnership with her husband, although she can contract with him, the theory being that such a relation is not, strictly speaking, one of contract, and that an obligation assumed in a partnership deal is not one contracted "in her own name," and, moreover, that the legislative policy did not indicate that a broader scope should be given the statute in question. *Haggett v. Hurley* (1898) 91 Me. 542, 41 L.R.A. 362, 40 Atl. 561.

And again, in South Carolina statutes (in force until 1891) giving a married woman power to acquire, hold, and dispose of separate property as if unmarried, and to contract and be contracted with, but only "as to her separate property," have been held not to permit a married woman to enter into a business partnership with her husband, the theory being that such a relation involves an obligation to contribute one's time and services, both of which belong to the husband, and that partnership contracts would not be contracts as to her separate property. *Gwynn v. Gwynn* (1887) 27 S. C. 525, 4 S. E. 229, holding that such construction was imperative inasmuch as the general right to contract, given by a previous statute, had been so limited by amendment as to permit only contracts as to separate property. *Weisiger v. Wood* (1891) 36 S. C. 424, 15 S. E. 597; *Collins v. Hall* (1899) 55 S. C. 336, 33 S. E. 466.

As before stated, in several jurisdictions (said by many text writers and in a number of judicial opinions to be a decided preponderance), the statutes of which have been so construed as to allow a married woman to enter into a partnership with a person other than her

husband, the courts have refused to extend the rule so as to allow a husband and wife to become business partners.

Thus, in Michigan, under statutes providing that the real and personal property of a married woman shall be and remain her separate estate, and shall not be liable for debts of her husband, and may be contracted, sold, etc., as if she were unmarried, and that she may sue and be sued with respect thereto, it has been held that a husband and wife cannot form a valid business partnership which will bind her for the payment of partnership obligations. *Edwards v. McEnhill* (1883) 51 Mich. 160, 16 N. W. 322; *Bassett v. Shepardson* (1883) 52 Mich. 3, 17 N. W. 217 (wherein it was held that a partnership between a man and a woman was dissolved by their marriage); *Artman v. Ferguson* (1888) 73 Mich. 146, 2 L.R.A. 343, 16 Am. St. Rep. 572, 40 N. W. 907 (wherein the court took the position that if a married woman was allowed to "enter into a business partnership with her husband, it would subject her property to his control in a manner wholly inconsistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements"); *Hackley Nat. Bank v. Jeannot* (1906) 143 Mich. 454, 106 N. W. 1121 (wherein it was held that although a married woman could not become a co-partner in trade with her husband so as to render her responsible for firm debts, she might bind her interest in such a venture by joining with her husband in a mortgage thereon to secure a firm debt).

So, in Wisconsin, under very similar statutory provisions, it has been held that a married woman cannot enter into a business partnership with her husband, it being said that the principal purpose of the statute, which was to give a wife the power and rights of a feme sole as to her separate property, free from the disposition of the husband, and liability for his debts, manifestly would be subverted by allowing her to enter into a partnership with the husband, wherein he could contract debts for which her separate property would be liable. *Fuller & F. Co. v. McHenry* (1892) 83 Wis. 573, 18 L.R.A. 512, 53 N. W. 896.

So, in Massachusetts, where the statutes provide that a married woman may bargain, sell, and convey her separate real and personal property, and enter into any contracts with reference to the same as if she were sole, and may sue and be sued as if sole in regard to her trade, business, labor, services, and earn-

ings, the courts have held that a married woman is not empowered thereby to enter into a business partnership with her husband. *Lord v. Parker* (1861) 3 Allen (Mass.) 127; *Lord v. Davison* (1861) 3 Allen (Mass.) 131; *Edwards v. Stevens* (1862) 3 Allen (Mass.) 315; *Plumer v. Lord* (1863) 7 Allen (Mass.) 481; *Bowker v. Bradford* (1886) 140 Mass. 521, 5 N. E. 480; *Voss v. Sylvester* (1909) 203 Mass. 233, 89 N. E. 241. In *Lord v. Parker* (1861) 3 Allen (Mass.) 127, the court expounded its theories regarding these statutes as follows: "They are in derogation of the common law, and certainly are not to be extended by construction. And we cannot perceive in them any intention to confer upon a married woman the power to make any contract with her husband, or to convey to him any property, or receive any conveyance from him. The power to form a copartnership includes the power to create a community of property, with a joint power of disposal, and a mutual liability for the contracts and acts of all the partners. To enter into a partnership in business with her husband would subject her property to his control in a manner hardly consistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. The property invested in such an enterprise would cease to be her 'sole and separate' property. The power to arrange the terms of such a contract would open a wide door to fraud in relation to the property of the husband. The property which a married woman may acquire and dispose of by Stat. 1857, includes such as may come to her 'by gift of any person except her husband,' clearly indicating that a gift from him was not to be recognized as creating any title to property in her. If she could contract with her husband, it would seem to follow that she could sue him and be sued by him. How such suits could be conducted, with the incidents in respect to discovery, the right of parties to testify, and to call the opposite party as a witness, without interfering with the rule as to private communications between the husband and wife, it is not easy to perceive; and the consequences which would follow in respect to process for the enforcement of rights fixed by a judgment, arrest, imprisonment, charges of fraud, proceedings in invitum under the insolvent laws, and the like, are not of a character to be readily reconciled with the marital relation. We cannot suppose that an altera-

tion in the law involving such momentous results, and a change so radical, could have been contemplated by the legislature without a much more direct and clear manifestation of its will."

And in Washington, where, by the Statutes of 1881, a married woman is given full right over her property, and all civil disabilities not imposed upon the husband are removed, including the right to manage, lease, sell, etc., her separate property to the same extent and in the same manner that her husband can property belonging to him, and the right to contract and incur liability to the same extent and in the same manner as if she were unmarried, it has been held that a married woman cannot enter into a business partnership with her husband, the theory being that it was not the intent of the legislature to allow husband and wife to become partners. *Board of Trade v. Hayden* (1892) 4 Wash. 263, 16 L.R.A. 530, 31 Am. St. Rep. 919, 30 Pac. 87, 32 Pac. 224. In this connection the court, among other things, said: "The purpose of the act seems to be to set her free from all influence or dominion of her husband in so far as her property rights are concerned, and leave her to manage, control, and dispose of them as she pleases, whether to her gain or loss. . . . Counsel for respondents contend that, as it is the evident purpose of these provisions to emancipate the wife from the control of the husband, and to enfranchise her with the power, denied to her under the common law, to acquire, hold, enjoy, and dispose of property, and do business on her own account as freely as he can, or even more freely than he can, under the same act, it must follow that she can enter into a contract of partnership in all the ways, and with all the liabilities, that her husband can, and that unless she is permitted and held to be able to enter into the same contracts with him that she can with others, she is deprived of the full measure of liberty which the law intends to confer upon her. . . . In the foreground of the discussion is placed the proposition that the purpose of the statute is to free the wife from the control and influence of her husband, and to relieve her property from his debts and management; but the next following suggestion, that unless she can become his partner she will not be wholly free, if yielded to, will place her and her property within touch of the very dangers which it is sought in the first place to withdraw her from. Her improvident husband, by the most ordi-

nary persuasion, or by his mere declaration, made in her presence, as in the case at bar, could, in spite of her, unless she assumed a hostility which would endanger the continuance of the marriage relation, waste and dissipate her entire estate, and thus the very purpose which, it seems to us, stands out the most clearly in the act in question, i. e., to secure her protection in the management and enjoyment of her estate, would be defeated." But in the subsequent Washington case of *Elliott v. Hawley* (1904) 34 Wash. 585, 101 Am. St. Rep. 1016, 76 Pac. 93, the court seemingly limited the doctrine of the Seattle Board of Trade Case to instances calling for the protection of the wife's property as against debts incurred by the husband, holding in the instant case that profits earned by the wife's separate property in a partnership enterprise belonged to her, and could not be subjected to the payment of her husband's separate debts.

And under Arkansas statutes entitling a married woman to hold separate property and to transfer same, and to carry on any trade or business, and to hold earnings as separate property, it has been held that a married woman cannot form a business partnership with her husband. *Gilkerson-Sloss Commission Co. v. Salinger* (1892) 56 Ark. 294, 16 L.R.A. 526, 35 Am. St. Rep. 105, 19 S. W. 747. In this case the ruling was made in view of the legal unity and identity of the husband and wife at common law and the wife's incapacity to sue the husband at law, and court rulings incapacitating the wife to contract with her husband; but a strong dissent was recorded upon the ground that the statutes clothed a married woman as respects her separate estate with all the powers of a single woman, the assigned reason being that "whatever law can be appealed to as authorizing her to form a partnership with any person is without limitation or restrictions as to the person with whom she may form it; and that, as it confers a power without restriction in that respect, it can be held to exclude the husband only by a system of judicial construction which seems to me to be legislation,—and that toward restraining the power vested under an act which is highly remedial, and expressly calls for a liberal construction." And for a conclusion contrary to that reached by the majority of the court in the *Gilkerson-Sloss Commercial Co. Case*, based upon a construction of the Arkansas statutes by the Mississippi supreme court, see *Toof v. Brewer* (1888) 96 Miss. 19, 3

So. 571, wherein the court reasoned as follows: "We find it difficult to conceive of any public policy that would prevent the formation of a partnership between the husband and wife in a state in which her individuality is so completely provided for as to her dealings with others. If she may engage in trade, and, as an incident thereto, may enter into partnership with others, why may she not form that relation with her husband? If it be said, as by the supreme court of Massachusetts, that the power is not expressly conferred, the reply is that neither is it as to third persons; and yet it is held that with such third persons she may make such contract.

The power springs as an incident from the recognition by law of her separate existence, and from the capacity given her to engage in trade. A married woman could not at common law contract either with her husband or a third person, for her existence apart from his was not recognized. He and she were by that law one, and he was that one. But by the statute her individuality is preserved. She is one, and the husband is one. Each has the capacity to contract. Both may desire to contract. Partnership is a lawful subject-matter of contract, and there is nothing in the law which, either expressly or by necessary implication, forbids them from contracting. If we reflect upon the extent of the changes wrought by the Constitution and statutes, that they withdraw from the husband the ownership, control, disposition, and enjoyment of the wife's estate; that the same are secured to her as though she were a feme sole; that the right to her personal services and the fruits of her labor are denied to him, and given to her; that her will is freed from the dominion of his as to all property rights; that she may, without his consent, enter into the closest business relations with third persons; and if we add to this the declaration of the statute that the changes it has wrought shall not be restrained by the rule of construction that is ordinarily applied to statutes in derogation of the common law, there seems to be but little force in the suggestion that, by implication, a disability as to business transactions and contracts, springing from the common-law motion of the unity of the husband and wife, still obtains. The construction put upon the words 'sole and separate use,' 'sole and separate property,' etc., in the statute, by the supreme court of Massachusetts, and by the supreme court of

New York in the case of *Kaufman v. Schoeffel* (1885) 37 Hun (N. Y.) 140, whereby the conclusion is reached that it was intended to preclude any contract between husband and wife, is entirely unsatisfactory. To us it seems manifest that the sole purpose of these words is to preclude the marital rights of the husband as they existed at common law, and not to prevent the husband and wife from associating their effects in trade, either as joint owners or as partners. The property or estate of the wife may well remain her 'sole and separate property,' though it consists of goods, wares, and merchandise, book accounts, notes, or other evidences of debt, owned by a firm of which she and her husband are members. The man who is her partner may also be her husband; but his right to manage and dispose of the firm property—his title and possession—spring from his relation as partner, and not from that as husband."

And under a Federal statute similar to the Arkansas statute the same conclusion reached in the Arkansas cases has been reached in the District of Columbia. *Norwood v. Francis* (1905) 25 App. D. C. 463, 4 Ann. Cas. 865, construing 29 Stat. at L. 193, chap. 303, enacted June 1st, 1896. In this case the court said: "While the tendency of legislation has been to remove the disabilities of married women, we think, in view of all the authorities, that such statutes removing such disabilities should not be construed so broadly as to permit a partnership between husband and wife, unless the statute expressly gives the husband and wife power to contract with each other generally."

But the rule laid down in the foregoing cases is by no means of universal adoption. For example, in *Re Goodman* (1873) 5 Biss. 401, 8 Nat. Bankr. Reg. 380, Fed. Cas. No. 5,540, the court, by way of obiter, expressly criticized those cases which permit a married woman to carry on trade with her separate property, but deny her the right to carry on a copartnership with her husband, saying: "I am not able to see any reason for this distinction. If a married woman may engage in trade with her own means as a feme sole, why may she not become a partner in trade? If she may embark with her own separate means in general trade and merchandise, why say that she shall not have the same advantage that others derive from uniting their capital and skill as partners? If she may contract with her husband for his service as an agent in superintending and carry-

ing on her business, of course she may contract with any other person for the same purpose; and if she may do this, it would seem more rational to say that she may also do what experience has shown is generally more profitable and satisfactory in trade, and that is to make a contract with some person who has either skill or capital or both to share in the profits and losses of her business."

And in New York, under Laws of 1860, chap. 90, § 2, which provided that a married woman may bargain, sell, assign, and transfer her separate personal property, may carry on any trade or business, and perform any labor or business on her sole and separate account, and that her earnings shall be her sole and separate property, it has been held that a husband and wife may enter into a business partnership, and that the wife cannot escape liability for firm debts on the ground of coverture. This rule was expressly laid down in *Suau v. Caffé* (1890) 122 N. Y. 308, 9 L.R.A. 593, 25 N. E. 488, wherein the court, in discussing the statute and its effect upon partnership contracts of husband and wife, said: "It is urged that this language is not broad enough to authorize married women to engage in business as partners, or jointly with others, or at least with their husbands, but that the statute simply confers power on them to contract by themselves and apart from others. This construction is too narrow and fails to express the evident intent of the legislature, which was not to prescribe the mode in which married women should carry on their business, but to free them from the restraints of the common law, and permit them to engage in business in their own behalf as free from the control of their husbands as though unmarried. Before this statute, the profits of their business belonged to their husbands, and the words 'sole and separate account' were intended to convey the idea that the beneficial interest of any business in which they might engage belonged to them, and not to their husbands. Since the enactment of this statute it has been held that husbands and wives may legally contract with each other in reference to their separate estates. . . . Partners are the agents of each other, and are jointly and severally liable for the debts of the firm, these being two of the essential elements of a contract partnership. It being settled that husbands and wives may be the agents of each other, and that they may bind themselves by joint contracts entered into with third persons, we see no L.R.A.1916D.

warrant in the statute for exempting them from liability to creditors for debts incurred by firms of which they are members;" *Graff v. Kinney* (1885) 37 Hun (N. Y.) 405, affirming (1885) 15 Abb. N. C. (N. Y.) 397, 1 How. Pr. N. S. 59 wherein the decision was placed upon the ground that since a husband may be the agent of his wife, he may be her partner in business; *Gottschalk v. Pruss* (1885) 15 Abb. N. C. (N. Y.) 402, note; and *Hook v. Kenyon* (1890) 55 Hun, 598, 9 N. Y. Supp. 40. And support is found for this rule in *Zimmerman v. Erhard* (1879) 8 Daly (N. Y.) 311, affirmed without consideration of this point in (1880) 83 N. Y. 74, 38 Am. Rep. 396. And see *Scott v. Conway* (1874) 58 N. Y. 619, wherein it was held that a married woman apparently carrying on a separate business cannot, when sued as such, defend upon the ground that she was in partnership with her husband. *Noel v. Kinney* (1887) 106 N. Y. 74, 60 Am. Rep. 423, 12 N. E. 351, is to the same effect, but it also expressly held that the conclusion would not be otherwise, even assuming that the husband and wife had no right to enter into a partnership. But several of the earlier New York decisions laid down a contrary rule, the theory generally adopted being that the phrase "on her sole and separate account" referred back and qualified the words "trade, business, labor, or services," and therefore that the common-law disability was not so destroyed as to enable a married woman to engage in a business copartnership undertaking with her husband, but rather that the statute merely permitted her to carry on a business separate from her husband. The following cases announced such to be the law: *Boyle's Estate* (1864) *Tucker* (N. Y.) 4, holding that the act of 1860 did not permit a married woman to form a business partnership with her husband, as the statute related to business carried on by a wife, separate from her husband; *Noel v. Kinney* (1885) 15 Abb. N. C. (N. Y.) 403; *Jacquin v. Jacquin* (1885) 15 Abb. N. C. (N. Y.) 408, note; *Kaufman v. Schoeffel* (1885) 37 Hun (N. Y.) 140; *Lowenstein v. Salinger* (1891) 62 Hun, 622, 42 N. Y. S. R. 414, 17 N. Y. Supp. 70; *Chambovet v. Cagney* (1873) 3 Jones & S. (N. Y.) 474. And see *Hendricks v. Isaacs* (1889) 117 N. Y. 411, 6 L.R.A. 559, 15 Am. St. Rep. 524, 22 N. E. 1029. However, all of the New York cases which hold that a husband and wife cannot enter into a business partnership under the New York statute of 1860

must be regarded as overruled by the decision in *Suau v. Caffé* (N. Y.) supra. In fact, that decision expressly overrules *Chambovet v. Cagney* (1873) 3 Jones & S. (N. Y.) 474, and the case of *Hendricks v. Isaacs* (N. Y.) supra, was relied upon in the dissenting opinion in the *Suau Case*, so that that decision was probably taken into consideration by the majority of the court in reaching its conclusion. And so far as New York is concerned, the question was absolutely settled by an amendment enacted in 1892, by the terms of which a married woman may contract with her husband or any other person as though she were unmarried, except with respect to dissolution of marriage and relief from liability for support.

And in Mississippi, where, by the Code of 1880, reincorporated in the Code of 1906, § 2517, all disabilities of married women were removed and they were given equal power of a feme sole to acquire and own property, to convey it, to make all sorts of contracts, and to sue and be sued, it has been held that a husband and wife may enter into a business partnership, and that the separate estate of the wife is liable for partnership debts. *Jones v. Jones* (1911) 99 Miss. 600, 55 So. 361, citing *Toof v. Brewer* (1909) 96 Miss. 19, 3 So. 571, and relying upon the arguments therein advanced, and which are quoted supra in the paragraph dealing with the Arkansas statute.

In Alabama, where, by statute, a married woman is entitled to her earnings and to the control and management of her separate estate, and to contract with her husband, she may form a partnership with him as with any other person, so as to render herself liable as a partner. *Schlapback v. Long* (1889) 90 Ala. 525, 8 So. 113; *Belser v. Tuscumbia Bkg. Co.* (1894) 105 Ala. 514, 17 So. 40; *Compton v. Smith* (1897) 120 Ala. 233, 25 So. 300.

And in Ontario, by virtue of a married woman's property act (Ont. Rev. Stat. 1897, chap. 163, § 3, subsec. 2), a married woman can in all respects and for all purposes contract with her husband as if she were a feme sole, and every contract made by her is deemed to be made with respect to and to bind her separate property; wherefore she is entitled to enter into a business partnership with her husband, and when such a partnership is registered, as provided by statute, she cannot set up incapacity to enter into same, so as to relieve her separate estate from liability for partnership obligations. *Gibson v. Le Temps Publication Co.* (1904) 8 Ont. L. Rep. 709, 5 Ont. Week. Rep. 4.

So, in Ohio, it seems that a husband and wife, by virtue of statutes enacted in 1884 and 1887, which permit them to contract with each other, may enter into a business partnership. See *First Nat. Bank v. Rice* (1900) 22 Ohio C. C. 183, 12 Ohio C. D. 121, as set out supra. But that, previous to 1884, such a partnership could not be formed, see *Payne v. Thompson* (1886) 44 Ohio St. 192, 5 N. E. 654. But see *Fisher v. McMahon* (1878) 4 Ohio Dec. Reprint, 87, wherein it was held that the separate property of a married woman engaged in a copartnership with her husband was liable for goods sold the firm.

And in England, under the married women's property act 1882, § 1 (44 & 46 Vict. chap. 75), which enacted that a "married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued either in contract or in tort or otherwise in all respects as if she were a feme sole," a married woman may become a partner either with her husband or with others. 22 Laws of England (Halsbury) 20. And see opinion of Williams, J., in *Re Helsby* (1893) 63 L. J. Q. B. N. S. (Eng.) 261.

And in Iowa, where the statutes give to married women the right to acquire, own, and dispose of property in the same manner and to the same extent that their husbands may do, and to make contracts and incur liabilities enforceable against them the same as if they were unmarried, it has been expressly held that a husband and wife may enter into a business partnership. *Hoaglin v. Henderson* (1903) 119 Iowa, 720, 61 L.R.A. 756, 97 Am. St. Rep. 335, 94 N. W. 247.

In Illinois, where the statutes provide that a contract may be made by a wife as if she were unmarried, except that she may not enter into or carry on a business partnership without the consent of her husband, it was held that husband and wife may form a business partnership. *Heyman v. Heyman* (1904) 210 Ill. 524, 71 N. E. 591, affirming (1903) 110 Ill. App. 87; *Dressel v. Lonsdale* (1892) 46 Ill. App. 454; *Farwell v. Kinkead* (1873) 1 Am. L. Rec. 533, Fed. Cas. No. 7,824, as set out in *Harris, Contracts of Married Women*, p. 466. And see *Re Kinkead* (1873) 3 Biss. 405, Fed. Cas. No. 7,824, wherein, in holding that a firm composed of husband and wife could be adjudged bankrupt, and that

where, by statute, as in Illinois, a married woman is given full control of her property owned by her at the time of her marriage, or which was acquired during coverture from any person other than her husband, she, having such separate property, may enter into a partnership with her husband, the court said that it could "see nothing in the relation of husband and wife which would prevent the wife from being her husband's partner in business if she could be a partner with any other person."

In Indiana, where, by statutes enacted in 1881, all legal disabilities of married women are abolished except with respect to becoming a surety and mortgaging and transferring real property, and they were given the right to trade as if unmarried, the rule is that a married woman may enter into a business partnership with her husband. *Anderson v. Citizens' Nat. Bank* (1906) 38 Ind. App. 190, 76 N. E. 811. But see *Haas v. Shaw* (1883) 91 Ind. 384, 46 Am. Rep. 607, wherein it was held that, under the Indiana Statutes of 1879, but which were practically the same as those above referred to, a wife could not legally form a business partnership. This case, however, was held in *Conant v. National State Bank* (1889) 121 Ind. 323, 22 N. E. 250, set out supra, not to state the law under the statute of 1881, and therefore the *Anderson* Case must be regarded as laying down the present Indiana law.

And in Missouri, under a statute (Rev. Stat. 1879, § 3296) which provided that any personal property of a married woman shall be and remain her separate property and under her sole control, it has been held that a married woman must necessarily have the power to contract with respect to such property, and that consequently she could enter into a business partnership with her husband. *Dunifer v. Jecko* (1885) 87 Mo. 282; *Macks v. Columbia Theatre Co.* (1900) 86 Mo. App. 224. And the decision in *Plummer v. Trost* (1884) 81 Mo. 425, seems to be to the same effect. See also *Niemeyer v. Niemeyer* (1897) 70 Mo. App. 609.

In Pennsylvania, under a statute (act of June 8, 1893, P. L. 344) giving married women practically the same rights with respect to trade and contracting as were enjoyed by *femes soles*, it has been held that a husband and wife may form a commercial partnership. *Italo-French Produce Co. v. Thomas* (1906) 31 Pa. Super. Ct. 503. And a married woman empowered to contract as a *feme sole* is a person within the meaning of a stat-

ute which requires not less than three persons to unite in forming a limited partnership. *Bernard & L. Mfg. Co. v. Packard & Calvin* (1894) 12 C. C. A. 123, 28 U. S. App. 84, 64 Fed. 309, construing Pa. act June 2, 1874, and holding that two men and their wives could form such a partnership under the statute.

So, in Kentucky, where the statute merely empowers a married woman to trade as a *feme sole*, it has been held that a *feme covert* may form a business partnership with her husband. *Louisville & N. R. Co. v. Alexander* (1894) 16 Ky. L. Rep. 306, 27 S. W. 981. In this case it was contended that the statute only enlarges the power of a married woman as to others than the husband, but the court held that at least as to dealings with a stranger the wife could not say that she was interested in the business venture with her husband, and that her property was pledged to the payment of partnership debts, and then escape liability on the plea that the peace and quiet of domestic life rendered it impolitic for husbands and wives to form such business relations.

And in Georgia, where the statutes have gone far toward emancipation of married women (provisions not reported), it has been expressly held that a *feme covert* may enter into a partnership with her husband. *Burney v. Savannah Grocery Co.* (1896) 98 Ga. 711, 58 Am. St. Rep. 342, 25 S. E. 915, wherein the court said that "after a careful examination of all our statutes and many decisions we have reached the conclusion that there is no law or public policy in Georgia which forbids such a partnership, provided always it is *bona fide* and actual, and not merely colorable" and, continuing, quoted from an earlier Georgia case on an analogous question as follows: "There is nothing contrary to public policy in allowing husband and wife to unite their joint credit in procuring the means of supplying joint resources in the shape of a home, or a place of business from which to derive an income for the support of the family. Very often it would contribute to the well-being and prosperity of both and to the permanent good of the family. No doubt such a power can be abused and misapplied, but this is no reason for not recognizing its existence, or why the law should not tolerate it, if, on the whole, its results are beneficial rather than pernicious. At all events, we think the power exists at present under our law." And the following later Georgia cases adopt the same rule without question: *Ellis v. Ellis* (1896) 99 Ga. 490, 27 S. E.

740; *Vizard v. Moody* (1904) 119 Ga. 918, 47 S. E. 348; *Morrison v. Dickey* (1905) 122 Ga. 353, 69 L.R.A. 87, 50 S. E. 175; *Butler v. Frank* (1910) 7 Ga. App. 655, 67 S. E. 884.

And in Oregon it seems that a partnership between a husband and wife is valid. At least, such an inference may be drawn from the case of *Snell v. Stone* (1892) 23 Or. 327, 31 Pac. 663. But see the early case of *Knott v. Knott* (1876) 6 Or. 142, wherein it was said that a married woman could not be a member of a partnership.

In Vermont, where, by statute, a married woman may make contracts with any person other than her husband, and bind herself and her separate property as if she were unmarried, except that she cannot become surety for her husband's debts, it has been held that a married woman forming a business partnership with her husband is liable to third persons for partnership obligations, although, as between the husband and wife, the partnership agreement could not be enforced. *Lane v. Bishop* (1893) 65 Vt. 575, 27 Atl. 499.

By the Spanish and Mexican law husband and wife can enter into a valid business partnership. *Fuller v. Ferguson* (1864) 26 Cal. 546, and the authorities cited therein.

But where, as in Connecticut, the statutes require certain affirmative acts as a condition precedent to the control by a married woman of her separate property, it has been held that failure to comply with such statutory provisions bars a woman from entering into a partnership with her husband, and therefore that she cannot be held liable as a surviving partner upon his death. *Barlow Bros. Co. v. Parsons* (1901) 73 Conn. 696, 49 Atl. 205, construing and applying Connecticut Gen. Stat. §§ 2796-2798, in force in 1877.

Liability notwithstanding lack of capacity to form partnership.

But even though a married woman cannot lawfully enter into a partnership, it has been held that coverture cannot be set up to defeat an action against a partnership of which a married woman is a member where the action is brought against the partnership by its firm name, without naming the individual partners, as in such case, at least, in the absence of statute, partnership property only is affected, and no personal liability of the married female partner is raised. *Yarbrough v. Bush* (1881) 69 Ala. 170; *Leinkauff v. Frenkle* (1885) 80 Ala. 136; *Rabitte v. Orr Bros.* (1887) 83 Ala. 185, R.A.1916D

3 So. 420; *Le Grand v. Eufaula Nat. Bank* (1886) 81 Ala. 123, 60 Am. Rep. 140, 1 So. 460; *O'Neil v. Birmingham Brewing Co.* (1892) 101 Ala. 383, 13 So. 576; *Belser v. Tusculumbia Bkg. Co.* (1894) 105 Ala. 514, 17 So. 40.

And in some other instances where a married woman who could not lawfully enter into a business partnership has attempted to do so, the partnership has been sustained for some purposes. Thus, it has been held that the rule of incapacity is for her benefit, and cannot be set up by others to her disadvantage and their own gain. *Silveus v. Porter* (1873) 74 Pa. 448 (holding that the husband's creditors could not set up her disability so as to subject partnership earnings to the husband's debts); *Carter Merchandise Co. v. Dickson* (1893) 39 S. C. 433, 17 S. E. 996 (holding that coverture is a personal privilege of a married woman, and that a debtor cannot resist the action of a partnership, his creditor, by proof that one of the members is a married woman); *Horneffer v. Duress* (1861) 13 Wis. 604 (holding that one who had converted property of a partnership consisting of a married woman and her husband could not defend an action on the ground that the partnership was illegal, inasmuch as a married woman could not lawfully enter into a partnership. And therefore it is immaterial whether one dealing with a partnership had notice that one of the parties is a married woman. *Collins v. Hall* (1899) 55 S. C. 336, 33 S. E. 466.

And in Florida, where a married woman's disability of coverture is removed merely to the extent that she may assume an obligation for the purchase price of property, which may be enforced out of her separate estate, while she cannot become charged for obligations or debts created by her copartner, she may, by her own act, and upon her sole credit, purchase merchandise for a mercantile firm in which she has an interest, so as to render her separate property subject to a suit in equity for the purchase price of such goods. *Nadel v. Weber Bros. Shoe Co.* ante, 1230.

And that in Tennessee, where neither the property of a married woman embarked in a partnership nor her other separate property is liable for partnership obligations unless she has entered into an express contract that such interest or property shall be bound for the particular debt with which it is sought to be charged, such property is liable if she made such an express contract, see *Theus v. Dugger* (1893) 93 Tenn. 41, 23 S. W. 135.

G. J. C.

IOWA SUPREME COURT.

SIoux CITY FOUNDRY & MANUFACTURING COMPANY

v.

W. G. MERTEN et al.

H. C. McNEIL et al., Cross Petitioners,
Appts.

(— Iowa, —, 156 N. W. 367.)

Mechanics' liens — application of payment — release of other lien.

1 A materialman cannot, by applying money paid him by a building contractor, who had received it on account of a particular job, upon accounts against the contractor, arising out of other jobs, retain a lien against the building upon account of which the money was paid, although he acts in ignorance of the source of the money, and by his application of payment releases his lien on the property upon account of which the application is made.

For other cases, see *Mechanics' Liens*, VI. in Dig. 1-52 N. S.

Payment — contractor to materialman — application.

2. A contractor made a party to a suit to foreclose a lien in favor of a materialman upon the building of the owner cannot defeat recovery against himself because he had paid over to the materialman money received from the owner on account of the building, without direction as to its application, and the latter had, contrary to the rights of the building owner, applied it to claims against the contractor, arising on account of other buildings which he was constructing.

For other cases, see *Payment*, IV. in Dig. 1-52 N. S.

(February 18, 1916.)

APPEAL by cross petitioners McNeil from a judgment of the District Court for Woodbury County in their favor for less than the amount of their claim, in a suit to foreclose a mechanics' lien. Modified and affirmed.

The facts are stated in the opinion.

Messrs. Marks & Marks, for appellants:

The general rule as to application of payments governs payments made to materialmen by contractors in cases arising under the foreclosure of mechanics' liens.

Chicago Lumber Co. v. Woods, 53 Iowa,

Note.—As to application of payments made by contractor to subcontractor or materialmen, as between jobs of different owners, see annotation following this case, post, 1254.
L.R.A.1916D.

554, 5 N. W. 715; Jefferson v. Church of St. Matthew, 41 Minn. 392, 43 N. W. 75; Waterman v. Younger, 49 Mo. 413; Smith v. Wilcox, 44 Or. 323, 74 Pac. 710, 75 Pac. 710; First Presby. Church v. Santy, 52 Kan. 462, 34 Pac. 974; Wilson-Reheis-Rolfes Lumber Co. v. Ware, 158 Mo. App. 179, 138 S. W. 690; Dey v. Anderson, 39 N. J. L. 199; Christnot v. Montana Gold & S. Min. Co. 1 Mont. 44; Thacker v. Bullock Lumber Co. 140 Ky. 463, 131 S. W. 272; Heim v. Elliott, 66 Wash. 361, 119 Pac. 826; Sheppard v. Steele, 43 N. Y. 60, 3 Am. Rep. 660; W. H. Pipkorn Co. v. Evangelical Lutheran St. Jacobi Soc. 144 Wis. 501, 129 N. W. 517; Green Bay Lumber Co. v. Thomas, 106 Iowa, 425, 76 N. W. 749.

The \$300 payment was applied by McNeil & Son exactly as Merten directed, and as McNeil & Son intended to make it, and the credit could not thereafter be changed except by their mutual action, and then only when the rights of third persons would not be prejudiced.

Chicago Lumber Co. v. Woods, 53 Iowa. 554, 5 N. W. 715; Green Bay Lumber Co. v. Thomas, 106 Iowa, 425, 76 N. W. 749; Schallert-Ganahl Lumber Co. v. Neal, 91 Cal. 362, 27 Pac. 744; Orr v. Nagle, 87 Hun, 12, 33 N. Y. Supp. 879; Sheppard v. Steele, 43 N. Y. 60, 3 Am. Rep. 660; City Coal & Wood Co. v. New Britain Institute, 77 Conn. 715, 59 Atl. 33.

In the absence of direction by Merten, McNeil was at liberty to apply the payment as he saw fit, and having applied it at the time, he could not afterward be required to change the application.

Hanson v. Manley, 72 Iowa, 50, 33 N. W. 357; Hansen v. Rounsavell, 74 Ill. 241; Union Trust Co. v. Casserly, 127 Mich. 183, 86 N. W. 546; Smith v. Wilcox, 44 Or. 323, 74 Pac. 710, rehearing denied in 44 Or. 330, 75 Pac. 710; Ridge v. Mercantile Loan & T. Co. 56 Mo. App. 155; Campbell Glass & Paint Co. v. Davis-Page Planing Mill Co. 130 Mo. App. 474, 110 S. W. 24; Brigham v. Dewald, 7 Ind. App. 115, 34 N. E. 499; Jefferson v. Church of St. Matthew, 41 Minn. 392, 43 N. W. 75; Waterman v. Younger, 49 Mo. 413; Thacker v. Bullock Lumber Co. 140 Ky. 463, 131 S. W. 272; W. H. Pipkorn Co. v. Evangelical Lutheran St. Jacobi Soc. 144 Wis. 501, 129 N. W. 517.

When the defendants, Stone & Day, made the payments on estimates to Merten, without seeing to the manner in which he used

the money, and the sums so paid were deposited in his general bank account, they became his money, to use as he found convenient; and, having lost their identity, could not be traced as separate funds.

Union Trust Co. v. Casserly, 127 Mich. 183, 86 N. W. 546; Sheppard v. Steele, 43 N. Y. 60, 3 Am. Rep. 660; Jefferson v. Church of St. Matthew, 41 Minn. 392, 43 N. W. 75; Thacker v. Bullock Lumber Co. 140 Ky. 463, 131 S. W. 272.
Messrs. Sargent, Strong, & Struble, for appellees:

The action of the trial court, in entering judgment giving to the owner of the building in controversy and the surety on the contractor's bond credit for the payment of \$300, paid by the owners to the contractor, and by the contractor paid to the materialmen, the plaintiffs herein, instead of applying the same on other debts of the contractor, for which neither the owner of the property nor the surety was liable, is sustained by:

Hughes & Co. v. Flint, 61 Wash. 400, 112 Pac. 633; Crane Co. v. Pacific Heat & P. Co. 36 Wash. 95, 78 Pac. 460; Williams v. Willingham-Tift Lumber Co. 5 Ga. App. 333, 63 S. E. 584; Crane Bros. Mfg. Co. v. Keck, 35 Neb. 683, 53 N. W. 606; Lee v. Storz Brewing Co. 75 Neb. 212, 106 N. W. 220; Cain v. Vogt, 138 Iowa, 631, 128 Am. St. Rep. 216, 116 N. W. 786; First Nat. Bank v. Hollinsworth, 78 Iowa, 575, 6 L.R.A. 92, 43 N. W. 536; Central Planing Mill & Lumber Co. v. Betz, 29 Ky. L. Rep. 252, 92 S. W. 591; Young v. Swan, 100 Iowa, 323, 69 N. W. 566.

Mr. E. A. Burgess also for appellees.

Salinger, J., delivered the opinion of the court:

I. Day & Stone employed one Merten to construct for them a building in Sioux City known as the Davidson building. They paid him in the course of construction a sum of money out of which he paid \$300 to the appellant McNeil. Merten was indebted to McNeil for various materials used by Merten in his work as contractor, including material for the Davidson job. He gave no direction as to the application of the \$300, and McNeil applied this payment to accounts for material other than that used in the Davidson building. The trial court, in effect, applied this \$300 to diminishing the account owed for the Davidson job, and the materialman appeals.

The appellant invokes the general rule which governs the application of payments between debtor and creditor. He urges that under that rule, since the contractor who did the paying owed appellant on several accounts, and gave no direction on which of

these accounts the payment should be applied, appellant had the right to apply on any account owing by the contractor, and not to apply on the account owing for material furnished for the building of these owners; and that, having so applied, the owners cannot compel a change in application by crediting the account for material furnished for the building of these owners. Appellant adds that it did not know where Merten got the money that he paid; that he and it acted in good faith; that it may suffer injury if the application made be now disturbed, because it "has probably lost its lien right" as to one of the accounts on which part of the \$300 was applied: that there is an additional estoppel because the owners knew appellant was furnishing material for which he was not being paid, and that subsequent payments were made to the contractor despite such knowledge. And it insists that, in a loose sense, at least, the equitable doctrine applies which prevents one from impressing funds with a trust unless the trust fund has been kept intact, can be traced, and has not been mingled beyond the power to trace.

Appellee responds:

(1) That while this rule does govern payment from debtor to creditor, it may well govern there because, so long as the payor remains silent, he has nothing to complain of when one debt of his, instead of another, is extinguished by payments made; that, after all, every dollar paid none the less relieves him of the debt he owes, even though it be one debt rather than another; but that the rule does not apply where the money of A, who owes a debt, is by the creditor applied to extinguish the debt of B. In other words, that the contractor and the materialman between them cannot by agreement or by failure to give direction effectuate that one who has furnished money for material shall still owe for the material, because his money was used to relieve from debt another who had not furnished the money.

(2) That appellant was put to inquiry as to where the money paid came from, and had notice where in justice it should be applied, because, say they: (a) When appellant received from the contractor the \$300 in the form of a check, it knew the contractor was engaged in the construction of their building, and that estimates and payments were being made, to apply on the construction of said building. And the contractor never got material without advising appellant for what job it was. (b) While the ledger account with the contractor did not differentiate between jobs, it bore references that enabled the segregation of the jobs by going to the original

itemized journal entries. (c) Appellant knew the owners were having constructed what was styled the Davidson building, and that this was being done when it got the payment in controversy. The books designated jobs by a designating letter or word, and the Davidson job was designated by "D," and the check that made said payment had the notation "No. D 54." (d) Appellant knew that one of the owners was a large stockholder and the other the cashier of the bank upon which the check was drawn, and that both owners did all their business with that bank. (e) Appellant McNeil testifies he knew that, customarily, contractors were paid on estimates, and supposes he knew that course was being followed as to the Davidson building; that at the time the check was paid he supposed the contractor was getting money at times on the contract for that building, was getting payment on estimates on that building, though it did not know it as a fact.

(3) That even if it be true that appellant had no knowledge that the money came from the owners, there is no estoppel to show that such is the fact; that it is not the question whether A knew he was using the money of B to satisfy his own claims against C, but whether, in fact, the money of A was so used.

(4) That there is no mingling of money; that it is proven the money received from the owners is the money paid over by the contractor; that this is no mingling at all within the equitable rule; that, if it be, it is not a mingling of funds with others, but mingling the things that were paid for with the money; and that in any view the appellant cannot urge the doctrine of mingling, nor yet an estoppel, upon mingling done by himself; nor injury by loss of lien rights caused by his own voluntary act. In other words, that the owner is not to suffer because the materialman, without the knowledge and consent of the owner, used the money of the owner to pay debts owing appellant from others; nor because appellant, of his own volition, without the knowledge and consent of the owner, deprived himself of a lien which secured the accounts of others.

This defines the dispute.

II. It will clear the controversy if we dispose of citations that are irrelevant, or are not controlling. Some we deal with fully; others are disposed of in a summary.

In *Hughes Co. v. Flint*, 61 Wash. 460, 112 Pac. 633, the materialman is defeated on the ground that he had notice that he was applying the money of the owner on accounts for material bought by the con-

tractor for others than Flint, and this, because the materialman kept the contracts separate on his books, and the Flint checks contained the indorsement "on contract." Also, because a conflict was resolved in favor of a direction to apply on the Flint job.

On its face, *Central Planing Mill & Lumber Co. v. Betz*, 29 Ky. L. Rep. 252, 92 S. W. 591, sustains what was done by the trial court, here. But in a later case, *Thacker v. Bullock Lumber Co.* 140 Ky. 463, 131 S. W. 272, it is said that the evidence in *Betz's* Case showed that the plaintiff was notified that the money paid it by the contractors came from him, and that it was requested to apply the money to that account; that the chancellor's judgment was based on this evidence; and that the case was affirmed on the ground that on these facts there was no reason for disturbing his conclusion.

III. There are cases, in effect, that when the money paid is that of the contractor, the materialman, having made application to some debt of the contractor, cannot be compelled by others to change the application for their benefit. We do not think them controlling. One of them is *Brigham v. Dewald*, 7 Ind. App. 115, 34 N. E. at 499, which is, in effect, that, if money is paid on contract and paid over to, and, in the absence of direction, is applied by, a materialman on the contractor's general account, this money is in such sense the property of the contractor as that the sum paid will not avail the owner as a credit on material bought of the same materialman, later.

The conflict raised by cases like *Hanson v. Manley*, 72 Iowa, at 50, 33 N. W. 357, and *Hansen v. Rounsavell*, 74 Ill. at 241, is one in seeming, only. These latter hold, merely, that if one be surety on a debt, and the debtor makes a payment by foreclosure had upon his own property, or pays out of his own funds, but the payment is not large enough to pay what he owes, secured and unsecured, he and his creditor may work an application, first, upon what is unsecured. In other words, one who becomes surety takes the risk that honest payment of unsecured debts may leave a deficiency which the surety must make good.

IV. The following cases have more or less tendency to sustain the decree:

In *Crane Co. v. Pacific Heat & P. Co.* 36 Wash. 95, 78 Pac. 460, it is conceded that as to moneys which are the absolute property of a debtor, his surety cannot control application. Yet it is held that where a contractor is paid for plumbing, and the proceeds are by his materialman applied on

accounts for jobs on which the surety is not liable, the surety, on suits for balance due on the job secured by it, may compel the reapplication to the account for which it is alone liable. The decision is put on the ground that the contract of the surety company is not to secure old claims then due and unsecured, or any other claim than the one which was the subject of the contract with the owner. It is further said that the general rule, broadly stated, applies to cases only where the principal makes the payment from funds which are his own, and free from any equity in favor of the surety to have the money applied in payment of the debt for which he is liable.

This seems to be squarely sustained in *Merchants' Ins. Co. v. Herber*, 68 Minn. 420, 71 N. W. 624, which holds, additionally, that, where the specific money paid to the creditor and applied on the debt of the principal for which the surety is not bound is the very money for the collection and payment of which he is surety, he is not bound by such application, and he is equitably entitled to have the money applied to the payment of the debt for which he is liable, unless the creditor shows a superior equity to have the application as made stand. This, we think, is not materially affected by the construction given by the *Heim's Case*, 66 Wash. 361, 119 Pac. 826, that the *Herber Case* holds an obligee in a bond, as against a surety, cannot apply payments made by the principal to a debt which the principal owed before the bond was given. In our opinion, this is in harmony with *Ida County Sav. Bank v. Seidensticker*, 128 Iowa, at 64, 65, 111 Am. St. Rep. 189, 102 N. W. 821, 5 Ann. Cas. 945, that where, during the period of the service of a cashier, for which the surety on his bond is liable, the cashier becomes entitled to credits sufficient to wipe out such liability, it should be applied to that liability rather than to indebtedness due the bank from the cashier subsequent to the time when the liability on the bond terminated.

Stewart v. Woodward, 50 Vt. 78, 28 Am. Rep. 488, decides that where a general agent of some tailors, who owed a debt to defendant, delivered him a suit of clothes belonging to them, on account of the debt, and defendant supposed the agent had authority to do this, but knew that the goods belonged to the tailors, they having charged the goods to defendant, it was held they were entitled to recover therefor in an action of book account. It is further said that the defendant's good faith avails him nothing; it does not cure the bad faith of the agent, where plaintiffs had not misled the defendant. And *Wiesenfeld v. Byrd*, 17 S. C. 106, and *Thompson v. Brown*, L.R.A.1916D.

Moody & M. 40, 31 Revised Rep. 710, hold that though a surviving partner pays firm funds to one who is his creditor and a creditor of the firm, without directing application, application to the firm debt will be compelled.

V. The following cases strongly support appellees: In *Young v. Swan*, 100 Iowa, at 326, 327, 69 N. W. 566, citing *Stewart v. Woodward*, supra, and *Gleaton v. Tyler*, 43 S. C. 474, 21 S. E. 333, we said: "The most that can be claimed for appellants is that the wife furnished the husband with money with which to purchase the material for the house; that he purchased it of plaintiffs, paid them the money which she had given him, but did not direct that it be applied upon his particular account; and that plaintiffs applied it on general account.

. . . Can he now, in an action to establish and foreclose a mechanics' lien against the property of the wife, insist that these payments of the wife's money shall be applied upon the husband's general account, to the detriment of the wife? We think not. The husband could not directly appropriate this money to his own use against the consent of the wife, and it surely is not the province of a court of equity to misappropriate it."

Crane Bros. Mfg. Co. v. Keck, 35 Neb. 683, 53 N. W. 606, recognizes the general rule as to application. "Yet," says the syllabus prepared by the court, "there is an exception to this rule, as where the money was received by the debtor from a third party whose property would be liable for the debt in case the money was not applied upon the third party's liability." The case is squarely followed on facts quite like those at bar, in *Lee v. Storz Brewing Co.* 75 Neb. 212, 106 N. W. 220.

In *Williams v. Willingham Tift Lumber Co.* 5 Ga. App. 533, 63 S. E. 584, the contractor paid the materialman funds received from an owner, one Reed. He paid by his own check without informing, at the time of payment, of the source of the money. When later he asked application to Reed's material account, this was refused, with a statement that the money had already been applied to bills of his on other contracts. A lien was denied, and it is said that this is not in conflict with the general rule of the right by the creditor to apply, in the absence of directions; that that is a rule between the creditor and the debtor; but that, where the rights of third persons are involved, the law will make the credit according to principles of justice and equity,—will not permit the money of one man to be used in the payment of the debt of another man, or declare a lien on the property of the man who has paid in

full for all the material furnished to improve his property, and thus relieve from a lien the property of a man who still owes for the material that was used to improve his property.

VI. The citations thought to give support to the appellant come to this:

1. The general rule governing applications between debtor and creditor apply to open accounts only. *First Nat. Bank v. Hollinsworth*, 78 Iowa, 576, 577, 6 L.R.A. 92, 43 N. W. 536; *Dey v. Anderson*, 39 N. J. L. at 205.

2. Where a partnership owed a balance due at the time when one partner died, and such balance was carried forward in the account of the reorganized firm, payments later made by it should be applied to the earliest items of what made said balance due, rather than to later items, where to do the last would result in holding the dead partner's estate for said balance due; the holding being put on the ground that the whole account was mutually treated as a running one. *De Vaynes v. Noble*, 1 Memo. 528.

3. If a partnership allows a partner to keep an account in his own name with one who is ignorant of the existence of the partnership, it cannot complain that money paid his creditor by the partner was applied to the items in that individual account, in the order of priority. *Allen v. Brown*, 39 Iowa, at 332; *Hanson's Case*, 72 Iowa, 52, 33 N. W. 357.

4. A receipt fraudulently obtained from the materialman will not avail the owner to whom said receipt is exhibited, because he thereupon pays money to the contractor, in the absence of a showing that the owner does not owe the contractor enough to pay the materialman. *Schallert-Ganahl Lumber Co. v. Neal*, 91 Cal. 362, 27 Pac. 743.

5. Where the contractor pays money received from two owners upon an account for material furnished for their buildings, and the payment is equitably apportioned between the buildings, the fact that it is not shown by the record exactly how the payment was apportioned will not defeat the lien for a balance claimed to be due, where the contractor did not direct what sums should be applied on each building. *Smith v. Wilcox*, 44 Or. 323, 74 Pac. 710, 75 Pac. 710.

6. The rule will be applied between debtor and creditor where there are no equitable considerations.

7. A contractor and one subcontractor cannot change an application once made as intended, and thus prejudice the rights of another subcontractor in a fund reserved to pay all. *Green Bay Lumber Co. v. Thomas*, 106 Iowa, 424, 76 N. W. 749. L.R.A.1916D.

8. The rule will be applied if it does not appear what is the source of the money that was paid over.

9. It will be applied where it is not shown the funds were furnished by the owner. *Union Trust Co. v. Casserly*, 127 Mich. 183, 86 N. W. 546; *Thacker v. Bullock Lumber Co.* 140 Ky. 463, 131 S. W. 272; *Waterman v. Younger*, 49 Mo. 413; *W. H. Pipkorn Co. v. Evangelical Lutheran St. Jacobi Soc.* 144 Wis. 501, 129 N. W. 517.

10. Where it does not appear who furnished the money, and a lien is satisfied, it will not be revived by changing the application which satisfied the lien, without the consent of the one against whom such lien existed before the satisfaction. *Chicago Lumber Co. v. Woods*, 53 Iowa, 552, 5 N. W. 715.

11. One who contributed nothing to the money paid over is bound by any application which binds the payer. *Heim v. Elliott*, 66 Wash. 361, 119 Pac. 826.

12. Any money paid to the contractor becomes his own property, and therefore any application binding on him is binding on those who paid him the money. *Sheppard v. Steele*, 43 N. Y. 60, 3 Am. Rep. 660.

13. The rule will be applied unless the creditor knows he is receiving the money of a third person, or is put on inquiry as to whether this be not so.

14. It will be applied unless it appears that the money paid over can be traced through the debtor to the creditor. *Thacker v. Bullock Lumber Co.* 140 Ky. 463, 131 S. W. 272.

15. It will not be applied where the materialman had notice that he was applying money received by the payer for one account to the extinguishment of another account.

16. The owner is bound to see to it that application is made to his account, or give notice that it should be so made. *Jefferson v. Church of St. Matthew*, 41 Minn. 392, 43 N. W. 74.

2.

There is and can be no serious claim that the \$300 paid by the contractor to McNeil was not money paid to Merten by the owners, and we are fully persuaded that this was the source of that \$300 payment. All that is relevant in these sixteen ultimate propositions is that (1) unless the owner gives notice that money paid by him to the contractor must be applied only to material furnished the owner, (2) or unless the materialman knows that the money he is receiving was paid the contractor to be so applied, and (3) unless the money paid by the owner can be "traced," then any money paid by the owner to the contractor

is to be treated, not as in any sense a trust fund to be applied for the benefit of the owner, but as a general payment to the contractor by means of which what is paid to him becomes absolutely his own property, freed from any duty as to its application. So, what we have to determine is whether we should accede to these, rather than to adopt the holdings in *Young v. Swan*, *Crane Bros. Mfg. Co. v. Keck*, *Lee v. Storz Brewing Co.* and *Williams v. Willingham-Tift Lumber Co. supra*.

VII. Concretely, this is the situation: The owners of a building being constructed by a principal contractor made him a large payment on estimates. Part of this he paid over to a materialman who had unpaid accounts against the contractor for material furnished the building of the one who had furnished this money and also material that had gone into other jobs. The contractor being silent when he paid, the materialman applied what was paid upon an account for material furnished the contractor for the building of a stranger, and thus, "probably," worked a discharge of his lien against this third person. He asks us to find estoppels and to apply certain equitable rules as to mingling of funds, to the end that he may not be disturbed as to what he did without the consent of these owners. That is to say, he contends equity requires, rather than that he shall lose the lien which he released by his own voluntary act, that we shall sustain his use of the money which the owners furnished, and thus save him from the probable loss of a lien which once secured his claims against a third person. In ultimate effect, it is proposed that we sanction that the money paid by these owners shall leave their own account for material unpaid, and pay the debt of a third person, because of acts done by the appellant without the knowledge and consent of the one whose money was thus used. There would not be very much substantial "equity" accomplished by our doing this. When it is all said, the vital facts are that Day & Stone paid the contractor money, of course, with the mutual understanding that this would discharge in part what they were owing for labor and materials put into their building; that the contractor paid part of this money to McNeil; that McNeil was at perfect liberty to apply the payment on the Day & Stone job; that such application would have cost appellant nothing which the law recognizes; that so to apply would have worked, merely, a diminution of the Day & Stone account by \$300, and an augmentation of the funds of the appellant in \$300; that, instead of pursuing this course, appellant, on its own motion, credited the \$300 on the material account

of strangers; and that the essential result of doing what appellant asks will be that it will have \$300 of Day & Stone's money, without compensation to them other than that the money furnished by them has cut down the indebtedness of some other person. We are unable to agree that any sound rule of estoppel, or on mingling of funds, requires the working out of such a result. All equity is opposed to what appellant claims. That must be, indeed, a strained use of the equitable jurisdiction which will permit one, without the knowledge or consent of another, to appropriate the money of that other to the payment of the debt of a third person.

We are of opinion that no question of notice is involved; that no equitable doctrine on the mingling of funds has any bearing; that we need not go into whether or not appellant knew or should have known where this money which it so used came from; that the only question is (and appellee is not estopped as to it) whether its money was thus appropriated. What rule of law or equity is violated if we now hold that appellant must give Day & Stone credit for \$300 because it has received that much of their money? To compel this will result merely in letting appellant keep \$300 of their money, and giving them credit for that amount. What difference does it make that appellant was not informed where this money came from until after it had made the application? Ordinarily, and freed from some such rule as governs the transfer of negotiable paper to one who takes it without notice and for value, one may always assert title to his money or property against one who has misappropriated it. The estoppel in this case comes to this: Appellant says: "Money of another was paid me, but I 'mingled' it by applying it to a debt that others owed me; and I may have lost some of my rights by doing this. Therefore you must not assert that this money is yours and that you should have credit for it on the debt you owe me. I have the right to use your money to pay off what someone else owed me, unless you advise me before I do so that you make some claim in this money."

In fewer words, an estoppel is built up by a prejudice which was wholly caused by the act of the one urging the estoppel. The claim is not persuasive.

We find nothing in the authorities cited, and do not believe, that the equitable doctrine of mingling funds has any application here. If there was any "mingling," it consists of the applying, by the contractor and the materialman, of the money of A upon debts owing by B and C. Equity suggests

no difference between what was then done and taking the money of one's principal and depositing it to the credit of the agent, mixed with his own, and claiming for this that the bank owes the principal nothing, and may use all that was deposited to pay itself a debt due from the agent; and such claims have always been held to be untenable.

In *Van Alen v. American Nat. Bank*, 52 N. Y. 7, it is held that, if one deposit a sum belonging to another with one belonging to himself, the bank would owe the first sum to that other, though the particular bills that were his cannot be identified. And this doctrine is applied in *Crane v. Keek*, supra, to save the owner's money applied by the materialman to the debt of another. The two held that, when money belonging to two is paid over, the obligation to one is not lessened because there is as well one to the other; that in equity the ostensible obligation yields to the actual.

The same principle was affirmed in *Whitley v. Foy*, 59 N. C. 34, 78 Am. Dec. 236. So also of *Frith v. Cartland*, 2 Hem. & M. 417, 34 L. J. Ch. N. S. 301, 11 Jur. N. S. 238, 12 L. T. N. S. 175, 13 Week. Rep. 493, where a person received from the plaintiff certain acceptances to take up paper owing to the plaintiff, and got them cashed and ran away, after mingling the money with his own, and making various changes and transformations. It was decided that plaintiff was entitled to the money in preference to creditors; Vice Chancellor Wood saying that "the court attributes the ownership of the trust property to the cestui que trust so long as it can be traced," and that said mingling and changing had no effect. And see *Merrill v. Bank of Norfolk*, 19 Pick. 32.

In the case of *Overseers of Poor v. Bank of Virginia*, 2 Gratt. 544, 44 Am. Dec. 399, an attorney deposited a check for the amount of a judgment in favor of his clients to his own credit in a bank where he had a small amount of other money to his credit, and died. On the day of his death a note fell due belonging to the bank which it claimed to set off, but the court held that the clients were entitled to the money.

In *Clark County v. Springfield*, 36 Ohio St. 643, the county treasurer embezzled money from a mass which was mixed funds and belonged to the county and other corporations of which the county treasurer was also treasurer. On a settlement with the county board, he was unable to pay these other corporations; but there was sufficient to satisfy the amount owing to the county, which the county board directed to be L.R.A.1916D.

placed to the credit of the county and appropriated to county purposes. It was held the county was liable in equity to account to the other corporations for their proportionate share of the funds so appropriated, and this, with a statement that, though the amount appropriated by the county was the exact sum due it, "neither mingling the money, the embezzlement, nor the appropriation by the county, had the effect of destroying the interest" of the others "in the sum which was in the treasury at the time of the settlement;" and this rule would apply to individuals, under such circumstances as well as to special corporations.

Dey v. Anderson, 39 N. J. L. 205, seems in a sense to involve the converse of the controversy here. It seems to be a holding that if the materialman wants to protect himself against having payments applied where he is already well enough secured, and thus lose payments of claims not so well secured, he should not employ running accounts, but treat each building account as a separate debt; and that if he does maintain a running account only, and the builder makes him a payment without direction, it must be applied on the running account items according to seniority, even though this results in payments upon claims which are well secured, to the exclusion of others not thus fortified. And its citations (*Beckel v. Petticrew*, 6 Ohio St. 247, and *Waterman v. Younger*, 49 Mo. 413), more clearly than its text, indicate that this is what it decides.

Williams v. Willingham-Tift Lumber Co. 5 Ga. App. 533, 63 S. E. at 585, sums it up well. It holds that the evidence did not warrant the directed verdict, because it shows plaintiff had been paid for all the material it furnished the contractor to be used in the improvement of the property of Reed. And it is added that, if the materialman neglects to give the proper credit, the fault was not the owners', and the loss should not fall upon them; that when the materialman has furnished at the same time material to one contractor for the improvement of the property belonging to different persons, and has full knowledge of the separate contracts, and money is paid to the materialman by the contractor from time to time on account of the material so furnished, it is incumbent upon the materialman to keep separate accounts, and to find out from the contractor on what contract the money is paid, and to what account it should be applied; that if he does not do so, but applies the money as a credit on a general account against the contractor, he thereby waives his right to a lien on the owner's property, and must look alone to the contractor; that the lien claimant is

presumed to keep his lien in mind, and if he is to seek its enforcement, the law requires him to preserve its unity as a claim against the particular property; that if he does not, but so mingles it with other claims as to necessitate a process of separation by the courts, it may well be held that he has waived his lien; that with the state of accounts between the contractor and the materialman relating to materials furnished for other buildings than his own the owner has nothing to do; and that he has the right to have all his money paid to the materialman applied for his benefit, and not appropriated by the materialman to the payment of a general account against the contractor, which includes accounts for material furnished to the contractor for other persons.

We hold the money of the owners was misappropriated, and that equity will correct this against the one who did the misappropriating, even if he did not know at the time that he was misappropriating, when no controlling equity stands in the way of the correction. We hold further that none such intervenes where the materialman loses, if at all, because he volunteered to use the money of one to pay the debt of another; while, on the other hand, the owners will, through an act of the materialman, be compelled to pay their debt to him twice; when on one side stands one who received \$300, and credited some debtor of his in that amount, and, on the other,

one who has paid \$300 at a time when he owed it, and is now to pay it again, because the money was used to credit another debtor.

Division II.

Appellant urges in argument that, even if a deduction of \$300 from his claim against the owner be upheld, he should have had judgment against the principal contractor for the full claim, because that contractor made default. Appellees answer that a statement in abstract so limits the issues here, as that we should not consider this point. This avoidance seems to rest upon misunderstanding of said statement. While it is said that the controversy here is limited to whether the \$300 credit was proper, this is at the same time amplified to cover whether deducting same from either "the account" or from "the mechanics' lien so established" was proper. Now, the principal contractor owed the "account." He made default and asked no deduction—and he could not. He did get credit on something which he owed appellant. No \$300 of his was used to lessen the debt of another. The judgment against him should be for what is prayed, and the decree below is modified to that extent.

Modified and affirmed.

Evans, Ch. J., and Ladd and Gaynor, JJ., concurring.

Annotation—Mechanics' lien: application of payments made by contractor to subcontractor or materialmen as between jobs of different owners.

I. Introduction, 1254.

II. Application directed by contractor, 1255.

III. Absence of application by contractor:

a. Source of fund not appearing, 1256.

b. Source of fund appearing:

1. Rule that creditor may apply as desired, 1257.

2. Rule that payment must be applied to account of owner making payment, 1258.

3. Effect of notice to subcontractor or materialman of source, 1259.

4. Payment to a materialman who has not at the time furnished material for building of owner making payment, 1260.

I. Introduction.

The present note is confined to the application of payments as bearing upon the right of a subcontractor or materialman to a lien. In accord with this limitation actions on bonds given by contractors to secure the payment of the claims of materialmen and subcontractors have in general been excluded. As indicated in the title, the note is also confined to the application of such payments as between the jobs of different owners; and does not, in general, include cases involving the application of payments as between different jobs of the same owner; or as between lienable and nonlienable items.

In case of a payment by a contractor to a subcontractor or materialman, the application thereof affects not alone the parties to the transaction. Statutes give a subcontractor and materialman a lien

upon a building for which they have furnished material or done work, upon compliance with certain conditions. Assuming that the statutory conditions have been complied with, as is assumed in this note, the application of payments made by the contractor to the subcontractor or materialman has the effect to discharge the right to a lien as against the owner thus credited with the payments.

Speaking generally, two situations arise in this connection. There is first a case in which nothing appears as to the source of the fund with which the contractor makes payments. Second, there is the case in which the source of the fund does appear. These situations will be discussed in the order stated. Before, however, discussing these questions, the cases in which the contractor directed an application of the payment at the time of making it will be discussed.

II. Application directed by contractor.

The contractor may make an application at the time of making the payment, and his direction governs.¹ A direction to apply a payment to the general account of the contractor governs even in case of payment by indorsing to the materialman a check, received by the contractor from the owner, the materialman having knowledge that the money was received by the contractor on account of this contract.²

The direction need not be express.³ Where the contractor intends to apply money received by him from an owner for whom he is constructing a building, upon the account of the material going into the building, and the materialman knows that the contractor so intends, it must be so applied by the materialman. The account in question is discharged to the extent of the payment, and the materialman cannot, by attempting to apply it on another account, retain his lien.⁴

¹ The petition for a mechanics' lien by a materialman who had been paid money by the contractors which they had received from the owner of the house, more than sufficient to pay for all the material that went into the house, but which was applied by the materialman to other accounts of the contractors, was denied in *Central Planing Mill & Lumber Co. v. Betz* (1906) 29 Ky. L. Rep. 252, 92 S. W. 591, by the chancellor, and this judgment was not disturbed upon appeal. There was a conflict in the evidence as to whether the materialman was notified that the money paid in by the contractors came from the owner, and whether they requested him to apply the money to the best account, and this was not determined in the case. This case is stated in *Thacker v. Bullock Lumber Co.* (1910) 140 Ky. 463, 131 S. W. 271, to have turned upon the facts, and there was an application of the payments.

In *Brink v. Walter* (1911) 145 Ky. 17, 139 S. W. 1064, the contractor, before he had received any money from the owner of the building on which a lien was sought, gave the materialman a check, directing him to apply a part of it on a prior account and the balance on the account of the building on which the lien was sought. The application in accord with this direction was sustained, but there seems to have been little question about it.

In *Petersen v. Shain* (1893) 4 Cal. Unrep. 122, 33 Pac. 1086, a second subcontractor received from the original contractor checks drawn by him, payable to the first subcontractor, and indorsed by the payee; the second subcontractor applied the money to the payment of a prior debt due him from the first subcontractor, according to an agreement between them. It is stated that the checks were delivered to the sec-

ond subcontractor by the original contractor to enable him to obtain payment from the first subcontractor for the materials furnished in the particular building in question; that, as the original contractor was bound to clear the building of all liens for labor and materials, he had a right, with the consent of the first subcontractor, to pay the second subcontractor for the materials furnished, and to direct the application of the payment to that purpose. The lower court found that the second subcontractor was fully paid by the checks, and a judgment founded thereon was sustained.

That the direction as to application cannot be made after the creditor has applied the payment and a lien is sought, see *St. Louis Sash & Door Works v. Tonkins*, *infra*, note 16.

² In *Jefferson v. Church of St. Matthew* (1889) 41 Minn. 392, 43 N. W. 74, the directions by the contractor to the materialmen to apply it on their account were held to authorize the application to the oldest items of the account. At the time of the payment, the material furnished on this particular job did not amount to the sum paid.

See *St. Louis Sash & Door Works v. Tonkins* (1915) 188 Mo. App. 1, 173 S. W. 47, *infra*, note 16; and see *Petersen v. Shain*, *supra*, note 1.

³ Where the materialman asked the contractor for payment on a particular job, and thereafter the contractor, in response to the demand, made payment, the materialman must apply the payment so made to the particular job in question, the request and payment amounting to a direction of application by the contractor. *Koehler v. Bierbaum* (1909) — Ky. —, 122 S. W. 524.

⁴ *Hanson v. Cordano* (1892) 96 Cal. 441, 31 Pac. 457. The owner, supposing that all demands and liens against his property had

Where a payment made by a contractor to a materialman is applied upon one of several accounts, upon direction to that effect by the contractor, the materialman cannot thereafter cancel the credit and apply the payment to another account, so as to revive his lien.⁵

III. Absence of application by contractor.

a. Source of fund not appearing.

In the absence of anything appearing

been satisfied, paid the balance of the contract price to the contractor.

It is stated in the concurring opinion in *Goss v. Strelitz* (1880) 54 Cal. 640, that a materialman who has received money from the contractor on account of materials furnished in a specified building cannot apply the sum so received to the satisfaction of a balance of an open general account which he has against the contractor. It is stated that all payments made by the owner of a building to his contractor, and those made by the contractor to a materialman for materials furnished, to be used in a building, should be applied in satisfaction of the original contract; that neither the contractor nor a materialman nor workman upon a building can legally apply any portion of such payment to the satisfaction of general debts or demands existing between himself and others, who may be entitled to file liens upon the building against the owner.

⁵ *Chicago Lumber Co. v. Woods* (1880) 53 Iowa, 552, 5 N. W. 715.

Where a general account has been paid by a promissory note given by the contractor, the materialman cannot thereafter change the application of the promissory note, and retain a lien upon a building for which some of the items in the general account were sold. *City Coal & Wood Co. v. New Britain Institute* (1904) 77 Conn. 715, 69 Atl. 33.

It is stated in *United States use of Port Blakely Mill Co. v. Massachusetts Bonding & Ins. Co.* (1912) 198 Fed. 923, an action on a contractor's bond, that credits, having once been applied by the materialman to reduce the claim, cannot be changed and other application made thereof.

In *Green Bay Lumber Co. v. Thomas* (1898) 106 Iowa, 420, 76 N. W. 749, an action to charge a particular fund with the payment of the claims of subcontractors, and materialmen, it was held that although there was a mistake as to the application of a payment made by the contractor to an account other than that directed, and that this might be corrected as between the subcontractor to whom the payment was made and the contractor, it could not be corrected as to subcontractors against whom no mistake was shown.

In *Schallert-Ganahl Lumber Co. v. Neal* (1891) 91 Cal. 362, 27 Pac. 743, the contractor made a payment to an agent of the L.R.A.1916D.

as to the source of the fund from which the contractor makes payments, a payment made by a contractor to a subcontractor or materialman to whom he is indebted on account of several buildings, without any direction as to application, may be applied by the subcontractor, or materialman as he desires.⁶ He is not required to apply it to any particular account. At least, his application to the oldest of the accounts between him and

materialman, and directed a certain application thereof. Immediately thereafter, and before the agent had returned to the office, the contractor went to the bookkeeper of the materialman and stated that he had paid the agent, and requested a receipt therefor on account of a job other than that to which he had previously directed the application. The receipt was given, and thereupon the contractor went to the owner and secured further advances on the strength of the payment. The materialman, upon discovering the facts, at once repudiated the application and made it as agreed upon when the check was given. Upon these facts the owner, who had thus made a payment on the strength of the receipt, was held not entitled to a credit. It was not alleged that he had paid more money than was due to the contractor, and it appeared that he still had large amounts in his hands, applicable to the payment of the materialman's claim when the action was commenced.

⁶ *Gantner v. Kemper* (1875) 58 Mo. 567; *Crane Co. v. United States Fidelity & G. Co.* (1913) 74 Wash. 91, 132 Pac. 872 (action on surety bond). See *Crane Co. v. Pacific Heat & P. Co.* infra, note 23.

A materialman who is supplying materials to a contractor for use in three buildings which are being erected for the same owner may apply a payment to him on the indebtedness as he sees fit, especially where the source of the money with which the payment is made by the contractor does not appear. The action of the materialman in applying the payments to an account for two of the buildings, on which the time for filing a lien had expired, was sustained, so as to entitle it to a lien upon the third building. *Portland Floor Co. v. Spaulding Logging Co.* (1913) 64 Or. 316, 130 Pac. 52.

In *Smith v. Wilcox* (1903) 44 Or. 323, 74 Pac. 708, 75 Pac. 710, an action by a subcontractor who had constructed two buildings for a contractor, to obtain liens on both buildings, in which payments were made without directions by the contractor as to how they should be applied, it is stated that as the subcontractor had the right to make the application in such case, having made it upon an altogether equitable basis, the owners of the buildings cannot be heard to complain.

In *Ballou v. Black* (1885) 17 Neb. 389, 23 N. W. 3, while admitting as a general

the contractor will be sustained.⁷ The payment may be applied to an old account of the contractor, although received during the time the material is being furnished for the building on which the lien is sought.⁸ It has been held that it is not necessary for the materialman to apply it to the oldest item of his account against the contractor.⁹

If the parties make no application, the law applies payments to the extinguishment of the earliest items, if nothing in the circumstances shows a different intent.¹⁰

b. Source of fund appearing.

1. Rule that creditor may apply as desired.

Where it appears that money paid by

principle that, in case of payment without any direction as to application, the party receiving the payments would have the right to apply the money to such account as he sees fit, under the peculiar circumstances of that case, and it appearing that, at the time of the failure of the contractor, payments made by him to the materialman had been credited to the general account between the contractor and the materialman, the payments so made were distributed pro rata upon the amount due for the materials delivered for and charged to the contractor, and then due the materialman for each building then in course of erection by him, or under a contract with him, in proportion to the amount due on each at the date of the several payments.

⁷ Kaufman-Wilkinson Lumber Co. v. Christophel (1894) 59 Mo. App. 80.

⁸ Union Trust Co. v. Casserly (1901) 127 Mich. 183, 86 N. W. 545.

⁹ Waterman v. Younger (1872) 49 Mo. 413. The materialman kept a general account in which the contractor was charged with all the lumber he bought, but, when lumber was delivered, the quantity obtained for the respective houses which the contractor was engaged in building was charged separately on the journal, and was also placed on the wagon ticket. Two payments on account of the lumber furnished for the house in question were made and duly credited, and before the filing of the lien the contractor paid the materialman a sufficient amount to pay off the entire demand, without any direction as to its application, nor did it appear from what source this money was derived.

¹⁰ Dey v. Anderson (1877) 39 N. J. L. 199. The contractor had given a note to the materialman, covering a running account for materials furnished in several houses, and subsequently renewed the note by dividing the amount and giving two notes therefor, one of which fell due before the time for filing a lien on one of the properties had expired; the other note had not L.R.A.1916D.

an owner is by the contractor paid to the subcontractor or materialman, the cases are divided as to the right of the subcontractor or materialman to apply the payment as desired, in the absence of application by the contractor. The general rule applicable to payments by a debtor to his creditor is applied by some courts, and it is held that the materialman has a right to make the application.¹¹ In accord with this rule a materialman to whom a subcontractor pays money received by him from the principal contractor of a building under construction, the subcontractor directing no application thereof, may apply it to other accounts of the subcontractor.¹²

This rule is especially applicable where the owner has made the payment to the contractor without any direction

yet fallen due. Upon an attempt by the materialman, upon the falling due of the earlier note, to obtain a lien on the property in question, it was held that the outstanding note should be applied to the running accounts, in the absence of any application by the creditor or debtor, to the extinguishment of the earlier items, and as all the items furnished for the house in question were among the earlier items, the right to a lien was lost. The note, although not treated as a payment, was treated as merging in the account.

¹¹ Mack v. Colleran (1892) 136 N. Y. 617, 32 N. E. 604; W. H. Pipkorn Co. v. Evangelical Lutheran St. Jacobi Soc. (1911) 144 Wis. 501, 129 N. W. 516.

The opinion of the lower court, which is reversed in Mack v. Colleran (N. Y.) supra, made a point of the fact that in New York the theory prevails that the money due or to become due from the owner constitutes a fund to which the liens of subcontractors attached when filed in conformity with the statute, and of the further fact that the liability of the owner to the contractor and subcontractor is limited by statute to the amount of the contract. The court of appeals does not notice this contention further than to say that the contractor earned enough money to satisfy all the liens.

Payments made by a shipbuilder to a mechanic from money paid him on a contract for building a certain vessel, of which fact the mechanic was informed, were held applicable by the mechanic as he saw fit, in the absence of any direction by the shipbuilder at the time of payment. Sheppard v. Steele (1870) 43 N. Y. 60, 3 Am. Rep. 660. It is stated that when the shipbuilder received the money on the contract for this vessel, it became his money; but when he paid part of it to a mechanic, and gave no directions for its application on any particular part of the account against him, the creditor might make the application.

¹² Campbell Glass & Paint Co. v. Davis-

as to its application,¹³ or if it is not shown that the money paid by the owner to the contractor is by him paid to the materialman. In order to deprive the creditor of his right to apply a payment, where the debtor does not direct the application, it must appear that the money of the innocent third party can be traced through the debtor to the creditor, and the creditor must know that he is receiving the third person's money, or there must be facts sufficient to put him on notice.¹⁴

It has been held that the materialman may credit upon other accounts of a subcontractor a note given by the owner of the building on which the lien is sought, to the contractor, and by him turned over to the subcontractor, who turns it over to the materialman.¹⁵

After the payment has been applied by the subcontractor or materialman, the application cannot be changed by

direction of the contractor, especially if the direction does not come until after the subcontractor or materialman is claiming a lien.¹⁶

2. Rule that payment must be applied to account of owner making payment.

According to the other line of authorities, the rule that a creditor has the right, in the absence of direction by his debtor, to apply a payment on account, is a rule between creditor and debtor, and does not apply where the money is received by the debtor from a third party whose property will be liable for the debt in case the money is not applied on the third party's liability.¹⁷ It is stated in one case¹⁸ that a materialman who is furnishing at the same time material to a contractor for the improvement of property belonging to different persons is bound to keep separate ac-

Page Planing Mill Co. (1908) 130 Mo. App. 474, 110 S. W. 24; St. Louis Sash & Door Works v. Tonkins (1915) 188 Mo. App. 1, 173 S. W. 47 (direction was to apply it to general account; it was thus applied to items other than those going into the building in question).

¹³ First Presby. Church v. Santy (1893) 52 Kan. 462, 34 Pac. 974.

In Chicago Lumber Co. v. Douglas (1913) 89 Kan. 308, 44 L.R.A.(N.S.) 843, 131 Pac. 563, a surety on the contractor's bond was held not entitled to a credit of money received from the owner by the contractor, and by the contractor paid to a materialman without any direction as to its application, and thereupon applied by the materialman to an old account of the contractor. It did not appear that the materialman had any notice as to the source of the money. It is stated that the laborers and the materialman were not under any obligation to watch dealings between the owner of the building and the contractor.

¹⁴ Thacker v. Bullock Lumber Co. (1910) 140 Ky. 463, 131 S. W. 271, the materialman is not affected by the fact that the contractor kept separate accounts for the different jobs, dividing his payments, setting down a certain part as paid on this job or that, where it had no knowledge of such custom of the contractor, and was not shown his account book. The owner in this case paid by check to the contractor, the contractor cashed the checks, and made his own payments to the materialman.

In Flexner University School v. Strassel Gans Paint Co. (1908) — Ky. —, 112 S. W. 686, the application by a materialman to an old account of a subcontractor of money paid him by the subcontractor was sustained where it was not shown that there was any direction as to the payment, nor that the money of the owner was actually paid to the materialman. L.R.A.1916D.

That knowledge of the materialman of the source of the money does not require its application to the account for materials furnished for the building of the person making the payment, where the contractor directs otherwise, see Jefferson v. Church of St. Matthew, supra, note 2.

¹⁵ Grace Harbor Lumber Co. v. Ortman (1916) — Mich. —, 157 N. W. 96. See Hughes & Co. v. Flint (1911) 61 Wash. 460, 112 Pac. 633, infra, note 24.

¹⁶ St. Louis Sash & Door Works v. Tonkins (1915) 188 Mo. App. 1, 173 S. W. 47.

¹⁷ Williams v. Willingham-Tift Lumber Co. (1909) 5 Ga. App. 533, 63 S. E. 584; James B. Clow & Sons v. Goldstein (1909) 147 Ill. App. 571; SIOUX CITY FOUNDRY & MFG. CO. v. MEESTEN, ante, 1247; Crane Bros. Mfg. Co. v. Keck (1892) 35 Neb. 683, 53 N. W. 606; Lee v. Storz Brewing Co. (1905) 75 Neb. 212, 106 N. W. 220 (money was paid by owner direct to materialman by consent and direction of contractor).

In James B. Clow & Sons v. Goldstein (1909) 147 Ill. App. 571, a check given the contractor by the owner was cashed and the proceeds taken with additional money and paid to the materialman.

See Goss v. Strelitz (1880) 54 Cal. 640 supra, note 4.

¹⁸ Williams v. Willingham-Tift Lumber Co. (1909) 5 Ga. App. 533, 63 S. E. 584.

This particular argument is noticed in Campbell Glass & Paint Co. v. Davis-Page Planing Mill Co. (1908) 130 Mo. App. 474, 110 S. W. 24, a case adhering to the opposite theory, and it is stated that where the dealings of a materialman are with a single contractor, who has different contracts going on at the same time, he is not bound to ascertain from what particular contracts the contractor realized the money with which he made payments.

Where a husband who has been furnished money by his wife with which to buy a

counts; and, upon receiving a payment from the contractor, is bound to determine the account upon which the payment is to be applied. If the contractor does not do so, but applies the money as a credit on a general account against the contractor, he thereby waives his lien.¹⁹

In some cases in which this rule is applied the materialman had knowledge of the source of the money;²⁰ but knowledge is not necessary to bind him to apply it to the account of the owner making the payment.²¹

Where the owner, in making the payment to the contractor, has directed the application, and this has been assented to by the contractor, it has been held that the money does not belong to the contractor, but is intrusted to him for a specific purpose; that he is merely a messenger or bailee for the purpose of

paying the money as directed. Consequently, a materialman who obtains the money so paid must apply it to the credit of the owner making the payment.²²

3. Effect of notice to subcontractor or materialman of source.

Where the materialman or subcontractor has notice of the source of the money, he must apply it to the account of the owner making the payment.²³ A check drawn by the owner in favor of the contractor, and having written thereon the words "on contract," which is indorsed by the contractor to the materialman, furnishes notice of the source, so that the materialman cannot apply the proceeds to other jobs, especially where the materialman knew of the particular job on which the payment had been made, and had it entered separately

bill of lumber for the construction of a house goes to a materialman with whom he has a general account, and purchases the lumber, and pays the money which the wife has given him to the materialman, the materialman cannot apply it to the husband's general account, and thereby retain a mechanics' lien against the property of the wife. *Young v. Swan* (1896) 100 Iowa, 323, 69 N. W. 566. It further appeared in this case that the husband directed that credit be given upon the items of account for lumber which went into the house for the wife.

¹⁹ *Williams v. Willingham-Tift Lumber Co.* (Ga.) *supra*.

²⁰ *Lee v. Storz Brewing Co.* (1905) 75 Neb. 212, 106 N. W. 220 (money was paid by owner to materialman by consent and direction of contractor).

²¹ *SIOUX CITY FOUNDRY & MFG. CO. v. MERTEN*, ante, 1247.

²² In *Boyer-Van Kuran Lumber & Coal Co. v. Colonial Apartment House Co.* (1913) 94 Neb. 180, 142 N. W. 519, a materialman to whom the owner directed the payment of \$400, the amount due him for material furnished, had previously been given an undated check for \$670 by the contractor for materials furnished in other buildings, with the understanding that the contractor would notify the materialman when he received the architect's estimate and the money due upon the respective jobs, and would let the materialman know when he might cash this check. Upon receiving the money from the owner in this case, the contractor called the materialman on the telephone and told him he had some money for him. The materialman, without further inquiry, and without notification or permission from the contractor, filed in the date of the check, presented it at the bank for payment, and withdrew the amount thereof from the sum which had been given to the contractor

by the owner to pay the specific amounts and parties named, including \$400 to this particular materialman. Before the check had thus been presented for payment by the materialman, the owner had a conversation with him in which he asked him if he had received the \$400 that was sent to him previously; he replied that he had, but, when asked for a receipt, said that he did not think a receipt was necessary, and told the owner to fix it up with the contractor. Upon this state of facts the owner was held entitled to a credit of \$670; the materialman is stated by this unauthorized act of withdrawal, and by refusing credit to the owner, to have wrongfully converted to his own use the money thus drawn from the bank; that, under well-settled principles of law, he would have been liable to an action for money had and received, and he is equally bound to allow the owner of the fund credit upon its indebtedness to that extent.

²³ A surety on a contractor's bond is entitled to have payment made by the contractor from money received from the building applied to that account; the materialman, who knew the source of the money, cannot apply the same to an old account of the contractor for which the surety is in no wise responsible. *Crane Co. v. Pacific Heat & P. Co.* (1904) 36 Wash. 95, 78 Pac. 460. See *Crane Co. v. United States Fidelity & G. Co.* *supra*, note 6.

A materialman to whom the contractor furnished materials used in the building cannot credit the contractor on an old account for the materials so furnished, and retain a lien upon the building. *Mills v. Olsen* (1911) 43 Mont. 129, 115 Pac. 33.

See *Lee v. Storz Brewing Co.* *supra*, note 20, and *Petersen v. Shain*, *supra*, note 1.

As to the necessity for notice, see *SIOUX CITY FOUNDRY & MFG. CO. v. MERTEN*, ante, 1247.

on his books.²⁴ But where the party receiving payment does not know of the source, he may credit it as he chooses.²⁵ The effect of notice of the source of the money is not considered in other cases.²⁶

4. Payment to a materialman who has not at the time furnished material for building of owner making payment.

A materialman to whom a contractor

has paid money received from the owner of the building under construction without any direction as to its application may apply the money on a general account of the contractor, where, at the time of payment, no labor or materials had been furnished by the materialman for the building of the owner making the payment, and he did not know the source of the money.²⁷

²⁴ Hughes & Co. v. Flint (1911) 61 Wash. 460, 112 Pac. 633. That notice of source is not material where the contractor directs the application, see Jefferson v. Church of St. Matthew, supra, note 2, and Petersen v. Shain, supra, note 1.

²⁵ Thacker v. Bullock Lumber Co. (1910) 140 Ky. 463, 131 S. W. 271.

²⁶ See Grace Harbor Lumber Co. v. Ort-

man (1916) — Mich. —, 157 N. W. 96, supra, note 15.

²⁷ Brigham v. Dewald (1893) 7 Ind. App. 115, 34 N. E. 498.

See Boyer-Van Kuran Lumber & Coal Co. v. Colonial Apartment House Co. (1913) 94 Neb. 180, 142 N. W. 519, supra, note 22. W. A. E.

IOWA SUPREME COURT.

RE ESTATE OF EDWARD A. OLDFIELD,
Deceased.

NANCY BOWIE

v.

WILLIAM TROWBRIDGE, Exr., etc., of
Edward A. Oldfield, Deceased.

(— Iowa, —, 156 N. W. 977.)

Evidence — contract — facts and circumstances.

1. An express contract to pay for services rendered may be proved by facts and circumstances, as well as by direct evidence.

For other cases, see Evidence, XII. i, in Dig. 1-52 N. S.

Limitation of actions — services under continuous contract.

2. The statute of limitations does not begin to run against a claim for services rendered under contract so long as they are continuous.

For other cases, see Limitation of Actions, II. b, in Dig. 1-52 N. S.

Breach of promise — affliction with fatal disease — effect.

3. A man who, after entering into a contract to marry, is afflicted with pernicious anemia, which is incurable and will be fatal within a short time, may repudiate the contract without subjecting his estate to liability for damages, if consummation of the marriage would tend to hasten the disease and shorten his life.

For other cases, see Breach of Promise, II. in Dig. 1-52 N. S.

(Evans, Ch. J., and Salinger, J., dissent in part.)

(March 23, 1916.)

Note. — For ill health as defense to action for breach of promise to marry, see annotation following this case, post, 1276. L.R.A.1916D.

CROSS APPEALS from a judgment of the District Court for Carroll County in plaintiff's favor in part, in an action brought to recover damages for an alleged breach of promise of marriage, and to recover for personal services rendered by plaintiff to decedent in his lifetime; defendant appealing from the judgment in plaintiff's favor, and plaintiff appealing from so much of the judgment as denied a recovery for the breach of promise of marriage. Affirmed on both appeals.

The facts are stated in the opinion.

Mr. Charles C. Helmer for defendant.

Mr. Brown McCrary, for plaintiff:

After a case has been tried to a jury upon certain issues and appealed after a reversal, neither party has, as a matter of right, to so amend their pleadings as to raise new issues.

Re Cook, 143 Iowa, 734, 122 N. W. 578; Zalesky v. Home Ins. Co. 114 Iowa, 516, 87 N. W. 428.

Sickness or incurable disease incurred after a promise to marry is not ground for releasing a man from his agreement to marry.

Addison, Contr. 1913 ed. p. 1180; Hall v. Wright, El. Bl. & El. 746, 29 L. J. Q. B. N. S. 43, 6 Jur. N. S. 193, 1 L. T. N. S. 230, 8 Week. Rep. 160; Smith v. Compton, 67 N. J. L. 548, 58 L.R.A. 480, 52 Atl. 586; Lemke v. Franzensburg, 159 Iowa, 466, 141 N. W. 332; Broom, Legal Maxims, 7th ed. 251.

Gaynor, J., delivered the opinion of the court:

The controversy in this suit is based on two claims filed against the estate of Edward A. Oldfield, deceased. The plaintiff states her causes of action in two counts.

In the first count of her petition she seeks to recover damages for a breach of promise of marriage. In the second count she seeks to recover for personal services rendered by her to decedent during his lifetime. It appears that Edward A. Oldfield died on December 2, 1910, testate; that his will was duly admitted to probate, and Wm. Trowbridge, defendant herein, appointed executor of the will. On the 11th day of January, 1911, the appellee, plaintiff, filed a claim against the state, wherein she asks \$10,000 on account of a breach of promise of marriage which she alleges was made between her and the decedent. In the second count, she claims \$3,975 for services rendered by her for decedent from September 14, 1893, to September 2, 1910. To the first count of plaintiff's petition, based on an alleged promise of marriage, the defendant interposed the following defenses: First, that any agreement of marriage entered into was, by mutual consent of the parties, postponed and deferred from time to time up to the death of Edward A. Oldfield; that consummation of the agreement was prevented by said death; second, that, at the time the alleged breach of promise occurred, if any, the said Edward A. Oldfield was suffering from an incurable disease, known as pernicious anemia, which made it impractical and impossible for him to consummate a marriage with the plaintiff; that any marriage at that time would have aggravated said disease and shortened his life; that the incurable character and disastrous consequences of the disease were unknown to Oldfield at the time of the alleged promise; third, defendant pleads the physical condition of Oldfield in mitigation of damages. To the second count of plaintiff's petition, based on the claim for services rendered, the defendant pleads: First, that all of said claims and demands which accrued prior to five years before the filing of the claim are barred by the statute of limitations. Second, that during the time claimed for services rendered, the plaintiff was a member of decedent's family, receiving support therein as a member of the family; that during all the time that plaintiff and her five children resided with Oldfield, she and they were furnished with food, clothing, and other necessities of life in decedent's family; that Oldfield received no pay therefor except from the services rendered by the plaintiff and her children; that the necessities furnished were at least of the value of the services performed, and that she was fully compensated therefor by such support and maintenance; that, at the time plaintiff resided in the family of Edward A. Oldfield, the defendant avers the said Oldfield believed that the services ren-

dered by the plaintiff during such time were gratuitous, and were rendered by the plaintiff, and received by Oldfield, without the expectation on the part of either that payment should be made therefor. In addition to the foregoing defenses, the defendant pleads a general denial as to all matters alleged by the plaintiff in her respective claims. Upon the issues thus tendered, the cause was tried to a jury, and a general verdict returned for the plaintiff for \$3,164. The jury found, however, specially that the plaintiff was not entitled to recover on the first count of her petition for the breach of promise of marriage. A judgment having been entered upon the verdict, both parties appeal. The defendant, having appealed first, is designated as appellant, and the plaintiff as appellee, when referred to hereafter in this opinion.

As defendant first appealed, we will give our attention first to a consideration of the claim based upon the second count of the petition upon which the jury allowed plaintiff to recover. In this count of her petition she seeks to recover for services rendered, and alleges that in the year 1893, Edward Oldfield lived on a farm in Sac county; that at his instance and request, and by express agreement, this plaintiff came to his place to work; that in 1894, she brought her family with her, consisting of five children; that she continued to work for him from September, 1893, to September, 1910, except when temporarily away on a visit; that the reasonable value of her services, during all the time was \$5 a week; that her work consisted of household duties, work and labor in the house, and manual labor upon the farm. The plaintiff further alleges that payments were made to her from time to time during said period.

The first alleged error, relied upon by the defendant for reversal, is based on the action of the court in giving instruction 25 to the jury, on its own motion. The theory upon which the error is predicated is that the plaintiff's petition seeks to recover for services rendered under an express contract, while this instruction, it is claimed, authorizes her to recover on an implied contract. A mere statement of what the instructions contain is sufficient to negative appellant's contention. The court recognized the fact that the plaintiff predicates her right to recover upon an express agreement, and denied her right to recover except upon proof of such express agreement. The court said: "The plaintiff alleges that she went to work for decedent under an express agreement that she should do so. Direct evidence of such agreement is, however, not

necessary if, from all the facts and circumstances appearing in evidence in the case, you can find by a preponderance of the evidence that there must have been such an agreement."

The court in the instruction complained of simply told the jury that the agreement, alleged, could be proved by facts and circumstances, as well as by direct evidence. Many facts about which there is controversy are so proved. The mouths of both parties to this controversy were closed; one by death, and one by operation of law. That there was, or was not, such an agreement as she alleged was a substantive fact to be proved, as the court says, by direct evidence, or by facts and circumstances appearing in evidence, not necessarily by direct evidence. If the facts and circumstances proved established in the minds of the jury a belief in the existence of the controverted fact, then the fact itself was proved, even though there were no direct evidence of its existence.

That a party cannot recover upon an implied contract where he pleads and relies upon an express contract is elementary. No rule is more familiar to the profession than the one which requires a case to be tried upon issues made in the pleadings. No ultimate fact, not pleaded, can be considered in determining such liability. This rule was recognized on the former appeal of this case (158 Iowa, 98, 138 N. W. 847), in which it was said: "Direct evidence of such an agreement for employment is not necessary, however. If from all of the facts and circumstances appearing in the case it can fairly be said that there must have been such an agreement, it is sufficient."

In the 28th instruction given to the jury the court expressly said: "In this case, plaintiff cannot recover anything for her services . . . unless she has established . . . that such services were rendered by her under and by virtue of an express agreement with Oldfield for the performance of the same."

It is next contended that the court erred in giving the 28th instruction, for the reason, as it is said in argument, that the instruction assumes that there is evidence of an express agreement, and that such agreement did not contemplate payment for such services by furnishing plaintiff with a home, food, clothing, etc., for herself and family. This instruction must be read in connection with instructions 26 and 27, immediately preceding, in order that its full import and purpose may be understood. The contention of the defendant was that the plaintiff was a member of decedent's family: that the labor performed was per-

formed by her as a member of the family; that there was no reasonable expectation on her part of receiving pay, and that there was no expectation on his part of compensating her for the services; that in no event could she recover for services rendered, in the absence of an express contract such as alleged by her in her petition. The 26th and 27th instructions given are as follows:

"Where one person performs services for another, and the other furnishes a home, food, and clothing for the first, a presumption arises that neither expects to pay or receive compensation. If, therefore, you find by a preponderance of the evidence that plaintiff did perform services for Oldfield, and Oldfield furnished a home, food, and clothing to the plaintiff, and if you further find that the plaintiff has not shown by a preponderance of the evidence that Oldfield agreed or expected to pay her for services, then the plaintiff is not entitled to receive anything therefor, and your verdict should be for the defendant on this branch of the case.

"If you should find plaintiff to have been living with decedent as a member of his family and receiving support therein, a presumption would arise that such services as rendered by her were gratuitous, and the plaintiff must overcome this presumption in order to entitle her to recover for such services by showing by a preponderance of the evidence that such services were rendered under an express agreement for the rendering of the same as heretofore explained to you in these instructions."

Immediately following which is this portion of the 28th instruction, of which complaint is made, reading as follows: "If she has thus established that such services were rendered by her under and by virtue of an express agreement with Oldfield for such services, and by which she was to be paid therefor, then in such event she would be entitled to recover herein for such services, even though they may have been rendered at a time when she was furnished a home, food, and clothing by decedent, and was living with decedent in his home, and with his family."

The contention of appellant is that the court ignores the claim made by the defendant that the home, food, and clothing furnished plaintiff fully compensated her for all the services rendered, and that the agreement contemplated that one should be in satisfaction of the other. We do not construe the instruction as so holding. In the 21st instruction given by the court, the jury were expressly told that one of the defenses is that plaintiff has been fully paid for such services by reason of payments made

to her by decedent, and by reason of food, clothing, and necessities furnished her and the members of her family, and said to the jury that they should determine from the evidence whether this contention was true or not, and should consider all the evidence, the circumstances under which the services were rendered, and the supplies furnished, and the extent of the same, and what services, if any, were rendered by the children in determining this question.

It is next contended that this record discloses such a state of facts that all of plaintiff's claim, prior to five years immediately preceding the filing of the claim, was barred by the statute of limitations. This question was before the court on the former appeal, and the evidence on this point was substantially the same as in this record. This court said: "The evidence as a whole tended to show that the service was continuous for the entire time up to at least within a year or two of the commencement of this action, with the exception of one or two brief periods when plaintiff was absent on visits, and, such being the case, the statute did not begin to run" (citing *Kilbourn v. Anderson*, 77 Iowa, 501, 42 N. W. 431; *Asher v. Pegg*, 146 Iowa, 541, 30 L.R.A. (N.S.) 890, 123 N. W. 739).

We think this disposes of this same contention made upon this appeal. See *Hensley v. Davidson Bros. Co.* 135 Iowa, 106, 112 N. W. 227, 14 Ann. Cas. 62.

It is next contended that the verdict is excessive. In this contention we cannot concur. We may further say that a review of the evidence in this case satisfies us that the verdict on this branch of the case is sustained by it.

We find no reversible error upon defendant's appeal.

Division II.

This brings us to a consideration of plaintiff's appeal, and calls for a review of the record made upon the claim of plaintiff for breach of promise of marriage. Assuming, for the purposes of this opinion, that the record disclosed a promise of marriage entered into between plaintiff and deceased substantially as claimed by the plaintiff; assuming that this promise continued to be recognized by both parties as binding upon each; assuming that in September, 1910, the deceased refused to fulfil his promise and marry the plaintiff; assuming that at the time of the alleged breach of promise, Oldfield was suffering from pernicious anemia, and that the same was an incurable disease, and that marriage would aggravate the disease, and would have tended to shorten the life of the deceased, and that this was not known to Oldfield at the time L.R.A.1916D.

of the making of the promise, and that the condition arose subsequently to the making of the promise, and that this disease caused his death on December 2, 1910,—the question presented is whether or not such a finding would excuse the conduct of the deceased in refusing to consummate his promise by marriage, and defeat plaintiff's right to recover damages based on such refusal.

The testimony of Dr. Patty is that he was first consulted by Oldfield in February, 1910; that Oldfield then said he had no appetite, was tired all the time and unable to work; that he was easily fatigued, short of breath, and unable to sleep well; that he made an examination of him; that he had hemic murmurs of the heart; that his condition was due to a loss of blood elements; that his condition was serious; that he had pernicious anemia; that when he first consulted him, he was pale, and his eyelids showed little color; that he informed Oldfield that his condition was serious; that he saw him on August 3d of that year; that he had then become weaker and unable to do anything; that he informed Oldfield that his condition was fatal; that he died of pernicious anemia; that, at the time he first consulted him, he was unable physically to fulfil a contract of marriage.

Dr. Kessler testified that the disease of pernicious anemia may last two or three months, possibly more than a year, but usually a year is the limit; that if it appeared in the early part of 1910 that Oldfield had no appetite, was tired all the time and unable to work, was easily fatigued, unable to sleep well, and that an examination disclosed hemic murmurs of the heart, and his eyes were pale, and he died September 2, 1910, he would say that he died of pernicious anemia; that if a man was suffering from pernicious anemia, it would have a bad effect on his health to marry and have intercourse; that it would aggravate the disease and shorten his life; that in treating pernicious anemia, the patient is advised to refrain from labor, dissipation, or excitement; in other words, take everything as easily as possible and be quiet; that such things would aggravate the disease and shorten his life; that any excitement or exertion would tend to aggravate the disease and shorten the life of the patient; that the disease is debilitating in its character, and tends to weakening the vital forces, and, in some cases, impair the mind, and said: "I would advise a patient suffering from pernicious anemia to avoid excitement and exertion and keep quiet."

The plaintiff, Nancy Bowie, testified, that she was away from September, 1909, until

April, 1910; that the deceased told her in February, 1910, that he had been to see a doctor, and the doctor told him he could not live. "It was after that time that he told me he would not marry me."

Dollie Sawyer, daughter of the deceased, testified: "I came back home in April, 1910, because my father wanted me to come back. He said his health was getting very bad. He wanted me to come back and stay with him. I stayed with him until he died. His health was bad during all the summer of 1910, and kept gradually growing worse. I heard him say before Mrs. Bowie that the doctor told him he could not live."

Under the heading, "Propositions of Law Requiring a Reversal," the plaintiff, the cross appellant, urges but two propositions:

First: "After a case has been tried to a jury upon certain issues and appealed after reversal, neither party has, as a matter of right, to so amend the pleadings as to raise new issues."

As a matter of right, perhaps no. As a matter of discretion in the court, yes. The amendment complained of was filed with the consent of the court, and for reasons then urged before the court. It was a discretionary matter with the court to allow it or not in this particular case. The second proposition was stated in these words: "Sickness or incurable disease, incurred after a promise of marriage, is not ground for releasing him from his agreement to marry."

Upon this second proposition, the authorities are not agreed. Some courts hold that every contract to marry has coupled with it an implied condition that the parties will not endanger life or health in the consummation of the marriage; that where illness or disease exists in either party to the contract, such as would render marriage dangerous to the life or health of either, a breach of the contract, based on such unavoidable and unanticipated condition, is excusable. In *Sanders v. Coleman*, 97 Va. 690, 34 S. E. 621, 47 L.R.A. 581, the supreme court of Virginia said: "It can no longer be doubted that, if the performance of a contract is rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance, and such a stipulation will be understood to be an inherent part of every contract. This principle, it would seem, should apply with peculiar force to a marriage contract, the performance of which, owing to causes subsequently intervening, and altogether independent of any default of the party, might result in consequences disastrous to the life or health of the parties, or either of them. We hold, therefore, that a contract to marry is coupled with the implied condi-

tion that both of the parties shall remain in the enjoyment of life and health, and, if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable" (citing *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Shackleford v. Hamilton*, 93 Ky. 80, 15 L.R.A. 531, 40 Am. St. Rep. 166, 19 S. W. 5).

The opinion further proceeds: "In the case at bar the evidence as to which, in our opinion, there is no real conflict, shows that there was a predisposition in the defendant's family to physical trouble of the kind that had developed with him; that his father had died with a similar disease, and a brother with urinary trouble; that after his engagement with the plaintiff, and before the time fixed for the marriage, the defendant had, without fault on his part, developed, and was suffering with, a grave malady, involving the urinary organs, which had continued and kept him constantly under the advice and treatment of a physician up to the time of the trial; that he had cystitis, with probable inflammation of the urethra, complicated with enlargement of the prostate gland, and that an indulgence . . . would aggravate the disease, and likely shorten his life; and that it would be, not only a wrong and injustice to the defendant, but also to the plaintiff, for him to marry in his condition of health. Marriage is assumed in law to be made for mutual comfort. The condition of the defendant precludes any hope of mutual comfort from cohabitation. On the contrary, an indulgence . . . would aggravate his disease, and enhance the chances of a fatal result. . . . Our conclusion upon the law and the evidence is that the defendant acted throughout with good faith, and that the unhappy circumstances in which he found himself justified the alleged breach of his contract to marry the plaintiff."

As supporting this rule, we have *Grover v. Zook*, 44 Wash. 489, 7 L.R.A. (N.S.) 582, 120 Am. St. Rep. 1012, 87 Pac. 638, 12 Ann. Cas. 192, in which the rule laid down in the *Sanders Case*, supra, was quoted with approval. In this *Zook Case* the defendant was afflicted with pulmonary tuberculosis (commonly called consumption), in an incurable form. The woman sought to recover damages for the breach of the contract. This was interposed as defense. The sufficiency of the defense was questioned on many grounds, but was sustained on the ground that the consummation of the marriage would endanger not only his life, but the life of the woman, and would affect the offspring, if any, resulting from the marriage. It appeared

in this case that several members of defendant's family had died of pulmonary consumption. As recognizing the doctrine expressed in these two cases, though not directly in point, see *Beans v. Denny*, 141 Iowa, 52, 117 N. W. 1001; *Vierling v. Binder*, 113 Iowa, 337, 85 N. W. 621; *Trammell v. Vaughan*, 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. Rep. 302, 59 S. W. 79; *Shackleford v. Hamilton*, 93 Ky. 80, 15 L.R.A. 531, 40 Am. St. Rep. 166, 19 S. W. 5. In this last case the defense interposed was that, long prior to any contract of marriage with the plaintiff, defendant had contracted a loathsome disease called syphilis, and was treated for by skilled physicians until he was pronounced cured; that physicians advised him he was cured, and was in a fit state to marry and could safely do so; that after this time, and with the belief in good faith that the malady no longer existed, he made the contract with the plaintiff; that, after the engagement to marry, and without any fault on his part, the symptoms of the disease reappeared, and he was advised by physicians that he should not marry; that prior to the bringing of this action, he made known the fact to the plaintiff. The lower court sustained appellee's demurrer to this contention as a defense, but allowed the pleas to go to the jury in mitigation of damages. The supreme court said: "The court below, entertaining the opinion that, as the defendant had entered into this marriage contract, he is bound for its breach, although it might have been the duty of the appellant, under the circumstances, to decline to execute it, sustained the demurrer; . . . that the contract was unconditional, and the defendant being able, at the time the promise was made, to perform the contract, he must either execute it, or become responsible in damages for the breach. If such a contract as that of marriage is to be treated in the light of a mere bargain and exchange of chattels between parties competent to contract, then it seems to us there would be but little difficulty in sustaining the action of the court below; but if the agreement, when entered into, is to be treated as creating a status that forms the basis of our entire social system, and in which society has more interest in preserving its purity than the parties to the agreement, it must follow that the defense interposed to the appellee's claim for damages was, in law as well as morals, sufficient to prevent the recovery. When the marriage contract is consummated, the parties taking each other for better, for worse, for richer, for poorer, and agree to cherish each other in sickness and in health, the fact that the social stand-

ing of the one party or the other, or their pecuniary condition, was not as represented, will afford no ground for relief; still, when there is a mere agreement to marry, there may be such a condition of the one party or the other, as to health or other bodily infirmity, arising subsequent to the agreement, as would authorize either party to decline to enter into the marriage relation; and to hold otherwise would be to place such a contract upon the same footing with cases of mere personal chattels. It is said by Mr. Bishop in his work on *Marriage and Divorce* that 'one, after marriage, cannot complain of an impediment known to him before; but, if he were ignorant of the existence of the defect, or of its incurable nature, though in himself, he may take advantage of it by suit of nullity. The marriage was a mistake; the ends intended by it cannot be answered' ([citing] 2 Bishop, *Marr. & Div.* 5th ed. 581). The text-books establish the doctrine that 'without sexual intercourse the ends of marriage—the procreation of children and the pleasures and enjoyments of matrimony—cannot be attained.' 'The first cause and reason of matrimony,' says Ayliffe, 'ought to be the design of having offspring; so the second ought to be the avoiding of fornication. And the law recognizes these two as its principal ends; namely, a lawful indulgence of the passions, to prevent licentiousness; and the procreation of children, according to the evident design of Divine Providence,' [citing] 1 Bishop, *Marr. & Div.* 5th ed. 322.

"It is not pretended, nor has it been so adjudged, in any court, that a mere temporary disease, or such a change in the physical condition of a party to a marriage contract, after it has been entered into, and without his fault, as would render him less capable of discharging duties growing out of the marital relation, would be sufficient to justify its breach; but when the party is afflicted with bodily disease to such an extent as is dangerous to the lives of those with whom he comes in contact, and such as must, if he should marry, necessarily be communicated to his wife, . . . and, through her, to affect her offspring with the poison, connected with the fact that he was ignorant of the disease being upon him at the time he contracts to marry, he will be excused for the nonperformance of his undertaking. While the contract to marry is silent as to any condition, it must be implied that any subsequent change in the physical or mental condition of either party without fault, so as to render it impossible, in the nature of things, to accomplish the object for which the marriage relation is brought about, will release the

parties from the agreement. Impotency, insanity, or such a diseased condition of the body as would affect the offspring and endanger the life of the mother if the contract were carried out, would certainly be within this rule. Any other doctrine would require the same construction to be given the agreement to marry that is given to contracts for the sale and delivery of personal property. Where the party can recover damages for the breach, although it is impossible to perform it; in other words, it is urged that the woman must have either the husband or damages in his stead, if he is able to have the marriage ceremony performed. This is also the objection to the majority opinions rendered in the court of Queen's bench in the case of *Hall v. Wright*, El. Bl. & El. 746. We concur with the minority opinion in that case that the contract of marriage is subject to implied conditions peculiar to itself. In that case the defense was that, after the promise, and before the breach, the defendant was afflicted with bleeding from the lungs, and by reason of the disease became incapable of marriage without great danger to his life, and therefore unfit for the marriage state, of which the plaintiff had notice. After reviewing the authorities upon the question, Erle, J., said: 'The principle deduced from the cases seems to be that a contract to marry is assumed in law to be made for the purpose of mutual comfort, and is avoided if by the act of God or the opposite party the circumstances are so changed as to make intense misery, instead of mutual comfort, the probable result of performing the contract.' The majority opinion was rendered on the idea that the disease was not such a state of health as to make it impossible for the defendant to marry, and therefore not impossible of performance; and, if a case like the one being considered had been presented, we doubt if any difference of opinion would have been expressed. Pollock and other text writers on contracts, in alluding to this opinion, say that it is so much against the tendency of the later cases that it is now of little or no authority beyond the point decided; but, if that opinion had been unanimous, although entitled to great weight, we would not be inclined to follow its reasoning, or concur in the conclusion reached."

Judge Pollock in his work on *Contracts*, 3d ed. p. 546, said: "In the early and very peculiar case of *Hall v. Wright*, the question after some critical discussion of the pleadings, which it is needless to follow, came to this: Is it a term in the ordinary agreement to marry that if a man from bodily disease cannot marry without danger to his life, and is unfit for marriage

from the cause mentioned at the time appointed, he shall be excused from marrying then? or, in other words, is the continuance of health (that is, of such a state of health as makes it not improper to marry) an implied condition of the contract? The court of exchequer chamber decided by four to three that it is not; the court of the Queen's bench having been equally divided. The majority of the judges relied upon two reasons,—that if a man could not marry without danger to his life, that did not show the performance of the contract to be impossible, but, at most, highly imprudent, and that, at any rate, the contract could be so far performed as to give the woman the status and social position of a wife. It is not disputed that the contract was voidable at her option. 'The man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position, so far as in his power, though he may be unable to fulfil all the obligations of the marriage, and it rests with the woman to say whether she will enforce or renounce the contract.' As to the first of these reasons, the question is not whether there is or not an absolute impossibility, but what is the true meaning of the contract; and in this case the contract is of such a kind that one might expect the conditions implied in strictly personal contracts to be extended rather than excluded. As to the second reason, it cannot be maintained except against the common understanding of mankind and the general treatment of marriage by English law, that the acquisition of legal or social position by marriage is a principal or independent object of the contract. Unless it can be so considered, the reason cannot stand with the principle affirmed in *Geipel v. Smith*, L. R. 7 Q. B. 404, 41 L. J. Q. B. N. S. 153, 26 L. T. N. S. 361, 20 Week. Rep. 332, 1 Asp. Mar. L. Cas. 268, that when the main part of a contract has become impossible of performance by an accepted cause, it must be treated as having become impossible altogether. The decision itself can be reviewed only by a court of ultimate appeal, but it is so much against the tendency of the later cases that it is now of little or no authority beyond the point actually decided, which, for obvious reasons indicated in some of the judgments, is not likely to recur."

In the footnote on page 547, Pollock on *Contracts*, 3d ed. it is said: "In an action by a woman for a breach of promise to marry, it is a defense either that the woman has physical defects, making marriage improper, if the existence were unknown to the defendant at the time the engagement was made, or that the defendant himself has

such defects"—citing *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242; *Gring v. Lerch*, 112 Pa. 244, 56 Am. Rep. 314, 3 Atl. 841; *Vierling v. Binder*, 113 Iowa, 337, 85 N. W. 621; *Shackelford v. Hamilton*, 93 Ky. 80, 15 L.R.A. 531, 40 Am. St. Rep. 166, 19 S. W. 5; *Gardner v. Arnett*, 21 Ky. L. Rep. 1, 50 S. W. 840; *Trammell v. Vaughan*, 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. Rep. 302, 59 S. W. 79; *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444; *Sanders v. Coleman*, 97 Va. 690, 47 L.R.A. 581, 34 S. E. 621.

In *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444, the defendant failed to fulfil a contract of marriage upon the ground that he was afflicted with a venereal disease which rendered him unfit for the marriage state. The court, in disposing of the case, said: "However once doubted, it is now generally conceded, that if the performance of a contract be rendered impossible by the act of God alone, such fact will furnish a valid excuse for its nonperformance; and such a stipulation will be understood to be an inherent part of every contract. It is likewise true that whenever the main part of an executory contract becomes impossible of performance from any cause beyond the power of the party to control, it will be treated as having become impossible in toto. Why should not the same principle apply to a contract, the fulfilment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and such as may entail misery upon others to come after them."

In discussing the case, reference was made to *Hall v. Wright*, hereinafter more fully referred to. The court said: "In making that decision, the court treated a contract for marriage as they would any other contract, saying that, though in bad health, the man might nevertheless so far perform his contract as to marry the woman, and thus secure to her the status and social position of his wife, and endow her with a wife's interest in his estate; and, if unwilling to do this, he should compensate her in damages for his refusal. We confess that we are not satisfied with this course of reasoning. In the first place, it is not possible to assimilate a contract like this to an ordinary contract for personal service, which, if not capable of being wholly performed, may be partially so; and, in the next place, we believe it to be contrary to the understanding of men generally that the acquisition of property or social position either does or should constitute a main and independent motive and inducement for entering into such a contract. The usual, and we may say legitimate, ob-

jects sought to be attained by such agreements to marry are the comfort of association, the consortium vitæ, . . . the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And if either party should thereafter become, by the act of God and without fault on his own part, unfit for such a relation and incapable of performing the duties incident thereto, then, the law will excuse a non-compliance with the promise. The main part of the contract having become impossible, . . . the whole will be considered to be so."

In *Pollock on Contracts*, 370 (a book in which the principles of contracts are treated more philosophically than by any author known to us), the decision of *Hall v. Wright*, supra, is referred to with the remark that it is so much against the tendency of later cases to be now of little or no authority. This case then proceeds to discuss the effect of consummating such a marriage upon the woman and her offspring, because that was the strongest argument to be urged against the consummation of the marriage, we think; however, not the only argument. In *Boast v. Firth*, L. R. 4, C. P. 1, a master sued the father of his apprentice on his covenants in an apprentice deed, in which it was provided that the apprentice should serve him (the plaintiff) during all the term. The defense was that the apprentice was prevented from so doing by permanent illness arising after the making of the indenture. The court held that it must be held to have been in the contemplation of the parties, when they entered into this covenant, that the prevention of the performance by the act of God should be an excuse for non-performance, and the defense was held good. The court, however, was cited to the case of *Hall v. Wright* as supporting the contention that there should be liability, notwithstanding the illness of the apprentice. The court said: "It seems to me, however, that that case is clearly distinguishable. In the case of a contract to marry, the man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position so far as in his power, though he may be unable to fulfil all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract."

Robinson v. Davison, L. R. 6 Exch. 269, 40 L. J. Exch. N. S. 172, 24 L. T. N. S. 755, 19 Week. Rep. 1036, involved a contract to perform services which no deputy could perform (the defendant was an eminent pianoforte player), and which, in case

of death, could not be performed by the executors of the deceased. It was held that by virtue of the terms of the contract, incapacity, either of body or mind in the performer, without default on his or her part, is an excuse for nonperformance, and it seems to be the general holding that where one is engaged to perform services which he alone can perform, if, by the act of God, he becomes disabled for performance, he is excusable without damages. See *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; *Fenton v. Clark*, 11 Vt. 557; *Green v. Gilbert*, 21 Wis. 395, 2 Mor. Min. Rep. 694.

This brings us to the only two cases to which our attention has been called holding that sickness does not excuse a refusal to perform a marriage contract. The first is *Hall v. Wright*, decided in 1858. This case was first heard in the court of Queen's bench. In that court the judges were four to three against defendant's contention. The court of exchequer chamber on appeal (El. Bl. & El. 765) held against such defense by a vote of three, each judge filing an opinion, in support of his contention; thus holding that it was necessary to show, in order to escape damages, that the performance of the contract was impossible, and that, at any rate, the contract should be so performed as to give the woman the status and social position of the wife, no matter what the condition of the defendant is at that time, providing he is capable of sitting up long enough to have the marriage ceremony performed. Judge Willes, speaking as a member of the court, said: "The contract in this case is stated by the plaintiff . . . and admitted by the defendant, . . . to have been in terms an unconditional one. . . . Its performance is not impossible, and it is not enough to show, in answer to an action upon a contract, that its performance is inconvenient or may be dangerous. The delicacy of health alleged as an excuse is the man's misfortune, not to be visited, beyond what is inevitable, upon the woman. If either party is to have the option of breaking off the match, it ought to be the woman. . . . If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. I do not sympathize with such a woman, . . . but this is not a question of sentiment. If it were, I might put the case of a real attachment where such an illness as that stated in the plea supervening might make the woman even more anxious to marry, in order to be the companion and the nurse, if she could not be the mistress, of her sweetheart."

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Judge Crowder said:

"It is quite impossible to construe the plea as alleging any physical impossibility to go through the ceremony of marriage, or any physical incapacity to perform the duties of marriage. Whether, if such allegations had existed, they would have afforded any answer to the action I do not think it necessary in this case to decide. . . . But I am of opinion that it is no excuse for the breach of a promise to marry that the performance of the conjugal duties would be attended with danger to the defendant's life."

Erle, Judge, speaking for himself, said: "The plea alleges that before any breach of the promise, the defendant was afflicted with dangerous bodily disease which had occasioned frequent and severe bleedings from the lungs, and by reason thereof the defendant was incapable of marriage without great danger to his life. . . . The plaintiff contends that a contract to marry is not subject to implied conditions peculiar to itself, . . . and that when the time is come, the woman has a right either to a husband or to damages in lieu thereof, and that the fatal consequence of the marriage to the husband is either immaterial to the wife, or a ground for greater damage; as a widow may get more of her former husband's assets than a wife, but there is no authority to support this view; and there seems to me to be much reason and authority against it. A contract to marry has some peculiar incidents arising from its nature. . . . The principle to be deduced from these cases seems to me to be, that a contract to marry is assumed in law to be made for the purpose of mutual comfort, and is avoided if, by the act of God or the opposite party, the circumstances are so changed as to make intense misery, instead of mutual comfort, the probable result of performing the contract. . . . The near approach of death by a fatal disease precludes any hope of personal comfort from cohabitation; and, if death is knowingly hastened thereby, each party, by performing the contract, might incur the criminal guilt of intentionally causing death."

Judge Pollock said: "Some learned judges think it [a contract to marry] is of the same character as any other contract, and that no terms or conditions can be implied by the law, and that, if it be not performed in the terms expressed, the party failing to perform it must pay damages for the breach of it. Other learned judges think that there are implied conditions or exceptions, and that the matter stated in the plea is one of them, and therefore that the defendant cannot be called upon to pay damages for the nonperformance of the con-

tract . . . under the circumstances which appear on the whole record. Now it must be conceded . . . that there are contracts to which the law implies exceptions and conditions which are not expressed. All contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them."

Judge Pollock further said: "I prefer putting [my judgment] on the ground that there is an implied exception [in a contract of marriage], including the state of facts alleged in the plea. . . . The question then is: Is the continuance of health, of such a state of health, as makes it not improper to marry, another condition? I am of opinion that it is. There are conditions to be implied . . . on both sides in such an agreement. . . . By the act of God, the contract has become void. . . . It has been suggested that in such a case the woman may be contented with the society of the man, and that the choice ought to rest with her; and that if she be willing to marry, he must marry or pay damages. . . . I think if the man can say with truth, 'by the visitation of Providence, I am not capable of marriage,' he cannot be called upon to marry: and I think this is an implied condition in all agreements to marry. I think that a view of the law, which puts a contract of marriage on the same footing as a bargain for a horse, or a bale of goods, is not in accordance with the general feelings of mankind, and is supported by no authority."

Our attention is called to what is said in Addison on Contracts, the great English authority (10th ed. chap. 7, bk. 2, page 1180) as follows: "If, subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the performance of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance, but the latter may break off the engagement; for, if a man, by disease, accident, or mutilation become impotent, he could never maintain an action against a woman for refusing to marry him."

The only authority cited in support of the text is *Hall v. Wright*, supra, and the statement is practically taken from that case, and adds nothing to the holding of the English court.

Our attention has been called to *Smith v. Compton*, 67 N. J. L. 548, court of errors and appeals, New Jersey, decided June 16, 1902, and reported in 58 L.R.A. 480, 52 Atl. 386. That court said: "The case L.R.A.1916D.

of *Sanders v. Coleman*, 97 Va. 690, 47 L.R.A. 581, 34 S. E. 621, is more liberal to the defendant, and lays down the rule that where the defendant, after the promise, contracts or develops a disease, without fault on his part, which renders it unsafe and dangerous to his health or life to perform his contract, it will constitute a defense to an action against him. On the contrary, *Hall v. Wright*, El. Bl. & El. 746, maintains that such physical defects cannot be set up in bar to the action. In the case under consideration the declaration alleges that the promise made was to marry on the 15th day of June, 1900, and both the plaintiff and defendant admit that such was the promise. . . . The promise being admitted, and the refusal to perform at the stipulated time being also admitted, the plaintiff clearly established her right of action. In the case of *Hall v. Wright*, the promise counted upon being to marry within a reasonable time, it might with some plausibility be argued that the defendant's physical condition might be considered in determining whether a reasonable time had elapsed, and, if it had not, there would be no breach proved, and the right of action would not exist."

The court proceeded: "This is not a duty or a charge created by law, which the party is disabled to perform without any fault on his own part, but a contract entered into by himself, in which he might have provided against the contingency which he alleges has occurred. The contract is an unconditional one, into which the defendant cannot read a condition which will defeat it. I agree with the declaration of the majority of the judges in *Hall v. Wright*, that it is not enough to show in answer to an action upon the contract, after breach, that its performance is inconvenient or may be dangerous. Impossibility to perform will alone constitute an absolute bar. Ill health is the defendant's misfortune, not to be visited, beyond what is inevitable, upon the plaintiff. If the plaintiff was willing, in view of his social position, or that which she might acquire by reason of his wealth, to marry him, and await his restoration to health, she had the right to insist upon the benefit of the unconditional contract. If he was apprehensive of danger to his health or life, he could break the engagement, but was subject to such damages as a jury would award against him for the breach. That would, in effect, be a substituted performance in discharge of the obligation. . . . This is in consonance with the well-established rule which governs contracts, and, unless it is adhered to, the loss falls upon the party to whom no fault can be im-

puted. . . . There was no error in the charge of the . . . court."

The instruction which the supreme court approved, so far as this case is concerned, is substantially as follows: "Nothing will excuse the defendant for the breach of his promise, except such a disease, or complication of diseases, as renders the making of the marriage contract and the consummation of the marriage by marital intercourse impossible."

There are all the authorities pro and con to which our attention has been called, or which we are able to discover upon our individual research.

In the case at bar, the doctors testified that the defendant was affected with pernicious anemia; that one survives this disease usually but two or three months, possibly not more than a year; that, usually, a year is the limit; that defendant had become afflicted with the disease in February, 1910; at least that was the first time it was discovered that he was so afflicted. If the doctors' testimony is to be relied upon (and there is no evidence to the contrary), it appears that he then had but ten months to live. There is no evidence that he broke his promise of marriage. The plaintiff testifies that he told her in 1910, and after her return in April, 1910, from a visit, that he had been to see a doctor, and the doctor told him he could not live; that it was after that that he told her that he could not marry. There is no evidence that the promise was made after he discovered his condition. There was no evidence that he sought to avoid the contract until after it was found that he was stricken with a fatal malady, and that he could live, by reason of his disease, but a few months at most. There was no definite time fixed for the performance of the marriage, so far as this record discloses. If the malady had proved fatal before he had informed the plaintiff that he was unable to marry her because of his diseased condition, clearly plaintiff would have no cause of action under any of the authorities. Death would have dissolved the contract. There is, in every contract of marriage, the implied condition that the parties to the contract will be alive at the time appointed for its consummation.

The consideration for every agreement to marry is found in the consummation of that agreement by marriage. Each has bargained to give and receive, on that day, all that is implied in the marriage relationship,—all that grows out of the marriage relationship. If, by the act of God, before the time fixed for the consummation of the marriage, either party is rendered incapable of giving that which the contract calls for, L.R.A.1916D.

the other party may repudiate the agreement to marry because of the failure, through the act of God, of the very consideration upon which the promise rests. It may be that the very condition that renders him incapable of giving, renders him wholly incapable of receiving, any of the consideration which, under the consummated contract, he is entitled to. The giving and receiving are mutual obligations. One is a condition for the other. If the woman may repudiate the contract because the man has become, by the act of God, in such a condition physically as to render him incapable of giving to her all that, under the consummated contract, she is entitled to, then the man may, the contract being mutual, refuse to perform when, by the act of God, he has become wholly incapable of receiving any of the consideration which the consummated contract entitles him to. One cannot give to another that which the other is wholly incapable of receiving. We would hold, rather, that the consideration for the original agreement to marry has been destroyed by the act of God, and that what is claimed to be a repudiation of the contract is simply a communication to the opposite party of the happening of an implied condition in the original contract which rendered the contract incapable of performance.

Take an extreme case: Two people have entered into a contract to marry on a certain day. All the arrangements are made for marriage on that day. On the day before that fixed for the consummation, the man is afflicted with a mortal wound, or is overcome by a fatal malady. It becomes apparent from the conditions that he can live but a few hours or days. The woman appears at his bedside on the day fixed for the marriage and demands its consummation. Under the rule in *Hall v. Wright*, he must perform if able to sit up and go through the ceremony and consummate the marriage; and this, that she may receive some of the benefits of the contract, although he is totally incapable of receiving anything in return. If he failed to respond to her request, his estate is mulcted in damages, though he died within two hours after the demand. Reversing the tables, we take the case of a man in the full vigor and strength of his manhood, promising to marry a wealthy widow, vigorous and strong at the time of the promise, who, on the day fixed for the marriage, is stricken with a fatal malady from which there is no hope of recovery. There is left her but a few days or weeks in which to live. On the day fixed, he appears and demands the consummation of the marriage. She tells him she is unable to marry because of her fatal malady. However, she is able, at the par-

ticular time, to go through the form and ceremony of marriage, though in it is involved great peril to her life. She refuses to consummate, and her estate becomes liable to him in damages. If consummated, he is placed in a position to receive a large portion of her estate. She receives nothing, in the consummation of the marriage, but the hollow mockery of an empty ceremony. If the rule in the Wright Case is adopted out of a chivalrous regard for the woman, it is thus seen it may fail in its application. This, we think, is the logical effect of the full application of the doctrine in *Hall v. Wright*, as followed by the New Jersey court of appeals. We are not inclined to follow these authorities.

We take from these authorities, based as we think on sound reasoning:

First. That one may repudiate an agreement to marry when, subsequent to the making of the contract, he becomes afflicted with a loathsome disease which, upon the consummation of the marriage, may be communicated to the spouse and to the offspring born of said marriage.

Second. When, after the making of the contract to marry, he becomes afflicted with a fatal and incurable malady, and the consummation of the marriage would hasten his death, he is not bound to perform by consummating the marriage, and therefore is not liable in damages for such failure. Or, in other words, that there is implied in every contract to marry that the parties will not endanger life or health in the consummation of the marriage, and that where illness or disease comes upon one after making the contract to marry, such as would render marriage dangerous to his life, a breach of the contract, based on such unavoidable and such unanticipated condition, is excusable. We do not mean by this that the danger should be simply problematical, or a possible contingency,—one that may or may not be a resultant consequence of the act of consummating the marriage,—but one in which the evidence renders reasonably certain the inevitable consequence of such an act. Where the malady is of such a fatal character that he cannot enter into the marriage relation and receive any of the benefits which grow out of, and are involved in, the relationship established by the consummation of the marriage, he is excused.

Third. That where one is stricken, before the time arrives for the consummation of the marriage, with a fatal malady, and has but a few days or weeks or months to live, and the evidence makes this reasonably certain, he is excused from the consummation of the marriage, and, being excused, L.R.A.1916D.

his estate, upon his death, is not liable in damages for such failure.

These are implied conditions in the agreement to marry, and the agreement to marry is voided by their happening; and, the agreement being void, no liability for damages results from the failure to perform. The first proposition rests upon public policy, as well as upon the conditions herein suggested. In the instant case, the evidence discloses without question that, before any time was fixed for the final consummation of the agreement to marry, the defendant was afflicted with a fatal malady,—a knowledge of which came to him before any suggestion was made by him, to the plaintiff, of any disposition on his part to withdraw from the performance of the contract and consummating it by marriage; that the malady was of a progressive character, and that he died soon after his conversation with the plaintiff in which she claims he breached his promise to consummate the marriage. Under the facts in this case, we are satisfied that the plaintiff has not shown a right to recover for the alleged breach of promise of marriage, and, on this issue, the case must also be affirmed.

Affirmed on both appeals.

Preston, Deemer, Weaver, and Ladd, JJ., concur.

Salinger, J., dissenting:

While being afflicted with a loathsome venereal disease is suffered to be a complete defense to breach of promise, it has been understood always that this rests on a narrow exception ingrafted upon the law of contracts; understood that such exception is not worked by tenderness to the defendant, but by reasoning that it will be a less evil to permit him to take advantage of his own wrong than to press him into a marriage which will offend public policy. The majority has extended the exception to what is not within the reason for the extension, to pernicious anemia, which while surely fatal, and usually so within a year, is neither infectious, contagious, nor transmissible. This exception is not enlarged on considerations of public policy, but on the ground that if performance of a contract will be injurious to one party to it, neither performance nor damages may be exacted of him. In my opinion, this violates both reason and authority. "Cessante ratione legis, cessat ipse lex," is disregarded. It, therefore, is not surprising that the opinion of the majority proves to be much more a strenuous effort to find reasons for a desired conclusion than the statement of a conclusion compelled by reasoning. In *Broom, Legal Maxims*, 7th ed. *251, it is

said: "To a declaration for breach of promise of marriage, a plea that after the promise, and before breach, the defendant became afflicted with disease, which rendered him 'incapable of marriage without great danger of his life, and therefore unfit for the marriage state,' was recently held bad in accordance with the general rule that a man who has voluntarily contracted shall either perform his contract or pay damages for breach of it, the plea, moreover, not showing an impossibility of performance."

Addison on Contracts, the great English authority, in the last, the edition of 1903, at page 1180, says: "If subsequently to the making of a contract to marry, one of the parties by bodily disease becomes unfit for the performance of the most important duty of marriage, the party so unfitted is not thereby entitled to treat the contract as dissolved, the other party still desiring its performance. But the latter may break off the engagement; for if a man, by disease or mutilation, becomes impotent, he could never maintain an action against a woman for refusing to marry him."

For this he cites *Hall v. Wright*, El. Bl. & El. 746, decided in exchequer chamber, reversing a contrary decision below. This case fully sustains the text. In it the following plea was held to present no defense: "That defendant after the promise and before the breach, became afflicted with disease occasioning bleeding from the lungs, and by reason of such disease became incapable of marriage without great danger to his life, and therefore unfit for the marriage state."

Willes, J., in speaking of the contract, said: "Its performance is not impossible; and it is not enough to show, in answer to an action upon a contract, that its performance is inconvenient or may be dangerous. The delicacy of health, alleged as an excuse, is the man's misfortune, not to be visited, beyond what is inevitable, upon the woman. If either party is to have the option of breaking off the match, it ought to be the woman. The court have no right to say what is best for her. If the man were rich or distinguished, and the woman mercenary or ambitious, she might still desire to marry him for advancement in life. I do not sympathize with such a woman, if any there be, but this is not a question of sentiment. If it were, I might put the case of a real attachment, where such an illness as that stated in the plea supervening might make a woman even more anxious to marry, in order to be the companion and the nurse, if she could not be the mistress, of her sweetheart."

Crowder, J., said: "But I am of opinion that it is no excuse for the breach of a L.R.A.1916D.

promise to marry that the performance of the conjugal duties would be attended with danger to the defendant's life. Such a state of illness may make it a matter of the greatest prudence on his part to break his contract, and to pay such damages as a jury may award against him for the breach. But, in my opinion, it is no legal answer to the action."

Boast v. Firth, relied on by the majority, so far from sustaining the opinion, is affirmatively against it. It says (L. R. 4 C. P. [1868] at page 8): "In the case of a contract to marry, the man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman, and so give her the benefit of social position so far as is in his power, though he may be unable to fulfil all the obligations of the marriage state; and it rests with the woman to say whether she will enforce or renounce the contract."

Hall's Case was expressly approved in *Smith v. Compton*, 87 N. J. L. 548, 58 L.R.A. 480, 52 Atl. 386. There the contention was that defendant had a complete defense because, without his fault, he, after promise, contracted or developed a urinary disease which kept him under treatment, and which would be aggravated by sexual intercourse, and thus be an imminent hazard to his life. On appeal Justice Van Syckel said: "I agree with the . . . majority of the judges in *Hall v. Wright*, that it is not enough to show, in answer to an action upon the contract, after breach, that its performance is inconvenient or may be dangerous. Impossibility to perform will alone constitute an absolute bar. Ill health is the defendant's misfortune, not to be visited, beyond what is inevitable, upon the plaintiff. If the plaintiff was willing, in view of his social position, or that which she might acquire by reason of his wealth to marry him, and await his restoration to health, she had the right to insist upon the benefit of the unconditional contract. If he was apprehensive of danger to his health or life, he could break the engagement, but was subject to such damages as a jury would award against him for the breach. That would, in effect, be a substituted performance in discharge of the obligation incurred. This is in consonance with the well-established rule which governs contracts, and, unless it is adhered to, the loss falls upon the party to whom no fault can be imputed."

II. The majority attempts to avoid these direct and palpably sound authorities by stating that the tendency of the "later cases" is against *Hall v. Wright*. The "later cases" consist of the one case of *Sanders v. Coleman*, 97 Va. 690, 47 L.R.A. 581,

34 S. E. 621, in which on identical plea of urinary disease, a conclusion opposite to that of *Smith v. Compton*, supra, is reached. It is sufficient comment upon the *Sanders Case* that its only citations are the *Shackleford Case* and the *Allen Case*. As to *Shackleford v. Hamilton*, 93 Ky. 80, 15 L.R.A. 531, 40 Am. St. Rep. 166, 19 S. W. 5, it is the fact, and the opinion itself shows it to be the fact, that it was decided wholly on the ground that the marriage of a syphilitic might have such consequences as that public policy will permit that disease to be urged as a complete bar to a promise to marry. While it in a way approves a statement in a dissent by Erle, J., in *Hall v. Wright*, supra, an examination will show that even this much, which is said merely arguendo, deals with the rights of the party not breaching. While *Allen v. Baker*, 86 N. C. 91, 41 Am. Rep. 444, has an abundance of rhetoric and language which, if broadly accepted, makes any disease a complete defense, it suffices to say that it, too, involves "a loathsome disease incurable in fact, and of such a nature as to render him unfit to enter the marriage relation with any one," and that its ultimate conclusion is: "We cannot understand how one can be liable for not fulfilling the contract when the very performance thereof would, in itself, amount to a great crime, not only against the individual, but against society itself."

2. The "support" of the *Sanders Case*, which the majority marshals, is remarkable. The *Shackleford* and the *Allen Case* have been discussed. *Grover v. Zook*, 44 Wash. 489, 7 L.R.A.(N.S.) 582, 120 Am. St. Rep. 1012, 87 Pac. 638, 12 Ann. Cas. 192, which the majority thinks supports the *Sanders Case*, cites the *Shackleford Case*. The *Zook Case* itself is decided wholly upon the ground that consumption is a complete defense because it is highly infectious and transmissible, and the ruling, once more, is put wholly upon grounds of public policy. The only support it affords to the claim of the majority, that aggravation of a disease which defendant has would justify his breach of promise, is the remark that "in addition to the thought of progeny, there would be also that of the aggravation of the disease as to both himself and prospective wife, the medical expert evidence showing that the intimate association of married life would tend to augment the ravages of the malady upon each."

To make plain that this is merely incidental argument, instead of the decision in the case, it is only necessary to examine its citations, which are *Ryder's Case*, 66 Vt. 158, 44 Am. St. Rep. 833, 28 Atl. 1029; *Atchinson v. Baker*, 2 Peake, N. P. Add. L.R.A.1916D.

Cas. 103, and *Trammell v. Vaughan*, 158 Mo. 214, 51 L.R.A. 854, 81 Am. St. Rep. 302, 59 S. W. 79, which last case the majority relies on affirmatively. It holds that discovery that defendant was affected with contagious venereal disease entitled him to postpone the marriage for a reasonable time whether or not plaintiff, with knowledge of his condition, was willing for the marriage to take place. *Beans v. Denny*, 141 Iowa, 52, 117 N. W. 1091, involves the rights of the party who is not diseased, and the nearest it comes to touching the case at bar is in its statement that one is excusable for declining to carry out the promise of marriage where the other party is afflicted with an incurable venereal disease, unless the promise was made with knowledge that the other party had such disease. The other cases relied on by the majority are the following, and seem to be utterly irrelevant: *Vierling v. Binder*, 113 Iowa, 339, 85 N. W. 621, is that where the defendant pleads he did not engage to marry because of physical condition of the plaintiff at the time when it is claimed he did make such engagement, he cannot show that she had these ailments at the time of the trial of her action for breach. *Gring v. Lerch*, 112 Pa. 244, 56 Am. Rep. 314, 3 Atl. 841, holds it to be a valid defense to the action that the woman was unable to have sexual intercourse, and, although she promised to submit to a surgical operation to cure the difficulty, refuses to do so. All that is decided by *Goddard v. Westcott*, 82 Mich. 180, 46 N. W. 242, is that plaintiff may be asked, on cross-examination, whether she had told certain persons she had a tumor, for the purpose of showing that she was not capable of making or carrying out the contract at the time inquired into, without fraud or injury to the defendant.

3. It seems to have been apprehended that the weight of direct case law is not with the opinion, and a labored attempt is made to fortify it with act of God law, and the general principles that govern mutuality of contract, and failure of consideration. To make use of the act of God cases, the majority is obliged to assume certain facts erroneously, to make unsound deductions from what is assumed, and to misapprehend what "act of God" is in law. To make this plain one need but point out that the opinion inquires whether death before breach would not be a complete defense, and answers that it would. This is true, but true because all the cases hold that that only is an act of God which makes any performance impossible. Death does that. As to the cases upon which the opinion relies (*Robinson v. Davison*, L. R. 6 Exch. 269, 40 L. J. Exch. N. S. 172, 24 L. T. N.

S. 755, 19 Week. Rep. 1036, and the cases therein cited and cited also by the majority, to wit, *Dickey v. Linscott*, 20 Me. 453, 37 Am. Dec. 66; *Fenton v. Clark*, 11 Vt. 557; *Spalding v. Rosa*, 71 N. Y. 40, 27 Am. Rep. 7; and *Green v. Gilbert*, 21 Wis. 395, 2 Mor. Min. Rep. 694, each and all of them in some form or other involve the proposition that if one agree to perform personal labor or services which cannot be done by deputy, and become too ill to perform, he is excused. Certainly. Where one agrees to do labor, and, without fault of his, sickness makes it impossible for him to labor, there is a case which is in principle the equal of death. The law on this head is in no confusion. *Dewey v. Union School Dist.* 43 Mich. 480, 38 Am. Rep. 206, 5 N. W. 646, 647, and *Carthage v. Gray*, 10 Ind. App. 428, 37 N. E. 1059, declare that the performance of a contract will only be excused as being prevented by the act of God when there are intervening circumstances which render performance impossible, and not when they only make it difficult and undesirable; and hence the suspension of a school by reason of an epidemic of a contagious disease does not defeat the right of a teacher to compensation under his contract. In *Ringeman v. State*, 136 Ala. 131, 34 So. 351, sureties on a bail bond pleaded to a judgment nisi that after the execution the principal was so ill of consumption that it became necessary to the preservation or prolongation of his life for him to go to another state, and that at the time a forfeiture was taken a return could not have been made without serious detriment to his health nor without imminent danger of his death. It was held a bad plea because it did not aver impossibility of appearance by the principal resulting from an act of God; and that while his death in such case would have been the act of God in legal contemplation, illness, however severe and critical, is not. In support the case cites *Cain v. State*, 55 Ala. 170; *State v. Crosby*, 114 Ala. 11, 22 So. 110, 2 Am. & Eng. Enc. Law, 717; *Taylor v. Taintor*, 16 Wall. 368, 21 L. ed. 287; *Piercy v. People*, 10 Ill. App. 219; *Devine v. State*, 5 Sneed, 623; and *Scully v. Kirkpatrick*, 79 Pa. 324, 21 Am. Rep. 64.

Not a case may be found in which vis major is applied to anything short of utter inability to perform at all. That it may not be in the very case at bar is squarely held in *Broom's Legal Maxims*, *Addison on Contracts*, *Pollock on Contracts*, and *Boast v. Firth*, relied on by the majority, and in *Hall v. Wright* and *Smith v. Compton*. These demonstrate that act of God has no application where performance is not rendered impossible. To avoid them the ma-

jority is forced to reason thus: (1) Act of God is a complete defense because it makes any performance impossible; (2) a fatal disease is an act of God; (3) defendant had such disease; (4) therefore, it was impossible for him to marry, and he is excused.

It is manifest the opinion was compelled to assume that his disease made performance by defendant impossible. This assumption counters the testimony adduced for defendant, including Dr. Patty, who said: "I do not mean to say he was unable to stand up and go through a ceremony of marriage." It assumes what is contrary to reason and common knowledge, and is against all the authorities that speak to the point, including those upon which the majority relies. See the authorities last referred to. It cannot be conceived how the mere going through the ceremony can have such or much effect on health or life, or, though one be in never so parlous a state of health, why he is incapable of becoming married.

The majority inquires whether in the extreme case of a demand for performance, when the other party is immediately to die and the ceremony involves "in it great peril to life," there should be a recovery. It is an extreme case, and the question might well be answered by asking whether if death be certain, though a year away, performance would be excused; for the two cases involve nothing but a difference in degree. But even as to the extreme case suggested, it can be said that in the first place the going through the ceremony cannot involve great or any other peril to life; that cases do occur in which the man, though mortally wounded and about to expire, has insisted upon giving his name and right of inheritance to the woman whom he had promised to marry, and that the situation presents no more than matter in mitigation. In such circumstances, the recovery would not be large, but that is no good reason for departing from the sound rules of the law of contracts. Better that recovery should be allowable in any case, than to disturb salutary elementary rules which prohibit a breach of contract, based on the desires or convenience of the one repudiating.

4. Realizing, no doubt, the weakness of argument based on the "impossibility" or injuriousness of going through the ceremony, it is insisted that marriage means more than being one party to the marriage service, and that marriage is "impossible" whenever one party is unable to respond to all that marriage means or should mean. This reasoning can be supported only by the application of general rules governing mutuality in contracts, or by assuming that

the rearing of children is of itself the consummation of marriage, and its sole constituent. This last overlooks consortium, the privilege of bearing the name of the man, of being endowed with his social standing, and of the right of inheritance. Followed to the bitter end, any who are above a certain age may freely breach a contract to marry because there could be no offspring from their marriage. As the opinion itself shows, Pollock declares that impossibility of performance as applied to breach of contract to labor by reason of sickness has no place here, because to apply it would be "against the common understanding of mankind, and the general treatment of marriage by English law according to which the acquisition of legal or social position by marriage is a principal or independent object of the contract," and (Contracts 3d ed. p. 546) though defendant may be unable to fulfil all the obligations of the marriage, it rests with the woman to say whether she will enforce or renounce the contract,—all of which amounts to saying that there is no impossibility of performance, as the law understands the term, merely because children are impossible. In *Boast v. Firth*, relied on by the majority, it is said that the contract to marry may be performed despite bad health, because the sick man can "give her the benefit of social position so far as is in his power, though he may be unable to fulfil all the obligations of the marriage state."

In *Grover v. Zook*, also relied on by the majority, "the thought of progeniture" is treated as but one element, and the defendant is excused, not on that account, but because his pulmonary consumption made the marriage one against public policy. It has already been presented, by the illustration of an agreement to marry entered into by very old people, and by deathbed marriages, insisted upon by the one dying, that marriage on part of one who is mortally ill is not impossible, and that marriage involves more than children.

5. The theory of failure of consideration is not persuasive, either. This is the first time it has been invoked for the one who is unable to furnish full consideration. It involves a confusion of the parties. The woman might well refuse to marry because the condition of the man was such as that his marrying her would furnish no consideration for her promise to marry him. Reversing this leads to the remarkable result that one who had agreed to furnish certain things, and is unable to furnish them, or some of them, may plead a failure of consideration, and say that because he can furnish only half of what was agreed upon, that then, though the other party is satis-

fied with half, he need not perform at all, because he cannot furnish all. Such reasoning overlooks that where there may be part performance, and the one able to perform fully is willing to waive full performance by the other, it does not lie in the mouth of the one who is in default to complain. Take the illness cases before adverted to. There would be a wholly different ruling if one agreed to do copying in an office and also to sweep the office, and it transpired he was too ill to do the sweeping, but able to do the copying, and the employer was willing to accept copying as full performance of the contract. The employer might well refuse to perform if the other could not do all that was contracted for. But the opinion turns this round, and excuses one from doing what he can do because it is less than he agreed to do, even though the other party is willing to accept the shortage. *Boast v. Firth*, L. R. 4 C. P. 8, involves inability to perform labor, agreed to be performed, because of permanent sickness, and holds such illness to be an excuse; but it distinguishes *Hall v. Wright*, El. Bl. & El. 746, by pointing out that while the apprentice in the *Boast Case* could not perform, on contract to marry, the man, though he may be in a bad state of health, may perform to some extent, and he may not avail himself of his disability if the woman is willing to accept part performance. One can understand how, on the reasoning of the majority, a young woman who had agreed to marry an octogenarian might decline performance on the ground that there was no consideration for her promise, but it is beyond me to understand how the old man can interpose such plea to excuse performance on his part, when the other party remains willing.

"Where the malady is of such a fatal character that he cannot enter into the marriage relation and receive any of the benefits which grow out of and are involved in the relationship established by the consummation of the marriage, he is excused," says the majority. And if "either party is rendered incapable of giving that which the contract calls for, the other party may repudiate the agreement . . . because of the failure . . . of the consideration upon which the promise rests." And, one may "refuse to perform when by the act of God he has become wholly incapable of receiving any of the consideration."

Is the majority prepared to follow this where it may lead? If one have spectacles fitted and immediately thereafter become blind, is he excused from paying for the work and the glasses because an act of God has made them of no use to him? Will the amputation of both feet after ordering

boots absolve from payment? If one ordered lemons, and by the time they reached him in due course of transportation he found himself suffering from some disease of the throat that would make it agony for him to use the lemon juice as he had intended, it would follow, on the reasoning of the majority, that he could refuse to pay.

6. The majority says: "If the woman may repudiate the contract because the man has become by the act of God in such a condition physically as to render him incapable of giving to her all that under the consummated contract she is entitled to, then the man may, the contract being mutual, refuse to perform when by the act of God he has become wholly incapable of receiving any of the consideration which the consummated contract entitled him to. One cannot give to another that which the other is wholly incapable of receiving."

This overlooks all that has just been said, and holds that because one who has the right to repudiate chooses to waive that right, the other is thereby authorized to repudiate. So far as the doctrine of mutuality of contracts is applicable the cases do apply it. Either may defend on the ground that his or her disease is such as that performance would violate public policy. To go beyond this is to apply one of the exceptional rules in specific performance to the case of this contract. There is a rule in specific performance that one who was himself unable to perform when the contract was made cannot have this particular remedy, even though he becomes able to perform before he brings action. *Luse v. Deitz*, 46 Iowa, 205; *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 422. Self-evidently, this rule can have no application in any case where the court is without power to compel specific performance. A marriage is

manifestly one of the things that may not be compelled by court order. Consequently that one is not bound to marry a plaintiff who is sick does not make a law rule that where plaintiff is willing to marry a defendant, though sick, such defendant may breach his contract because he is sick. If one can conceive the inconceivable case of a promise to marry being brought into chancery on application for specific performance, then, the granting of the relief being discretionary, it might well be that in a case where performance would entail physical danger to the party in default, the chancellor would use his discretion and relegate the one not in default to some remedy other than specific performance. But here the essential position of the defendant is that, because it will work an injury to him and him alone, because if he kept his promise the consortium he could give would be of less value than if he were well, therefore the party not in fault is entitled to no relief.

I would reverse on the appeal of defendant.

Evans, Ch. J.:

I am not averse in spirit to the condition imposed by the majority upon the marriage promise. Its reasonableness is that it softens harshness in the enforcement of a contract which from its very nature ought to be characterized by tenderness. However, to subject such contracts to such a condition as a continuing and necessary qualification thereof is to declare a measure of disability. This is a purely legislative prerogative, and not a judicial one.

In the absence, therefore, of qualifying legislation, I feel constrained to join the dissent, as declaring for the recognition of the contract as actually made by the parties.

Annotation—Ill health as defense to action for breach of promise to marry.

Earlier cases covering the question under annotation will be found in notes to *Grover v. Zook*, 7 L.R.A.(N.S.) 582, and *Travis v. Schnebly*, 40 L.R.A.(N.S.) 585.

The cases which have considered the question under annotation from the point of view of the right of a defendant in a breach of promise action to set up his own ill health as defense have, as will be seen from the cases collected in the earlier notes, and as pointed out in the dissenting opinion in *RE OLDFIELD*, ante, 1260, been, with few exceptions, cases where defendant had an infectious or contagious disease, and the ground of the decision as well as the contention of L.R.A.1916D.

The defense has been that it would be contrary to public policy to hold that one should marry where there is danger of communicating disease to the other party or transmitting it to offspring. Of the cases decided in the earlier notes, but three have set up as justification for the breach that defendant's own life and health would be endangered by a consummation of the marriage relation. Two of these are opposed to *RE OLDFIELD*, and the third, which sustains it, relies on cases as in *RE OLDFIELD*, where the disease was infectious or contagious.

Since the earlier notes it has been held that ill health of plaintiff, known to the defendant at the time a promise of mar-

riage was made, is no defense to a breach of promise suit. *Lemke v. Franzenburg* (1913) 159 Iowa, 466, 141 N. W. 332.

Nor is it a defense to an action for breach of promise of marriage, that the defendant honestly and on reasonable ground believed that plaintiff was unfit for marriage, where she was not in fact unfit for marriage. *Jefferson v. Paskell* [1916] 1 K. B. (Eng.) 57, 85 L. J. K. B. N. S. 398, 113 L. T. N. S. 1189, 32 Times L. R. 69. *Phillimore, L. J.*, said that "a contract of marriage is in this respect like any other contract. A justification for the refusal to carry it out must be found in the actual facts, and not on belief or opinion, however reasonable or honest as to what the facts are. If instead of want of health, the question had been one of want of chastity, it will be very apparent that the objective truth, and not the subjective belief, would have to be looked for."

Where a defendant in a breach of promise suit admits that he had agreed to marry plaintiff if she regained her health, and there is evidence that she went to a physician suggested by defendant, and, after being treated, reported that she had practically regained her health, there is no error in permitting such physician to testify as to what he

told plaintiff regarding her recovery, nor in permitting him to testify directly that plaintiff had recovered her health, and that such slight trouble as she had would be cured by marriage. *Lemke v. Franzenburg* (Iowa) supra.

In *Parsons v. Trowbridge* (1915) 140 C. C. A. 310, 226 Fed. 15, action for breach of promise of marriage by another woman against the same defendant as in *RE OLDFIELD*, the plaintiff assigned as error the refusal to give a requested instruction and of the giving instead thereof, of the following. That "if it be a fact that Mr. Oldfield had a disease known as pernicious anemia as illustrated by the testimony in this case, it would not be a sufficient excuse on his part for not carrying out the contract and having the ceremony performed. But if he had pernicious anemia, and believed that it would be fatal after a year or so from such time, you would have a right to consider that upon the question of amount of damages." The court held that this instruction was almost identical with the one requested by plaintiff, and was as favorable to her as she was entitled to. There is nothing in this decision which can be said to be in conflict with the decision in *RE OLDFIELD*.

J. H. B.

MICHIGAN SUPREME COURT.

MICHAEL LA VECK

v.

PARKE, DAVIS, & COMPANY, Plff. in Certiorari.

(— Mich. —, 157 N. W. 72.)

Master and servant — workmen's compensation — paralysis as accident.

Paralysis due to cerebral hemorrhage in one suffering from arterial sclerosis, because of prolonged exertion in a hot room in the course of his employment, is within the operation of a workmen's compensation act

Note. — As to recovery of compensation under workmen's compensation acts for incapacity resulting from disease, see annotation following *Adams v. Acme White Lead & Color Works*, L.R.A.1916A, 289; and see also later cases, *Industrial Commission v. Brown*, L.R.A.1916B, 1277, and *Carroll v. What Cheer Stables Co.* L.R.A.1916D, 154.

Generally as to workmen's compensation acts, see annotation in L.R.A.1916A, 23, and other annotation in that volume referred to in the Index to Notes under the title, "Workmen's Compensation." L.R.A.1916D.

providing compensation for accidental injuries.

For other cases, see *Master and Servant*, II. a, in *Dig. 1-52 N. S.*

(March 30, 1916.)

CERTIORARI to the Industrial Accident Board to review its finding awarding compensation to claimant for personal injuries sustained by him while in defendant's employ. Affirmed.

The facts are stated in the opinion.

Mr. Charles M. Woodruff, for plaintiff in certiorari:

Neither the testimony nor the finding of the Industrial Accident Board discloses any accident within the contemplation of the workmen's compensation act to which claimant's injury was due.

Adams v. Acme White Lead & Color Works, 182 Mich. 157, L.R.A. 1916A, 283, 148 N. W. 485, 6 N. C. C. A. 482; 1 Cyc. 228; *Sinclair v. Maritime Pass. Assur. Co.* 3 El. & El. 478, 30 L. J. Q. B. N. S. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342; *Schneider v. Provident L. Ins. Co.* 24 Wis. 28, 1 Am. Rep. 157, 7 Am.

Neg. Cas. 174; *Feder v. Iowa State Traveling Men's Asso.* 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252; *McCarthy v. Travelers' Ins. Co.* 8 Biss. 362, Fed. Cas. No. 8,682; *Henssey v. White* [1900] 1 Q. B. 481, 69 L. J. Q. B. N. S. 188, 48 Week. Rep. 257, 63 J. P. 804, 81 L. T. N. S. 787, 16 Times L. R. 64; *Broderick v. London County Council* [1908] 2 K. B. 807, 77 L. J. K. B. N. S. 1127, 99 L. T. N. S. 569, 24 Times L. R. 822, 15 Ann. Cas. 885; *Eke v. Hart-Dyke* [1910] 2 K. B. 677, 80 L. J. K. B. N. S. 90, 103 L. T. N. S. 174, 26 Times L. R. 613, 3 B. W. C. C. 482, 3 N. C. C. A. 230; *Black v. New Zealand Shipping Co.* 6 B. W. C. C. 720.

Mr. H. R. Martin, for defendant in certiorari:

The findings of fact made by the Board are conclusive.

Bayne v. Riverside Storage & Cartage Co. 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837; *Redfield v. Michigan Workmen's Compensation Mut. Ins. Co.* 183 Mich. 633, 150 N. W. 362, 8 N. C. C. A. 889.

An injury such as the claimant received is an accident within the compensation act.

Adams v. Acme White Lead & Color Works, 182 Mich. 157, L.R.A. 1916A, 283, 148 N. W. 485, 6 N. C. C. A. 482; *Bayne v. Riverside Storage & Cartage Co.* 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837; *M'Innes v. Dunsmuir & Jackson*, 45 Scot. L. R. 804, 1 B. W. C. C. 226; *Ismay, I. & Co. v. Williamson*, 42 Ir. Law Times, 213, 1 B. W. C. C. 232; *Hughes v. Clover C. & Co.* [1909] W. N. 187, 75 L. J. K. B. N. S. 1057, 25 Times L. R. 760, 127 L. T. Jo. 322, 2 B. W. C. C. 18; *Fenton v. J. Thorley & Co.* [1903] A. C. 443, 72 L. J. K. B. N. S. 787, 52 Week. Rep. 81, 89 L. T. N. S. 314, 19 Times L. R. 684, 5 W. C. C. 1; *Morgan v. The S. S. Zenaida*, 25 Times L. R. 446, 2 B. W. C. C. 19; *Johnson v. The S. S. Torrington*, 3 B. W. C. C. 68; *Davies v. Gillespie*, 105 L. T. N. S. 494, 28 Times L. R. 6, 56 Sol. Jo. 11, 5 B. W. C. C. 64; *Doughton v. Hickman*, 6 B. W. C. C. 77; *Broforst v. The S. S. Blomfield*, 6 B. W. C. C. 613; *Maskery v. Lancashire Shipping Co.* [1914] W. C. & Ins. Rep. 290, 6 N. C. C. A. 708; *Tank v. Milwaukee*, decided 1914 by Wisconsin Industrial Acci. Commission; *Ross v. Tube Co. (Ohio, 1914)*; *Kringle v. Meyers (Ill. 1914)*; *Voorhees v. Smith Schoonmaker Co.* 86 N. J. L. 500, 92 Atl. 280, 7 N. C. C. A. 646; *Brightman's Case*, 220 Mass. 17, L.R.A. 1916A, 321, 107 N. E. 527, 8 N. C. C. A. 102.

Moore, J., delivered the opinion of the court:

This is certiorari by the respondent to the Industrial Accident Board to review a find-
L.R.A.1916D.

ing of the Board awarding compensation to the claimant. The brief of appellant begins as follows:

"Appellant does not question the Industrial Accident Board's finding of facts, and only refers to the testimony of record to amplify the same."

It will be helpful to quote from the opinion of the Industrial Accident Board:

"In this case the committee of arbitration denied applicant's claim for compensation, and applicant thereupon appealed the case to the full Board for review. Since the arbitration a considerable amount of additional testimony was taken, particularly medical testimony tending to show that the probable cause of the paralysis from which the applicant suffers was a cerebral hemorrhage caused by heat and overexertion, together with a diseased condition of his arteries, known as arterial sclerosis of some two years' standing.

"The evidence fairly tends to show that the paralysis resulted from the rupture of a small blood vessel in the brain. We say 'small' because the paralysis was gradual, being first noticed by the dropping of a flask from the hand, later on by inability to use his arm, and still later by the paralysis of one side of the body. The work which applicant was doing was making bouillon from beef by boiling and certain other processes in a room and with retorts and appliances maintained for that purpose by respondent. The weather was hot, and an extra amount of bouillon was made that week, so as to have enough to meet the demands of the plant while the apparatus was being transferred to a new room which was to be equipped for such work. A high degree of heat was required in the process, and, although the retorts were so constructed as to protect the operator as far as possible from the heat and steam, a considerable quantity of both escaped into the workroom at the times of making the various changes connected with the process. No visible accident occurred, and no event causing external violence to applicant's body. It was apparently conceded on the hearing that the cause of the paralysis was in the brain, the applicant contending that it was the rupture of the cerebral blood vessel, while the respondent contended that the paralysis resulted from the clogging of such vessel. The testimony on behalf of the applicant tended to show that on account of the condition of his arteries a cerebral hemorrhage was likely to result from the increased pressure caused by unusual heat and overexertion, and that in the opinion of his experts such hemorrhage did occur, resulting finally in the total paralysis of one side of the body. Was it

an accident within the meaning of the law, and did it arise out of and in the course of applicant's employment?

"Under the doctrine laid down in the 'Spanner Case,' so-called, and also in other and later English cases, this would be an accident. In *Fenton v. J. Thorley & Co.* 5 W. C. C. 4, the question of what constitutes an accident is exhaustively discussed, Lord Macnaghten's opinion being in subsequent cases regarded as authority, and this being regarded as a leading case. Lord Macnaghten's opinion is an able discussion of the principle involved and a review of the authorities. In the opinion of Lord Robertson on page 9, it is said: 'In the present instance a man by an act of overexertion broke the wall of his abdomen. Suppose the wheel had yielded and been broken by exactly the same act; surely the breakage would be rightly described as accidental.'

"In *M'Innes v. Dunsmuir & Jackson*, 1 B. W. C. C. 226, it is held that, where overexertion brings on a cerebral hemorrhage and paralysis, it is an accident entitling the workman to compensation. The court say on page 229: 'It is the giving way of an artery causing effusion of blood on the brain, and I am unable to see any distinction between this kind of physiological injury resulting in disablement, and the kind of injury we had to consider in the case of *Stewart*.'

"On page 231 the court quote from the *Thorley Case* as follows: 'If a workman has suffered an injury by breaking a limb or by a rupture while he is trying to lift a weight too heavy for him, then, according to the ordinary use of language, one would say that the injury was caused by an accident which he met with while he was engaged in his work. I think the same rule of construction applies to the question before us, and that we should say that this man suffered from the bursting of a blood vessel while trying to lift a weight too heavy for him. That it might not have been too heavy for a man whose arteries were in a sound condition is nothing to the purpose. In the condition in which this man's arteries were, he was undertaking a work which was too great for him.'

"In *Ismay I. & Co. v. Williamson*, 43 Ir. Law Times, 213, 1 B. W. C. C. 232, it is held that where a seaman died from a heat stroke while raking the fire, that it was an accident entitling him to compensation. This is a House of Lords case, and follows the rule laid down in the *Thorley Case*."

"In *Johnson v. The S. S. Torrington*, 3 B. W. C. C. 70, it was held that, where a fireman working in the hold of a vessel under great heat and drinking large quantities of

water had an apoplectic stroke, it was an accident within the meaning of the compensation law. The court treats the principle as established, and holds that the determination of the case was a question of fact."

"In *Hughes v. Clover, C. & Co.* 2 B. W. C. C. 17 (the *Spanner Case*), the court say: 'Every man brings some disability with him. Any exertion of any external action which might have been innocuous to a man in good health may produce most serious results to the workman bringing with him,' as I have said, some disability. This man brought with him a disability of a serious nature—an aneurism—which I quite agree might have caused his death at some time or other without any exertion, usual or unusual. But in this case we have this fact found that a strain incurred by the workman in the ordinary discharge of his duties caused the rupture from which he died. As I read the decisions in the House of Lords, it is not open to this court to say that this is not an accident. It is impossible, I think, to read the judgment of Lord Macnaghten in *Fenton v. J. Thorley & Co.* without seeing that this case is exactly and precisely within the language which he used. But if there were any doubt about that, the more recent decision of the House of Lords in *Ismay I. & S. Co. v. Williamson*, is really a much stronger case than this.' In that case Lord Loreburn said: 'To my mind the weakness of the deceased which predisposed him to this form of attack is immaterial. The fact that a man who had died from heat stroke was by a physical debility more likely than others so to suffer can have nothing to do with the question whether what befell him is to be regarded as an accident or not. If a workman in the reasonable performance of his duties sustains a physiological injury as a result of the work he is engaged in, this is an accidental injury in the words of the statute.'

"In the case of *Broforst v. The S. S. Blomfield*, 6 B. W. C. C. 613, where a workman shoveling coal in the fire of a vessel had an apoplectic stroke which was found by the trial court to be due to the rupture of an artery in the brain which was attributed to heat and exertion, it was held that he was entitled to compensation, and that the question was one of fact which the appellate court could not review."

"From a careful examination of all the facts and evidence in the case, the board is of the opinion that the strain upon the weakened arteries of the applicant caused by overexertion and excessive heat was more than they could stand, and resulted in the rupture of a blood vessel in the brain, which was followed by a gradual effusion of blood, resulting in the gradual

paralysis, and finally disabling one side of the body. The award of the committee will be reversed, and applicant granted compensation."

We cannot state the claim of appellant better than to quote from the reply brief as follows:

"As pointed out in his brief, respondent does not question the Industrial Accident Board's finding of facts, but does affirm that the essential facts are not clearly stated, and that it is necessary to refer to the testimony to understand what the Board means by certain words, phrases, and references. Before doing this, however, counsel for respondent wishes his position as to the law distinctly understood, so that his comments upon the finding of the Board may be read in the light thereof.

"Counsel for respondent claims that the principles, the arguments, the reasoning upon which the decision in *Adams v. Acme White Lead & Color Works*, 182 Mich. 157, L.R.A. 1916A, 283, 148 N. W. 485, 6 N. C. C. A. 482, was based, control the present case as effectually as it did the case there decided, notwithstanding claimant in the case at bar cannot be said to have suffered an 'occupational' disease. . . .

"That the word 'accident' is not subject to a special construction, but must be understood in the light of common-law definitions and common-law decisions. . . .

"Third. The accident contemplated by the Michigan act must be some 'casualty' occurring on some day which can be definitely fixed, and from which the time within which notice of the injury must be given, and demand for compensation must be made, can be determined. This proposition is clearly indicated in the *Adams Case*."

"Fourth. It is therefore submitted that, unless it appears that some accident within the meaning of the common law occurred that was the exciting cause of the gradually developing cerebral hemorrhage referred to in the case, the claimant and appellee is not entitled to compensation under the Michigan compensation act."

Counsel cites other authorities in support of his contention, among them *Feder*

v. Traveling Men's Asso. 107 Iowa, 538, 43 L.R.A. 693, 70 Am. St. Rep. 212, 78 N. W. 252. Counsel also contends that the authorities counsel for appellee cites from New Jersey and Massachusetts are not applicable, because the statutes of those states are different from the Michigan statute. It must be conceded there is some confusion in the authorities.

We cannot agree with counsel that the case of *Adams v. White Lead & Color Works*, supra, is conclusive of the instant case. In that case the sole question was: Is an occupational disease within the statute? It was held that it was not. The case is more like the case of *Bayne v. Storage & Cartage Co.* 181 Mich. 378, 148 N. W. 412, 5 N. C. C. A. 837. In that case Mr. Bayne undoubtedly intended to do the lifting which he did, but he did not expect the effect would be to hurt his back, with resulting pneumonia. In the instant case Mr. La Veck intended to do the prolonged work which the situation demanded, but he did not anticipate that because of doing so his blood pressure would be so increased as to result in the rupture of a cerebral blood vessel. According to the testimony of some of the physicians that result could be traced to the unusual hours of work and the unusual conditions. It was an unexpected consequence from the continued work in the excessively warm room.

Where there is testimony upon which the Accident Board can base its conclusion, we will not review its action. *Bayne v. Storage & Cartage Co.* supra; *Redfield v. Michigan Workmen's Compensation Mut. Ins. Co.* 183 Mich. 633, 150 N. W. 362, 8 N. C. C. A. 889. Other cases than those mentioned in the opinion of the Industrial Accident Board which support its conclusions are *Voorhees v. Smith Schoonmaker Co.* 86 N. J. L. 500, 92 Atl. 280, 7 N. C. C. A. 646; *Doughton v. Heckman*, 6 B. W. C. C. 77; *Maskery v. Lancashire Shipping Co.* [1914] W. C. & Ins. Rep. 290, 6 N. C. C. A. 708. See also the cases cited in note c, p. 714, of 6 N. C. C. A.

The order is affirmed.

NEW MEXICO SUPREME COURT.

FIRST NATIONAL BANK OF ALBUQUERQUE, Appt.,
v.

RODERICK STOVER.

(— N. M. —, 155 Pac. 905.)

Bills and notes — provision for extension.

1. A promissory note containing the provision that "all parties hereto, . . . L.R.A.1916D.

agree that this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us, and after such extension the liability of all parties shall remain as if no such extension had been made," grants no power to the maker or other parties to the note to extend the time of payment without the consent of the payee or holder.

For other cases, see *Bills and Notes*, VI. b, in *Dig. 1-52 N. S.*

Headnotes by PARKER, J.

Same — negotiability.

2. A provision in a note in the foregoing form does not render the note non-negotiable under the law merchant or the provisions of the negotiable instrument law (Laws 1907, chap. 83).

For other cases, see Bills and Notes, I. d, in Dig. 1-52 N. S.

On Rehearing.

Same — good-faith purchaser — suspicious circumstances.

3. The general principle, running throughout the whole law, that notice of facts which should put one upon inquiry and which, if followed up with diligence and understanding, would lead to the truth, had no application to the question of good faith in the taking of negotiable instruments. The question in such cases is, Did the holder have actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith? Suspicious circumstances, negligence, or wilful ignorance may be evidence of bad faith from which the jury may find the fact. The holder, however, will be protected unless, at the time he took the paper, he had reason to believe, and did believe, there was some defect or infirmity in the paper. The facts in this case examined, and held not to authorize a finding that the appellant bank did not take the note in good faith; there being no substantial evidence to support any such finding.

For other cases, see Bills and Notes, V. b, 2, in Dig. 1-52 N. S.

On Second Motion for Rehearing.

Appeal — sufficiency of proof.

4. Sections 646, 649, 653, Code 1915, applied, and held that the plaintiff bank, under the circumstances, took the note in question charged with the burden of proof that it took the same in due course. Held, further, that under the proof, that burden had been successfully met. Held, further, that where the evidence was all one way, and the witness stands unimpeached in any way, his evidence is to be taken by this court as true in determining whether there

Note.—As to effect on negotiability of promissory note of provision permitting extension of time, see note to *State Bank v. Bilstad*, 49 L.R.A. (N.S.) 132. The effect upon negotiability of a provision accelerating maturity is considered in notes to *Holaday State Bank v. Hoffman*, 35 L.R.A. (N.S.) 390, and *Kennedy v. Broderick*, L.R.A.1915B, 472; and see later case, *Finley v. Smith*, L.R.A.1915F, 777.

As to the circumstances sufficient to put a purchaser of negotiable paper on inquiry, see notes to *Mee v. Carlson*, 29 L.R.A. (N.S.) 351; and *McPherrin v. Tittle*, 44 L.R.A. (N.S.) 395; and later case *Security Trust & Sav. Bank v. Gleichmann*, L.R.A.1915F, 1203.

L.R.A.1916D.

is any substantial evidence to support the verdict.

For other cases, see Appeal and Error, VII. 1, 2, in Dig. 1-52 N. S.

(March 30, 1915.)

APPEAL by plaintiff from a judgment of the District Court for Bernalillo County granting defendant's motion for a directed verdict in his favor, and overruling a motion for a new trial, in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Mr. A. B. McMillen, for appellant:

Plaintiff is entitled to the judgment in this court which the district court should have rendered.

Tagliaferri v. Grande, 16 N. M. 486, 120 Pac. 730; *Armstrong v. Aragon*, 13 N. M. 19, 79 Pac. 291; 3 Cyc. 451; *Reilly v. McKinnon*, 86 C. C. A. 268, 159 Fed. 78; *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 108; *Sinkler v. Siljan*, 136 Cal. 356, 68 Pac. 1024.

To defeat plaintiff as a bona fide holder it must be shown either that the plaintiff had actual notice, or that it was guilty of fraud or bad faith in taking the paper.

Lawson v. Weston, 4 Esp. 56; *Crook v. Jadis*, 5 Barn. & Ad. 909, 3 Nev. & M. 257, 6 Car. & G. 191, 3 L. J. K. B. N. S. 87; *Goodman v. Harvey*, 4 Ad. & El. 870, 6 L. J. K. B. N. S. 260, 6 Nev. & M. 372; *Murray v. Lardner*, 2 Wall. 121, 17 L. ed. 859; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934; *Bank of Pittsburgh v. Neal*, 22 How. 96, 16 L. ed. 323; *Cromwell v. Sac County*, 96 U. S. 58, 24 L. ed. 686; *Shaw v. North Pennsylvania R. Co.* (*Shaw v. Merchants' Nat. Bank*) 101 U. S. 564, 25 L. ed. 894; *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 193; *Second Nat. Bank v. Morgan*, 165 Pa. 199, 44 Am. St. Rep. 653, 30 Atl. 957; *Phelan v. Moss*, 67 Pa. 59, 5 Am. Rep. 402; *Richards v. Monroe*, 85 Iowa, 359, 39 Am. St. Rep. 304, 52 N. W. 339; *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 65, 34 L.R.A. 69, 55 Am. St. Rep. 649, 44 N. E. 701; *Kitchen v. Loudenback*, 48 Ohio St. 177, 29 Am. St. Rep. 544, 26 N. E. 979; *Rosemond v. Graham*, 54 Minn. 330, 40 Am. St. Rep. 338, 56 N. W. 38; *Merchants' Nat. Bank v. McNeil*, 51 Minn. 123, 53 N. W. 178; *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849; *Jennings v. Todd*, 118 Mo. 303, 40 Am. St. Rep. 377, 24 S. W. 148; *Wilson v. Denton*, 82 Tex. 531, 27 Am. St. Rep. 912, 18 S. W. 620; *Breckenridge v. Lewis*, 84 Me. 349, 30 Am. St. Rep. 357, 24 Atl. 864; *Farrell v. Lovett*, 68 Me. 326, 28 Am. Rep. 59;

- Kellogg v. Curtis, 69 Me. 212, 31 Am. Rep. 273; Youle v. Fosha, 76 Kan. 20, 90 Pac. 1091; Eames v. Crosier, 101 Cal. 260, 35 Pac. 873; Matlock v. Scheuerman, 51 Or. 49, 17 L.R.A.(N.S.) 747, 93 Pac. 826; McPherrin v. Tittle, 36 Okla. 510, 44 L.R.A.(N.S.) 395, 129 Pac. 722; Scandinavian American Bank v. Johnston, 63 Wash. 187, 115 Pac. 102; Reilly v. McKinnon, 86 C. C. A. 268, 159 Fed. 78; Union Nat. Bank v. Neill, 10 L.R.A.(N.S.) 426, 79 C. C. A. 417, 149 Fed. 711; First Nat. Bank v. Moore, 78 C. C. A. 581, 148 Fed. 953; National Salt Co. v. Ingraham, 74 C. C. A. 479, 143 Fed. 805; Tabor v. Merchants' Nat. Bank, 48 Ark. 454, 3 Am. St. Rep. 241, 3 S. W. 805; Sinkler v. Siljan, 136 Cal. 356, 68 Pac. 1024; Meyer v. Lovdal, 6 Cal. App. 369, 92 Pac. 322; Merchants' Bank v. McClelland, 9 Colo. 610, 13 Pac. 723; Credit Co. v. Howe Mach. Co. 54 Conn. 357, 1 Am. St. Rep. 123, 8 Atl. 472; Rowland v. Fowler, 47 Conn. 347; Winter v. Hutchins, 20 Idaho, 749, 119 Pac. 883; Vaughn v. Johnson, 20 Idaho, 669, 37 L.R.A.(N.S.) 816, 119 Pac. 879; Park v. Brandt, 20 Idaho, 660, 119 Pac. 877; Kavanagh v. Bank of America, 239 Ill. 404, 88 N. E. 171; Bradwell v. Pryor, 221 Ill. 602, 77 N. E. 1115; Shreeves v. Allen, 79 Ill. 553; Comstock v. Hannah, 76 Ill. 530; First Nat. Bank v. Cox, 140 Ill. App. 98; Howell v. Merchants' Trust & Secur. Co. 134 Ill. App. 467; Norlin v. Becker, 138 Ill. App. 488; Batesville Bank v. Lehner, 43 Ind. App. 457, 87 N. E. 990; Harris v. Pate, 7 Ind. Terr. 493, 104 S. W. 812; Voss v. Chamberlain, 139 Iowa, 569, 19 L.R.A.(N.S.) 106, 130 Am. St. Rep. 331, 117 N. W. 269; Montrose Sav. Bank v. Claussen, 137 Iowa, 73, 114 N. W. 547; Youle v. Fosha, 76 Kan. 20, 90 Pac. 1090; Fox v. Bank of Kansas City, 30 Kan. 446, 1 Pac. 789; McCarty v. Louisville Bkg. Co. 100 Ky. 4, 37 S. W. 144; Wing v. Ford, 89 Me. 140, 35 Atl. 1023; Breckenridge v. Lewis, 84 Me. 349, 30 Am. St. Rep. 353, 24 Atl. 864; Kellogg v. Curtis, 69 Me. 212, 31 Am. Rep. 273; Ebert v. Gitt, 95 Md. 186, 52 Atl. 900; Citizens' Nat. Bank v. Hooper, 47 Md. 88; Maitland v. Citizens' Nat. Bank, 40 Md. 540, 17 Am. Rep. 620; Commercial & F. Nat. Bank v. First Nat. Bank, 30 Md. 11, 96 Am. Dec. 554; Ellicott v. Martin, 6 Md. 509, 61 Am. Dec. 327; Clark v. Roberts, 206 Mass. 235, 92 N. E. 481; Savage v. Goldsmith, 181 Mass. 420, 63 N. E. 918; Stimson v. Whitney, 130 Mass. 591; Carroll v. Hayward, 124 Mass. 120; Atlas Nat. Bank v. Savary, 127 Mass. 75, 34 Am. Rep. 345; Smith v. Livingston, 111 Mass. 342; Spooner v. Holmes, 102 Mass. 503, 3 Am. Rep. 491; Hakes v. Thayer, 165 Mich. 476, 131 N. W. 174; Detroit Nat. Bank v. Union Trust Co. 158 Mich. 557, 123 N. W. L.R.A.1916D.
- 28; Armstrong v. Stearns, 156 Mich. 597, 121 N. W. 312; Custard v. Hodges, 155 Mich. 361, 119 N. W. 583; Davis v. Seeley, 71 Mich. 210, 38 N. W. 901; Rosenstein v. Berman, 116 Minn. 231, 133 N. W. 792; Park v. Winsor, 115 Minn. 256, 132 N. W. 264; Robbins v. Swinburne Printing Co. 91 Minn. 491, 98 N. W. 331, 867; Merchants' Nat. Bank v. Hanson, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849; Borgess Invest. Co. v. Vette, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754; Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148; Edwards v. Thomas, 66 Mo. 483; Mayes v. Robinson, 93 Mo. 121, 5 S. W. 611; Bank of Ozark v. Tuttle, 144 Mo. App. 294, 127 S. W. 918; Jobes v. Wilson, 140 Mo. App. 281, 124 S. W. 548; Paul S. Reeves & Son v. Letts, 143 Mo. App. 196, 128 S. W. 246; Ozark Bank v. Hanks, 142 Mo. App. 110, 125 S. W. 221; Harrington v. Butte & B. Min. Co. 33 Mont. 330, 114 Am. St. Rep. 821, 83 Pac. 467; First Nat. Bank v. Borchers, 83 Neb. 530, 120 N. W. 142; Norwood v. Bank of Commerce, 77 Neb. 205, 109 N. W. 152; Hallock v. Young, 72 N. H. 416, 57 Atl. 236; Hamilton v. Vought, 34 N. J. L. 190; Magee v. Badger, 34 N. Y. 247, 90 Am. Dec. 691; Cheever v. Pittsburgh, S. & L. E. R. Co. 150 N. Y. 59, 34 L.R.A. 69, 55 Am. St. Rep. 646, 44 N. E. 701; Perth Amboy Mut. Loan, H. & Bldg. Asso. v. Chapman, 178 N. Y. 558, 70 N. E. 1104; Second Nat. Bank v. Weston, 172 N. Y. 250, 64 N. E. 949; Jarvis v. Manhattan Beach Co. 148, N. Y. 652, 31 L.R.A. 776, 51 Am. St. Rep. 727, 43 N. E. 68; Farmers' & M. Bank v. Germania L. Ins. Co. 150 N. C. 770, 64 S. E. 902; Setzer v. Deal, 135 N. C. 428, 47 S. E. 466; Walters v. Rock, 18 N. D. 45, 115 N. W. 511; Johnson v. Way, 27 Ohio St. 374; Matlock v. Scheuerman, 51 Or. 49, 17 L.R.A.(N.S.) 747, 93 Pac. 823; Phelan v. Moss, 67 Pa. 59, 5 Am. Rep. 402; McSparran v. Neeley, 91 Pa. 17; Second Nat. Bank v. Morgan, 165 Pa. 199, 44 Am. St. Rep. 652, 30 Atl. 957; Walker v. Kee, 14 S. C. 142; Witte v. Williams, 8 S. C. 290, 28 Am. Rep. 294; First Nat. Bank v. Anderson, 28 S. C. 143, 5 S. E. 343; Greneaux v. Wheeler, 6 Tex. 526; Wilson v. Denton, 82 Tex. 531, 27 Am. St. Rep. 908, 18 S. W. 620; Cochran v. Priddy, 49 Tex. Civ. App. 39, 107 S. W. 616; Frank v. Lillienfeld, 33 Gratt. 390; First Nat. Bank v. Johns, 22 W. Va. 535, 46 Am. Rep. 506; Merchants' & M. Nat. Bank v. Ohio Valley Furniture Co. 57 W. Va. 625, 70 L.R.A. 312, 50 S. E. 890; Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697; Winter v. Nobs, 19 Idaho, 18, 112 Pac. 525, Ann. Cas. 1912C, 302; Arnd v. Aylesworth, 145 Iowa, 185, 29 L.R.A.(N.S.) 638, 123 N. W. 1000; Bothwell v. Corum, 135 Ky.

766, 123 S. W. 291; Valley Sav. Bank v. Mercer, 97 Md. 458, 55 Atl. 435; Jefferson Bank v. Chapman White Lyons Co. 122 Tenn. 415, 123 S. W. 641; Cherry v. First Texas Chemical Mfg. Co. 103 Tex. 82, 123 S. W. 689; Bank of Sampson v. Hatcher, 161 N. C. 359, 134 Am. St. Rep. 989, 66 S. E. 308.

Messrs. F. E. Wood and E. W. Dobson for appellee.

Parker, J., delivered the opinion of the court:

A promissory note was made and delivered in the following form:

\$6,250.00. Albuquerque, N. M., Jan. 5, 1911.

On or before two years after date I promise to pay to the order of W. H. Gillenwater at Montezuma Trust Company six thousand two hundred fifty, and no/100 dollars, with interest at the rate of 6 per cent per annum from April 1, 1912, until paid, payable semiannually, with 10 per cent additional on the amount unpaid as attorney's fees, if placed for collection in the hands of an attorney. All parties hereto and all indorsers hereof waive grace and protest and all appraisal laws, and agree that this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us, and, after such extension, the liability of all parties shall remain as if no such extension had been made.

Payable at the Montezuma Trust Company, Albuquerque, N. M.

[Signed] Roderick Stover.

Action was brought on the note by the plaintiff as indorsee, claiming to be a bona fide holder for value without notice and prior to maturity. The answer admitted the execution and delivery of the note, but alleged, by way of defense, that the note was given in payment for shares of stock in a bank of which the payee of the note was the head, under a proposed scheme for its reorganization and the increase of capital stock; that it was agreed between the parties that proceeds arising from the sale of said stock should be deposited with and held as a special deposit by the Montezuma Trust Company until the reorganization should be completed; that if the defendant would purchase 50 shares of the new capital stock for the sum of \$6,250, his note would be accepted therefor, payable at such time as he desired, and that if for any reason it was not convenient for him to pay the note when it became due, he might extend the same from time to time until such further time as he desired; that said note would not be used, delivered, put

in effect, or considered valid or in force until the entire \$200,000 of capital stock should be fully subscribed; that said note was accordingly given in payment for a subscription of 50 shares of the stock in the said corporation contemplated to be organized; that the said corporation was never organized or created, nor were any other subscriptions to the stock thereof ever secured or paid for; that thereafter, in violation of this promise and agreement with the defendant, the payee of the note fraudulently and without authority indorsed the said note to the plaintiff in this case for the sole personal use and credit of the said payee; that the plaintiff had full knowledge and notice of all of the facts hereinbefore stated, and took the said note charged and chargeable with full knowledge and notice thereof and of each of said facts. The plaintiff replied, denying that it took the said promissory note with knowledge of the facts, and alleged that the same was delivered to the plaintiff for full value in due course of business. At the close of the trial each party moved for a directed verdict in his favor, and the court thereupon directed a verdict for the defendant. The only testimony given in the case was that the vice president and manager of the plaintiff bank designed to show that the bank took the note as collateral security for a present loan made to payee of the note at the time, and in good faith, without any notice of the facts alleged in the answer by way of defense. The motion of the defendant for a directed verdict was upon the ground that the note was without consideration, and that the note itself by its terms is not a negotiable promissory note, and that the plaintiff, therefore, took it chargeable with all the defenses and equities which would have been good as between the original parties. The grounds of the motion in behalf of the plaintiff for a directed verdict in its favor are not stated. A verdict was rendered by the jury, in accordance with the instruction of the court, in favor of the defendant. The motion for a new trial was filed and overruled, and the plaintiff appeals.

It is apparent that the question involved is a very narrow one. The position of the defendant is clearly shown by his motion for a verdict in his favor. It is based upon the proposition that the note was without consideration, or rather that the consideration therefor failed, which facts are admitted by the pleadings. Upon the state of the pleadings it is clear that the original payee had no cause of action upon the note against the defendant. The defendant further urged upon the trial court that the form of the note is such that it is a non-

negotiable instrument. Therefore, it is argued, that it was impossible for the plaintiff to become the holder in due course so as to cut off the defenses which would be available as between the original parties to the note. The argument is made by counsel for appellee that the note is non-negotiable for two reasons—viz., (1) It contains a provision that the maker shall have the right to extend the maturity of the note from time to time at his pleasure, thus rendering the time of payment indefinite and uncertain; (2) even if the power to extend the time of payment is conferred by the terms of the note, upon the payee or holder alone, yet this renders the time of payment indefinite and uncertain and destroys the negotiability of the note. On the other hand, counsel for appellant argues that no such power is conferred upon the maker, and he denies appellee's second proposition entirely.

1. The language as employed in the note is certainly unfortunate. It provides that "all parties hereby . . . agree that this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us."

The maker of the note is certainly one of the "parties." The maker certainly has the power to extend the time of payment of the note by the express terms of the contract, in so far as the terms used give that power. But is the grant of power to the maker to extend the time of payment an absolute grant of that power regardless of the consent of the holder? It would seem that the answer is determinable by a proper definition of the words, "may be extended." It is a matter of common knowledge and practice that an extension of the time of payment of a note is accomplished by the concurrence of the payee or holder and someone or more of the other parties to the contract. The actual extension of the time is effectuated by the agreement of the payee or holder. The maker or indorsers cannot extend the time unless the payee consents. If it is intended to give to the maker absolutely the right to extend, a provision is sometimes inserted that he may have the right to an extension for a certain specific time, or according to whatever the contract may be between the parties. The provision then in this contract, that "this note may be extended from time to time by any one or more of us without the knowledge or consent of any of the others of us," in the light of commercial custom and usages, as well as common knowledge, is the equivalent of saying that "this note may be extended, with the consent of the payee or holder, from time to time," etc., because it is a contradiction in terms to say that a note

may be extended without the consent of the payee or holder, unless the contract provides in terms that the maker shall have the right to an extension. The words, "without the knowledge or consent of any of the others of us," can clearly have no application to the payee or holder. As before seen, there can be no such thing as an extension without his consent. The extension is effectuated by the making of a new contract between the parties, except in those cases where the right is given in terms to the maker; and a granting of the extension is, in such case, but the performance of a contract already made. That this is the sense in which the word "extended" was used by the parties is made more manifest by the following clause. "And, after such extension, liability of all parties shall remain as if no extension had been made."

There could be no liability on the part of the payee or holder, and the words used clearly indicate that the object of all of the provisions in regard to extensions were inserted simply to avoid the consequences, under the law merchant, of an extension without the consent of the indorsers or sureties. They do not grant the arbitrary right to the maker or other parties to the note to extend the same at their will and against the consent of the payee or holder; they simply provide that, in case of extension, they agree that their liability shall remain unchanged. It follows that the payee or holder of this note may insist upon payment of the same when due, and that there is consequently no uncertainty as to the time of payment, by reason of any right conferred upon the maker.

We are aware that this interpretation does violence to the naked letter of the contract. It provides that the note may be extended by "any one" of the parties without the "knowledge or consent" of any of the others. Then the maker may mentally resolve to extend the note indefinitely, and, without the knowledge or consent of the payee, may effectuate an indefinite extension, thereby rendering the contract an empty shell, devoid of meaning or efficiency. If such were the sense in which the word "extended" was used by the maker and payee in this case, they must be convicted of a foolish and vain act, if not an intention to carefully prepare a trap for the unwary. But no such presumption can be indulged. They are to be presumed to have intended to put out an ordinary note, expressing the ordinary binding contract of this kind.

Not much, if any, direct precedent is to be found in the cases, because no such language, probably, was ever before used in a note. Some of the cases, however, are valu-

able for their statements of the principles governing these matters.

In *First Nat. Bank v. Buttery*, 17 N. D. 326, 16 L.R.A. (N.S.) 878, 116 N. W. 341, 17 Ann. Cas. 52, the note in question contained the provision that "the makers and indorsers herein severally . . . consent that the time of payment may be extended without notice."

It was argued that under this provision the holder of the note might, without notice, extend the note indefinitely, thereby rendering the time of payment uncertain and the note consequently non-negotiable. The court said: "It is strenuously argued that the use of the word 'makers' in the waiver admits of an extension being made at any time on the part of the holder, by a mere secret mental process unknown to any other party. This may be true as a psychological fact, but we do not deem it so as a matter of practice in commerce and banking. To us it is clear that it has the same effect as though the note read 'on the 1st day of October, 1903, or thereafter on demand,' in which case there would be no question of its negotiability. Holders of notes do not, by a secret mental process, make an extension of the time of payment, but such extension, if made at all, is made by an agreement between the principal debtor and the holder of the paper, either with or without the consent of the indorsers."

In *National Bank v. Kenney*, 98 Tex. 293, 83 S. W. 368, the note in question contained the provisions that "the makers and indorsers hereof hereby severally . . . agree to all extensions and partial payments before or after maturity without prejudice to holder."

The Texas court says: "If, as is argued, the effect of the stipulation is to give the right to the maker, without the consent of the holder, or to the holder without the consent of the maker, to appoint another day of payment and thereby extend the time, it may be that it would render the instrument not negotiable. But we do not think it capable of that construction. It does not say that either the holder or the maker may extend the note. It merely makes a provision in case the time of payment may be extended. How extended? It seems to us that the extension meant is that which takes place when the debtor and creditor make an agreement upon a valuable consideration for the payment of the debt on some day subsequent to that previously stipulated. The obvious purpose of the provision taken as a whole was merely to relieve the holder of the paper from burdens made necessary by the rigid requirements of the mercantile law in order to secure the

continued liability of the indorsers and sureties upon the paper. Therefore what was meant by the stipulation as to extension of time was simply that, in case the holder and the maker should agree upon an extension, the sureties and indorsers should not be discharged. The holder and maker of any note may, at any time, agree upon an extension; therefore the fact that they may have that right does not affect the negotiability of the paper. . . . So in that case, the time at which the maker may elect to pay is uncertain, but the time at which the holder may demand payment is certain. It follows that if the holder has the absolute right to demand payment at a certain day, the note is negotiable."

In *Longmont Nat. Bank v. Loukonen*, 53 Colo. 489, 127 Pac. 947, Ann. Cas. 1914B, 208, the note in question contained a provision that "the makers and indorsers hereof hereby . . . agree to any extensions of time of payment and partial payments before, at, or after maturity."

The court said: "The provision under consideration does not mean they the holder can arbitrarily extend the time of the payment of the note as he may see fit, over objection by the maker, nor can the latter make an extension without the consent of the holder."

In *Navajo County Bank v. Dolson*, 163 Cal. 485, 41 L.R.A. (N.S.) 787, 126 Pac. 153, the note in question provided that "we agree that after maturity this note may be extended from time to time by any one or more of us, without the knowledge or consent of any of the others of us, and after such extension the liability of all parties shall remain as if no such extension has been made."

The court in speaking of this provision, says: "There is nothing uncertain in this note about the date of maturity. The provision refers only to something that may be done by the maker, if the holder agrees thereto 'after maturity.' Clearly the provision referred to is in no way binding upon the holder of the note. No one can reasonably claim that the effect thereof is to give the maker the right to extend the time of payment, without the consent of the holder. The note was dated April 23, 1908, and by its terms, unaffected by anything in the provision referred to, was to mature 'nine months after date,' at which time the holder, so far as anything contained therein is concerned, had the absolute right to insist on payment. There was no provision under which the time so specified could be changed, or the right of the holder to insist on payment at such time be held to be affected. Where the time is thus definitely and irrevocably fixed at which the note

shall mature, and the holder shall be at liberty to compel payment, we are unable to see how a provision, looking to a possible agreement between the parties, after maturity, for an extension, renders the executed note at all indefinite or uncertain as to the time when it is payable."

The interpretation of the language which is identical with the note here in question, in this regard, is exactly as we have interpreted this one. The fact of the slight difference in the phraseology in the other regard in no way affects the reasoning in the California case.

In *Missouri-Lincoln Trust Co. v. Long*, 31 Okla. 1, 120 Pac. 291, the note contained the provision that "the makers . . . consent that the time for payment may be extended without notice thereof."

The court holds that the provision does not make a note non-negotiable, relying upon *First Nat. Bank v. Buttery* supra, and other cases for authority.

In *Stitzel v. Miller*, 250 Ill. 72, 34 L.R.A. (N.S.) 1004, 95 N. E. 53, Ann. Cas. 1912B, 412, the note contained the provision that "we also agree that, in case said note is not paid at maturity, it is at the option of the holder hereof to extend, as he deems proper, the payment of the above note, and that said extension shall not in any manner release one or either of us from the payment hereof."

The court says: "The contention that said quoted words gave the holder the authority to extend the note as he pleased, that it could not be known what extensions he might grant, and that therefore the time when the note became due . . . was uncertain and indeterminate, rendering the note non-negotiable, cannot be sustained. The note expressly provides that such option to extend can be exercised only upon the failure of the payors to make payment at its maturity."

The decision is based upon the proposition that until the note matures no person under its terms had power to make an extension of time for payment, and contains an expression to the effect that, if there was authority to extend the note before maturity, it would render the note non-negotiable.

2. A much more serious question arises under appellee's second proposition. It is apparent that if a provision is inserted for extensions at or after maturity, they can have no effect upon the negotiability of the note, because at maturity the note ceases to be negotiable by operation of law. It therefore becomes immaterial that a provision is inserted that, after the maturity of the note, the sureties and indorsers shall not be discharged in case the note is extended. L.R.A.1916D.

This is clearly pointed out in the Illinois and California cases, cited supra.

But where there is a provision authorizing extensions prior to maturity, then a more serious proposition is presented. If the note may be extended from time to time at will during the period prior to maturity, then the time of payment becomes uncertain and indefinite. It is upon this proposition that, in a majority of the states, we believe, a note like the one here in question is held to be non-negotiable. Thus, in *Smith v. Van Blarcom*, 45 Mich. 371, 8 N. W. 90, the note contained a provision that "the makers and indorsers of this note expressly agree that the payee, or his assigns, may extend the time of payment thereof indefinitely, as he or they may see fit."

The court, per Campbell, J., said: "By the terms of this note, which must be read subject to the condition, it was not payable absolutely three months after date, or at any other one time. The time of payment could be postponed not merely once, but as often as either Charles H. Van Blarcom or his assigns might think it desirable. There is nothing on the face of the note whereby anyone can tell, either directly or by reference to any particular event, at what period this paper will become absolutely payable. We cannot conceive how this can be treated as not payable on a contingency."

In *Second Nat. Bank v. Wheeler*, 75 Mich. 546; 42 N. W. 963, a note containing a similar provision was likewise held to be non-negotiable. In *Woodbury v. Roberts*, 59 Iowa, 348, 44 Am. Rep. 685, 13 N. W. 312, the note contained a provision that "the makers and indorsers of this obligation further expressly agree that the payee, or his assigns, may extend the time of payment thereof from time to time indefinitely, as he or they may see fit."

The court said: "But the note before us may never fall due, for payment may be extended indefinitely. . . . By regarding such paper as non-negotiable no prejudice will result to the mercantile and financial business of the country, but sharpers will be defeated in their attempt to swindle the confiding and unwary, a result in accord with sound public policy and good morals."

In *Farmer v. Bank of Graettinger*, 130 Iowa, 469, 107 N. W. 170, the note contained the provision that "sureties hereby consent that time of payment may be extended from time to time without notice thereof."

The distinction drawn in this case is evidently based upon the fact that in the former there was an agreement to an extension, but in the latter there was merely an agreement that the surety should not be dis-

charged in case an extension should be granted. In *Glidden v. Henry*, 104 Ind. 278, 54 Am. Rep. 316, 1 N. E. 369, the provision for extensions are the same as in the Michigan case, supra, and the court said: "In the case before us, all parts of the note must be looked to in determining the quality of the paper. There is a promise to pay in twelve months, but that promise is not certain and unconditional. The other clause is that the time of payment may be extended indefinitely, as the parties may agree. From an inspection of the note, it is impossible to tell when it may mature, because it is impossible to know what extension may have been, or may hereafter be, agreed upon."

In *Coffin v. Spencer* (C. C.) 39 Fed. 262, the provision in the note was practically the same as in the Michigan and Indiana cases, and the circuit court for the district of Indiana said: "The latter I think the true reading, and it means that at any time before or after the maturity of the note by its terms, or by the terms of any agreement for renewal or extension, the holder, whether the payee or any assignee, may, by agreement with the maker, or with an indorser or other party liable on the paper, renew or extend the date of payment 'from time to time,' that is to say, definitely, without prejudice ultimately to his remedies against any of the parties. Every successive taker of the paper is, of course, bound to take notice of this stipulation, and, instead of looking only to the face of the instrument for the time of its maturity, as in case of commercial paper he must, is put upon inquiry whether or not any agreement for a renewal or extension of time has been made by his proposed assignor or by any previous holder. . . . The note in suit, it seems clear enough, cannot be deemed negotiable."

In *Union Stockyards Nat. Bank v. Bolan*, 14 Idaho, 87, 125 Am. St. Rep. 146, 93 Pac. 508, the provision in the note is as follows: "No extension of time of payment, with or without our knowledge, by the receipt of interest or otherwise, shall release us or either of us from the obligation of payment."

The court said: "This is an express contract to the effect that the time of payment may be extended to any one or all of the sureties, guarantors, indorsers, or makers of the note, without notice to all or any one of them. This undoubtedly renders the note non-negotiable under all the authorities that have been brought to our attention on the subject."

In *Rossville State Bank v. Heslet*, 84 Kan. 315, 33 L.R.A.(N.S.) 738, 113 Pac. 1052, the provision of the note was that L.R.A.1916D.

"each signer and indorser makes the other an agent to extend the time of this note."

The court refers to the former case in that state of *City Nat. Bank v. Gunter Bros.* 67 Kan. 227, 72 Pac. 842, in which the provision appeared in the note that "the makers and indorsers . . . agree to all extensions and partial payments before or after maturity without prejudice to holder."

In discussing the case under consideration, and the *Gunter Case*, the court said:

"Interpreting 'signer' to mean maker, and the agency of each maker and indorser to act for the other, as equivalent to a consent to the action of either to an agreement for extension made by another, the only material difference discernible is that in the *Gunter Case* the note stated that the extension might be made before or after maturity, while in this case it authorizes the extension without stating when it may be made. The precise inquiry suggested is whether the authority to extend here given may be exercised only after maturity. If so, the time is fixed for payment; for the promise, apart from this clause, is to pay on January 1, 1909, and an authority to extend afterwards would only amount to a waiver of the right to be relieved from liability for an extension without such authority. If, however, the clause is to be construed as giving the parties named the right to extend the time before maturity, its effect would be precisely the same as though the words, 'on or before,' had been inserted, and the rule of the *Gunter Case* would apply. . . . The vice of the stipulation in question is that the day of payment cannot be determined. The signer (maker) or any indorser may, at any time he sees fit to do so, as agent one for another, extend the time for payment by agreement with the holder. The payee in transferring the note may become an indorser, and therefore an agent for the maker, and his indorsee may, in turn, become an indorser with like power, so that the time of maturity must be indefinite, and not determinable from the instrument."

See further many cases collected in a note to *First Nat. Bank v. Buttery*, 17 Ann. Cas. 52.

It clearly appears from the reading of the foregoing cases, and many others which we have examined, that in the opinion of those courts the uncertainty as to the time of payment, which is held to render the note non-negotiable, arises out of the fact that there is an agreement in the note that the same may be extended prior to its maturity. The fact that such extension of the time of payment is contemplated and provided for is held to render the time of payment so uncertain as to destroy the negotiability

of the instrument. On the other hand, there is a line of cases, mostly more modern, which takes an opposite view of provisions of this kind. They are based upon the proposition that the time of payment within the meaning and requirement of the law merchant and the negotiable instrument law is certain or determinable, whenever the time at which the payee or holder may demand payment is certain or determinable. We have before seen that, under the terms of this instrument, in this case, the payee or holder is entitled to demand payment on the day specified therein, there being no right on the part of any other party to the instrument to compel him to extend the same against his consent. The Texas case, heretofore cited and quoted from, is one of the leading cases adopting the latter position. The North Dakota case is another leading case to the same effect. In *Missouri-Lincoln Trust Co. v. Long*, the supreme court of Oklahoma announces its adherence to the same doctrine that so long as the payee or holder may insist upon the payment of the note at maturity, there is no uncertainty as to the time of payment, citing the Texas case, *supra*, and Missouri cases. In *Longmont Nat. Bank v. Loukonen*, 53 Colo. 489, 127 Pac. 947, Ann. Cas. 1914B, 208, the makers and indorsers agreed to any extensions of time of payment before, at, or after maturity. The Colorado court in that case adopts the reasoning of the Texas and North Dakota courts, and says: "The time of payment of this note, by its express terms, is certain. A definite time when the holder may demand payment is stated, and the period of maturity is fixed. There is nothing in the note which gives the maker, or anyone else, a right to demand an extension, or which binds the holder to give it. We are unable to perceive how the mere fact that the signers and indorsers undertake to be bound by any extension of time of payment, which may thereafter be settled upon, takes from an instrument, in all other respects commercial paper, its negotiable character. Any agreement for an extension, not appearing in the instrument, and unknown to a purchaser for value before maturity, would not defeat his right to demand payment of the note according to its original terms. . . . The sole purpose of the stipulation is for the protection of the holder, by continuing the liability of both maker and indorser in case of extension. . . . A legal right exists in the maker and holder of any negotiable instrument to agree to an extension, and the fact that such legal right exists does not make the paper non-negotiable; no more should the fact that the maker's consent to an extension, which

he always has the legal right to give, is expressed in the note, but which does not in fact constitute an extension, have such effect. To hold that an undisclosed agreement to extend destroys the obligation to pay a note according to its terms, thus making the time of payment uncertain, in the hands of a bona fide holder for value before maturity, would be contrary to every principle of justice and fair dealing. Such would be the effect of declaring this instrument non-negotiable."

The court cites the Missouri, North Dakota, Texas, and Oklahoma cases, before referred to.

In *City Nat. Bank v. Goodloe-McClelland Commission Co.* 93 Mo. App. 123, the note provided that "the makers and indorsers agree to all extensions and partial payments before or after maturity without prejudice to the holder."

The court held that this provision did not impair the negotiability of the note.

We propose to adopt what, we are free to admit, is the minority doctrine, at least, so far as numbers of states are concerned, because we believe the doctrine to be founded in reason, and to be best suited to business and commercial usage. It is a matter of common knowledge that it is the general, if not the universal, custom of banks to insert provisions of a similar nature to the ones inserted in the note in question, whenever they loan money. We cannot see that harm can come to the people of the business world by holding this note to be a negotiable instrument. On the other hand, we can see that harm may come from unduly hampering business transactions of this kind. If a banker must insist upon payment of a note at maturity, or otherwise lose the security of indorsers upon commercial paper, then the borrowers of money from banks will inevitably suffer great inconvenience, and often great loss. This is apparent to all who have had experience or observation in commercial transactions of this kind. Nor will this holding operate as a restraint upon the dealing in commercial paper, for the reason that under §§ 52 and 56 of our negotiable instruments law (chapter 83, Laws of 1907) the assignee cannot take such paper and lose the benefit of its negotiable character unless he has actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith. A simple inquiry in good faith of the payee or holder of negotiable paper as to whether the same had been extended by the parties thereto would, we assume, be held to constitute such assignee a holder in due course. It follows that the judgment of the district court in holding that the

instrument was non-negotiable was erroneous.

3. It is urged by counsel for appellant that this court should now enter judgment for the plaintiff upon the note in question. It appears, however, from the pleadings that the question of taking of the note by the plaintiff in good faith or bad faith was in issue, but was not decided by the court, the court having directed a verdict for the defendant upon the sole proposition that the note was non-negotiable, and that therefore there was no question as to the good faith or bad faith of the plaintiff, in taking the note, for determination by the jury. It is argued, on the other hand, by counsel for appellee, that the action of the court in directing a verdict for the defendant was a finding that the burden of proof resting upon the plaintiff in regard to good faith in the taking of the note had not been met. We think not. The district court, at the instance of counsel for the defendant, held that the note was non-negotiable, and that therefore it was subject, in the hands of plaintiff, to all of the defenses set up in the answer. The plaintiff, of course, denied the allegations in the answer that it had taken the note in bad faith, and introduced proof on the issue. But this issue has never been submitted to a jury, nor decided by the court. It is therefore apparent that the cause must be retried.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded to the district court, with instructions to award a new trial; and it is so ordered.

Roberts, Ch. J., and Hanna, J., concur.

A petition for rehearing having been granted Parker, J., on January 11, 1916, handed down the following additional opinion:

In the last section of the opinion we determine that the question as to whether the plaintiff took the note without notice, and in good faith, had not been determined in the court below, and consequently we remanded the cause for a new trial. A later examination of the record, however, discloses that in this we were in error, and for that reason we have granted a rehearing.

At the close of the case each party moved for an instructed verdict in his favor, the defendant specially submitting the case on the "basis of all the evidence." This necessarily submitted to the court the evidence on the question of notice and good or bad faith on the part of the appellant in taking the note. The appellant does not resist this L.R.A.1916D.

proposition, but, on the contrary, insists that the evidence submitted authorizes and requires a judgment in its favor. Appellee, of course, argues that the evidence authorized the direction of a verdict in favor of appellee upon this point, and that the action of the court cannot be disturbed here. There is a controversy between counsel as to the issue tendered by the answer. It was alleged in the answer that "the said plaintiff had full knowledge and notice of all of the facts hereinabove stated, and took the said note charged and chargeable with full knowledge and notice thereof, and of each of said facts."

In the reply the appellant denied this allegation of the answer, and alleged that it acquired said note for full value in due course of business prior to its maturity, and without knowledge of any defect or want of consideration or other defects claimed by said defendant. Upon this state of the pleadings the appellant argues that there was tendered the sole issue of notice or want of notice to the appellant of the infirmities in the paper, and that no issue of bad faith in taking the note was tendered by the pleadings. The appellee contends that the allegations of the answer are broad enough to tender the issue both of actual notice and of knowledge of such facts that the taking of the instrument amounted to bad faith. In view of the disposition which we will make of the matter, we do not deem it necessary to determine specifically whether the issue tendered was narrowed by the pleadings, as claimed by the appellant, or not, and the case will be treated as if the pleadings tendered both issues.

One M. W. Flournoy, vice president and manager of the appellant bank, was the only witness who testified upon these subjects. He flatly denies that he or the appellant bank had any knowledge or notice of the defects or infirmities of the paper at the time the bank took the same; the business having been done entirely between the holder of the note and the witness as such vice president and general manager. Upon cross-examination the witness was not shaken in any particular from the position which he took on direct examination in this regard. The issue then as to whether the appellant bank had notice of the infirmities of the paper at the time it acquired it may be dismissed from further consideration, there being no evidence of any kind in the record to support a finding that it did have such notice, and, on the other hand, evidence given all showing that it did not have such notice.

Upon cross-examination the witness Flournoy was pressed for facts which

might show that he was aware of the financial condition of the payee, and the general condition of his business affairs, from which it was thought to be inferred that the note was taken in bad faith. He was asked whether he did not know, prior to taking the note, that the Montezuma Trust Company, of which the payee of the note was the head, was in bad financial condition, and that the payee was endeavoring to reorganize the same with additional capital. The witness admitted that he knew that the Montezuma Trust Company was doing business under unfavorable conditions; that he had declined to join in the reorganization of the same and supposed that the plan had been abandoned. He testified that the Montezuma Trust Company appeared to be in financial difficulty. He further testified that the payee presented the note, and asked a loan of \$5,000 with the note as collateral security, which was made, and the proceeds placed to the credit of the Montezuma Trust Company according to the custom of years; the payee not having a personal account with the appellant bank. The note was upon a printed blank, with the Montezuma Trust Company named as payee, and it was interlined, substituting the name of the payee for that of the Montezuma Trust Company. The note was payable on or before two years from date, and the witness testified it was not customary for the appellant bank to discount such note, but it was customary to take the same as collateral. The note provided for semiannual interest, but the witness did not demand interest for about one year after the date of the note. He explained the failure to demand the interest by saying that, the note being held as collateral security, the bank did not attend to the collection of the interest promptly, as it would in case the bank really owned the note. The witness said he understood the maker of the note to be a man of means, and knew nothing about his business affairs, or whether he had needs to raise money on notes, and made no inquiry of the payee as to how he came to have the maker's note. This is the substance of the testimony of the witness Flournoy, on this subject on cross-examination. The most that can be said for this evidence is that the bank failed to make inquiry of the payee how or why he came to have such a note of the maker. That the bank did not take the note in bad faith in the sense that it knew of these infirmities, and attempted to defraud the maker to its advantage, or that of the payee, is apparent. The evidence points to no other conclusion. The bank simply failed to inquire of the payee how or why he had such

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a note, either through negligence or carelessness, if, indeed, it was its duty to so inquire, or under suspicious circumstances.

Appellee argues that while gross negligence is not the same thing as bad faith, it may be evidence of the same, and, in this case the appellant bank having been negligent, or being aware of suspicious circumstances, these facts are sufficient to support a finding of bad faith in taking the note. He relies upon *Goodman v. Harvey*, 4 Ad. & El. 870, 6 L. J. K. B. N. S. 260, 6 Nev. & M. 372; *Ward v. City Trust Co.* 192 N. Y. 61, 84 N. E. 585; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 Ann. Cas. 665; *Re Hopper-Morgan Co.* (D. C.) 156 Fed. 525; and 1 Dan. Neg. Inst. 6th ed. § 776.

In *Goodman v. Harvey*, supra, the bill was given by the defendants to a shipowner for freight. It was presented for acceptance by an agent of the holder, and acceptance was refused, and the bill was protested. The bill was then returned to the payee, and was again put out by him, and was discounted by the plaintiff. When it became due, it was presented to the makers, and payment refused, and it was thereupon again protested for nonpayment. The jury, in answer to a question from the Lord Chief Justice, said that in their opinion the notarial marks on the bill were sufficient notice to an indorsee of nonacceptance. The court said: "The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given consideration for the bill. Gross negligence may be evidence of mala fides, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should have been taken in perfect good faith."

In *Willis v. Bank of England*, 4 Ad. & El. 32, it is said: "A doctrine has, indeed, prevailed that the person taking a negotiable instrument must show that he used such caution as a prudent man acquainted with business would exert; but this gave rise to many complicated questions, and the law has now nearly reverted to the old rule, which was that of certainty and convenience, that the bona fide holder of a negotiable instrument for value is entitled as against everyone. It would probably be considered now, if the precise point arose,

that the real question was *bona fides*. . . . It would, perhaps, be more correct to say that the same facts might raise the presumption of gross negligence or that of fraud. The facts might show a determination to wink at anything."

In *Ward v. City Trust Co.* 192 N. Y. 61, 84 N. E. 585, the trust company had representatives on the board of directors of a corporation, and two of the officers of the corporation used the funds of the corporation for the payment to the trust company of their personal obligations to it. The transaction was on its face apparently without authority on the part of the officers of the bank. The court said: "It was not enough for the trust company to part with value by surrendering the note and collateral, for it was bound to act in good faith in order to get good title. . . . Bad faith in taking commercial paper does not necessarily involve furtive motives; for it exists when the purchaser has notice of facts which, if unexplained, would show that he was taking the property of one who, to quote again from *Paviour Case*, 164 N. Y. 281, 52 L.R.A. 790, 58 N. E. 114, 'owed him nothing, in payment of a claim that he held against someone else. . . . Even if his actual good faith is not questioned, if the facts known to him should have led him to inquiry, and by inquiry he would have discovered the real situation, in a commercial sense he acted in bad faith, and the law will withhold from him the protection that it would otherwise extend.'"

The court said further: "The presumption was against the transaction, and, as we have seen, unless that presumption was overcome by reasonable inquiry, the transaction, unlawful in fact and unlawful on its face, is presumed to have been known to the trust company to be unlawful."

In *McNight v. Parsons*, the note was delivered by the maker to the payee under agreement that it should not be negotiated until it was ascertained whether a certain fact came to pass, and in case it did not, the note was to be void and to be returned to the defendant. The question was whether the holder and plaintiff was a holder in good faith. It appears that the plaintiff in that case was really a dummy, and the note was indorsed to him for the express purpose of avoiding such defenses as the defendant might make against the holder of the note. The plaintiff made no attempt to assert the good faith of his purchase, or to negative the fact that he had notice of any defense thereto. The trial court directed a verdict for the plaintiff upon the ground that there was no evidence of bad faith in the taking of the note. This L.R.A.1916D.

judgment was reversed. It is said by the court: "It is equally true that, if the facts shown have any fair tendency to show bad faith, the question remains one of fact, and not of law. It is especially the case where the evidence of fraud is sufficient to put the burden of showing good faith on the holder."

In *Re Hopper-Morgan Co.* 156 Fed. 525, it appeared from an agreed statement of facts that the plaintiff purchased the note in a peculiar way, under peculiar circumstances, and with knowledge that the note had been issued for some particular purpose, not disclosed, but that Mugler, who had disposed of it to Prescott, from whom the claimant obtained it, was not the owner, and had the right to use it as collateral merely. The court said: "If the purchaser of the note has actual knowledge of the infirmity in the note, or want of title in the one from whom he takes it, that, of course, ends the case. If he has no such actual knowledge, then bad faith or a wilful disregard of known facts showing the infirmity or want of title or a wilful evasion of knowledge of the facts, will be sufficient to defeat recovery. Facts sufficient to create a suspicion of the truth are not sufficient to show knowledge or bad faith, nor is mere gross negligence in making inquiry, or in failing to make inquiry, alone, sufficient. There must be either actual knowledge or bad faith. Bad faith may be shown by a wilful disregard of and refusal to learn the facts when available and at hand."

It is apparent from what has been shown as to the facts in each of the foregoing cases that they have no application to a case like the one under consideration. In each of those cases, except, perhaps, the English cases, there was something about the nature of the transaction itself which excluded and prevented any dealing concerning the same in good faith. In the case at bar there was nothing whatever about the nature of the transaction which called for explanation; it bore no evidence whatever of illegality or fraud, but was the usual and ordinary commercial transaction. Mr. Daniel, in discussing this proposition, uses the following language: "It thus appears that the majority rule, referred to in the foregoing discussion, that there must have been actual notice or bad faith, has been codified in those states which have enacted the statute. According to that rule, and under the statute, mere suspicion of defect of title or knowledge of circumstances which would excite suspicion in the mind of a prudent man, or even gross negligence on the part of the taker of the instrument, at the time of the transfer,

will not defeat his title. While neither gross negligence, nor knowledge of suspicious circumstances, of itself constitutes bad faith as matter of law, it is evidence from which bad faith may be inferred, and such facts, when proved, may be considered by a jury in arriving at the ultimate fact of good or bad faith. What constitutes this actual knowledge of bad faith, under the statute, has been the subject of judicial discussion. Bad faith in taking commercial paper, it has been said, does not necessarily involve furtive motives. It may be shown by a wilful disregard of and refusal to learn the facts when available and at hand, and if a purchaser of a note for value before maturity has notice of facts tending to show defenses to the same, he cannot purposely refrain from making inquiries as to the inception of the paper, and at the same time claim to be a bona fide purchaser." 1 Dan. Neg. Inst. 6th ed. § 776.

Appellant cites a multitude of cases upon the general doctrine that there must be either actual notice or bad faith to defeat a holder of commercial paper. A few of them only will be cited. *Murray v. Lardner*, 2 Wall. 121, 17 L. ed. 859; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934; *Bank of Pittsburgh v. Neal*, 22 How. 96, 16 L. ed. 323; *Cromwell v. Sac County*, 96 U. S. 58, 24 L. ed. 686; *Shaw v. North Pennsylvania R. Co.* (*Shaw v. Merchants' Nat. Bank*) 101 U. S. 564, 25 L. ed. 894; *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 193; *Second Nat. Bank v. Morgan*, 165 Pa. 199, 44 Am. St. Rep. 653, 30 Atl. 957; *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 65, 34 L.R.A. 69, 55 Am. St. Rep. 649, 44 N. E. 701; *Kitchen v. Loudonback*, 48 Ohio St. 177, 29 Am. St. Rep. 544, 26 N. E. 979; *Jennings v. Todd*, 118 Mo. 303, 40 Am. St. Rep. 377, 24 S. W. 148; *Wilson v. Denton*, 82 Tex. 531, 27 Am. St. Rep. 912, 18 S. W. 620; *Breckenridge v. Lewis*, 84 Me. 349, 30 Am. St. Rep. 357, 24 Atl. 864; *Youle v. Fosha*, 76 Kan. 20, 90 Pac. 1091; *Eames v. Crosier*, 101 Cal. 260, 35 Pac. 873; *Matlock v. Scheuerman*, 51 Or. 49, 17 L.R.A. (N.S.) 747, 93 Pac. 826; *McPherrin v. Tittle*, 36 Okla. 510, 44 L.R.A. (N.S.) 395, 129 Pac. 722; *Scandinavian American Bank v. Johnston*, 63 Wash. 187, 115 Pac. 102; *Reilly v. McKinnon*, 86 C. C. A. 268, 159 Fed. 78. He also cites 7 Cyc. 945, and *Crawford, Anno. Neg. Inst. Law*, 3d ed. 68. These authorities all establish the uniform doctrine that a holder of commercial paper may be a holder in due course, notwithstanding that he may have knowledge of suspicious circumstances, or may be guilty of even gross negligence in taking the paper; the question always being in such L.R.A.1916D.

cases whether he took the paper in good faith or in bad faith.

It is apparent, however, from what has been heretofore seen in the original opinion and herein, that this fundamental, underlying proposition is not quite the proposition involved in this case. The question in this case is whether there was sufficient evidence before the trial court to authorize a finding that the plaintiff bank took the note in bad faith. In other words, the question is, Had the trial court or the jury made a specific finding that the plaintiff bank did not take the note in good faith, is there any substantial evidence in the record upon which such a finding could be based? We do not think that there is any such evidence. As has been before pointed out, this transaction was the ordinary business transaction dealing with commercial paper. There was nothing about the note itself to call attention of the plaintiff bank to any infirmity in the same. There was nothing about the circumstances or the relations of the parties which called for explanation on the part of the payee, or which even was calculated to arouse suspicion on the part of the bank. The witness Flournoy testified that he treated the transaction exactly as he would treat any other of the same character, and that he knew of nothing irregular or defective about the note. Owing to the condition of the record, we are put in the position of sitting as a jury or a trial court, and passing upon these facts. After careful examination of the testimony, and a thorough consideration of all legitimate inferences which could be drawn therefrom, we are compelled to say that there is no substantial evidence in the record authorizing a finding of bad faith on the part of the bank. A fine discussion of this same question is to be found in 3 R. C. L. p. 1071, §§ 277 et seq. It is there said: "It is a general principle, running through all branches and subjects of the law, that one will be charged with notice of a fact who has information which should have put him upon inquiry, if, by following up such information with diligence and understanding, the truth could have been ascertained. . . . It is now well settled, however, that the doctrine of notice, as it affects good faith of transactions generally, does not apply to negotiable instruments."

Detroit Nat. Bank v. Union Trust Co. 145 Mich. 656, 116 Am. St. Rep. 319, 108 N. W. 1092, is cited, wherein it is said: "It is a general rule, applicable to transactions not involving commercial paper, that where one has notice of facts which would put an ordinarily prudent man upon inquiry, he cannot be considered a bona fide purchaser,

if he neglect to take such care of his own interests as an ordinarily prudent man would do, but that rule has not been applied to commercial paper."

A lengthy quotation from *Jones v. Gordon*, L. R. 2 App. Cas. 627, 4 Eng. Rul. Cas. 416, is inserted in the opinion, from which we quote the following: "But if the facts and circumstances are such that the jury, or whoever has to try the question, came to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind: I suspect there is something wrong, and if I ask questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover,—I think that is dishonesty. I think, my Lords, that that is established not only by good sense and reason, but by the authority of the cases themselves."

In § 278 of 3 R. C. L. p. 1074, it is said: "He cannot be charged with notice by reason of any want of diligence on his part, even when he is in the situation where such facts could be ascertained by inquiry. . . . Gross negligence even is not sufficient; actual knowledge of the facts which impeach the validity of the note must be brought home to the holder. Knowledge, however, may be shown to have been possessed by the party either by direct proof, or by facts and circumstances that fairly lead to that conclusion, and circumstances that are not of any great probative force in themselves are admissible in connection with other proof to show guilty knowledge or want of good faith."

In § 280, p. 1075 of 3 R. C. L., it is said: "Although suspicious circumstances are not notice as a matter of law, yet the jury may find them to be so as a matter of fact, and evidence going to show the existence of such grounds for suspicion is always admissible."

See also *Harrington v. Butte & B. Min.* Co. 33 Mont. 330, 114 Am. St. Rep. 821, 83 Pac. 467.

The only suspicious circumstances, if it may be called such, is the fact that this note was dated January 5, 1911, and was negotiated by the payee on January 6, 1912. It appears in the record that this note was made on January 5, 1912, and was accidentally misdated. However, at the time the note was negotiated, the fact that the payee had apparently had possession of the note for a year was not mentioned. It might be argued that a man who had a

good note like the one in question, and who needed money, would hardly refrain from using it for a year after its date, and that the bank should have taken notice of this fact, under the circumstances. On the other hand, if the matter was considered at all by the bank, which does not appear from the record, it might well have been inferred that the negotiating of the note one year after its date was in accordance with a perfectly honest and lawful arrangement with the maker. No inference of bad faith can be legitimately drawn from this circumstance. The question is, Did the witness Flournoy, as the agent of the bank, know or believe at the time he took the note from the payee that it was being fraudulently put out by him, and did he wilfully refrain from inquiry along that line? We have been unable, after a careful re-examination of the testimony, to put finger upon any fact from which a legitimate inference could be drawn to that effect.

This being the state of the record, we find that there is no substantial evidence upon which the district court could have found that the appellant bank took the note in bad faith. There being no such evidence, it was error to so find, and for that reason the judgment will be reversed. As a matter of fact the record bears internal evidence, but not in direct terms, that the trial court did not so find, but, owing to the form in which the record is presented here, he is made to have so found, as already pointed out.

The judgment of the lower court will be reversed, and the cause will be remanded to the district court, with directions to enter judgment in favor of the appellant bank as prayed in the complaint; and it is so ordered.

Roberts, Ch. J., and Hanna, J., concur.

A Second Motion for Rehearing having been filed Parker, J., on March 4, 1916, handed down the following second additional opinion:

A second motion for rehearing has been filed and is allowable, we assume, for the reason that the question to which it is directed was first considered upon the first motion for rehearing. The motion is directed to a supposed departure in the holding of the court from rules fixed by statute and the previous holdings of this court. The motion calls attention to §§ 649 and 653, Code 1915, being a part of the Negotiable Instrument act, and suggests that the court overlooked those provisions. Section 649 provides that the title of a person who negotiates an instrument is defective "when he negotiates it in breach of

faith, or under such circumstances as amount to fraud." Section 653 provides that "when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course."

Section 646, Code 1915, defines a holder in due course as follows: "A holder in due course is a holder who has taken the instrument under the following conditions: . . . III. That he took it in good faith and for value; IV. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

It sufficiently appears, from what has been heretofore said in the two opinions heretofore handed down in this case, that the title of the payee of this note was defective, and that the plaintiff bank took the paper charged with the burden of establishing that it took the same in due course; that is to say, under the facts in this case, that it took it in good faith and for value, and without notice of any infirmity in the instrument or defect in the title of the person negotiating it. While neither of these sections of the statute were noticed in the opinion, none of the principles or rules therein mentioned were overlooked by the court. In the discussion of the matter, the exact situation herein outlined was assumed.

The question, then, before the court is whether that burden of proof resting upon the plaintiff bank has been successfully met by the proofs. In our former discussion of the evidence, we pointed out that there was no evidence in the case tending directly to show notice or lack of good faith on the part of the bank when it took the paper. We further pointed out that there was no evidence in the case from which any legitimate inference of notice or lack of good faith could be drawn. The evidence was all one way, and pointed unequivocally to lack of notice and to good faith on the part of the plaintiff bank.

Counsel for appellee, however, points out the fact that one of the important considerations before the trial court was the demeanor and character of the witness Flournoy, whose conduct and honesty in taking the paper for the bank were directly involved. The verdict of the jury was in the following form: "We, the jury, by direction of the court, find the issues in this cause for the defendant."

The answer interposed by the defendant below tendered the proposition that the plaintiff bank "had full knowledge and notice of all the facts . . . and took the

said note charged and chargeable with full knowledge and notice thereof and of each of said facts."

The reply put this allegation in issue. When the jury returned the verdict, by direction of the court, finding the issues for the defendant, it consequently found this issue as to notice against the plaintiff bank. Counsel for appellee would have the court hold, if we understand the motion, that because the character and demeanor of the witness Flournoy was one of the considerations before the court and jury, therefore there is substantial evidence in the case to support the finding of the issue of notice to the bank, as found by the jury. They say in their motion that "his testimony alone, especially under the circumstances surrounding the transaction, was insufficient to compel the court, as a matter of law, to find the fact in accordance with his evidence."

We appreciate fully the great difference in the effect of the evidence of a witness when he appears before a trial court, where he is seen and heard, where his demeanor while testifying may be observed, and the sum total of his credibility may be ascertained, and its effect when reduced to writing and submitted to an appellate court. Untruthful witnesses seldom escape discovery, especially where their evidence is submitted to a trained man for consideration. It nevertheless remains true that this personality, demeanor while testifying, and apparent carefulness and fairness on the stand, is something which cannot be committed to paper, and which is not present before a reviewing court. Here we must judge of the witness's testimony by what he is reported to have said, without the aid of this personal element in his testimony. Here in the examination of the testimony of the witness, if he stands unimpeached, either by direct evidence of his lack of veracity, or of his bad moral character, or if unimpeached by some equivocal character of his testimony or inherent improbability therein, or by some other legal method of impeachment, we must assume that his evidence is true. To hold otherwise would bring us to absurd results. For example, can it be said that a finding by a trial court, or a verdict found by direction of the court against a plaintiff, were all of the evidence in the case in his favor, and, where there is none against him, cannot be disturbed in this court, because, possibly, the court did not believe the witnesses for the plaintiff, and consequently refused him the relief which he sought? Such cannot be the law. If there was a single fact in this record pointing to bad faith, or knowledge on the part of the bank, or if there were

equivocation or inherent improbability in the testimony of the witness Flournoy, or if he had been impeached in some way, we might say that the court correctly found the issue as to the notice and good faith against the plaintiff bank, because he did not believe the witness Flournoy, the one witness who testified on the subject. There being no such infirmities in the testimony, there is no foundation upon which to base a finding of knowledge or bad faith on the part of the bank.

Counsel in the motion suggest that the court in its holding has departed from the established doctrine in this jurisdiction, that a verdict of a jury or the finding of the trial court will not be disturbed in this court if it is supported by any substantial

evidence. This has been the established doctrine of this court ever since the case of *Candelaria v. Miera*, 13 N. M. 360, 84 Pac. 1020, and we do not desire to depart from or modify the doctrine there stated. But, as we have pointed out in this case, there is no substantial evidence, and no legitimate inferences can be drawn from any of the evidence, to support the finding of the court and the jury under his direction that the bank had notice of the infirmities in this paper or took it in bad faith.

For the reasons stated, the motion for rehearing will be denied; and it is so ordered.

Roberts Ch. J., and Hanna, J., concur.

SOUTH CAROLINA SUPREME COURT.

STATE OF SOUTH CAROLINA, Resp't.,
v.
WASHINGTON J. BROWN et al., Appts.
(— S. C. —, 88 S. E. 21.)

Arson — corpus delicti.

1. The corpus delicti in arson consists of a burned building and a criminal act in causing the burning.

For other cases, see Arson, in Dig. 1-52 N. S.

Criminal law — failure to prove corpus delicti — right to acquittal.

2. One accused of arson is entitled to acquittal as matter of law upon failure to prove the corpus delicti.

For other cases, see Trial, II. d, 3, in Dig. 1-52 N. S.

Evidence — statement of enmity — corpus delicti.

3. Evidence of statements by accused showing enmity on the part of accused against one whose barn has been burned is not admissible in a prosecution for arson, in the absence of evidence of the corpus delicti.

For other cases, see Evidence, X. o, in Dig. 1-52 N. S.

Same — trailing by dog — human control.

4. Evidence of the act of a dog in trailing one accused of crime is not admissible if it was not allowed to follow its inclination during the process.

For other cases, see Evidence, XI. t, in Dig. 1-52 N. S.

Note. — As to proof of corpus delicti in arson, see annotation following this case, post, 1299.

As to evidence of trailing of persons by bloodhounds, see notes to *Pedigo v. Com.* 42 L.R.A. 432, and *State v. Adams*, 35 L.R.A. (N.S.) 876.
L.R.A.1916D.

Same — period of efficiency.

5. One relying upon trailing by a dog to establish crime must show that the trailing was done within such time after the commission of the crime that the dog would be efficient.

For other cases, see Evidence, XI. t, in Dig. 1-52 N. S.

Same — inability to cross-examine dog — effect.

6. Inability to cross-examine a dog does not render evidence of its act in trailing one accused of crime inadmissible.

For other cases, see Evidence, XI. t, in Dig. 1-52 N. S.

Same — proof of corpus delicti.

7. Evidence that one accused of arson was trailed from the scene of the crime by dogs is not admissible as proof of the corpus delicti.

For other cases, see Evidence, XI. t, in Dig. 1-52 N. S.

(March 3, 1916.)

APPEAL by defendants from a judgment of the Court of General Sessions, First Circuit, for Berkeley County, convicting them of arson. Reversed.

The facts are stated in the opinion.

Messrs. Stoney & Cordes and J. D. E. Meyer, Jr., for appellants:

The corpus delicti consists of two component parts: First, the existence of a certain fact or result forming the basis of the criminal charge, and second, the existence of a criminal agency as the cause.

Cavaness v. State, 43 Ark. 331; *McBride v. People*, 5 Colo. App. 91, 37 Pac. 953; *Com. v. Webster*, 5 Cush. 295, 52 Am. Dec. 711; *Pitta v. State*, 43 Miss. 472; *State v. Dickson*, 78 Mo. 438; *State v. Pepo*, 23 Mont. 473, 59 Pac. 721; *People v. Schryver*, 42 N. Y. 6, 1 Am. Rep. 480; *People v. Bennett*, 49 N. Y. 137; *People v. Place*, 157 N. Y. 584, 52 N. E. 576; *People v. Benham*,

160 N. Y. 402, 55 N. E. 11; *State v. Leuth*, 5 Ohio C. C. 94, 3 Ohio C. D. 48; *Com. v. Cutaiar*, 5 Pa. Dist. R. 403; *Lovelady v. State*, 14 Tex. App. 545, 17 Tex. App. 287; *Shulze v. State*, 28 Tex. App. 316, 12 S. W. 1084; *Jackson v. State*, 29 Tex. App. 458, 16 S. W. 247; *Anderson v. State*, 34 Tex. Crim. Rep. 546, 53 Am. St. Rep. 722, 31 S. W. 673; *Smith v. Com.* 21 Gratt. 809; *State v. Gillis*, 73 S. C. 324, 5 L.R.A. (N.S.) 571, 114 Am. St. Rep. 95, 53 S. E. 487, 6 Ann. Cas. 993.

Before a conviction can be had, it is incumbent upon the prosecution to prove both of the constituent elements of the corpus delicti beyond a reasonable doubt.

United States v. Hewson, Brunner, Col. Cas. 532, Fed. Cas. No. 15,360; *Lovelady v. State*, 14 Tex. App. 545; *Johnson v. State*, — Tex. Crim. Rep. —, 24 S. W. 285; *Com. v. York*, 9 Met. 93, 43 Am. Dec. 373; *Haynes v. State*, — Miss. —, 27 So. 601; *People v. Deacons*, 109 N. Y. 374, 16 N. E. 676; *People v. Beckwith*, 108 N. Y. 67, 15 N. E. 53; *Com. v. O'Donohue*, 8 Phila. 623; *State v. Gillis*, 73 S. C. 318, 5 L.R.A. (N.S.) 571, 114 Am. St. Rep. 95, 53 S. E. 487, 6 Ann. Cas. 993; *State v. Parsons*, 39 W. Va. 464, 19 S. E. 876; *Brown v. State*, 15 Ga. App. 484, 83 S. E. 890.

There was an absolute failure on the part of the state to show the essential element of the crime of arson, namely, the corpus delicti and the connection of the crime with either of these defendants.

Clyatt v. United States, 197 U. S. 222, 49 L. ed. 731, 25 Sup. Ct. Rep. 429; *People v. Plath*, 100 N. Y. 590, 53 Am. Rep. 263, 3 N. E. 790, 6 Am. Crim. Rep. 1.

All questions of issues of fact are for the jury, but when the facts upon which the case must turn are undisputed, or conclusively established, and they admit of but one inference, the question is one of law, since there is no issue of fact, and the court not only may, but when requested must, direct a jury as to the proper conclusion, and if the motion to direct a verdict is refused, it is an error of law.

McLain v. Atlantic Coast Line R. Co. 81 S. C. 100, 18 L.R.A. (N.S.) 763, 128 Am. St. Rep. 892, 61 S. E. 900; *Jarrell v. Charleston & W. C. R. Co.* 58 S. C. 495, 36 S. E. 910; *Lyon v. Charleston & W. C. R. Co.* 77 S. C. 344, 58 S. E. 12; *State v. Norman*, 153 N. C. 591, 68 S. E. 917; *Carter v. State*, 106 Miss. 507, 50 L.R.A. (N.S.) 1112, 64 So. 215; *State v. Clardy*, 73 S. C. 340, 53 S. E. 493; *State v. Shaw*, 64 S. C. 566, 60 L.R.A. 801, 92 Am. St. Rep. 817, 43 S. E. 14; *State v. Blackledge*, 7 Rich. L. 336.

The circumstantial evidence neither estab-

lishes the corpus delicti nor connects the defendants with the crime charged.

State v. Simons, 4 Strobb. L. 266; *Bines v. State*, 118 Ga. 320, 68 L.R.A. 33, 45 S. E. 376, 12 Am. Crim. Rep. 205; *State v. Shaw*, 64 S. C. 566, 60 L.R.A. 801, 92 Am. St. Rep. 817, 43 S. E. 14; *State v. Clardy*, 73 S. C. 340, 53 S. E. 493; *Denmark v. Corley*, 100 S. C. 433, 84 S. E. 884.

Bloodhound evidence is inadmissible in all cases, because it is in violation of the defendants' constitutional privilege of being confronted by the witnesses against them, guaranteed every accused by the Constitution of the United States.

Pedigo v. Com. 103 Ky. 41, 42 L.R.A. 432, 82 Am. St. Rep. 566, 44 S. W. 143; *Brott v. State*, 70 Neb. 395, 63 L.R.A. 789, 97 N. W. 593.

Bloodhound testimony is incompetent, irrelevant, and hearsay, and should not be admitted in any case.

Ibid.; *People v. Pfanschmidt*, 262 Ill. 411, 104 N. E. 804, Ann. Cas. 1915A, 1171.

Such evidence is inadmissible unless amplified and indorsed by cumulative or corroborative human testimony.

Carter v. State, 106 Miss. 507, 50 L.R.A. (N.S.) 1112, 64 So. 215.

Evidence of trailing by bloodhounds is inadmissible unless preliminary foundation for its admission is laid.

Baum v. State, 6 Ohio C. C. N. S. 515, 27 Ohio C. C. 569; *State v. Dickerson*, 77 Ohio St. 34, 13 L.R.A. (N.S.) 341, 122 Am. St. Rep. 479, 82 N. E. 969, 11 Ann. Cas. 1181; *State v. Spivey*, 151 N. C. 676, 65 S. E. 995; *State v. Norman*, 153 N. C. 591, 68 S. E. 917; *Allen v. Com.* 26 Ky. L. Rep. 808, 82 S. W. 599; *State v. Adams*, 85 Kan. 435, 35 L.R.A. (N.S.) 870, 116 Pac. 608; *State v. Freeman*, 146 N. C. 615, 60 S. E. 986.

The evidence of the alleged trailing of the defendants is inadmissible in the case at bar, even if as a class such evidence is held to be competent, because the preliminary requisites were not satisfied.

Pedigo v. Com. 103 Ky. 41, 42 L.R.A. 436, 82 Am. St. Rep. 566, 44 S. W. 143; *Carter v. State*, 106 Miss. 507, 50 L.R.A. (N.S.) 1112, 64 So. 215.

Evidence of the "trailing experiment" was inadmissible, and should have been ruled out.

Martin v. State, 68 Fla. 18, 66 So. 139.

The absence of any charge whatsoever on the subject of bloodhound testimony, and his Honor's refusal to charge the jury on such evidence, were reversible error.

State v. Spivey, 151 N. C. 676, 65 S. E. 996; *State v. Brooks*, 1 Ohio Dec. Reprint, 407; *State v. Adams*, 35 L.R.A. (N.S.) 872, note; *State v. Norman*, 153 N. C. 591, 68 S. E. 917; *State v. Rasco*, 239 Mo. 535, 144

S. W. 449; *State v. Simons*, 4 Strobb. L. 266; *People v. Palmer*, 109 N. Y. 113, 4 Am. St. Rep. 423, 16 N. E. 529, 7 Am. Crim. Rep. 399; *State v. Moore*, 129 N. C. 494, 55 L.R.A. 99, 39 S. E. 626; *State v. McNinch*, 12 S. C. 96.

Mr. William C. Wolfe, for the State:
The proof of the corpus delicti is a question of fact for the jury, and cannot be reviewed by this court.

State v. Martin, 47 S. C. 68, 25 S. E. 113.

In a criminal case every element of the corpus delicti may be established by circumstantial evidence.

State v. Martin, 47 S. C. 72, 25 S. E. 113; *Campbell v. People*, 159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123; *State v. Williams*, 52 N. C. (7 Jones, L.) 446, 78 Am. Dec. 248; *Rippey v. Miller*, 46 N. C. (1 Jones, L.) 479, 62 Am. Dec. 177; *People v. Beckwith*, 108 N. Y. 67, 15 N. E. 53; *People v. Palmer*, 109 N. Y. 110, 4 Am. St. Rep. 423, 16 N. E. 529, 7 Am. Crim. Rep. 399; *Sawyers v. Com.* 88 Va. 356, 13 S. E. 708; 11 Am. & Eng. Enc. Law, 2d ed. 938; *Winslow v. State*, 76 Ala. 42, 5 Am. Crim. Rep. 43.

Bloodhound testimony is admissible in evidence.

12 Cyc. 393; 5 Wigmore, Ev. p. 22; *Hargrove v. State*, 147 Ala. 97, 119 Am. St. Rep. 60, 41 So. 972, 10 Ann. Cas. 1126; *State v. Rasco*, 239 Mo. 535, 144 S. W. 458; *State v. Adams*, 35 L.R.A. (N.S.) 870, note; *Hodge v. State*, 98 Ala. 10, 39 Am. St. Rep. 710, 13 So. 385; *State v. Hall*, 3 Ohio N. P. 325, 4 Ohio S. & C. P. Dec. 147; *Simpson v. State*, 111 Ala. 6, 20 So. 572; *Denham v. Com.* 119 Ky. 508, 84 S. W. 538; *State v. Hunter*, 143 N. C. 607, 118 Am. St. Rep. 830, 56 S. E. 547; *State v. Freeman*, 146 N. C. 615, 60 S. E. 986; *Gallant v. State*, 167 Ala. 60, 52 So. 739; *State v. Spivey*, 151 N. C. 676, 65 S. E. 995; *State v. Norman*, 153 N. C. 591, 68 S. E. 917; *Parker v. State*, 46 Tex. Crim. Rep. 461, 108 Am. St. Rep. 1021, 80 S. W. 1008, 3 Ann. Cas. 893; *State v. Dickerson*, 77 Ohio St. 34, 13 L.R.A. (N.S.) 341, 122 Am. St. Rep. 479, 82 N. E. 969, 11 Ann. Cas. 1181; *Spears v. State*, 92 Miss. 613, 16 L.R.A. (N.S.) 285, 46 So. 166; *Richardson v. State*, 145 Ala. 46, 41 So. 82, 8 Ann. Cas. 108; *Baum v. State*, 27 Ohio C. C. 569; *Underhill*, Crim. Ev. 2d ed. § 374a; 1 Wigmore, Ev. 177; *Davis v. State*, 46 Fla. 137, 35 So. 76.

It is not error to refuse a request where the principle requested is covered in the general charge.

Thompson v. Seaboard Air Line R. Co. 78 S. C. 384, 58 S. E. 1094; *Milhous v. Southern R. Co.* 72 S. C. 442, 110 Am. St. Rep. 620, 52 S. E. 41; *State v. Dean*, 72 S. C. 74, 51 S. E. 524; *Lampley v. Atlantic Coast Line R. Co.* 71 S. C. 156, 50 S. E. 773. L.R.A.1916D.

A circuit judge is not required to charge a request in exact words, nor if it be covered in the general charge.

Edwards v. Wessinger, 65 S. C. 161, 95 Am. St. Rep. 789, 43 S. E. 518.

A requested charge invading the province of the jury is properly refused.

Black v. State Co. 99 S. C. 433, 83 S. E. 1088.

Messrs. P. T. Hildebrand, E. J. Dennis, and George B. Davis also for the State.

Fraser, J., delivered the opinion of the court:

This is an indictment for statutory arson, i. e., the burning of a barn. Mr. McNair who, for the purposes of this case, was the owner of the barn, had a lawsuit with the father and sister of the defendants. There is evidence that the defendants were offended with Mr. McNair as the result of the lawsuit. The suit was about a mule which Mr. McNair took from these relatives of the defendants. One of the defendants is said to have remarked that the mule would do Mr. McNair no good. One of the defendants is also said to have remarked that he would not be surprised if a barn should be burned and he be accused of it. The very night of the day upon which the case was determined the barn was burned. The tracks of three people were discovered near the place where the barn had been burned. Dogs were put on these tracks. These dogs went to where one of the defendants was under arrest. The other defendant rode up to the place where a crowd was assembled, and when he got on the ground the dogs went up to him. The witness who was in charge of the dogs testified that the dogs told him that these were the men they had been tracking. The defendants were convicted with a recommendation to mercy. From this judgment of conviction, the defendants appealed, with eight exceptions. The third, fourth, fifth, sixth, and eighth exceptions include matters of fact with which this court cannot deal, and they are overruled. The remaining exceptions raise three questions:

(1) Did his Honor err in refusing to direct a verdict for the defendants at the close of the state's testimony?

(2) Did his Honor err in refusing to direct a verdict for the defendants at the close of all the testimony?

(3) Did his Honor err in admitting the evidence of the conduct of the dogs in following the tracks?

I. Did his Honor err in refusing to direct a verdict for the defendants at the close of the testimony for the state? Before a defendant can be required to go into his de-

fense, it is necessary that there shall be some proof of the corpus delicti. If there be no evidence to prove the corpus delicti, the defendant is entitled to a verdict of not guilty. The respondent claims that the proof of the corpus delicti is a question of fact, and is for the jury, and this court cannot consider the question, and cites *State v. Martin*, 47 S. C. 87, 25 S. E. 113, as authority. The *Martin* Case does not go so far. In the *Martin* Case the question was not, Was there any evidence? but, Was there sufficient evidence? The sufficiency of evidence was, of course, a question for the jury. The *Martin* Case states the true rule when it says (page 71 of 47 S. C.): "The weight of modern authority is undoubted to the effect that all the elements constituting the corpus delicti may be proven by circumstantial evidence. The corpus delicti in a case of murder consists of two elements, the death of a human being and the criminal act of another in causing that death."

So, in a case of arson the corpus delicti consists of two elements, the burned house and the criminal act of another in causing the burning. If there is no evidence of either, the defendant is entitled to an acquittal, and he is entitled to an acquittal as a matter of law. In the *Martin* Case a body was found in the remains of a burned building. A part of the head sufficient to cause death was cut off by a sharp instrument. The body was about the size of the alleged victim. Articles of personal property were found near the body, identified as the property of the alleged victim, and unburned pieces of cloth, resembling the clothing worn by him just before his disappearance. There were circumstances from which the jury might find that the body found was the body of someone who had been feloniously killed, and that the person killed was the alleged victim, Peter Patite.

In the case at bar we have only the first requisite, to wit, a burned barn. There is not a single circumstance to show that it was the result of the criminal act of another. There are only three things that can, by any possibility, be claimed as circumstances: (a) Tracks; (b) statements of the accused showing enmity; (c) the actions of the dogs.

(a) The peculiarities were not described, and the prosecuting witness said there was nothing peculiar about them. The evidence as to identity of tracks goes out and may be disregarded.

(b) Until there is some evidence of the corpus delicti, even confessions made out of court are not admissible. 7 Am. & Eng. Enc. Law, p. 863, note.

(c) There is conflict in the authorities as to the admissibility of the action of dogs in tracking supposed criminals. Our Code L.R.A.1916D.

contains a provision (Crim. Code, § 945) for the "purchase and use of bloodhounds or other serviceable dogs for the tracking and arrest of escaped convicts and other fugitive lawbreakers." We cannot therefore say that that method that the law approved for locating a fugitive is of no value in the identification of the criminal. The authorities admit that the conduct of the dogs is only a circumstance to be weighed with other circumstances. Circumstances must be proved by competent evidence. If the testimony is admissible at all, its weight is for the jury.

It is very manifest that, if reliance is had upon the instinct of the dogs, then that instinct must be free and untrammelled. In the case at bar the dogs wanted to enter the premises of Adam Brown, and were not permitted to do so. This control of the animal that is supposed to have the instinct, by the man, who has not the instinct, destroys any value it may have as evidence, and all reference to the conduct of the dogs should have been stricken from the record.

Further, the owner and manager of these dogs said: "After a track is eighteen or twenty hours old, I don't like to fool with it; you can do very well up to fifteen hours."

The person relying upon the testimony must show that the dogs were within the period of efficiency, and the state failed utterly to do so. Mr. McNair saw the fire at between 10:30 and 11 o'clock on the night of the 18th, and the dogs did not come until 2:45 P. M. on the 19th. The shortest time puts the dogs within the period of unreliability. The testimony was inadmissible on this ground also.

It is claimed that the dog is the real witness, and cannot be used because he cannot be cross-examined. The dog is not the witness, and the objection does not apply.

We have treated the testimony as to the action of the dogs as if it could be used to make out the corpus delicti. This is not true. We have allowed the state more than it is entitled to. The only thing the conduct of dogs could prove was that the defendants were at the place of the fire within fifteen hours, and that would have put the defendants at the place of the fire after the fire had been burning for some (unknown) time.

Questions 2 and 3 have been considered under question 1.

The judgment appealed from is reversed, and the case is remanded to the Court of General Sessions for an order of discharge, unless they be held upon some other charge.

Gary, Ch. J., and Hydrick, Watts, and Gage JJ., concur.

Annotation—Proof of corpus delicti in arson.

The general subject of corpus delicti is treated in the note to *Bines v. State*, 68 L.R.A. 33. The question is treated specifically with reference to arson in the note to *Spears v. State*, 16 L.R.A. (N.S.) 285, which is supplemented by the present note.

What constitutes.

See also note in 16 L.R.A.(N.S.) 285.

To establish the corpus delicti of the crime of arson it must be shown both that the building in question was burned and that it was burned with criminal intent. *Daniels v. State* (1915) — Ala. App. —, 68 So. 499; *West v. State* (1909) 6 Ga. App. 105, 64 S. E. 130; *Davenport v. State* (1912) 12 Ga. App. 102, 76 S. E. 756; *Sims v. State* (1913) 12 Ga. App. 551, 77 S. E. 891; *State v. McLarne* (1915) 128 Minn. 163, 150 N. W. 787; *State v. Cox* (1915) 264 Mo. 408, 175 S. W. 50; *Kohn v. State* (1911) 33 Ohio C. C. 417; *STATE v. BROWN*, ante, 1295.

In order to constitute arson it is not necessary that the firing of the building should have consumed it or materially injured it; so, where the walls were at least charred and to some extent injured, it constituted a burning of the building. *Kehoe v. Com.* (1912) 149 Ky. 400, 149 S. W. 818; *State v. Rogers* (1914) 168 N. C. 112, 83 S. E. 161.

Necessity for proving.

See also note in 16 L.R.A.(N.S.) 285.

The presumption that the burning was accidental must be overcome. *Burley v. State* (1909) 6 Ga. App. 776, 65 S. E. 816; *Matthews v. State* (1912) 10 Ga. App. 302, 73 S. E. 404; *Williams v. State* (1912) 11 Ga. App. 416, 75 S. E. 442; *Barrett v. State* (1913) 12 Ga. App. 508, 77 S. E. 652; *Sims v. State* (1913) 12 Ga. App. 551, 77 S. E. 891, second appeal (1913) 14 Ga. App. 28, 79 S. E. 1133; *Moon v. State* (1913) 12 Ga. App. 614, 77 S. E. 1088; *Rice v. State* (1915) — Ga. App. —, 84 S. E. 609.

—in connection with confession.

The corpus delicti must be established independently of the confession of the accused. *Moon v. State* (1913) 12 Ga. App. 614, 77 S. E. 1088; *Sims v. State* (1913) 12 Ga. App. 551, 77 S. E. 891, second appeal (1913) 14 Ga. App. 28, 79 S. E. 1133; *State v. McLarne* (1915) 128 Minn. 163, 150 N. W. 787; *Bolden v. State* (1911) 98 Miss. 723, 54 So. 241; *State v. Cox* (1915) 264 Mo. 408, 175 S. W. 50. L.R.A.1916D.

A mere confession is not sufficient to establish the corpus delicti, although cases may be imagined in which a confession might disclose independent facts or circumstances which would furnish sufficient proof. *West v. State* (1909) 6 Ga. App. 105, 64 S. E. 130.

Evidence of an alleged confession of the defendant, unsupported by evidence or by circumstances tending to corroborate the facts contained in such alleged confession, does not constitute prima facie proof of the corpus delicti. *People v. Kennedy* (1909) 150 Ill. App. 571.

While the corpus delicti is ordinarily the first point to which the evidence should be directed, nevertheless the admission in evidence of a declaration by the defendant before such proof is made will not warrant a reversal of the judgment. *People v. Saunders* (1910) 13 Cal. App. 743, 110 Pac. 825.

In *Daniels v. State* (1915) — Ala. App. —, 68 So. 499, which was reversed because no evidence was offered as a predicate for the admission of a confession of defendant which tended to exclude the theory that the burning was accidental, the court said that it should be shown, if it be a fact, that prior to the discovery of the fire there was no fire near where the fire was first discovered that was likely to have been communicated to the house.

Character and sufficiency — circumstantial evidence.

See also note in 16 L.R.A.(N.S.) 285.

The corpus delicti of arson may be proved by circumstantial evidence. *Cunningham v. State* (1915) — Ala. App. —, 69 So. 982; *DeVore v. State* (1909) 7 Ga. App. 197, 66 S. E. 484; *State v. McCauley* (1916) — Minn. —, 156 N. W. 280.

But where circumstantial evidence is relied on to overcome the presumption that a fire was the result of accident or some providential cause, it must be sufficient to exclude every other reasonable hypothesis than that the house was feloniously burned. *Sims v. State* (1913) 12 Ga. App. 551, 77 S. E. 891.

—evidence tending to connect accused.

While, as a general rule, the corpus delicti must be proven before any evidence is offered as to the guilt of accused, where there is no question about the burning of the property, and the same evidence which shows a criminal agency as to the fire also shows the guilt

of the accused, the evidence may be offered at the same time. *Kohn v. State* (1911) 33 Ohio C. C. 417.

—evidence held sufficient.

Any evidence at all, even the slightest, tending to show that the burning was by design, although there is other evidence showing or tending to show that it was accidental, is sufficient proof of the corpus delicti to afford a predicate for the admission of the defendant's confession. *Daniels v. State* (1915) — Ala. App. —, 68 So. 499.

Evidence that the fire was discovered in the nighttime; that a few minutes later a part of the furniture was found piled together in one room; that defendant was seen running away from the fire; that he told a witness that no one was in the house; that defendant was found two hours after the fire at a point several miles from the scene, with serious burns upon his person, and that he refused to give his name and made contradictory statements as to why he was in such a condition and in that locality; that he resisted an officer who sought to accompany him in quest of a physician, and finally gave an assumed name when taken to the hospital; that a policy of insurance had been taken out only a few days before the fire; that one of defendants, who lived in the house, was found almost entirely dressed a few minutes after the fire; together with other suspicious circumstances, was sufficient to establish that a crime had been committed, so as to authorize the admission of alleged confessions in evidence. *People v. Morley* (1908) 8 Cal. App. 372, 97 Pac. 84.

Where the physical condition of the premises showed that three separate and distinct fires had been started, such evidence, in connection with other evidence tending to show the improbability of the fire being the result of accident, was sufficient to show that the crime of arson had been committed. *People v. Saunders* (1910) 13 Cal. App. 743, 110 Pac. 825.

The corpus delicti of arson was sufficiently proved by evidence that the barn in question was destroyed by fire about 3 o'clock in the morning; that no fire had been left in or near the building on the night before it was burned; that while the fire was in progress an odor of kerosene oil emanated from the building, and that an empty can which had contained such oil was found near, and that tracks of a human being leading to and from the barn were found, under

circumstances such as to indicate that they were made after the barn was closed on the night before the burning. *Dixon v. State* (1912) 11 Ga. App. 367, 75 S. E. 266.

Evidence that a barn in and near which there had been no fire during the day preceding its destruction, and in which no one for hours immediately before its destruction had had occasion to go for any legitimate reason, was discovered at 2 o'clock in the morning to be burning all over; that the barn had no combustibles, such as oil or gasoline, housed therein; that it was partially filled with hay and fodder, which, when ignited, would blaze out almost instantly and burn with great rapidity, showing that it must have been burning but a few minutes before it was discovered by the owner; that stealthy tracks leading to the barn and running tracks leading away, which were discovered early the next day, were fresh, so that they must have been made at about the time that the fire originated, was sufficient to establish the corpus delicti of arson. *Wade v. State* (1915) — Ga. App. —, 84 S. E. 593.

Proof that a man's tracks were found leading to and from a schoolhouse which was burned, and that they were made at a time when the grass and stubble were wet with dew, the schoolhouse having been burned at about 2 o'clock in the morning, was sufficient proof of the corpus delicti to justify the admission of defendant's confession. *People v. Hannibal* (1913) 259 Ill. 512, 102 N. E. 1042, Ann. Cas. 1914C, 329.

Testimony as to the odor of coal oil in the burning premises and the arrangement of kindling wood about the pool tables would tend to show that the fire was caused by a criminal agency rather than by natural or accidental means. *State v. Ruckman* (1913) 253 Mo. 487, 161 S. W. 705.

Where there were two other fires at about the same time and place as the one with which defendant was charged, and while those fires were bursting out one by one, the defendant twice procured matches near the fires, while either fact alone might be perfectly free from a suggestion of guilt, when compounded in connection with evidence that defendant was seen running along the street at midnight looking back, there is sufficient proof of the corpus delicti independent of defendant's confession. *State v. Cox* (1915) 264 Mo. 408, 175 S. W. 50.

—Evidence held insufficient.

Evidence that the house which was burned was an unoccupied dwelling house within sight from the dwelling house of the prosecutor; that it was burned about 12 o'clock on Sunday night; that the door of the house was open and in plain view of the residence of the prosecutor; that there was no fire used in or about the house and, so far as was known to anyone, there was no fire about the house late in the afternoon or in the early part of the night of the burning; that the house had in it at the time of the burning some seed cotton and about 100 bushels of cotton seed; and that there were some tracks apparently made during the night in the public road going by the house that was burned, falls far short of proof of any criminal agency in the burning of the house. *West v. State* (1909) 6 Ga. App. 105, 64 S. E. 130.

Where the only proof of the corpus delicti outside defendant's confession was the mere fact that two barns in which was stored inflammable material were burned at midnight, and the confession was shown to have been induced by promises of protection and immunity from punishment made by the owner of

the barns, a conviction was not supported by the evidence. *De Vore v. State* (1909) 7 Ga. App. 197, 66 S. E. 484.

Mere proof that a barn was consumed by fire does not even tend to show that the fire was a felonious one. *Moon v. State* (1913) 12 Ga. App. 614, 77 S. E. 1088.

Where the only evidence introduced, other than the alleged confession of defendant, which tended to show that the burning of the building in question was by a criminal agency, was that the burning occurred at night, that the fire originated on the outside of the house, and that shortly after the house had burned tracks which resembled those of defendant, who lived several miles from the scene, were discovered about 75 yards from the place where the building had stood, the corpus delicti was not proven. *Bolden v. State* (1911) 98 Miss. 723, 54 So. 241.

Where the only evidence tending to establish that the burning was caused by a criminal agency was several slight circumstances, it was wholly insufficient to establish the corpus delicti. *Ratcliff v. State* (1911) 99 Miss. 277, 54 So. 947.
R. L. S.

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